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8 **United States District Court**
9 **Central District of California**
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11 GARY E. JOHNSON; JAMES P. GRAY)
and GARY JOHNSON 2012, INC.,)

12 Plaintiff)

13 vs.)

14 FEDERAL ELECTION COMMISSION,)

15 Defendant.)
16)
17)

Civil Action #

ORAL ARGUMENT REQUESTED

EX PARTE APPLICATION FOR
MANDATORY INJUNCTION, OR IN
THE ALTERNATIVE WRIT OF
MANDATE, OR OTHER
APPROPRIATE RELIEF; POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

THREE-JUDGE COURT

Date:
Time:
Department:

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

25 Plaintiffs file the present application on an ex parte basis on the grounds that
26 the funding to which Plaintiffs are entitled is only available prior to the general
27 election, which is scheduled to take place in mere weeks' time, on November 6, 2012.
28 Defendant disputes Plaintiffs' eligibility to receive said funds, rendering the necessity

1 of judicial determination on the issue, and thus the relief that Plaintiffs seek requires
2 immediate review. An accompanying hearing is also requested.

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4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **INTRODUCTION**

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

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

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23 **II.**

24 **STATEMENT OF FACTS**

25 Plaintiff Gary E. Johnson is the former Governor of the State of New Mexico, a
26 resident of that state, and the nominee of the Libertarian Party for the office of
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1 President of the United States. (Declaration of Gray at ¶ 3.) Plaintiff James P. Gray
2 is a retired judge of the Superior Court of the State of California for the County of
3 Orange, and is the nominee of the Libertarian Party for Vice President of the United
4 States. (Declaration of Gray at ¶ 3.) Their campaign committee is Plaintiff Gary
5 Johnson 2012, Inc., and it is based in Salt Lake City, Utah. (Declaration of Gray at ¶
6 3.) The names of Johnson and Gray will appear this November as candidates for
7 President and Vice President on the ballots of not less than 47 states, and
8 confirmation of the same has been received from those states, and from the District of
9 Columbia. (Declaration of Gray at ¶ 3.) These jurisdictions have 495 combined votes
10 in the electoral college. (Declaration of Gray at ¶ 3.)

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

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

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

5 Officially determined by Defendant on September 18, 2012, to be ineligible for
6 pre-general election campaign funding just weeks before the general election,
7 Plaintiffs filed suit in this court to obtain a judicial determination of the dispute
8 between the parties, and to direct Defendant to disburse the requested funds.
9 (Declaration of Gray at ¶ 13.) Due to the exigency of Plaintiffs' situation, this ex
10 parte application is brought.

11 III.

12 COMPELLING REASONS JUSTIFY PLAINTIFFS' REQUEST FOR THE 13 INSTANT RELIEF AS DEFENDANT HAS WRONGFULLY DENIED 14 PLAINTIFFS PRE ELECTION FUNDING TO WHICH THEY ARE 15 STATUTORILY ENTITLED. 16

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

26 On May 5, 2012, Plaintiff Johnson received the nomination of the Libertarian
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1 Party for President of the United States, and Plaintiff Gray received the nomination of
2 the Libertarian Party for Vice President of the United States. (Declaration of Gray at ¶
3 5.) The Libertarian Party, which was founded in 1971, is the third-largest political
4 party in the United States. (Declaration of Gray at ¶ 5.) In the 30 states of the union
5 where voters are allowed to register by party, over 282,000 are currently registered
6 Libertarians. (Declaration of Gray at ¶ 5.) Hundreds of Libertarians have won election
7 throughout the country at the state and local levels, and thousands of candidates have
8 appeared on ballots seeking election. (Declaration of Gray at ¶ 5.) Its nominees for
9 President and Vice President have appeared on ballots in every presidential election
10 from 1972 onwards. (Declaration of Gray at ¶ 5.) Millions of votes have been cast for
11 these candidates. (Declaration of Gray at ¶ 5.)

12 The scheme for pre-general election funding for third party candidates is set
13 forth in 26 U.S.C. §9004 (a)(2)(A)¹ which provides, *in its entirety*, that, “[t]he eligible
14 candidates of a minor party in a presidential election shall be entitled to payments
15 under section 9006 equal in the aggregate to an amount which bears the same ratio to
16 the amount allowed under paragraph (1) for a major party as the number of popular
17 votes received by the candidate for President of the minor party, as such candidate, in
18 the preceding presidential election bears to the average number of popular votes
19 received by the candidates for President of the major parties in the preceding
20 presidential election.” (Declaration of Gray at ¶ 6.) Plaintiff Johnson is an “eligible
21 candidate” within the ambit of this section, as that term is defined in §9002(4) and
22 §9003(a) and (c). (Declaration of Gray at ¶ 6.) For the same reason, we aver that the
23 definition of §9002(7) of “minor party” is only relevant to §9004(a)(2)(B) and not
24 relevant to (a)(2)(A). (Declaration of Gray at ¶ 6.)

25 On May 8, 2012, through counsel, Plaintiffs applied by letter to Defendant for

26 ¹All further statutory references are to 26 U.S.C., unless otherwise noted.
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1 public funds for the general election, asserting their entitlement to such funding under
2 §9004(a)(2)(A). (Declaration of Gray at ¶ 10.) It should be noted that this provision
3 imposes no additional requirement relating to the same presidential candidate having
4 run in the presidential election four years earlier. It should also be noted that the
5 following section, §9004 (a)(2)(B), as distinct from subsection (A), provides funding
6 to candidates who *do* meet such an *additional* criteria. The funding provided in
7 subsection (B) is derived from an entirely different mathematical calculation than the
8 funding authorized by subsection (A), and would necessarily result in much greater
9 funding—a much larger amount – than under subsection (A).

10 On June 11, 2012, at Defendant’s request, Plaintiffs sent a separate letter, again
11 requesting pre-general election campaign funding. (Declaration of Gray at ¶ 11,
12 Exhibit 2.) Subsequently, on June 27, 2012, also at the FEC’s request, Plaintiffs sent
13 Defendant a Letter Agreement in connection with their application. (Declaration of
14 Gray at ¶ 11, Exhibit 3.) The request made by Plaintiffs included a request for an
15 extension of time, and subsequently Defendant granted this time extension.
16 (Declaration of Gray at ¶ 11.) On August 6, 2012, Defendant notified Plaintiff of its
17 Initial Determination on Eligibility and Entitlement, which concluded that Plaintiffs
18 were not entitled to pre-election public funds. (Declaration of Gray at ¶ 12, Exhibit
19 4.) Not until September 18, 2012, less than two months before the general election,
20 did Defendant release its Final Determination on Eligibility and Entitlement, which
21 echoed its earlier conclusion that Plaintiffs do not meet the eligibility requirements to
22 qualify for the requested funding. (Declaration of Gray at ¶ 12, Exhibit 5.)

23 In 2008, the Democrat nominee for president received 69,498,215 votes; the
24 Republican nominee for president received 59,498,240; the Libertarian nominee for
25 president received 523,713 votes. (Declaration of Gray at ¶ 7.) The average of the
26 two major party votes is 64,498,228. (Declaration of Gray at ¶ 7.) The Libertarian
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1 nominee thus received 523,713/64,498,228, or .81% of the average vote of the major
2 party candidates. (Declaration of Gray at ¶ 7.) This election cycle, the major party
3 candidates will each receive \$92,241,400.00. (Declaration of Gray at ¶ 8.) Based on
4 these figures, Plaintiffs are entitled to receive .81% of that number, which is
5 \$747,115.34. (Declaration of Gray at ¶ 8.) Defendant has failed to distribute any
6 funds to Plaintiffs, and has taken the position that Plaintiffs are ineligible for funding,
7 notwithstanding the plain language of §9004(a)(2)(A). (Declaration of Gray at ¶ 8.)

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

21 Thus, an actual dispute exists between Plaintiffs and Defendant, in that
22 Plaintiffs claim they are entitled to pre-general election funding as set forth above,
23 while Defendant claims that Plaintiffs are ineligible for such funding, and a judicial
24 determination on this issue is necessary. (Declaration of Gray at ¶ 9.) Unless an
25 injunction issues mandating that Defendant disburse the pre-general election funding
26 to which Plaintiffs are statutorily entitled, they will be gravely and irreparably harmed
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1 and no amount of money could adequately compensate them. Accordingly, Plaintiffs
2 are entitled to a mandatory injunction directing the immediate payment of the pre-
3 election funds for which they have applied, such that payment be received in advance
4 of the general election this November.

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6 IV.

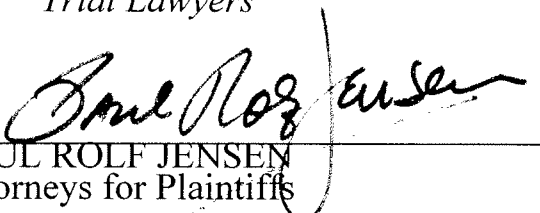
7 CONCLUSION

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

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15 Respectfully submitted,

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17 Dated: September 26, 2012

18 **JENSEN & ASSOCIATES, APC**
19 *Trial Lawyers*

20 By: 
21 PAUL ROLF JENSEN
22 Attorneys for Plaintiffs
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