CASE NO. 08-4340

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

——————— o ———————

PHILIP J. BERG, ESQUIRE

Plaintiff - Appellant

v.

BARACK HUSSEIN OBAMA, JR., et al,

Respondents - Appellee

——————— o ———————

RESPONSE OF APPELLANT, PHILIP J. BERG, ESQUIRE TO APPELLEE'S, THE FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY AFFIRMANCE

——————— o ———————

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INDONESIAN LAWS

Appellee, the Federal Election Commission [hereinafter the "FEC"] filed a Motion for Summary Affirmance of the lower Court's Dismissal of Appellant's case based on Standing and Failure to state a Claim that Relief could be granted. Appellant opposes said Motion and incorporates his Opening Brief, Appendix Volume I and Appendix Volume II, filed with this Court January 20, 2009, as if fully set forth herein.

STATEMENT OF THE CASE

Petitioner's case involves national security, extraordinary public significance and requires action urgently as Obama was due to be inaugurated on the 20th of January, 2009 and take the Office of President of the United States, and he was sworn in so we have greater problems.

Obama's birth is reported as occurring at two (2) separate hospitals, Kapiolani Hospital and Queens Hospital in Hawaii.

Through extensive investigation, Petitioner learned that Obama was born in Mombasa, Kenya located in Coast Province. Obama's biological father was a Kenyan citizen and Obama's mother a U.S. citizen. Under the laws in effect between December 24, 1952 and November 14, 1986 (Obama was born in 1961), a child born abroad, to one U.S. citizen parent and one foreign national, could acquire "natural born" United States citizenship if the United States citizen parent had been physically present in the United States for ten (10) years prior to the child's birth, five (5) of those years being after age fourteen (14). Nationality Act

of 1940, revised June 1952; *United States of America v. Cervantes-Nava*, 281 F.3d 501 (2002), *Drozd v. I.N.S.*, 155 F.3d 81, 85-88 (2d Cir.1998), *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). Obama's mother was only eighteen (18) when Obama was born in Kenya and therefore, did not meet the age and residency requirements for her child to have acquired "natural born" U.S. citizenship. Therefore, Obama is not considered a "natural born" United States citizen. The law that applies to a birth abroad is the law in effect at the time of birth, *Marquez-Marquez a/k/a Moreno v. Gonzales*, 455 F. 3d 548 (5th Cir. 2006), *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir.1990) (holding that "the applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth").

Obama's Kenyan step-grandmother, Sarah Obama, has repeatedly stated Obama was born in Kenya and she was present, in the hospital, during his birth. Bishop Ron McRae and Reverend Kweli Shuhubia, had the opportunity recently to interview Sarah Obama. Reverend Kweli Shuhubia went to the home of Sarah Obama located in Kogello, Kenya. Reverend Kweli Shuhubia called Bishop McRae from Ms. Obama's home and placed the call on speakerphone. Bishop McRae obtained permission from the parties to tape the interview. Because Ms. Obama only speaks Swahili, Reverend Kweli Shuhubia and another grandson of Ms. Obama's, translated the telephone interview. Bishop McRae asked Ms.

Obama where Obama was born; Ms. Obama answered in Swahili and was very adamant that Obama was born in Kenya and she was present during his birth.

After the interview of Sarah Obama in October 2008, Reverend Shuhubia had meetings with the Provincial Civil Registrar. Reverend Shuhubia learned there were records of Ann Dunham giving birth to Barack Hussein Obama, Jr. in Mombosa, Kenya on August 4, 1961. Reverend Shuhubia spoke directly with an Official, the Principal Registrar, who openly confirmed that the birthing records of Senator Barack H. Obama, Jr. and his mother were present; however, the file on Barack H. Obama, Jr. was classified. The Official explained Barack Hussein Obama, Jr.'s birth in Kenya is top secret.

Obama allowed the Daily Kos, Factcheck and his campaign website to post a Hawaiian Certification of Live Birth, purported to be Obama's birth certificate on their websites. The image posted on dailykos.com, factcheck.org and fightthesmears.com has been deemed an altered and forged document according to document image specialists. Even if this document purported to be Obama's Certification of Live Birth was an accurate document, it does not prove "natural born" U.S. citizenship status. The Hawaii Department of Health issues a Certification of Live Birth to births that occurred abroad in foreign countries as well as birth's that occurred at home and not in a Hospital. Certifications of Live Birth are issued to those births as "naturalized" U.S. citizens as well as "natural

born" U.S. citizens. A Certification of Live Birth is not sufficient evidence to prove you are in fact a "natural born" U.S. citizen.

Dr. Fukino, Director of the Hawaiian Department of Health released a press release stating she saw Obama's "vault" version birth certificate in a file. However, Dr. Fukino does not claim Obama was born in Hawaii or the U.S. for that matter, she simply confirms Obama's "vault" version birth certificate exists. Once again, Obama has not released access to his "vault" version birth certificate, which shows doctors signatures, city, state and country of birth and of course, this would solve the issue of where he was in fact born.

In or about 1965, when Obama was approximately four (4) years old, his mother, Stanley Ann Dunham, after being divorced from Obama's father, married Lolo Soetoro, a citizen of Indonesia and moved to Indonesia with Obama. A minor child follows the naturalization and citizenship status of their custodial parent. A further issue is presented that Obama's Indonesian stepfather, Lolo Soetoro, either signed a governmental acknowledgement form legally "acknowledging" Obama as his son and/or adopted Obama, either of which changed any citizenship status of Obama to a "natural citizen" of Indonesia.

Obama was registered in a public school as an Indonesian citizen by the name of Barry Soetoro and his father was listed as Lolo Soetoro, M.A. Indonesia did not allow foreign students to attend their public schools in the 1960's and any time a child was registered for a public school, their name and citizenship status

was verified through the Indonesian Government. The school record indicates that Obama's name is "Barry Soetoro;" his nationality is "Indonesia;" and his religion as "Islam". There was no other way for Obama to have attended school in Jakarta, Indonesia as Indonesia was under tight rule and was a Police State. See Indonesian Constitution Article 2 and Chapter X, Article 26 (citizens and Residents). These facts indicate that Obama is an Indonesian citizen, and therefore, he is not eligible to be President of the United States.

Under Indonesian law, when a male acknowledges a child as his son, it deems the son — in this case Obama — to be an Indonesian State citizen. Constitution of Republic of Indonesia, Law No. 62 of 1958 Law No. 12 concerning Citizenship of Republic of Indonesia; Law No. 9 concerning Immigration Affairs and Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesie).

Furthermore, under the Indonesian adoption law, once adopted by an Indonesian citizen, the adoption severs the child's relationship to the birth parents, and the adopted child is given the same status as a natural child. Indonesian Constitution, Article 2.

The Indonesian citizenship law was designed to prevent apatride (stateless) or bipatride (dual citizenship). Indonesian regulations recognize neither apatride nor bipatride citizenship. Since Indonesia did not allow dual citizenship, neither did the United States, and since Obama was a "natural" citizen of Indonesia, the

United States would not step in or interfere with the laws of Indonesia. Hague Convention of 1930.

As a result of Obama's Indonesia "natural" citizenship status, Obama would never regain U.S. "natural born" status, if he in fact he ever held such. Obama could have **only** become "naturalized" if the proper paperwork were filed with the U.S. State Department, in which case, Obama would have received a Certification of Citizenship, after U.S. Immigration.

Petitioner is informed, believes and thereon alleges Obama was never naturalized in the United States after his return. Obama was ten (10) years old when he returned to Hawaii to live with his grandparents. Obama's mother did not return with him. If citizenship of Obama had been applied for in 1971, Obama would have a Certification of Citizenship. If Obama returned in 1971 to Hawaii without going through U.S. Immigration, today he would be an illegal alien – and obviously not able to serve as President, but also his term as a United States Senator from Illinois for the past three (3) years was illegal in the absence of a Certification of Citizenship.

Obama's mother, Stanley Ann Dunham, a/k/a Soetoro divorced Lolo Soetoro in 1980 in Honolulu, Hawaii. In the divorce papers it clearly states the couple had two (2) children. Stanley Ann Dunham a/k/a Soetoro and Lolo Soetoro, M.A. only birthed one child, Maya, thus the second child being Obama.

Obama traveled to Indonesia, Pakistan and Southern India in 1981. The relations between Pakistan and India were extremely tense and Pakistan was in turmoil and under martial law. Pakistan was so dangerous that it was on the United States State Department's travel ban list for US Citizens. According to the State Department records, Non-Muslim visitors were not welcome unless sponsored by their embassy for official business. A Muslim citizen of Indonesia traveling on an Indonesian passport would have success entering Indonesia, Pakistan and India. Therefore, it is believed Obama traveled on his Indonesian passport entering those Countries. Indonesian passports require renewal every five (5) years. At the time of Obama's travels to Indonesia, Pakistan and India, Obama was twenty (20) years old. If Obama would have been a U.S. citizen, 8 USC §1481(a)(2) provides loss of nationality by native born citizens upon "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state...after having attained the age of eighteen years", in violation of 8 U.S.C. §1401(a)(1).

As a result of the above, Petitioner, Philip J. Berg, Esquire, filed suit August 21, 2008 for Declaratory and Injunctive Relief. At the same time, Petitioner filed a Motion for a Temporary Restraining Order [TRO] prohibiting the DNC from nominating Obama as the Democratic Presidential Nominee and prohibiting Obama from further campaigning for the Office of President of the United States, which was denied on August 22, 2008. Petitioner filed a Motion for Expedited

Discovery, Extensive Discovery and Appointment of a Special Master on September 9, 2008. Although unopposed, the District Court failed to rule upon or set a hearing on the matter. Petitioner served upon Defendants Requests for Admissions and Requests for Production of Documents, **which were not objected to and/or answered by Defendants**. On September 24, 2009, Defendants filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). At request of the Court, Petitioner filed his Opposition in response to Defendants Motion to Dismiss on September 29, 2008. On October 6, 2008, Defendants filed a Motion for a Protective Order Staying all Discovery. Petitioner filed his Response in Opposition to Defendants Motion for Protective Order on October 9, 2008. Defendants Motion for Protective Order was not ruled upon by the District Court. October 21, 2008, Petitioner filed a Motion for Summary Judgment as there were no undisputed material facts remaining as Obama failed to object to and/or answer Petitioner's request for Admissions and therefore they were deemed admitted. Petitioner filed a Motion for an expedited ruling on his Motion for Summary Judgment. The District Court failed to rule upon Petitioner's Summary Judgment Motion and instead granted Defendants Motions to Dismiss on October 24, 2008. Petitioner immediately appealed.

The citizenship status of Obama is a critical issue; an issue which needs to be addressed to uphold the Constitution of the United States. If Obama's citizenship status is not ascertained and it is later found Obama is ineligible to

serve as the President of the United States due to his non-natural born citizen status, the consequences could provide long-term damage to America. This would set a precedent for future variances from our United States Constitution without due process of law, and ultimately, all citizens of the United States would no longer enjoy the same protections secured by the United States Constitution.

Therefore, it is incumbent on this Honorable Court to allow the ascertainment of truth concerning Obama's constitutional qualifications to serve as President of the United States.

ARGUMENT

I. How Judge Surrick Decided the Issues:

The District Court reviewed the Defendants, the DNC, Obama and the FEC's Motions to Dismiss and issued his Memorandum and Order granting the Defendants Motions to Dismiss based on standing. The Court found "[A] voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate" quoting *Crist v. Comm'n on Presidential Debates*t, 262 F.3d at 193, 194 (2d Cir. 2001); *Jones v. Bush*, 122 F.Supp. 2d 713 (N.D. Tex. 2000). The Court went on further stating "the alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirement of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing quoting *Hollander v. McCain*, 2008 U.S. Dist. LEXIS 56729 at

*12. In taking the facts asserted in the Complaint as true for purposes of determining Defendants Motion to Dismiss, specifically, Petitioner's contention that Defendant is not a "natural born" American citizen, it is unjust to deny Petitioner standing just because other voters have suffered the same harm.

II. The District Court erred in Denying Petitioner Standing:

A. Petitioner Has Standing under the Tenth Amendment:

Petitioner has standing under the Tenth Amendment because the power to determine the qualifications of the President-elect is left to the states and the people after the Congressmen and Senators failed to object to the counting of the electoral votes on January 8, 2009. The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

3 U.S.C. §15 provides a method for challenges to any Presidential candidate to be presented. This statute provides the process for counting electoral votes in Congress and a mechanism for objections then to be registered and resolved.

If only one [1] Member of the House and one [1] Member of the Senate object to the Electoral Vote in any/every state, the counting of the votes would stop and the Joint Session would cease until the House and Senate meet, discuss and vote on each States Electoral Votes. When the electoral votes were counted in Congress on January 8, 2009, the President of the Senate failed to call for

objections at the end of the counting of each state's electoral votes and Petitioner has no knowledge of any objections that were submitted by any Congressman and Senator. Since the legislative mechanism for challenging the qualifications of the President has expired, the power to make such a challenge is "reserved to the states respectively, or to the people" pursuant to the Tenth Amendment.

That the power to challenge the qualifications of the President-elect is left to the states or to the people is consistent with the decision in *Robinson v. Bowen,* 2008 U.S. Dist. LEXIS 82306 (N.D. Ca. 2008), where the District Court stated at *7:

> "Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch…review--if any--should occur only after the electoral and Congressional processes have run their course. *Texas v. United States*, 523 U.S. 296, 300-02, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)." *Robinson v. Bowen*, at *7.

Since the "electoral and Congressional processes have run their course" this Court's review of Petitioner's challenges to the President-elect's qualifications is required.

B. Petitioner has Standing to Challenge the Qualifications of the President-Elect under *Gregory v. Ashcroft,* 501 U.S. 452, 463 (1991):

Petitioner has standing to challenge the qualifications of the President-elect under *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), which recognizes the authority of the people of the States under the Tenth Amendment to determine the

qualifications of their "most important government officials:" In the face of challenges under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621-634 and the Equal Protection Clause, U.S. Constitution, Amendment XIV, the Court in *Aschcroft* upheld a state constitutional provision which provided that all judges other than municipal judges must retire at the age of 70 years. The Court compared the situation presented in *Gregory* to a group of Supreme Court cases discussing the degree to which the Equal Protection Clause of the Fourteenth Amendment restricted a state from prohibiting aliens from gaining public employment. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In those cases, the Court held that while the Equal Protection Clause posed a check on state power to exclude aliens from service, the standard of reviewing exclusions would be lowered in "recognition of the authority of the people of the States to determine the qualifications of their most important government officials":

> "In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See *Bernal* v. *Fainter*, 467 U.S. 216, 220, 81 L. Ed. 2d 175, 104 S. Ct. 2312 (1984). See also *Nyquist* v. *Mauclet*, 432 U.S. 1, 11, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977); *Foley* v. *Connelie*, 435 U.S. 291, 295-296, 55 L. Ed. 2d 287, 98 S. Ct. 1067 [*463] (1978); *Ambach* v. *Norwick*, 441 U.S. 68, 73-74, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979); *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 439-441, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982). "We have... lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.'" *Bernal*, 467 U.S. at 221 (citations omitted)..."

> "**These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at "'the heart of representative government.'" Ibid. It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."** U.S. Const., Art. IV, § 4. See *Sugarman, supra*, at 648 (citing the Guarantee Clause and the [***426] Tenth Amendment). See also *Merritt*, 88 Colum. L. Rev., at 50-55." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) **[emphasis added].**

Under this standard, the power to determine the qualifications of the President-elect lies with the people of the States, including the Petitioner. This precept lies at the heart of our representative government.

C. Petitioner Meets the Constitutional Elements of Standing:

Petitioner meets the Constitutional elements of standing: (1) he has suffered an injury in fact; (2) that injury has been caused by the Defendants' challenged conduct; and (3) a simple favorable judicial decision ordering the production of Obama's original vault version birth certificate will, in part, provide Petitioner with redress from that injury. Article III standing has three requirements: "(1) the plaintiff has suffered 'an injury in fact,' (2) that injury bears a causal connection to the defendant's challenged conduct, and (3) a favorable judicial decision will likely provide the plaintiff with redress from that injury." *Hollander v. McCain*, 566 F. Supp. 2d 63, 67 (D.N.H. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Petitioner has standing because he meets the three-factor test. Petitioner has suffered Injury-in-Fact and

this harm was caused by Defendants' brazen misrepresentations. The particular harm suffered by Petitioner is the following: (1) he was denied information concerning the qualifications of Obama, thereby infringing on his fundamental right to cast an informed, meaningful vote for a Democratic candidate; (2) Petitioner's fundamental First Amendment right to freedom of speech has been violated because he was denied the opportunity to object through his representatives to the counting of votes when the President of the Senate failed to call for objections upon counting the electoral votes; (3) Petitioner was harmed by each state's action in placing Defendant on the ballot when there were substantial questions concerning his citizenship status and certifying the electoral votes; (4) Petitioner's reputation has been harmed by constant accusations that he is a racist when Petitioner's quest for the truth is not, by any stretch of the imagination, related to race, and in fact, Petitioner is a life member of the NAACP; and (5) Petitioner has spent huge amounts of money and time in trying to ascertain an uncomplicated truth, and Defendants have brazenly continued denying Petitioner this information knowing full well the expense of this litigation. A simple favorable judicial decision granting Petitioner standing to challenge the qualifications of the President-elect and ordering full disclosure of Obama's original vault version birth certificate will, in part, provide Petitioner with redress from that injury.

III. The District Court Erred in Dismissing Petitioner's Claims under 42 U.S.C. §1983:

The District Court erred in denying Petitioner's claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) based on standing under 42 U.S.C. §1983 for Standing and Failure to State a Claim that Relief could be granted. The District Court reasoned Petitioner failed cite a state action, when, in fact, each state effectuated Defendant's scheme by placing Defendant on the ballot without ascertaining his citizenship status and certifying the electoral vote in each respective state.

The Court in *Donohue v. Board of Elections of State of New York*, 435 F. Supp. 957, 966-68 (S.D.N.Y. 1976), affirmed, 559 F.2d 1202 (2d Cir. 1977), cert. Denied, 434 U.S. 861 (1977), recognized its jurisdiction and authority to provide an equitable remedy for electoral irregularities under 42 U.S.C.S. § 1983, provided that the plaintiffs met their burden of proof. The *Donohue* court established a four-factor test for applying § 1983 to electoral disputes. First, one must "plead and prove specific acts of misconduct, including time, place and circumstances of the alleged deprivation of the right to vote." Second, one must show intentional or purposeful discrimination. The Court clarified that intentional or purposeful discrimination included not only traditional race or gender discrimination, but also intentional conduct designed to deprive any qualified voter of his or her right to vote. Third, one must prove that the defendant acted under color of state law. It is

important to note that the court included the actions of "private persons acting jointly with state officials within the category of state actions." Finally, one must prove that the "fraud or other unlawful behavior changed the outcome of the election." *Donohue v. Board of Elections of State of New York*, 435 F. Supp. 957, 966-68 (S.D.N.Y. 1976), affirmed, 559 F.2d 1202 (2d Cir. 1977), cert. Denied, 434 U.S. 861 (1977). Petitioner will show that these four factors have been met, conferring standing upon Petitioner to seek redress for the infringement upon his fundamental right to vote.

Petitioner has plead and proven specific acts of misconduct by Obama and the DNC, namely, the failure to provide proof of Obama's citizenship and the posting on several websites of a document intended to mislead the public into believing that Obama was presenting genuine proof of his "natural born" citizenship status. This deception was intended to deprive citizens of their right to make an informed voting decisions, thereby debasing and diluting Petitioner's legitimate vote. Defendants have acted jointly with state officials to commit this deception by allowing each state to put Obama's name on the ballot and by allowing the certification of each state's electoral votes without providing proof of Obama's citizenship. Further, the statement made on October 31, 2008 by the Director of Hawaii's Department of Health, Dr. Chiyome Fukino, that she has "personally seen and verified that the Hawaii State Department of Health has Sen. Obama's original birth certificate on record in accordance with state policies and

procedures" appears to be a deliberate attempt by a state official to misrepresent proof of Obama's birth in Hawaii when such statement did not confirm this fact.

The District Court clearly erred in dismissing Petitioner's claims under 42 U.S.C. §1983.

V. Petitioner has Raised Questions which are Strictly a Question of Law, however, are of Political Interest; and therefore, do not fall Under the Political Question Doctrine:

Political questions include such areas as the conduct of foreign policy, the ratification of constitutional amendments, and the organization of each state's government as defined in the Constitution, none of which is the basis of Petitioner's suit. The Political Question Doctrine only applies in cases where a specific interpret of power is granted by the Constitution to branches of Government other than the Judiciary. The Courts continued to evidence the view that only questions textually committed to another branch are political questions. See Baker *v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969) and *Nixon v. United States*, 506 U.S. 224 (1993).

Petitioner raised questions as to Obama's citizenship status and qualifications to serve as President of the United States pursuant to the United States Constitution, which are questions of law, even though they are of political interest. The issues concern the inherent rights secured to Petitioner and all citizens of the United States by the U.S. Constitution and are therefore, clear legal questions of law.

Article II, Section I, Clause 5 of the United States Constitution dictates the qualifications of the President of the United States. The Constitution clearly states our President must be a "natural born" citizen. Although the Constitution dictates the qualifications of our President, the Constitution does not confer the responsibility to ensure this portion of our U.S. Constitution is upheld to any branch of Government, thus, it is not a political question; it is a question of law. *Baker v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969), *Nixon v. United States*, 506 U.S. 224 (1993). Furthermore, since the responsibility is not conferred to any Branch of Government, the responsibility is reserved to the States or the People. Tenth Amendment of the United States Constitution.

Petitioner's case herein is one "arising under" the Constitution within the meaning of Article III of the Constitution, since Petitioner's claims will be sustained if the Constitution…[is] given one construction and will be defeated if it [is] given another. Therefore, the Court has subject matter jurisdiction over Petitioner's action. *Powell v. McCormack*, 395 U.S. 486 (1969) at pp. 512-516 quoting *Bell v. Hood*, 327 U.S. 678.

The Court in *Powell v. McCormack*, 395 U.S. 486 (1969) at P. 517 stated,

> "In deciding generally whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Quoting *Baker v. Carr,* 369 U.S. 186 supra, at 198.

Petitioner's litigation is justiciable because the claims presented and the relief sought, which is Ordering Obama to prove he is constitutionally qualified to serve as President of the United States by turning over his "vault" version birth Certificate, which Hawaii states they have, turning over certified court documents showing where his name was legally changed to Barack Hussein Obama, Jr. from Barry Soetoro and provide satisfactory proof he is in fact a "natural born" U.S. Citizen and not an Indonesian Citizen are within the Court's power. Moreover, the Court can mold the right asserted by Petitioner. The relief Petitioner is seeking is susceptible of judicial resolutions since regardless of the appropriateness of a coercive remedy, declaratory relief is independently available. *Powell v. McCormack*, 395 U.S. 486 (1969), *Baker v. Carr,* 369 U.S. 186, Nixon *v. United States*, 506 U.S. 224 (1993).

In *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court rejected the contention that, because the case did not involve a matter of individual rights, it ought not be adjudicated.

The Constitution vests in Congress the authority to count electoral votes and provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes. Twelfth Amendment of the United States. Despite this, the Court did not make any mention of the Political Question Doctrine while resolving issues arising from Florida's recount of votes in

the 2000 Presidential Election that was contested. See *Bush v. Palm Beach County Canvassing Bd*., 531 U.S. 70 (2000) and *Bush v. Gore*, 531 U.S. 98 (2000).

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Honorable Court to deny Defendant, FEC's Motion for Summary Affirmance and hear the merits of the case.

Dated: January 26, 2009

Respectfully submitted,

s/ Philip J. Berg

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,799 words excluding the parts of the brief excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R.App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Office Professional (2000) in font 14, Times New Roman.

Dated: January 26, 2009

s/ Philip J. Berg
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CERTIFICATE OF SERVICE

I, Philip J. Berg, Esquire, hereby certify that Petitioner-Appellant's Response in Opposition to Defendant-Appellee, the Federal Election Committee's Motion for Summary Affirmance was served upon Defendants via electronic filing on the ECF System, this 26th day of January 2009 upon the following:

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