

No. 08A407

In The  
Supreme Court of the United States

Leo C. Donofrio,

v.

Nina Mitchell Wells, Secretary of State of the State of New Jersey

**APPLICATION FOR EMERGENCY STAY**

Leo C. Donofrio, Pro Se  
PO Box 93  
East Brunswick  
New Jersey, 08816

November 3rd, 2008

**AFFIRMATION**

Appellant, Leo C. Donofrio, respectfully submits to this most Honorable Court, having exhausted all available remedies below, that there are no other jurisdictions available to him for review. Appellant further respectfully submits to this Honorable Court that this matter reflects a vitally important public interest, and that it also presents a unique Constitutional question of first impression as to the legal significance of the term "natural born citizen" as enumerated in Article 2, Section 1, of the Constitution of the United States

as an absolute qualifier for all who seek the office of President of the United States.

### **LOWER COURT ORDERS**

Appellant, Leo C. Donofrio, Has brought the emergency Application before this most Honorable Court directly from an order denying Appellant's Motion For Emergency Injunctive Relief from The Supreme Court of New Jersey, by the Honorable Justice Virginia A. Long, on Friday October 31, 2008 at approximately 1:30 PM. Prior to making such Motion in The Supreme Court of New Jersey, Appellant sought emergency relief in the Superior Court of New Jersey, Appellate Division, before the Honorable Jack M. Sabatino. Appellant filed various papers in the Appellate Division, including a Fact Sheet Upon Application For Emergent Relief, and a letter supplement thereto, after which His Honorable Jack M. Sabatino granted full review of this matter. Appellant then filed a Complaint In Lieu of Prerogative Writs, followed by a Motion For Summary Judgment.

Appellant's Application for Emergent relief, after having been granted full review by the Honorable Jack M. Sabatino and the Honorable Philip S. Carchman, Presiding Justice, Appellate Division, on October 27, was dismissed on October 30, 2008, by an order and five page decision by the Honorable Jack M. Sabatino at approximately 5:00 PM, October 30, 2008.

### **RELIEF REQUESTED**

Appellant, Leo C. Donofrio, a New Jersey citizen who intends to vote in the pending general election of 2008, requests this most Honorable Court

to issue an Emergency Stay prohibiting the use, in the State of New Jersey, of defective ballots containing at least three ineligible candidates for the office of President of the United States, and for such Honorable Court to order Defendant-Respondent, Nina Mitchell Wells, Secretary of State of the State of New Jersey, to remove from New Jersey ballots the names of Republican candidate John McCain, Democratic candidate Barack Obama, and Socialist Worker's Party candidate Roger Calero, as Appellant respectfully submits they are not "natural born citizens" as enumerated in Article 2, Section 1, of the Constitution of the United States.

And should this Honorable Court agree that the aforementioned candidates are not "natural born citizens" of the United States, Appellant respectfully submits, that while he did not request a Stay of the national election in the lower courts, such a Stay be ordered for good and proper cause. In the alternative, while Appellant's original complaint requested an order staying the ballots until Respondent might complete a proper investigation as to the Presidential eligibility of the candidates, Appellant respectfully submits that the Constitutional issue now before the Court is of the utmost public importance and is also here now before this most Honorable Court as a matter of first impression.

Appellant respectfully submits that the only purpose for remanding the matter back to the Secretary of State would involve the issue of whether Democratic candidate Barack Obama be required to prove to Respondent that he was born in Hawaii.

Appellant, in both his original Complaint and Motion For Summary Judgment, contends that candidate Obama is not eligible to the Presidency as he would not be a "natural born citizen" of the United States even if it were proved he was born in Hawaii , since, as was argued in Appellant's original complaint brief, as well as Appellant's brief in support of Motion For Summary Judgment, Senator Obama's father was born in Kenya and therefore, having been born with split and competing loyalties, candidate Obama is not a "natural born citizen" as is required by Article 2, Section 1, of the United States Constitution.

### **STATEMENT OF THE FACTS**

In early October 2008, Appellant began to fear that controversys surrounding numerous law suits, filed against Presidential candidates Senator John McCain and Senator Barrack Obama, would threaten Appellant's fundamental voting right as well as his fundamental right to be governed by a President with a proper mandate under the Constituion.

On October 22nd, 2008, Apellant phoned the New Jersey Office of Secretary of State, Elections Division, and spoke with Donna Barber, the Elections Manager for the State of New Jersey. During that conversation, Appellant asked Ms. Barber what steps the Secretary had taken to determine whether any of

the candidates listed on New Jersey ballots for the upcoming Presidential election were eligible for the office of President.

Donna Barber then informed Appellant that Respondent-Secretary of State took no steps to determine such eligibility but rather assumed the candidates were eligible based upon only the fact that they had been nominated. Appellant then took a close look at the election statutes.

*N.J.S.A 19:13-22* requires Respondent to follow specifically prescribed steps in order to protect and secure New Jersey ballots voters from the destruction of electoral integrity. Specifically, 19:13-22 requires Secretary Wells to make a "statement" wherein she certifies, under her hand and official seal of office, the names...

"...of all such candidates for whom the voters within such county may be *by law entitled* to vote at such election." (Emphasis added.)

The purpose of the statement is to instruct the clerks, and the board of elections, for each county, as to which candidates are "by law entitled" to have their names printed on the ballots for the upcoming election.

The next day, October 23, 2008, Appellant spoke with Elections Manager, Donna Barber, and again was told that Respondent had no reason to object to the party nominations and that the statutory deadline for objection to such nominations had passed. Ms. Barber specifically stated that her office, the Elections Division, would not change the ballots at such a late date.

Appellant considered various options, but ultimately came to the conclusion, after further review of the statutory code, that the only

legal force available to him was an Action In Lieu of Prerogative Writs to compel Respondent's ministerial ballot policing duty.

### **TIMELINESS OF ACTION IN LIEU OF PREROGATIVE WRITS**

Counsel below contended, and the Honorable Jack M. Sabatino, in his decision, agreed, that Appellant brought his action too late. Appellant rigorously contends that assertion to be false. Feeling the weight of the impending election, Appellant wasted no time initiating litigation on October 27, 2008, only five days, including a full weekend, after he first learned of Respondent's misfeasance of office. Counsel and his Honor have misinterpreted the statute they rely upon.

Statutory objection deadlines listed in *N.J.S.A. 19:13-10* apply, as to the Presidential race, *only* to certificates (major partys) and petitions (independant partys) of nomination for the *electors* of each party. As long as such nominations follow statutory rules of construction, which Appellant stipulated below that they did, then such nominations were valid under the statute.

Furthermore, Appellant doesn't have the legal right to object to a political party's choice of candidate as such party is not a public official or agency, and has no Constitutional or statutory mandate. As private citizens they may, by law, nominate whoever they like.

New Jersey voters must rely upon the executive power of the Secretary of State to safeguard the integrity of our electoral process,

especially during Presidential cycles when she must be most vigilant of her oath of office. And if Respondent-Secretary doesn't protect the citizens of New Jersey, then it is up to the citizens of New Jersey to *command* her to do so via the eloquent tradition of writ of mandamus which in New Jersey falls under the statute as an action in lieu of prerogative writs.

Appellant's genuine cause of action accrued on September 22, 2008, when Respondent certified and delivered the 19:13-22 statement to the clerks of the several counties. The "statement" was a final State agency decision which triggered Appellant's exclusive avenue of action under *N.J. Ct. R. 2:2-(a)(2)*, a direct appeal, as of right, to the Appellate Division. Since the general limitation for commencing actions in lieu of prerogative writs is set at 45 days, according to *N.J. Ct. R. 4:69-6*, Appellant was well within such timeframe when he filed a Complaint In Lieu of Prerogative Writs with the Honorable Jack M. Sabatino on October 28, 2008.

## **LEGAL ARGUMENTS**

### **POINT 1**

#### **APPELLANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AS TO RESPONDENT'S FAILURE TO EXECUTE HER STATUTORY AND CONSTITUTIONAL DUTIES TO PROTECT THE INTEGRITY OF NEW JERSEY BALLOTS**

*N.J.S.A. 19:13-22* requires the Secretary of State to submit a "statement", prepared by her hand and under her seal of office, to the clerks of the several counties of New Jersey, listing the names,

"...of all such candidates for whom the voters within such county may be *by law entitled* to vote at such election". (Emphasis added.)

Appellant respectfully submits to this Honorable Court that the purpose of the statement is to instruct the clerks of the several counties of New Jersey as to which candidates are "by law entitled" to have their names printed on the ballots. This was disputed by Respondent's counsel who argues that the statute's use of the term "by law entitled", must refer to the actual voters who are eligible to vote, and not to the legal eligibility of the candidates. Appellant gives this argument no quarter.

There are various statutes within the code, which govern the citizens as to voting, but this isn't one of them. The statute isn't about suffrage. It commands the Secretary of State to protect voters.

*N.J.S.A. 19:13-22:*

The Secretary of State, not later than eighty-six days before any election whereat any candidates nominated in any direct petition or primary certificate of nomination or State convention certificate filed with him are to be voted for, shall make and certify, under his hand and seal of office, and forward to the clerks of the several counties of the State a statement of all such candidates for whom the voters within such county may be by law entitled to vote at such election. This statement, in addition to the names of the candidates for President and Vice-President of the United States, if any such have been included in any such certificate or petition filed with him, shall contain the names and residences of all other candidates, the offices for which they are respectively nominated, and the names of the parties by which or the political appellation under which they are respectively nominated. Candidates nominated directly by petition, without distinctive political appellation, shall be certified as independent candidates. Similar statements shall be made, certified and forwarded, when vacancies are filled subsequently, according to law.

As a result of Respondent's misfeasance, New Jersey ballots for the upcoming election contain the names of three Presidential candidates who are not, *by law entitled*, to hold the office of President of the United



States, since they are not "natural born citizens" as is required by *Article 2, Section 1, of the Constitution of the United States*.

Republican candidate John McCain was born in Panama. Socialist Workers Party candidate Roger Calero was born in Nicaragua. And the birthplace of Democratic candidate Barack Obama has not been verified by Respondent.

The State of New Jersey is granted rights under Article 2, Section 1, of the United States Constitution regarding the issuing of ballots for New Jersey voters as well as the qualifying of candidates to appear on those ballots for the Presidential election. The executive in charge of maintaining the integrity of New Jersey ballots is deemed to be the Secretary of State by Title 19 of the New Jersey Statute Annotated.

N.J.S.A 19:13-22 provides no safe harbor to:

- candidates *not* entitled by law to appear on New Jersey ballots
- candidates who *might* be entitled to appear on New Jersey ballots
- candidates who *probably* are entitled to appear on New Jersey ballots

The statute is very specific, the candidates *must* be by law entitled to appear on the ballots.

Respondent took an oath of office and swore to uphold, not just the Constitution of the State of New Jersey, but also the United States Constitution. As the executive in New Jersey charged with securing ballots from fraud and deception, her prescribed duty is merged by legal fusion, in that the statutory term, "by law entitled", *must* be subordinate to her Constitutional duty as the chief executive in charge of elections who

protects the office of President from ineligible candidates. This is because Article 2, Section 1, of the United States Constitution sets forth the minimum requirements which make candidates, by law entitled, to be eligible to hold the office of President of the United States:

*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 Supremacy Clause, Article VI, Clause 2 of the United States*

*Constitution, reads:*

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

Therefore, the requirements of *N.J.S.A. 19:13-22* must be interpreted, in so far as the election for President of the United States is concerned, in light of Article 2, Section 1, of the Constitution. Therefore, the words "by law entitled" in the aforementioned statute must incorporate the requirements for the Presidency set forth in the United States Constitution.

It is not disputed that Secretary Wells conducted no investigation to determine whether the major party candidates for President were constitutionally eligible for the office of President. She accepted the certifications of nomination from both major parties under the assumption that the candidates were eligible, but she did nothing further to verify such

eligibility.

Respondent's Counsel's brief in response to Appellant's complaint does not dispute the facts. Instead, Respondent's Counsel argues that the Secretary of State's role, as to elections in New Jersey, is only clerical:

"This matter rests upon Appellant's misreading of a statute. By misreading a modifying phrase, he has taken what is the Secretary of State's clerical function under N.J.S.A. 19:13-22 to certify a list of names to county clerks, and manufactured a requirement to broadly investigate the lineage of candidates for the highest federal office."

To that, Appellant argues, if not she, who then is responsible for protecting the integrity of New Jersey's electoral process? Respondent is named specifically in *N.J.S.A. 19:13-22*. The statement required therein is required to be made by her hand, under her seal of office.

"A State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jeness v. Fortson*, 403 U.S. 431, at 442. "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." *Rosario v. Rockefeller*, 410 U.S. 752, 761; *Bullock v. Carter*, 405 U.S. 134, 145 (1972).

If the Secretary of State's role is clerical, than who is responsible for Roger Calero appearing on New Jersey ballots? The official Presidential candidate for the Socialist Workers Party is Roger Calero. Mr. Calero was born in Nicaragua. The Socialist Workers Party has gained official access to ballots in ten States that Respondent is aware of. And, despite the fact that the Socialist Workers Party has qualified to have their chosen candidate listed on those ballots, state election officials from Colorado, Florida, Iowa, Louisiana, and Washington have all, for good and legal cause, refused to list Mr. Calero on the ballots since, having been born in Nicaragua, he is

not a "natural born citizen" as is required by Article 1, Section 2, of the United States Constitution. In those states, a stand-in candidate, Mr. James Harris, has been listed in place of Mr. Calero.

Furthermore, Respondent's counsel, in his reply brief, never discusses Respondent's Constitutional duty to uphold the Constitution, nor does the Honorable Jack M. Sabatino address the Secretary of State's oath of office meets Constitutional nexus in his decision.

With three ineligible Presidential candidates on their ballots, New Jersey voters will witness firsthand, the fraud their electoral process has become due to Respondent's misfeasance of office. Appellant respectfully requests emergency relief be granted in order to restore integrity to New Jersey's electoral process.

**COUNT 2**  
**CANDIDATES OBAMA, MCCAIN, AND CALERO ARE NOT ELIGIBLE TO**  
**THE OFFICE OF PRESIDENT BECAUSE THEY AREN'T NATURAL BORN**  
**CITIZENS AS DEFINED BY ARTICLE 2, SECTION 1, OF THE**  
**CONSTITUTION OF THE UNITED STATES.**

*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;*

**REPUBLICAN CANDIDATE McCain**

Petitioner begins this argument with a conclusion: had the US legislature intended to grant "natural born citizen" status to all who were born on US soil, then the 14th Amendment would contain the words "natural born citizen", but it doesn't. Republican candidate Senator John McCain was born in Panama. Panama is not considered U.S. soil, nor has it ever been

considered as such. *The Naturalization Act of 1790* was the only Congressional act which has ever attempted to confer "natural born citizen" status. The relevant portion reads as follows:

"...the children of citizens of the United States that may be born beyond Sea, or out of the limits of the United States, shall be considered as natural born Citizens..."

However, the *Naturalization Act of 1795* specifically repealed the act of 1790 and replaced it with virtually the same clause as that of 1790, except the words "natural born" were deleted and have never been replaced by Congress. The 1795 act reads as follows:

"the children of citizens of the United States born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States."

So Congress effectively kept the part of that clause which granted citizenship, but repealed the words "natural born" from that level of citizenship. Congress never again attempted to legislate a definition of "natural born citizen", and it's probably not even possible for them to do so without a Constitutional Amendment. The United States Department of State's *Foreign Affairs Manual at 7FAM1116.1-4(c)* states:

"Despite widespread popular belief, U.S. military installations abroad and U.S. diplomatic facilities are not part of the United States within the meaning of the 14th Amendment. A child born on the premises of such a facility is not subject to U.S. jurisdiction and does not acquire U.S. citizenship by reason of birth."

Indeed, it is well established by precedent that children born abroad of United States citizens are not granted citizenship by the Constitution, but rather by statute. The 14th Amendment states:

*Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States*

John McCain was neither born on United States soil, nor was he naturalized.

He is a citizen at birth by statute. This is discussed in the *Foreign Affairs Manual*:

7 FAM 1131.6-3 Not Citizens by “Naturalization”

Section 201(g) NA and section 301(g) INA (formerly section 301(a)(7) INA) both specify that naturalization is "the conferring of nationality of a state upon a person *after* birth." Clearly, then, Americans who acquired their citizenship by birth abroad to U.S. citizens are *not* considered naturalized citizens under either act. (Emphasis added.)

The Constitution confers three types of citizen status:

- "natural born citizen", but *only* with regard to eligibility to hold the office of President
- "citizen" to those born in the United States via the 14th Amendment
- "citizen" to those naturalized in the United States via the 14th amendment

McCain is none of the above. He wasn't born on United States soil and he wasn't naturalized in the United States. Instead, McCain may claim citizenship from 8 USC 1403(a):

“Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.”

McCain is in the class of citizens who obtain their citizenship at birth,

but not from the Constitution, but rather federal statute. In *Rogers v. Bellei*, 401 U.S.

815, 828 (1971). The Supreme Court stated:

*...[C]hildren born abroad of Americans are not citizens within the citizenship clause of the 14th Amendment.”... “To this day, the Constitution makes no provision for jus sanguinis, or citizenship by descent... “Our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status except as modified by statute.” Id. at 828.*

So, not being born on US soil, McCain cannot be a "natural born citizen".

The *Foreign Affairs Manual* weighs in on the issue as follows:

*7 FAM 1131.6-2 Eligibility for Presidency*

a. It *has never been determined definitively* by a court whether a person who acquired U.S. citizenship by birth abroad to U.S. citizens is a natural born citizen within the meaning of Article II of the Constitution and, therefore, eligible for the Presidency.

b. Section 1, Article II, of the Constitution states, in relevant part that "No Person except a natural born Citizen...shall be eligible for the Office of President,"

c. The Constitution does not define "natural born".

The "Act to establish an Uniform Rule of Naturalization", enacted March 26, 1790, (1 Stat.103,104) provided that, "...the children of citizens of the United States, that may be born ... out of the limits of the United States, shall be considered as natural born citizens: Provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

d. This statute is no longer operative, however, and its formula is not included in modern nationality statutes. *In any event, the fact that someone is a natural born citizen pursuant to a statute does not necessarily imply that he or she is such a citizen for Constitutional purposes.* (Emphasis added.)

Appellant would point out that the manual fails to mention that Congress specifically repealed the "natural born" part of the 1790 act. Recently, the US Senate has issued a resolution stating that McCain is a "natural born citizen" eligible to be President, but the resolution has *absolutely no legal effect*. It is simply an opinion and as such it holds no authority whatsoever.

Furthermore, while Congress could have at least *attempted* to pass legislation granting "natural born citizen" status to children of US citizens born abroad such as Senator McCain, Congress has not done so. The 14th Amendment also requires that, in

order for citizenship to be conferred thereby, whether born on US soil, or naturalized in the US, the person also be subject to the jurisdiction of the United States. And because of this caveat, "natural born citizen" status is proved to be a very special requirement specifically necessary for those who would be eligible to the office of President of the United States. A natural born citizen has no encumbrances or conditions whatsoever upon his citizenship.

Senator John McCain is an American patriot who has valiantly suffered more for this country than most of us ever will. He has shown bravery beyond that which the country has any right to ask, and it is with very deep and sincere regret that I respectfully request that this Honorable Court order the Secretaries of the several States to remove John McCains name from the ballots.

**DEMOCRATIC CANDIDATE BARACK OBAMA:**

First, I must address, out of respect for Senator Obama, that Judge Sabatino's lower court decision makes an egregious error wherein it states that Appellant suggested Senator Obama's father might have been born in Indonesia. Appellant never made any such allegation in any of Appellant's papers. I have been assured by his Honor's clerk that the error will be corrected.

As regarding the issues surrounding Senator Obama's birth certificate, and if it may please this Honorable Court, I would point



out that Senator Obama has *not* been presented with a genuine legal request from a party with proper standing to command him in any way, and therefore he has no legal responsibility to submit or to bend his integrity. And for that, he certainly deserves respect.

Appellant believes that if Senator Obama is presented with a legal request from a government authority sanctioned to make such request, that Senator Obama will respond accordingly and put this issue behind him forever.

That being said, petitioner regretfully submits that since candidate Obama was born to a Kenyan father, he also is not eligible to the office of President since is not a "natural born citizen" by the Constitution. Appellant respectfully requests that this Honorable Court order the Secretaries of the several States to remove Barack Obama's name from the ballots.

### **CONCLUSION**

Appellant respectfully submits to this Honorable Court, once again, that had the legislature intended to grant "natural born citizen" status to all who were born on US soil, then the 14th Amendment would contain the words "natural born citizen", but it doesn't.

And so this proposition leads to the logical conclusion that a natural born citizen is a citizen born in the United States to parents, neither of which is an alien. Having an alien parent would tie such

person at birth to the possibility of other loyalties and laws. And such a person, even if he be as loyal and devoted to this country as Senators Obama and McCain have proven to be, is not eligible to hold the office of President of the United States.

### **STANDING**

Appellant's standing was not challenged in Respondent's reply brief, nor was it challenged in his Honorable Sabatino's order and decision. However, Appellant discusses the issue below in respect to this most Honorable Court's superior jurisdiction. In *Ridgewood Education Association v Ridgewood Board Of Education*, 284 N.J. Super. 427 (App. Div. (1995)), the Court stated, "We see no reason why this State's historic liberal approaches to the issue of standing in general....should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education." *Silverman v. Board of Ed., Tp. of Millburn*, 134 N.J. Super. 253, 257-58 (Law Div.), aff'd o.b. 131 N.J. Super. 435 (App. Div. 1975).

The policies of justice regarding the sanctity of voting rights were also stated in *New Jersey Democratic Party v. Samson*, 175 N.J. 178, 814 A.2d 1028 (October 2, 2002). Although the petitioner bringing suit in that case was a political party, the voting rights discussed and protected were those of individuals. Therefore, the reasoning of that case should apply when the petitioner is an individual voter.

Appellant's fundamental right to vote for a candidate who will not be disqualified after the election is now threatened by the inclusion on

New Jersey ballots of three ineligible candidates.

"When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S 5, 6 (2000)

And finally, Appellant's fundamental right to live in the United States governed by a President and Commander In Chief who is Constitutionally eligible to the office of President is also threatened. Since this action is so very grounded in the interests of justice, and supported by all of the above, Appellant respectfully requests that this court recognize his standing.

### **FINAL CONCLUSION**

Appellant respectfully submits to this Honorable Court that while the limitations of our Constitution may at times appear unfair, it is important to remember that it is the restrictions which hold us to the Document, as much as it is the freedoms that bind us together as a nation.

"I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Leo C. Donofrio, Pro Se, November 3rd, 2008