



**United States Court of Appeals
for the
District of Columbia Circuit**

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GARY E. JOHNSON; JAMES P. GRAY)
and GARY JOHNSON 2012, INC.,)
Petitioners)
vs.)
FEDERAL ELECTION COMMISSION,)
and UNITED STATES OF AMERICA)
Respondents.)

Case No. 12- 12-1418

4-U

**EMERGENCY MOTION FOR MANDATORY INJUNCTION, WRIT OF
MANDAMUS OR OTHER APPROPRIATE RELIEF**

Pursuant to 26 U.S.C. §9001, *et seq.* and 28 U.S.C. §1651, Petitioners Gary E. Johnson, James P. Gray and Gary Johnson 2012, Inc. respectfully file the following emergency motion for a mandatory injunction, Writ of Mandamus, or other appropriate relief, directing Defendant to immediately disburse to Petitioners \$747,115.34 in pre-general election campaign funding to which Petitioners are statutorily entitled.

Petitioners file the present motion on the grounds that the funding to which Petitioners are entitled is only available prior to the general election, which is scheduled to take place in mere three weeks' time, on November 6, 2012. Defendant denied Petitioners' application for said funds, and unless the funds are received in time to be spent prior to the election, Petitioners will be irreparably harmed. Oral argument is also requested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

INTRODUCTION

Petitioners seek the appropriate relief that would direct Defendant to immediately disburse to Petitioners pre-general election campaign funding in the amount of \$747,115.34, to which Petitioners are statutorily entitled. Specifically, Petitioners Johnson and Gray, as the respective Presidential and Vice-Presidential nominees of the Libertarian party, qualify as third party candidates to receive a certain amount of pre-general election funding under 26 U.S.C. §9004(a)(2)(A). Without regard to the plain language of this statute, Defendant has refused to provide said funding to Petitioners. An immediate judicial determination of this dispute is thus necessary, as the funds to which Petitioners are entitled apply only to pre-election activity, and the general election is scheduled for November 6, 2012.

For these and other reasons set forth more fully below, Petitioners request the issuance of a mandatory injunction or in the alternative, a writ of mandate, or other appropriate relief directing Defendant to immediately disburse to Petitioners the statutorily proscribed amount of pre-general election funding to which Petitioners are entitled.

II.

STATEMENT OF FACTS

Petitioner Gary E. Johnson is the former Governor of the State of New Mexico, a resident of that state, and the nominee of the Libertarian Party for the office of President of the United States. (Declaration of Gray at ¶ 3.) Petitioner James P. Gray is a retired judge of the Superior Court of the State of California for the County of Orange, and is the nominee of the Libertarian Party for Vice President of the United States. (Declaration of Gray at ¶ 3.) Their campaign committee is Petitioner Gary Johnson 2012, Inc., and it is based in Salt Lake City, Utah. (Declaration of Gray at ¶

1 3.) The names of Johnson and Gray will appear this November as candidates for
2 President and Vice President on the ballots of not less than 47 states, and
3 confirmation of the same has been received from those states, and from the District of
4 Columbia. (Declaration of Gray at ¶ 3.) These jurisdictions have 495 combined votes
5 in the electoral college. (Declaration of Gray at ¶ 3.)

6 Defendant Federal Election Committee is the government agency with the
7 obligation under the Presidential Election Campaign Fund Act, 26 U.S.C. §9001, *et*
8 *seq.* to disburse pre-general election federal funds to candidates. (Declaration of Gray
9 at ¶ 2.)

10 The general election for the offices of President and Vice President of the
11 United States is scheduled to take place on November 6, 2012. (Declaration of Gray
12 at ¶ 10.) On May 8, 2012, in order to further their campaign efforts, Petitioners
13 applied via letter to Defendant for public pre-general election funding, as eligible
14 third party candidates under 26 U.S.C. §9004(a)(2)(A). (Declaration of Gray at ¶ 10,
15 Exhibit 1.) At Defendant's request, Petitioners applied for the same funding under
16 cover of a separate letter on June 11, 2012. (Declaration of Gray at ¶ 11, Exhibit 2.)
17 Also at Defendant's request, Petitioners subsequently sent Defendant a Letter
18 Agreement in connection with their funding applications. (Declaration of Gray at ¶
19 11, Exhibit 3.)

20 On August 6, 2012, Defendant notified Petitioner of its Initial Determination
21 on Eligibility and Entitlement, concluding that Petitioners were not entitled to pre-
22 election public funds. (Declaration of Gray at ¶ 12, Exhibit 4.) On September 18,
23 2012, less than two months before the general election, Defendant released its Final
24 Determination on Eligibility and Entitlement, which echoed its earlier conclusion that
25 Petitioners do not meet the eligibility requirements to qualify for the requested
26 funding. (Declaration of Gray at ¶ 12, Exhibit 5.)

1 Officially determined by Defendant on September 18, 2012, to be ineligible for
2 pre-general election campaign funding just weeks before the general election,
3 Petitioners filed suit in this court to obtain a judicial determination of the dispute
4 between the parties, and to direct Defendant to disburse the requested funds.
5 (Declaration of Gray at ¶ 13.) Due to the exigency of Petitioners' situation, this
6 emergency motion is brought.

7
8 III.

9 COMPELLING REASONS JUSTIFY PETITIONERS' REQUEST FOR RELIEF AS
10 DEFENDANT HAS WRONGFULLY DENIED PRE ELECTION FUNDING TO
11 WHICH PETITIONERS ARE STATUTORILY ENTITLED.

12 The Presidential Election Fund Act ("the Act") was enacted in the late-1960's
13 to provide for federal funding of presidential general election campaigns.
14 (Declaration of Gray at ¶ 4.) The Act provides for funding for not only the two
15 major-party candidates, but for third party candidates as well. (Declaration of Gray at
16 ¶ 4.) Funding is available, under specified circumstances, both prior to the general
17 election and, separately, after the general election. (Declaration of Gray at ¶ 4.) In the
18 instant case, Petitioners have applied to receive the former, which is referred to herein
19 as "pre-general election funding," (or simply "pre-election funding.") (Declaration of
20 Gray at ¶ 4.)

21 On May 5, 2012, Petitioner Johnson received the nomination of the Libertarian
22 Party for President of the United States, and Petitioner Gray received the nomination
23 of the Libertarian Party for Vice President of the United States. (Declaration of Gray
24 at ¶ 5.) The Libertarian Party, which was founded in 1971, is the third-largest
25 political party in the United States. (Declaration of Gray at ¶ 5.) In the 30 states of the
26 union where voters are allowed to register by party, over 282,000 are currently
27 registered Libertarians. (Declaration of Gray at ¶ 5.) Hundreds of Libertarians have

1 won election throughout the country at the state and local levels, and thousands of
2 candidates have appeared on ballots seeking election. (Declaration of Gray at ¶ 5.) Its
3 nominees for President and Vice President have appeared on ballots in every
4 presidential election from 1972 onwards. (Declaration of Gray at ¶ 5.) Millions of
5 votes have been cast for these candidates. (Declaration of Gray at ¶ 5.)

6 The scheme for pre-general election funding for third party candidates is set
7 forth in 26 U.S.C. §9004 (a)(2)(A)¹ which provides, *in its entirety*, that, “[t]he eligible
8 candidates of a minor party in a presidential election shall be entitled to payments
9 under section 9006 equal in the aggregate to an amount which bears the same ratio to
10 the amount allowed under paragraph (1) for a major party as the number of popular
11 votes received by the candidate for President of the minor party, as such candidate, in
12 the preceding presidential election bears to the average number of popular votes
13 received by the candidates for President of the major parties in the preceding
14 presidential election.” (Declaration of Gray at ¶ 6.) Petitioner Johnson is an “eligible
15 candidate” within the ambit of this section, as that term is defined in §9002(4) and
16 §9003(a) and ©). (Declaration of Gray at ¶ 6.) For the same reason, we aver that the
17 definition of §9002(7) of “minor party” is only relevant to §9004(a)(2)(B) and not
18 relevant to (a)(2)(A). (Declaration of Gray at ¶ 6.)

19 On May 8, 2012, through counsel, Petitioners applied by letter to Defendant for
20 public funds for the general election, asserting their entitlement to such funding under
21 §9004(a)(2)(A). (Declaration of Gray at ¶ 10.) It should be noted that this provision
22 imposes no additional requirement relating to the same presidential candidate having
23 run in the presidential election four years earlier. It should also be noted that the
24

25 ¹All further statutory references are to 26 U.S.C., unless otherwise noted.
26
27
28

1 following section, §9004 (a)(2)(B), as distinct from subsection (A), provides funding
2 to candidates who *do* meet such an *additional* criteria. The funding provided in
3 subsection (B) is derived from an entirely different mathematical calculation than the
4 funding authorized by subsection (A), and would necessarily result in much greater
5 funding—a much larger amount – than under subsection (A).

6 On June 11, 2012, at Defendant's request, Petitioners sent a separate letter,
7 again requesting pre-general election campaign funding. (Declaration of Gray at ¶ 11,
8 Exhibit 2.) Subsequently, on June 27, 2012, also at the FEC's request, Petitioners
9 sent Defendant a Letter Agreement in connection with their application. (Declaration
10 of Gray at ¶ 11, Exhibit 3.) The request made by Petitioners included a request for an
11 extension of time, and subsequently Defendant granted this time extension.

12 (Declaration of Gray at ¶ 11.) On August 6, 2012, Defendant notified Petitioner of its
13 Initial Determination on Eligibility and Entitlement, which concluded that Petitioners
14 were not entitled to pre-election public funds. (Declaration of Gray at ¶ 12, Exhibit
15 4.) Not until September 18, 2012, less than two months before the general election,
16 did Defendant release its Final Determination on Eligibility and Entitlement, which
17 echoed its earlier conclusion that Petitioners do not meet the eligibility requirements
18 to qualify for the requested funding. (Declaration of Gray at ¶ 12, Exhibit 5.)

19 In 2008, the Democrat nominee for president received 69,498,215 votes; the
20 Republican nominee for president received 59,498,240; the Libertarian nominee for
21 president received 523,713 votes. (Declaration of Gray at ¶ 7.) The average of the
22 two major party votes is 64,498,228. (Declaration of Gray at ¶ 7.) The Libertarian
23 nominee thus received 523,713/64,498,228, or .81% of the average vote of the major
24 party candidates. (Declaration of Gray at ¶ 7.) This election cycle, the major party
25 candidates will each receive \$92,241,400.00. (Declaration of Gray at ¶ 8.) Based on
26 these figures, Petitioners are entitled to receive .81% of that number, which is
27 \$747,115.34. (Declaration of Gray at ¶ 8.) Defendant has failed to distribute any

1 funds to Petitioners, and has taken the position that Petitioners are ineligible for
2 funding, notwithstanding the plain language of §9004(a)(2)(A). (Declaration of Gray
3 at ¶ 8.)

4 The only reason Respondent FEC uses to support its position turns on the
5 meaning of “minor party” in 26 U.S.C. §9004. Without question, “minor party” is a
6 defined term elsewhere in the chapter. However, as we alluded to above, we submit it
7 does not apply under that definition in subsection (a)(2)(A) the way it does in the
8 other subsections of §9004. Our reasoning is simple. Subsection (a)(2)(A) **ONLY**
9 applies to applicants who do NOT meet the technical definition, i.e., a political party
10 whose candidate in the prior election received more than 5%, but less than 25% of the
11 vote.² To impose this definition on subsection (a)(2)(A) would completely render it
12 meaningless and write it out of the statute. Section 9004 is entitled “Entitlement of
13 eligible candidates to payments”, and is the one section in the law authorizing
14 funding for candidates who have won their party’s nomination. Subsection (a) (1)
15 governs payments to major-party candidates. Subsection (a)(2)(B) covers candidates
16 who ran in the “preceding presidential election and received 5 percent or more but
17 less than 25 percent of the total number of popular votes..”, e.g., a “minor party” so
18 defined in 26 U.S.C. §9002(6). Subsection (a) (3) covers candidates who will
19 retroactively receive funding because they receive more than 5% of the votes cast in
20 this election. The remaining subsection, (a)(2)(A), covers candidates who do not fit
21 these other categories, such as Petitioners here, who are not of a major party, and
22 whose party fielded a candidate in the previous election. Governor Johnson is such a
23 candidate. Thus, subsection (a)(2)(A) was intended to apply to him, but “minor

24
25 ²“The term ‘minor party’ means, with respect to any presidential election, a political party whose
26 candidate for the office of President in the preceding presidential election received, as the candidate of
27 such party, 5 percent or more but less than 25 percent of the total number of popular votes received by
28 all candidates for such office.” 26 U.S.C. §9002 (6).

1 party” is used, we submit in the plain meaning of the word. The Libertarian Party is
2 universally understood in the plain sense of the words to be a “minor party”.

3 The Court must err on the side of giving effect to the statute. To ascribe the
4 meaning to (a)(2)(A) that the FEC gives would have the effect of making (a)(2)(A)
5 and (B) both apply in the same way, and would render (a)(2)(A) utterly meaningless.
6 Such a reading is inconsistent with standard maxims of statutory construction. Thus,
7 our submission is simply that the Congress used “minor party” inadvertently in
8 (a)(2)(A) in the common sense of the words instead of in the defined sense used
9 elsewhere in this Chapter.

10 Pre-election funding and post-election funding serve entirely different
11 purposes, and unless Petitioners receive their pre-election entitlement *before* the
12 general election, it is of little use, as the election will have already taken place.
13 (Declaration of Gray at ¶ 9.) The amount of the funding to which Petitioners are
14 presently entitled is so significant that it *could* make the difference between winning
15 and losing. (Declaration of Gray at ¶ 9.) Even more likely is the impact the receipt by
16 Petitioners before the general election of pre-election funding would have on
17 Petitioners’ subsequent entitlement to *post*-general election funding. (Declaration of
18 Gray at ¶ 9.) Post general-election funding requires that the Johnson/Gray ticket
19 receive a certain threshold percentage of votes in the general election, and the
20 likelihood of Petitioners meeting this threshold is dramatically greater if they receive
21 the pre-election funding, to which they are entitled, in time to spend it to support their
22 candidacy. (Declaration of Gray at ¶ 9.)

23 Thus, an actual dispute exists between Petitioners and Defendant, in that
24 Petitioners claim they are entitled to pre-general election funding as set forth above,
25 while Defendant claims that Petitioners are ineligible for such funding, and a judicial
26 determination on this issue is necessary. (Declaration of Gray at ¶ 9.) Unless an
27 injunction issues mandating that Defendant disburse the pre-general election funding

1 to which Petitioners are statutorily entitled, they will be gravely and irreparably
2 harmed and no amount of money could adequately compensate them. Accordingly,
3 Petitioners are entitled to a mandatory injunction directing the immediate payment of
4 the pre-election funds for which they have applied, such that payment be received in
5 advance of the general election this November.

6
7 IV.

8 CONCLUSION

9 As enumerated above, Defendant wrongfully determined that Petitioners are
10 ineligible for statutorily proscribed pre-general election campaign funding. As such,
11 Petitioners respectfully request a judicial declaration that they are entitled to pre-
12 general election campaign funding, and for a mandatory injunction, or other
13 appropriate relief directing the FEC to immediately disburse to Petitioners the sum of
14 \$747,115.34.

15
16
17
18
19 Respectfully submitted,

20 

21 Paul Rolf Jensen*

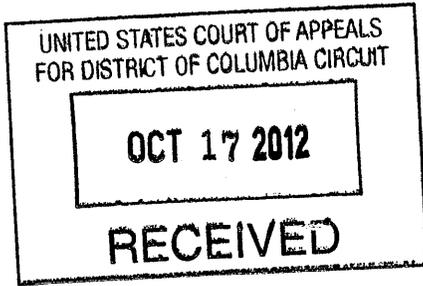
Counsel of Record

22 Gary E. Johnson
23 James P. Gray
24 Gary Johnson 2012, Inc.
25 280 South 400 West
26 Suite 200
27 Salt Lake City, UT 84101

JENSEN & ASSOCIATES, APC, Trial Lawyers
650 Town Center Drive, 12th Floor
Costa Mesa, California (714) 662-5538
(714) 662-5528

28 October 16, 2012

*Counsel to Gary E. Johnson, James P. Gray and
Gary Johnson 2012, Inc.*



**United States Court of Appeals
for the
District of Columbia Circuit**

GARY E. JOHNSON; JAMES P. GRAY)
and GARY JOHNSON 2012, INC.,)

Case No. 12- 12-1418

Petitioners

vs.

FEDERAL ELECTION COMMISSION)
and UNITED STATES OF AMERICA)

Respondents.

**DECLARATION OF PETITIONER JAMES P. GRAY IN SUPPORT OF EMERGENCY
MOTION FOR WRIT OF MANDAMUS**

I, James P. Gray, declare the following:

1. I am the 2012 Libertarian Party candidate for the office of Vice President of the United States, and a Petitioner in the action herein. I submit this declaration in support of Petitioners' Emergency Motion for a Mandatory Injunction, Writ of Mandamus, or Other Appropriate Relief directing Defendant to immediately disburse to Petitioners \$747,115.34 in pre-general election campaign funding to which Petitioners are statutorily entitled. The

following is based on my personal knowledge and my information and belief.

2. Defendant Federal Election Commission is an independent regulatory governmental agency created by Congress to administer and enforce the Presidential Election Campaign Fund Act, 26 U.S.C. §9001, *et seq.* The Commission's headquarters are located at 999 East Street, NW, Washington, DC 20463.
3. Petitioner Gary E. Johnson is the former Governor of the State of New Mexico, a resident of that state, and the nominee of the Libertarian Party for the office of President of the United States. I am a retired judge of the Superior Court of the State of California for the County of Orange, and a resident of that County, and the nominee of the Libertarian Party for Vice President of the United States. Our campaign committee is Petitioner Gary Johnson 2012, Inc., and it is based in Salt Lake City, Utah. As of this writing, 47 states and the District of Columbia have approved our campaign's request that our names appear on the ballot. (The matter is in litigation in two states, Oklahoma and Michigan, and a third state, Pennsylvania, has yet to respond.) 270 electoral college votes (out of a possible 538) are required for election; our names will be on ballots in states with at least 495 votes.

4. The Presidential Election Fund Act (“the Act”) was enacted in the late-1960's to provide for federal funding of presidential general election campaigns. The Act provides for funding for not only the two major-party candidates but for third party candidates as well. Funding is available, under specified circumstances, both prior to the general election and, separately, after the general election. This lawsuit involves only the former, which is referred to herein as “pre-general election funding”.
5. On May 5, 2012, Petitioner Johnson received the nomination of the Libertarian Party for President of the United States, and I received the nomination of the Libertarian Party for Vice President of the United States. The Libertarian Party, which was founded in 1971, is the third-largest political party in the United States. In the 30 states of the union where voters are allowed to register by party, over 282,000 are currently registered Libertarians. Hundreds of Libertarians have won election throughout the country at the state and local levels, and thousands of candidates have appeared on ballots seeking election. Its nominees for President and Vice President have appeared on ballots in every presidential election from 1972 onwards. Millions of votes have been cast for these candidates.

6. The scheme for pre-general election funding for third party candidates is set forth in 26 U.S.C. §9004 (a)(2)(A)¹ which provides, *in its entirety*, that, “[t]he eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.” Petitioner Johnson is an “eligible candidate” within the ambit of this section, as that term is defined in §9002(4) and §9003(a) and (c). With regard to the term “candidate” in §9002(2), as opposed to “eligible candidate” in §9002(4), that term is applicable only to (a)(2)(B) and not relevant to (a)(2)(A). For the same reason, we aver that the definition of §9002(7) of “minor party” is only relevant to §9004(a)(2)(B) and not relevant to (a)(2)(A).
7. In 2008, the Democrat nominee for president received 69,498,215 votes; the Republican nominee for president received 59,498,240; the Libertarian nominee for president received 523,713 votes. The average of the two major

¹All further statutory references are to 26 U.S.C., unless otherwise noted.

party votes is 64,498,228. The Libertarian nominee thus received 523,713/64,498,228, or .81% of the average vote of the major party candidates.

8. This election cycle, according to the FEC's website, the major party candidates will each receive \$92,241,400.00. Based on this, Petitioner Johnson and I are entitled to receive .81% of that number, which is \$747,115.34. The FEC has failed to distribute any funds to us, and has taken the position that we are ineligible for funding, notwithstanding the plain language of §9004 (a)(2)(A).
9. Pre-election funding and post-election funding serve entirely different purposes, and unless Petitioner Johnson and I receive our pre-election entitlement *before* the general election, it is of little use, as the election will have already taken place. The amount of funding to which we are presently entitled is so significant that it *could* make the difference between winning and losing. Even more likely is the impact the receipt of this pre-election funding will have on our entitlement to subsequent post-general election funding. Post general-election funding requires that Petitioner Johnson and my ticket receive a certain threshold percentage of votes in the general election, and the likelihood of us meeting this threshold is dramatically

greater if we receive the pre-election funding, to which we are entitled, in time to spend it to support our candidacy.

10. The general election for the offices of President and Vice President of the United States is scheduled to take place on November 6, 2012. On May 8, 2012, through our counsel, Petitioner Johnson and I applied by letter to the FEC for public funds for the general election, asserting our entitlement to such funding under §9004 (a)(2)(A). A true copy of this letter is attached hereto as Exhibit 1.
11. On June 11, 2012, at the Defendant FEC's request, Petitioner Johnson and I sent a separate letter to the FEC requesting funding, and a true copy of this letter is attached hereto as Exhibit 2. Subsequently, on June 27, 2012, also at the FEC's request, we sent the FEC a Letter Agreement in connection with our application, and a true copy of this is attached hereto as Exhibit 3. The request made by Petitioner Johnson and me included a request for an extension of time, and subsequently the FEC granted this time extension.
12. On August 6, 2012, Defendant notified Petitioner Johnson and me of its Initial Determination on Eligibility and Entitlement, concluding that we were not entitled to pre-election public funds. A true copy is attached hereto as Exhibit 4. Not until September 18, 2012, less than two months before the general election, did Defendant release its Final Determination on Eligibility

and Enforcement, which echoed its earlier conclusion that we did not meet the eligibility requirements to qualify for the requested funding. A true copy is attached hereto as Exhibit 5.

13. Once we finally received Defendant's determination that we were ineligible for pre-general election campaign funding just weeks before the general election, we filed suit in this court to obtain judicial determination of the dispute, and to direct Defendant to disburse the requested funds.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed in Los Angeles, California, this 16th day of October, 2012.

/s/

By: _____