No. 08-570

In The
# Supreme Court of the United States

PHILIP J. BERG,

*Petitioner,*

v.

BARACK OBAMA, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Third Circuit**

## MOTION TO FILE A BRIEF *AMICUS CURIAE* AND MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT OF BILL ANDERSON AND BRIEF *AMICUS CURIAE* OF BILL ANDERSON AND APPENDIX

*In Support Of The Petitioner*

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## MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT

### I. Motion For Leave To File A Brief *Amicus Curiae*

The Court's *amicus*, Bill Anderson, requests leave of this Court to file a brief *amicus curiae* in this case. Consent to file it has been obtained from the petitioner, whom this brief supports; the respondents have not granted consent.

The *amicus* is a citizen of the State of Arizona and an elector of that state for elector for President of the United States. He voted in the general election held by the State of Arizona on November 4, 2008. This Court has in fact recognized that the *amicus* has an interest in this type of case. See *United States v. Newman*, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915); and the same holds true for the petitioner. *Ibid*.

Your *amicus* submits that it will not be possible for this Court to dispose of this case properly without considering the following points which either have not been brought to the attention of this Court by the parties or which have not been adequately discussed:

1.) This Court is not facing a question of the constitutional aspects of standing, but a question pertaining to the prudential considerations only; and,

2.) The lack of an adequate remedy following the inauguration of Barack Obama,

and the potential civil and military crises which could arise therefrom, crises that could not be readily addressed by the ordinary processes of the law, must be considered in addressing the prudential aspects of standing; and,

3.) With respect to the prudential considerations of standing, certain aspects of this case are analogous to the doctrine of *res ipsa loquitur*.

## MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT

With respect to Rule 37(2)(a) of this Court, requiring notice to all parties at least ten days prior to filing an *amicus* brief, the *amicus* requests waiver of that Rule on the grounds that the point stated above concerning the aspect of this case which is analogous to *res ipsa loquitur* did not occur to counsel for the *amicus* at all until November 24, 2008; the *amicus* would not have sought to file this brief without that argument because counsel is of the opinion that that point is of such importance to this Court's full consideration of this case and to addressing the needs of justice that it justifies a waiver of this Court's rule. In the alternative, the *amicus* requests that this Court at least accept Argument II B. of this brief, which deals specifically with that point. (The other arguments deal with matters counsel had previously

considered bringing to this Court's attention if an *amicus* brief were to be filed at all.)

Following the research on Argument II B. and the drafting of the brief, and following the granting of consent by the petitioner to file this brief, counsel for the *amicus* sent a copy of the brief (including the cover, Table Of Contents, Table Of Authorities, motion for leave to file and motion for a waiver of Rule 37(2)(b), the text of the brief, and the appendix) by fax to the following persons at the fax numbers given:

1.) For respondents Barack Obama, the Democratic National Committee, and the Federal Election Commission: Gregory G. Garre, (202) 307-4613; and,

2.) For respondents Diane Feinstein and the Rules and Administration Committee of the United States Senate: "Counsel for Diane Feinstein and the Rules and Administration Committee," (202) 228-3954. Note: the office of the Rules and Administration Committee was closed when I called about 11:00 A.M. (1:00 P.M. in Washington), but Diane Feinstein is the Chair of that committee; and,

3.) For respondent Pedro A. Cortes, Secretary of the Commonwealth of Pennsylvania: "Counsel for Pedro A. Cortes," (717) 787-1734.

All three of these faxed transmissions were made between 11:45 A.M. and 12:45 P.M. Mountain

Standard Time on November 26, 2008. Immediately prior to sending the above faxes, I contacted the office of Gregory G. Garre by telephone and told the person who answered that I was sending the brief by fax; the other parties did not participate in the lower courts. An affidavit stating the relevant circumstances set forth in this motion (including the sending of these faxes) will accompany the filing of this brief and motion.

**Wherefore**, the *amicus* requests a waiver of Rule 37(2)(a) of this Court and for leave of this Court to file a brief *amicus curiae* in support of the petitioner either *in toto* or subject to such restrictions as this Court may deem proper.

Respectfully submitted,

LAWRENCE J. JOYCE
*Counsel of Record*

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MISCELLANEOUS

## INTEREST OF THE *AMICUS*

The Court's *amicus*, Bill Anderson, is a citizen of the State of Arizona and an elector of that state for elector for President of the United States.[1] He voted in the general election held by the State of Arizona on November 4, 2008. This Court has in fact recognized that the *amicus* has an interest in this type of case. See *United States v. Newman*, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915); the same holds true for the petitioner. *Ibid*. Consent to file this brief has been obtained from the petitioner, whom this brief supports; the respondents have not granted consent. The *amicus* seeks to file this brief by motion.

## SUMMARY OF ARGUMENTS

1.) Since this Court has already recognized that the petitioner has an interest in this type of case, the limits of standing for this petitioner are based not on constitutional considerations, but on prudential considerations only.

2.) The lack of a practical remedy following inauguration may present an unprecedented constitutional crisis with civil and military implications,

[1] Counsel of record on this brief is the sole author of this brief. No person or entity, other than the *amicus* or counsel thereof, made a monetary contribution to the preparation or submission of the brief.

implications not readily addressed by the ordinary processes of law.

3.) The prudential elements should also be considered in light of how the instant case is analogous to the circumstances in which courts apply the doctrine of *res ipsa loquitur*.

## ARGUMENTS

### I. The Petitioner Meets The Constitutional Element Of Standing

The petitioner meets the constitutional element of standing:

> "In a sense – in a very important sense – every citizen and every taxpayer is interested in . . . having only qualified officers execute the law."

*United States v. Newman*, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915).

This Court has made the following statement as well,

> "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requirements are met."

*Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80-81, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595, 616 (1978) (citation omitted).

## II. The Prudential Limits On Standing Must Be Considered In Light Of The Following Issues

### A. There Is No Adequate And Satisfactory Remedy Following Inauguration

Following respondent Obama's inauguration, the only way to attack his status as *de facto* President of the United States would be through *quo warranto* or by collateral attack. With respect to *quo warranto*, this Court said in *Newman* that an interest such as this petitioner does have,

> " . . . is to be represented by the Attorney General or the district attorney, who are expected by themselves or those they authorize to institute quo warranto proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law."

*Newman*, 238 U.S., at 547, 35 S.Ct., at 883, 59 L.Ed., at 1450.

In 1984 the United States Court of Appeals for the District of Columbia Circuit recognized that there are times when relying on the Attorney General to perform his obligations faithfully concerning *quo warranto* can be an absurdity. The Court said,

> "[T]he Attorney General was responsible for appointing appellees Diegelman and Lauer to their jobs. Requiring appellants to convince the Attorney General to file a *quo warranto* action on their behalf in this case would effectively bar their access to court."

*Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

In *Andrade*, the D.C. Circuit had already recognized the standing of the plaintiffs on other grounds, and noted that the practical lack of the remedy of *quo warranto* enhanced the need for granting injunctive relief. *Ibid.* If *quo warranto* were to be brought after respondent Obama is sworn in, it would have to be brought by the Attorney General or a U.S. attorney, or perhaps by the Vice-President of the United States.[2]

In light of that, we ask this Court to note the reasoning of the D.C. Circuit, and we ask this Court to find that the practical lack of *quo warranto* after respondent Obama may be sworn in not only enhances the need for injunctive relief for someone who does have standing, but also goes farther, and militates in favor of recognizing the petitioner's standing per se in the instant case.

With respect to collateral attacks on a *de facto* officer, this Court has noted that the usual rule is

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[2] See the Appendix for the current statutory provision on *quo warranto*, which is brought by the Attorney General, a United States attorney, or an "interested person."

that the official acts of a *de facto* officer are equally valid as those as a *de jure* officer. *Ryder v. United States*, 515 U.S. 177, 180-182, 115 S.Ct. 2031, 2034-2035, 132 L.Ed.2d 136, 142-143 (1995). More recently, however, this Court, in another case, first took note of its holding in *Ryder* and then held nonetheless that certain criminal convictions had to be vacated on the grounds that there was a constitutional defect in the authority of someone appointed to hear the appeals thereof. *Nguyen v. United States*, 539 U.S. 69, 77-81, 123 S.Ct. 2130, 2135-2137, 156 L.Ed.2d 64, 75-78 (2003).

Where does that leave us with respect to the validity of the official acts of a *de facto* President of the United States? No one knows. But this Court will surely see the test of that question if respondent Obama is sworn in as President. More damage will be done if this Court waits only until then to decide the question, and the reliance of the citizenry on the valid status of Obama as President of the United States, and the valid status of his act, will certainly be greater then than they are now.

A collateral attack on the status of respondent Obama after he has been sworn in might be thought of, academically, as being an adequate remedy, if ultimately that remedy should even prove to be available at all. But it is hardly a satisfactory remedy.

Would recognizing the standing of the petitioner in the instant case mean that anyone else could bring suit under just any circumstances in future cases?

No. These circumstances are unique. The hour is extremely late, and as a practical matter, other cases on this matter of exceptional national importance might not come before this Court in a timely manner, thereby necessitating this Court's allowing the petitioner to bring this case now in order to prevent nothing less than a possible national catastrophe and a constitutional crisis of unprecedented magnitude, a crisis not otherwise manageable by the ordinary operations of law.

Respondent Obama could, for instance, be blackmailed by anyone possessing *prima facie* evidence that he is not a natural-born citizen of the United States, just to give one example. And military officers, sworn to defend the Constitution against all enemies, both foreign and domestic, must not be placed in a situation in which they cannot say with absolute certainty whether the person claiming to be the Commander-in-Chief legitimately holds office or not, for another.

Are such questions to be left hanging in the balance when the moment comes – God forbid – to decide whether to use America's nuclear arsenal? In that moment, will our military leaders consider Barack Obama to be the Commander-in-Chief, or a "foreign enemy" of the Constitution? Do they dare speak up beforehand? Are these questions to be decided by justices of this Court who were appointed by Barack Obama, if even by this Court at all? Are not the status and reputation of this Court at stake?

In that light, we ask this Court to consider another point it made in *Duke Power*,

> "The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. . . . [D]elayed resolution of these issues would foreclose any relief from the present injury suffered . . . "

*Duke Power*, 438 U.S., at 81-82, 98 S.Ct., at 2635, 57 L.Ed.2d, at 616.

In saying all this, we do not hide from the fact that the fallout from this Court's merely granting certiorari (let alone any relief) will be tremendous. But this is hardly the fault of this Court. To begin with, the Constitution itself does not even envision the names of the ultimate candidates for President even being on the ballot, but instead only the names of the candidates for elector, who are left free to choose for whom they should vote. Thus, one would not even expect to find a provision in the Constitution requiring that someone being voted on for President by the electors would first have to affirmatively prove his eligibility to anybody.

The states, however, could have provided by statute that in order for the name of a political party's candidate to appear on the ballot, that candidate would have to provide affirmative proof of his qualifications. And Congress could have acted to require that in order to count a vote of an elector for a particular person, there would first have to be affirmative proof

that the person for whom the elector voted is in fact qualified to hold office. But the legislative bodies did not act. The onus is on them, therefore, to explain to an astonished and outraged citizenry just exactly how things could have gotten this far. This Court certainly could not reach out in anticipatory manner and try to adjudicate this issue prior to its being brought before the Court. The Court must simply do its duty; and in doing so, it simply has no authority or discretion to do more than just that.

This will hardly leave us in a constitutional crisis of our own making, however. The Constitution provides that if no person receives a majority of the votes of the Electoral College, the President is to be elected by the House of Representatives, and it also provides as to who, by provision of congressional statute, shall hold the office of President until someone qualifies for that office even if the office of Vice-President is vacant and no one qualifies to be President by the time the outgoing President leaves office.[3] (In the present case, if the House cannot decide on a President even by January 20, 2009, there would then be a vacancy in the office of President, and that vacancy would be filled by incoming Vice-President, presumably Joseph Biden. Our constitutional form of government will continue intact.) Given the fact that political parties had not yet ascended in American politics, the framers of the Constitution probably thought that this

[3] U.S. Const. art. II, § 1, cl. 3 and cl. 6.

method would be used at least as often as by selecting the President in the Electoral College, if not in fact even more often.

Furthermore, Barack Obama is a Democrat. And in the incoming Congress, the delegation of more than twenty-five states in the House of Representatives will consist of a majority of members of the Democratic Party.[4] Voting for President of the United States in the House of Representatives is done by individual states.[5] (Accordingly, there would be fifty votes total at present in the House for President.) Therefore, if, by action of this Court, Barack Obama does not receive a majority of the vote of the Electoral College, if respondent Obama can then produce a hard copy of a valid Certificate of Live Birth from the State of Hawaii to show to the members of the House, and if he can likewise answer other lingering questions about his citizenship, there is certainly no reason to think that the members of his own party would deny him their votes for President in the House of Representatives. But if he cannot explain, to the satisfaction of the world, by January 20, 2009, why and how it is that he was at birth, and now remains, a natural-born citizen of the United States, then what in the world is wrong with denying him a majority vote in the Electoral College now anyway?

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[4] http://news.yahoo.com/election/2008/dashboard/?d=ST

[5] U.S. Const. art. II, § 1, cl. 3.

### B. This Case Presents An Issue Analogous To The Doctrine Of *Res Ipsa Loquitur*

As we may recall from law school, in 1863 a man was walking down the street, approaching a business where a barrel was being hoisted up from a cart and over the sidewalk into a building. The man walked under the barrel, and the next thing he knew, he woke up lying on the sidewalk with the barrel smashed all over him.

Up until that time, the common law had required a plaintiff suing for negligence to prove just exactly who had been negligent and just exactly how such persons had been negligent, every single time. All the witnesses, however, denied seeing or knowing anything. So for obvious reasons, the plaintiff could not meet the ordinary elements of proof in a negligence case, and the defendant firmly relied on that in his defense. But in response to that, Chief Baron Pollock first announced the doctrine of *res ipsa loquitur* ("the thing speaks for itself"), saying,

> "There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. . . . If an article, calculated to cause damage is put in the wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them."

*Byrne v. Boadle*, Court of Exchequer, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

*Byrne*, of course, was the landmark case in which, for the sake of justice, and for very obvious reasons of practicality, the court made a fairly dramatic change in its jurisprudence if 1.) The type of thing that happened would not normally occur in the absence of negligence; and, 2.) The defendant had control over the situation during the time in question.

Do these provisions have an application to respondent Obama?

In response to the controversy surrounding the place of Obama's birth, Obama has posted online what is supposed to be a copy of his Hawaiian birth certificate. But the flaws in this "birth certificate" are so substantial, and so obvious, that it strains credibility to accept it as such. See the petitioner's web site: http://www.obamacrimes.com/ and the Petition for a Writ of Certiorari at pp. 16-17.

Question, then: Does substantial evidence of an attempted cover up ordinarily occur in the absence of someone having something to hide? This question is analogous to the first prong of the *res ipsa* test: whether the particular type of accident in question ordinarily occurs in the absence of negligence. And the answer in the instant case, of course, is no.

With respect to the second prong of the *res ipsa* test, respondent Obama has placed his supposed birth certificate in a place where it has done "mischief," as Chief Baron Pollock would put it (*i.e.*, on the face of things, it fraudulently misleads people, and seeks to have them rely on it). And respondent

Obama has had complete and exclusive control over this; again, in the words of Chief Baron Pollock, this makes him *prima facie* responsible. At a minimum, it indicates that, having placed this "birth certificate" online for all the world to see, respondent Obama has no cause to complain if a court of law should now want him to verify it.

Furthermore, under Hawaii law, the general public has no right to obtain a copy of someone's birth certificate, though respondent Obama could himself have obtained an original copy of his birth certificate, if such a thing exists. Thus, this aspect is likewise totally under respondent Obama's control. Accordingly, to complete the thought of the Chief Baron, respondent Obama must now be required to prove facts sufficient to rebut the presumption of a cover up.

Furthermore, internet sites have been raising this issue for well over a year. In all that time, respondent Obama has chosen either to ignore all requests for him to produce an actual hard copy of a Certificate of Live Birth from the state of Hawaii, or else he has spent substantial sums of money fighting all legal challenges to his constitutional eligibility to be President of the United States . . . for some reason.

He could have produced a Certificate of Live Birth from the State of Hawaii for $10.00, if he had

one.[6] And that is still all he has to do even today if he wants to relieve this Court of the bother of dealing with this case at all. But he won't. Ergo, *res ipsa loquitur*.

A potential constitutional crisis under President Barack Obama now looms more and more with each passing day. This Court must recognize that its duty to the nation and to the law in the instant case is far greater than that duty which Chief Baron Pollock faced in *Byrne v. Boadle*.

## CONCLUSION

**Wherefore**, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE J. JOYCE
*Counsel of Record*

[6] http://www.hawaiitopia.com/?p=36

# APPENDIX

District Of Columbia Code

*Subchapter I. Actions Against Officers of the United States*

**§ 16-3501. Persons against whom issued; civil action.**

A quo warranto may be issued from the United States District Court for the District of Columbia in the name of the United States against a person who within the District of Columbia usurps, intrudes into, or unlawfully holds or exercises, a franchise conferred by the United States or a public office of the United States, civil or military. The proceedings shall be deemed a civil action.

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**§ 16-3502. Parties who may institute; ex rel. proceedings.**

The Attorney General of the United States or the United States attorney may institute a proceeding pursuant to this subchapter on his own motion or on the relation of a third person. The writ may not be issued on the relation of a third person except by leave of the court, to be applied for by the relator, by a petition duly verified setting forth the grounds of the application, or until the relator files a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court prescribes, conditioned on the payment by him of all costs incurred in

the prosecution of the writ if costs are not recovered from and paid by the defendant.

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**§ 16-3503. Refusal of Attorney General or United States attorney to act; procedure.**

If the Attorney General or United States attorney refuses to institute a quo warranto proceeding on the request of a person interested, the interested person may apply to the court by certified petition for leave to have the writ issued. When, in the opinion of the court, the reasons set forth in the petition are sufficient in law, the writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of the interested person on his compliance with the condition prescribed by section 16-3502 as to security for costs.

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