IN THE NINTH CIRCUIT COURT OF APPEALS

CASE# 13-16359

JAMES GRINOLS, EDWARD NOONAN, THOMAS MACCLERAN, ROBERT ODDEN, KEITH JUDD, ORLY TAITZ

APPELLANTS

V

ELECTORAL COLLEGE, U.S. CONGRESS, GOVERNOR OF CALIFORNIA, SECRETARY OF STATE OF CALIFORNIA, BARACK OBAMA

APPELLEES

APPELLANTS' REPLY TO APPELLEES' BRIEF

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STATEMENT OF FACTS

The case at hand is brought by a group of presidential candidates, electors and voters. This case revolves around evidence, such as sworn affidavits of experts and law enforcement officials and government records, that show that Barack Obama, aka Barry Soetoro, aka Barry Soebarkah, is a citizen of Indonesia, listed in his official school records from Indonesia as a citizen of Indonesia, his legal last name is listed as either Soetoro or Soebarkah, not Obama, and he is using a stolen Connecticut Social Security number xxx-xx-4425 which failed both E-verify and SSNVS and was shown not to be issued to Obama. Plaintiffs asserted that Obama committed fraud and fraudulently asserted his identity, his U.S. citizenship and legitimacy for the U.S. Presidency. Plaintiffs sought both injunctive and declaratory relief against defendants that included the Secretary of State of California, Governor of California, Barack Obama in his capacity as a candidate for President in 2012 election, U.S. Congress and U.S. Electoral College. The case was brought before the Electoral college received the Certificate of Vote and Certificate of Ascertainment from the Secretary of State and from the Governor, before the electoral vote by the Electoral college, before the confirmation of

Obama by the joint session of the US House of Representatives and the US Senate and before swearing in of Obama by the Justice of the Supreme Court of the United States.

One of the central issues of the case is the fact that the U.S. Attorneys lied to the court and appeared in the court claiming to represent the U.S. Electoral college and the U.S. Congress. Plaintiffs received information that the U.S. Attorneys never contacted the members of the Electoral college, never forwarded the information and pleadings to them and acted without any consent of their alleged clients and against the wishes of their "clients". Plaintiffs provided the court with a signed declaration of one of the members of the Electoral college attesting to the above. U.S. attorneys never denied the aforementioned facts.

Further, attorney for the plaintiffs met with a number of members of the U.S. Congress, who advised her that the U.S. Attorneys on the case never contacted them, never provided any information or pleading to them and these U.S. Attorneys acted without their consent. U.S. Attorneys never denied these facts. This information was provided to the presiding judge with the request to recuse the U.S. Attorneys on the case and for the court to appoint new counsel, who would apprise the US Electoral college and U.S. Congress of the evidence in the case and would act according to the wishes of his clients.

Presiding Judge, Hon Morrison England colluded with the U.S. Attorneys Benjamin Wagner and Ed Olsen in de facto defrauding the U.S. Congress and hiding from the U.S. Congress all evidence of Obama's use of fabricated IDs. Judge England cancelled a hearing on the motion to recuse the U.S. Attorneys, held a hearing on the motion by the U.S. Attorneys to dismiss the case, even though he knew that they do not represent the clients that they allege to represent, and he denied the motion to recuse the U.S. attorneys as moot.

Judge England refused to grant the Default Judgment against Defendant Obama, even though Obama refused to accept service of process at his residence, demanded to be served through the Department of Justice, was served by the professional service at the Department of Justice and was served through the U.S. Attorney, Obama was obligated to use his own defense attorney, as he was sued as a candidate. He did not hire a defense attorney, did not furnish an answer or any other responsive pleadings and the court refused to issue a default judgment.

The court found standing to sue for plaintiff Keith Judd, who came second with 40% of the vote in the West Virginia Democratic party primary election. The court did not find standing for other parties.

The court ruled that it did not have jurisdiction in this case finding the issues to be non-justiciable and based on Speech and Debate clause.

The court declined to hear the state issue of elections fraud in CA after it ruled that it did not have jurisdiction to hear the federal issues.

Plaintiffs/appellants have submitted a 56 page Appellants brief, where all the issues were addressed at length. Defendants submitted their Appellees brief. Appellants are submitting this optional Reply Brief not to regurgitate the 56 page Appellants brief, but to clarify a number of points that were misrepresented in the Appellees brief.

ARGUMENT

1. US ATTORNEYS OFFICE NEVER DENIED AND THEREFORE ADMITTED THAT THEY DID NOT REPRESENT EITHER THE ELECTORAL COLLEGE OR THE US CONGRESS AND FRAUDULENTLY FILED A MOTION TO DISMISS AND OPPOSITION TO INJUNCTION WITHOUT ANY KNOWLEDGE AND CONSENT OF THEIR ALLEGED CLIENTS.

US Attorneys Wagner and Olsen appeared before Judge England and claimed that they represent the U.S. Congress and the U.S. electoral college and their clients want the case dismissed and oppose the injunction.

Plaintiffs presented the court with a statement from Presidential elector Ascoli, who stated that the U.S. Attorneys never contacted him, never advised him of their filings and their assertions were opposite of what he, as a Presidential elector, wanted to do.

Attorney for Plaintiffs Taitz filed a declaration with the court that she travelled to Washington DC for CPAC convention, talked to a number of members of Congress, who advised her that US Attorneys Wagner and Olsen never contacted them and never forwarded any pleadings and that their position was opposite to the position asserted by the US Attorneys.

Taitz sought an administrative hearing, seeking to recuse the US Attorneys' office from representing U.S. Electoral College and U.S. Congress. Judge England postponed the hearing, scheduled a motion to dismiss by the US Attorneys, even though he knew that they do not represent their alleged clients, and ultimately he dismissed the case and denied the motion to recuse as moot.

In their appeal Wagner and Olsen never denied that they lied to the court, that they defrauded the U.S. Congress and violated their ethical obligations and filed the pleadings without any knowledge and consent of the alleged clients.

They provided only one lame excuse, they stated that “U.S. Attorney’s Office had no obligation to poll each Member of Congress and obtain their individual consent to file an opposition to the motion for temporary restraining order and to motion to dismiss” Appellees’ brief p58 .

This is an admission to an unprecedented lawlessness and unprecedented abuse of power by the U.S. Attorneys’ office which is a part of the executive branch and representing the legislative branch in the case at hand.

U.S. Attorneys are employees of the executive branch working for the President and appointed by the President. U.S. Attorneys knew that the U.S. Congress has more Republicans than Democrats, 235 GOP representatives and 45 Senators, total 280 Republicans; with 200 Democrats in the House, 53 in the Senate and 2 independents in the Senate caucusing with the Democrats, total 253, maybe 255 Democrats.

So U.S. Attorneys knew that if they were to forward the pleadings and evidence to members of Congress, majority would not oppose the Motion for Injunction and would not want the case dismissed. So, the U.S. Attorneys devised a plan to go behind the back of the members of the Congress, defraud

the court and defraud the nation. They told Judge England that they represent the U.S. Congress and on behalf of their clients whey want the case dismissed.

This is an extremely dangerous usurpation of power of the equal branch of the government, mainly the U.S. Congress, by the Executive branch working for the President, who is the defendant in the law suit at hand.

Further, the U.S. Attorneys sought to usurp the power of the third branch of the U.S. government, namely the Judiciary, when they lied to Judge England and claimed that they represent the US. Congress and the Electoral college.

Further, in their Appellees brief the US Attorneys stated that the "Electoral college is not an entity subject to suit. Rather, it is a term used to refer collectively to the individual electors chosen by each state and the District of Columbia"

This argument does not hold water either.

If the U.S. Attorneys believe that Electoral College does not exist, why did they file pleadings on behalf of the Electoral College? They should not have filed any pleadings on behalf of the Electoral College.

Secondarily, the U.S. Congress is also an entity, which comprises of individuals elected by the citizens of different states; however it exists and can be sued.

This is a breathtaking arrogance and criminality for the U.S. Attorneys, who were supposed to uphold the law, but chose to lie to the judge and state that they represent the Electoral college, while they did not notify the members of the electoral college, and later, when caught lying, to claim that the Electoral college does not exist.

Electoral college is an important institution, members of the Electoral college are there to provide additional protection against electoral fraud, refuse to certify ineligible candidates. They were prevented from fulfilling their function by the U.S. Attorneys and the court.

Further, when Judge England received from Taitz information that the U.S. Attorneys lied and filed motions on behalf of the members of the U.S. Congress and Electoral College, he had a duty to hold an immediate administrative hearing on the matter. Since U.S. Attorneys Wagner and Olen were caught lying, they had to be recused from representing the defense and a different counsel had to be appointed, such counsel had to provide the court with verification that he is indeed representing the U.S. Congress and the

Electoral college, that they received the pleadings and evidence and agreed to representation and motions.

When Judge England manipulated the docket and covered up the lack of notification of the alleged “clients” and lack of their consent, a de facto criminal conspiracy formed between representatives of two branches of the U.S. government with the goal to defraud the third branch of the U.S. Government, the U.S. Congress. This was done by officials who were entrusted to uphold the law.

Moreover, this was done on the most important issue the Electoral college and the U.S. Congress have to decide and render decision, an issue of fraud and forgery committed by a candidate for the U.S. President, his assertion of his identity, U.S. citizenship and legitimacy based on a stolen Social Security number and fabricated IDs. These actions by the U.S. Attorneys and the lower court judge amount to a conspiracy to commit treason and aid and abet usurpation of the U.S. Presidency

For this reason alone this court has a duty to revoke and reverse the decision by the lower court. If the Ninth Circuit does not do so, the Ninth Circuit court of Appeals becomes criminally complicit in the criminal conspiracy to defraud

the U.S. Congress and the electoral College and commit treason against the U.S. and the U.S. Constitution.

2. ARGUMENT THAT ELIGIBILITY OF A CANDIDATE FOR PRESIDENT IS ONLY FOR CONGRESS TO DECIDE IS WITHOUT MERIT.

Recently Ninth Circuit conducted an oral argument in *Peta Lindsey et al v Debra Bowen* 13-15085. (exhibit 1) There is no decision yet, however statement by the Chief Judge of the 9th Circuit, Alex Kozinski and Judges Diarmuid O'Scannlain and Mary Murguia illustrate that the 9th Circuit agrees with the argument by the Appellants in this case, namely that the fact that the U.S. Congress has a right to impeach and remove from office a President who got into the position of presidency by fraud, does not mean that the state officials do not have the right to remove from the ballot and not certify a candidate, who was not eligible.

In Lindsey Secretary of State of California threw off the ballot a candidate for President Peta Lindsey, who was not 35 years old, as required by the U.S. Constitution.

Chief Judge of the 9th Circuit, Alex Kozinski, clearly expressed to the parties that the theory that eligibility of the candidate is a political, non-justiciable question, is

an utter nonsense. There is nothing in the US Constitution saying that vetting a candidate for President is an exclusive function of the U.S. Congress.

" 01:43 Attorney Barnes: ...The Constitution carefully creates a system whereby any dispute about the qualification of a person to hold the office of the Presidency is determined by the 12th Amendment, the 20th Amendment, and-

01:55 Judge Kozinski: **Where does is say it's exclusive**?" "03:25 attorney Barnes: The key question is whether she (Secretary of State) has this authority in general....

03:36...**I mean let's say, some party, not the Peace and Freedom party, but some party nominated a dog for President. I take it the Secretary of State would have to keep that off the ballot, right**?" 02.13.2014 oral argument in *Lindsey v Bowen"*

So the Chief Judge of the 9th circuit clearly shows how ridiculous the argument is. Ability of the U.S. Congress to impeach and remove from office the U.S. President does not prevent the State officials from removing from the ballot or not certifying one, who is not Constitutionally eligible, Congress does not prevent the courts from adjudicating whether state officials were correct in their decision to certify or de-certify an election. Ability of the U.S. Congress to remove a President from

office does not prevent the electoral college from not certifying a non-eligible individual.

As appellants stated in their opening brief, this was the case before as well. Secretary of State of California Frank Jordan threw off the ballot candidate for President Eldridge Cleaver for being non-eligible, similarly in *Fulani v Hogsett* the court ruled on the eligibility of Presidential candidates.

The whole nonsense of eligibility of the US Presidents being a non-justiciable issue was invented recently, in 2008, when both candidates for the U.S. President were not eligible and the courts were desperately searching for any, albeit bogus excuse, to keep them on the ballot. John Mccain, GOP 2008 Presidential candidate, was born in Panama. Obama, based on his own biography, submitted by him to his publisher, was born in Kenya. We cannot find any law or any precedent before Obama started running, before 2008, which would show that the state officials, the electoral college and the court cannot remove from office and/or decertify as a winner of the election, a person, who is not constitutionally eligible or a person using stolen and fabricating IDs to run for the US President.

The court had already found that Presidential candidate Keith Judd had standing in this case, so even if this court confirms that other plaintiffs did not have standing,

this case should proceed on the merits, as standing was confirmed by the court for Plaintiff Keith Judd.

3. BASED ON THE DECISION OF THE 9TH CIRCUIT IN KEYES V OBAMA JUDGE ENGLAND WAS OBLIGATED TO HEAR THE CASE ON THE MERITS AND HAD NO RIGHT TO CLAIM LACK OF JURISDICTION

As stated, Judge England already found that Plaintiff Keith Judd had standing. Both the lower court and Appellees agreed that competitive standing doctrine applied based on Keyes(Drake) v Obama664 F3d at 784.

Further, the lower court and Appellees in their brief misrepresented prior decision of the 9th court in Keyes (Drake) v Obama 664 F3d at 784 "Once the 2008 election was over **and President sworn in,** Keyes, Drake and Lightfoot were no longer "candidates" for the 2008 general election". At issue is swearing in of the President, which represents the cutoff point in the mind of the 9th Circuit. The lower court and the Appellees are attempting to misrepresent the decision in Keyes and claim that after the general election in November there is no more competitive standing. This is flagrantly wrong, as it goes against the decision by the 9th Circuit and it would de facto dismantle, negate the whole system of checks and balances:

a. confirmation of the candidate by the Electoral College

b. confirmation of candidate by the U.S. Congress

c. swearing of the candidate by the Justice of the Supreme Court.

U.S. Constitution provides for two more months of processes to do additional vetting of the candidate. In *Keyes* the 9th Circuit ruled that the cut off in the Federal court's jurisdiction i**s after the Candidate is sworn in**. The case was filed two months before the swearing in and the court had jurisdiction. The court erred and abused its' judicial discretion in ruing that it did not have jurisdiction and based on this fact alone the decision in this case has to be reversed.

4. JUDGE ENGLAND HAD NO RIGHT TO DE FACTO ABOLISH THE ELECTORAL COLLEGE

District court found standing for Plaintiff Judd, but not for other plaintiffs.

The court found that damages of other parties are generalized. However two of the plaintiffs are electors of the electoral college.

Electoral college is a group of 535 individuals, so it is a defined class of plaintiffs. Further, the whole purpose of the electoral college is to create an additional layer of protection, specifically to decertify a winner of the popular vote, if such winner did not qualify constitutionally. By depriving members of the Electoral college of

standing, Judge England de facto abolished the electoral college. No Judge have jurisdiction to abolish a constitutional institution, so the court definitely erred and abused its 'jurisdiction in finding that plaintiffs, members of the Electoral college do not have standing and their grievance is generalized.

5. STANDING OF GOP ELECTOR JAMES GRINOLS IS UNDENIABLE, AS HIS DAMAGES ARE NOT ONLY PLAUSIBLE BUT 100% CERTAIN.

Appellants advised the court that Plaintiff –Appellant James Grinols is an elector for GOP Presidential candidate Mitt Romney. Romney was a second finisher in 2012 election and lost by 1.5% of the popular vote. If the court were to issue declaratory relief that Obama ran for US president based on fraud and forgery, using a stolen CT Social Security number xxx-xx-4425 of Harry Bounel, as well as using fabricated IDs in order to fraudulently assert his identity, U.S. citizenship and eligibility, then Romney would become the winner of the 2012 election and Grinols would become 2012 Presidential elector, member of the electoral college, would become a part of the US history and would be paid daily allowance as an elector.

The case at hand was filed before the Electoral College meeting, before the confirmation by the U.S. Senate and before taking an oath of office in 2013.

Grinols was wrongfully deprived of his position as a member of the 2012 Electoral College by erroneous action of the lower court.

To counter this assertion Appellees brought forward two cases, where a plaintiff was a write in candidate and where an elector came from a minor party, where the courts found damages to be speculatory, however, since Grinols was a Romney GOP elector, his damages were not speculatory. not only Grinols damages were plausible, they were certain. For that reason Grinols had standing.

6. US ATTORNEYS REPRESENTING DEFENSE ACTED IN UNETHICAL MANNER BY TRYIN TO IMPLY THAT THE ISSUE OF OBAMA'S USE OF STOLEN AND FABRICATED IDS WAS EVER HEARD ON THE MERITS AND WAS EVER ADJUDICATED.

Appellees are attempting to mislead this court by trying to create an impression that the issue of Obama's eligibility was already adjudicated. This is absolutely not true. All prior cases were dismissed for technical reasons before they reached the discovery, on the issue of standing of the plaintiffs, ripeness and mootness. The issue was never adjudicated on the merits. No judge has ever seen any IDs for Obama, there was never any explanation provided why Obama is using a Social Security number, which failed both E-verify and SSNVS and showed as the never

that was never issue to Obama. Further, Just recently it was reported by the White House that Obama's application for ACA(Obamacare) was rejected by the Washington DC exchange, as the system could not verify Obama's identity.

Today we are seeing the biggest embarrassment to the U.S. and the biggest threat to the U.S National security, as an individual with a stolen Social Security number and fabricated IDs is sitting in the White House , usurping the position of the US President

7. THE DISTRICT COURT HAD JURISDICTION TO ISSUE DECLARATORY RELIEF.

Here, it appears that the US Attorneys are simply trying to extend he dictatorial power of the Obama administration and deprive the courts of their role and jurisdiction to issue declaratory relief, particularly on the issue of Obama using fabricated IDs.

Appellants brought forward the case of *Fullani v Hogsett* 917 F 2.d 1028 (7th Cir. 1991). Appellants have shown that in Fulani the District court and the 7th Circuit have found that a minor party candidate Eleanor Fulani had standing to sue legitimacy of both Republican and Democratic party candidates to be on the ballot.

Appellees wrote that none of the plaintiff's -Presidential candidates were on the ballot in any state. This is flagrantly not true. As a matter of fact Plaintiffs advised

the court both in their pleadings and oral argument that Plaintiff Keith Judd got 40% of the vote in the Democratic Party primary in West Virginia. The matter was widely publicized in the media, as it was an embarrassing fact for Obama, that 40% of West Virginia Democrats were willing to chose someone else. If Obama were to be found not eligible due to fraud, due to his Indonesian citizenship, fabricated IDs and a last name not legally his, it would be "no small boon" for an obscure candidate, like Chris Judd. Similarly in Fulani the 7th circuit ruled that without Republican and Democratic party candidates in Indiana a minor candidate, like Fulani, could win the election, "no small boon for a relatively obscure party" *id Fulani v Hogsett*. Judge England already ruled that Judd has standing, so *Fulani v Hogsett* supports the argument by the Appellants that the court has jurisdiction to render an opinion, plaintiff had standing and the court had to rule on the merits, to see if Obama indeed committed identity theft and elections fraud and whether Judd should have been declared the winner in at least one primary election.

Further, appellants brought forward *Cleaver v Jorda*n, 393 U.S., 810 (1968) where CA Secretary of State Frank Jordan removed from the ballot Presidential candidate Eldridge Cleaver, who was not constitutionally eligible, just like Obama. Cleaver appealed, his appeal was denied by the Superior court and the Supreme court of CA and the Supreme Court of the United States refused to hear the case certiorari.

Appellees are claiming that because Cleaver was adjudicated by the state court and the Supreme Court of CA, that means that the Federal court does not have jurisdiction.

This argument is without merit. An issue of constitutional eligibility of a candidate is a matter of Federal law, which can be readily heard in either state or Federal court. In Cleaver there was only one plaintiff and one defendant, the candidate and the Secretary of State, there was no diversity and Cleaver chose to bring his challenge in the State court. In the case at hand there are multiple plaintiffs and defendants, some of the defendants are Federal defendants, there is diversity of citizenship and for this reason the case was brought in the federal court, however there is no question that a question relating to the U.S. Constitution, to federal law can be heard in the Federal court.

Further, Plaintiffs brought forward *Peace and Freedom v Bowen* 912 F supp. 2d 905 (E.D. Cal 2012). In Lindsey a Presidential candidate, Peta Lindsey, Peace and Freedom Party and her supporter, Richard Bauer, sued the Secretary of State of California, Debra Bowen, claiming that Bowen had no right to remove Lindsey from the ballot due to the fact that eligibility of the candidate is a non-justiciable political question and neither the Secretary of State nor the Federal court have standing to rule on the question.

The U.S. District court for the same Eastern district of Ca disagreed and found that the court can rule on eligibility and the Secretary of state can make an administrative decision as well.

In Lindsey Secretary of State found somewhere that Lindsey was not 35 years old, not Constitutionally eligible, and threw her of the ballot without any administrative hearing. At the time Bowen threw Lindsey of the ballot she was not sure that Lindsey was not eligible, she got the information from some unverified Internet publication. Only after the fact, after Lindsey was thrown of the ballot, did attorney for Lindsey admit that she was not 35, but claimed that eligibility of Lindsey is a political and non -justiciable question.

Ironically Lindsey is more eligible than Obama, as Lindsey at least has valid papers. In case of Obama, he does not have any valid papers, presented to the public only flagrant forgeries, admitted that in his school registration in Indonesia he was listed as citizen of Indonesia, this information was submitted to Bowen time and again, yet Bowen chose to act based on her political affiliation, keep ineligible citizen of Indonesia Obama on the ballot and claim that she has no right to decide on eligibility of the candidate and the court has no right, no jurisdiction to decide.

The court ruled that it can decide on eligibility of a candidate for President, ruled that Lindsey was not eligible.

In Obama's case the court did not rule that Obama is eligible, the court did not rule that Obama has any valid papers, the court ruled the opposite of what it ruled just one month earlier in Lindsey case, it ruled that it has no right to decide what it already stated previously in Lindsey case that it has right to decide, namely eligibility of a candidate. Such actions by the curt not only represent an abuse of judicial discretion and an error, but represent a criminal act, a violation of the 14 th amendment equal protection right of parties similarly situated. During the oral argument in this court attorney Barnes representing Lindsey stated: "We asserted that we raised an equal protection question at least worthy of doing discovery as to what the Secretary of State actual motivation". During the hearing in this court, in the 9th Circuit, Chief Judge Kozinski noted that the power of the U.S. Congress to rule on eligibility is not exclusive and expressed his feelings, as to how ridiculous the whole notion of eligibility being a non -justiciable political question is: " ...I mean **let's say, some party, not the Peace and Freedom party, but some party nominated a dog for President. I take it the Secretary of State would have to keep that off the ballot, right**?" 02.13.2014 oral argument in *Lindsey v Bowen"*

All of the precedents show that the Secretary of State and the District court have jurisdiction to rule administratively and legally on eligibility of a candidate for the

U.S. President. the lower court erred and the lower court decision should be reversed.

Further, defense tried to turn the argument on its' head by saying for example that *US v Nixon*, 816 . F2d 1022 (5th Cir1987) and *Clinton v Jones* 520 U.S. 681 (1997) does not state that the court has jurisdiction to hear the case of Obama's use of fabricated IDs. In reality Article 3 court has jurisdiction to hear any and all cases arising under the federal law. U.S. Constitution is the Supreme Law of the land and to be decided and interpreted by the Article 3 court. Article 2 Section 1, Clause 5 of the US Constitution is a part of the Federal law and under the jurisdiction of the Article 3 court. As Judge Kozinski stated during *Lindsey v Bowen* argument, there is "no exclusivity". The fact that the U.S. Congress has a right not to confirm a President -elect and impeach and remove him from office, does not give the Congress the exclusivity on this issue of determination of fraud and eligibility and does not prevent the court from issuing declaratory relief. *US v Nixon* showed that even a sitting President does not have an absolute immunity against legal actions for fraud, for tortuous acts and for criminal complicity. In the case at hand Obama was sued as a candidate for the U.S. President. The case at hand was filed before Obama's election was confirmed by the Electoral college, before he was confirmed by the U.S. Congress and before he was sworn in by the

Justice of the Supreme Court. In the case at hand the court had even more jurisdiction then in *U.S. v Nixon.*

8. ACTIONS BY THE LOWER COURT AND THE U.S. ATTORNEYS DEPRIVED THE U.S. CONGRESS AND THE ELECTORAL COLLEGE FROM EXERCISING THEIR CONSTITUTIONAL DUTIES AND FROM MAKING AN INFORMED DECISION ON OBAMA'S CONFIRMATION.

Injunctive relief, discovery and decision on the merits were calculated to provide for a determination on the merits on the issue of Obama's use of fabricated IDs, his Indonesian citizenship and fraud committed by Obama on the issue of his eligibility to run for the U.S. President. This determination was essential for the members of the U.S. Electoral college and members of the U.S. Congress to fulfill their constitutional duties and decide whether to confirm Obama as the U.S. President. The U.S. attorneys, who claimed to represent the U.S. Electoral College and the U.S. Congress without the consent and knowledge of these "clients" and the court which knowingly allowed such "representation" and which refused to hear the case on the merits, deprived the Electoral College and the U.S. Congress of an ability to perform their constitutional duties and ability to make an educated choice.

An assertion that since Obama is sitting in the white House as a result of 2008 election, somehow means that it gives him a free pass from vetting during 2012 election, is flawed as well. Every election is an election in itself. This notion would deprive the U.S. Judiciary, Electoral college and the U.S. Congress from an important function of vetting of the candidate wishing to run for the second term.

9. THE COURT ERRED IN USING SPEECH AND DEBATE CLAUSE AS A JUSTIFICATION FOR DISMISSAL, AS IT RELATES ONLY TO IMPRISONMENT AND PROSECUTION OF MEMBERS OF CONGRESS, HAS NO CONNECTION TO ELIGIBILITY AND THERE ARE ZERO PRECEDENTS FOR USE OF SPEECH AND DEBATE CLAUSE IN CASES LIKE THIS

The use of speech and debate clause is so bizarre, that it shows the desperation of the court to find some excuse in dismissing the case. The speech and Debate clause states: "The senators and Representatives shall... in all cases **except Treason, felony, and breach of the Peace, be privileged from Arrest** during their Attendance at the Session of their respective Houses, and in going to and returning from the same and for any speech and debate in either House, they shall not be questioned in any other place" Art 1§6, *cl*1

Speech and Debate only relates to prosecution and arrest of members of Congress for something that they states during Congressional debates, it is a qualified immunity. The case at hand never sought a prosecution of members of Congress. It never sought to have them prosecuted or arrested for something that they stated during debates.

As a matter of facts, if any members of the U.S. Congress knew of Obama's Indonesian citizenship and his use of fabricated IDs, these members of the U.S. Congress can and will be tried for treason for knowingly confirming as the U. S. President a foreign national with stolen and fabricated IDs. Speech and Debate clause will not protect them, **as Treason is excluded from Speech and Debate immunity.**

If anything, this case would have provided protection to the members of the U.S. Congress from liability and future prosecution for treason, as confirmation of Obama would have been stayed by the injunction until the court were to issue a declaratory relief on Obama's use of fabricated IDs, his use of a stolen CT Social Security number and his foreign citizenship.

At any rate, neither the court, nor Appellees in their response brief provided any precedents that would be remotely relevant in this case. A couple of cases brought by the Appellees in their brief relate only to either criminal or civil cases where

members of the U.S. Congress were sued based on something they stated during the Congressional debate.

While the members of the U.S. Congress have qualified immunity against persecution for their actions, there is judicial review of the acts of the U.S. Congress, which is an integral part of the system of checks and balances. U.S. courts routinely rule on constitutionality of bills, lawfulness or lawlessness and constitutionality of Congressional bills and decrees. Confirmation without objection of a known foreign citizen with bogus IDs represents an unconstitutional action. Just as the federal court found parts of ACA, Affordable care act, to be unconstitutional and in violation of the U.S. Constitution and federal laws, the federal court has an absolute power as an Article 3 court to issue Declaratory relief stating that the confirmation without objections of an individual committing identity fraud, is unconstitutional and illegal.

Judicial review and declaratory relief would have adjudicated the facts and would have provided members of Congress with guidance, whether to object or not. As stated in the Appellants' opening brief, there were precedents of objections by the members of the U.S. Congress to counting of votes for particular presidential candidates.

When the lower court refused to hear the case on the merits and refused to allow experts to testify, it deprived the members of the U.S. Congress of a necessary judicial review and deprived them of an ability to make an educated choice, to make a decision whether to object to Obama's votes or not based on facts and law.

If not for judicial review, arguendo one can bribe a simple majority of the members of Congress to knowingly confirm a foreign national as a U.S. President. Judicial review provides protection to the citizens of this nation that if indeed a foreign national with fabricated IDs were to be considered for confirmation by the joint session of the U.S. Congress, such judicial review would provide a temporary stay, discovery and adjudication on the merits of eligibility and a declaratory relief.

10. APPELLEES DID NOT OPPOSE AND THEREFORE ADMITTED THAT THERE WAS NO LEGAL AND FACTUAL IMPEDIMENT FOR THE COURT TO ISSUE A DECLARATORY AND INJUNCTIVE RELIEF PREVENTING OBAMA FROM TAKING AN OATH OF OFFICE AS A US PRESIDENT, SHOULD THE COURT FIND THAT OBAMA WAS INDEED COMMITTING FRAUD AND RAN FOR THE U.S. PRESIDENT USING A STOLEN SSN AND FABRICATED IDS

While defense attempted to find some excuses to issuing declaratory and injunctive relief against the U.S. Congress, it did not provide any argument stating that the

court did not have jurisdiction to issue declaratory and injunctive relief against Obama taking an oath of office as a U.S. President.

As pled before, the 9th Circuit ruled in *Keyes v Obama* 664 F3d at 784. , that Federal courts have jurisdiction to rule on eligibility of a candidate until the candidate is sworn in as a President of the United States. There was no legal or factual impediment preventing Judge England from hearing the case on the merits, deciding whether indeed Obama, as a citizen of Indonesia, committed fraud and asserted his identity, U.S. citizenship and eligibility for the U.S. Presidency by using a stolen Social Security number and fabricated IDs. There was no impediment to the lower court in issuing a declaratory relief and on those matters and issuing an injunctive relief preventing Obama from taking an oath of office of a U.S. President in January of 2013, if the court were to find that Obama was not eligible. The court erred and abused its' discretion in not issuing requested declaratory and injunctive relief against defendant Obama and its' decision should be reversed.

11. THE COURT ERRED IN DENYING THE PLAINTIFFS THE RIGHT TO CORRECT A TECHNICAL ERROR.

Plaintiffs notified the court that First Amended Complaint consisted of part 1 and part 2 due to the fact that only certain amount of pages could be uploaded each time. Part 1 ended in the middle of the sentence and the court could plainly see it. The State defendants noted that as well. By accident part 1 got attached and uploaded twice, but part 2 was not uploaded. Plaintiff asked the court for a leave to allow them to upload part 2. The court refused to allow to correct the error. The court stated that it limits the pleadings to 20 pages. While the court might be free to limit motions to 20 pages, the court was not free to limit the complaint to 20 pages, as this would infringe on plaintiff's right for redress of grievances and represent an abuse of judicial discretion. Plaintiffs sought a leave of court and were denied. The actions by the court in denying the plaintiffs their right to file a full First Amended Complaint represented and error and an abuse of Judicial discretion which warrants a reversal on this basis alone.

12. **COURT ERRED IN NOT ALLOWING EXPERT WITNESSES TO TESTIFY, EVEN THOUGH IT PREVIOUSLY STATED THAT IT WILL ALLOW THEM TO TESTIFY.**

Attorney for Plaintiffs specifically asked the deputy for Judge England. The deputy advised Taitz that she needs to check with Judge England and will provide an answer shortly. Subsequently the deputy sent the attorney an e-mail stating that during the motion hearing for emergency Injunction each party would be allowed 20 minutes for oral argument and witnesses. Taitz, attorney for the Plaintiffs, paid for the expert to fly from Florida to California to testify that Obama's birth certificate is indeed a forgery.

When the hearing started, Judge England refused to allow the expert to testify. This behavior by the judge is consistent with an outside pressure on the judge, which was exerted between the time the judge stated that the expert can testify and when the judge changed his opinion. Plaintiffs were prejudiced by this refusal, as the expert was prepared to testify that Obama is indeed using a fabricated birth certificate as a basis for assertion of his identity and U.S. citizenship and therefore absent this forgery he cannot be the U.S. President.

13. THE COURT ERRED IN REFUSING TO RULE WHETHER OBAMA EXISTS AS A LEGAL ENTITY, BASED ON PRECEDENT OF FELICE V RHODE ISLAND BOARD OF ELECTIONS THE COURT HAD TO REVIEW THE EVIDENCE THAT OBAMA RAN FOR OFFICE UNDER THE LAST NAME NOT LEGALLY HIS

Appellees in their brief asserted that because the court did not have jurisdiction , it could not rule whether Obama was even a legal entity and whether he could be confirmed as the U.S. President under a name not legally his.

Plaintiffs/appellants provided the court with Obama's school registration from Indonesia which stated that he is a citizen of Indonesia and his legal name was Soetoro, his Indonesian step-father's last name (Complaint) and with the passport records of Obama's mother, Stanley Ann Dunham (Complaint) , which showed that his legal last name was Soebarkah, a blending of Barack and Soetoro, which is common in Southern Asia.

Appellees argued in their brief that the court did not have jurisdiction to rule.

This argument is without merit. Secretaries of State, election Boards and courts rule on a daily basis whether candidate was allowed to run under a name not legally his. *Norman v. Reed* Supreme Court of the United States January 14, 1992 502 U.S. 279 112 S.Ct. 698 -ruled on the merits, whether candidate could run under "Harold Reed" party.

781 F.Supp. 100 United States District Court, D. Rhode Island. Denise R. *FELICE v.RHODE SLAND BOARD OF ELECTIONS.* Civ. A. No. 88–0100–T. Dec. 16, 1991. Candidate for election as delegate to democratic national convention brought action alleging that Rhode Island Board of Elections violated her rights by refusing

to certify her candidacy on grounds that candidate did not comply with requirement that name and address on declaration correspond exactly to candidate's name and address as set forth on voting list. The District Court, Torres, J., held that requirement was rationally related to legitimate state interest in having efficient and accurate process recertified candidates and requirement was not unduly burdensome. Further, the court found that being a candidate on the ballot does not represent a fundamental right and therefore is not subject to strict scrutiny test.

State law requiring that candidate for election as delegate to national convention state name and address on declaration exactly as it was set forth on voting list did not have significant impact on any due process or equal protection rights of candidate as requirement was rationally related to achievement of legitimate state purposes of verifying candidate to be qualified elector and eligible to be listed on the ballot, preventing confusion on part of voters, and seeing to it that certification of candidates is accomplished in an efficient and objective fashion. R.I.Gen.Laws 1956, § 17–12.1–3.

Based on Felice precedent the lower court had jurisdiction and erred in not hearing on the merit the issue of Obama running under the last name not legally his.

Further, Appellees argue that because he court did not have jurisdiction, it could not rule on Obama's default and failure to answer the complaint. Felice precedent

shows that the court had jurisdiction and was wrong in not granting the default judgment when Obama failed to file an answer to the complaint. Futher, two statements from two process servers advised the court that Obama refuses to accept the service of process at his residence at the White House and security detail instruct the public and process servers to serve Obama at the Department of Justice. Obama was properly served by the professional process server at the Department of Justice and through the U.S. attorney. Not granting the default judgment against Obama in this circumstance would place Obama above the law and would allow him to evade service of process. T**he lower court erred in refusing to grant the default judgment.**

14. THE COURT HAS JURISDICTION TO ISSUE DECLARATORY RELIEF AND FIND PRESIDENT NOT TO BE LEGITIMATE EVEN AFTER THE PRESIDENT IS SWORN IN.

One of the notions by the Appellees, is that declaratory decision that Obama was not legitimate for the U.S. Presidency, was that after he is sworn in, only the U.S. Congress can impeach and remove the President from office. This argument is flawed, the fact that the court cannot remove Obama from office does not prevent the court from issuing a declaratory relief stating that he is not legitimately holding the position.

For example, in N.L.R.B. v. New Vista Nursing and Rehabilitation United States Court of Appeals, Third Circuit. May 16, 2013 719 F.3d 203 163 Lab.Cas. P 10,597 the court issued a declaratory relief on the question regarding validity, under Recess Appointments Clause, of President's appointment of member of National Labor Relations Board (NLRB) was NOT A NONJUSTICIABLE POLITICAL QUESTION.

...National Labor Relations Board's (NLRB) delegee panel, of three Board members, lacked the requisite number of members to exercise the Board's delegated authority with respect to unfair labor practice charges against employer, where one panel member's appointment to the Board, by the President, violated the Recess Appointments Clause because the appointment occurred during a break within a Senate session (intrasession break), and not during a break between Senate sessions (intersession break). U.S.C.A. Const. Art. 2, § 2, cl. 3...

So, the federal court could not impeach and remove from office labor board members, as any high level federal official that is appointed directly by the U.S. President, can only be impeached and removed from office by the Congress. However, the declaratory judgment by the court set in motion series of events, mechanisms that lead to a change. A number of courts came up with similar decisions about lack of constitutionality and legitimacy of the labor board members. Faced with a sure impeachment of his appointees and attempting to

avoid impeachment, Barack Obama announced that he will appoint new members, who will go through the Congressional approval.

Similarly, in case at hand the precedent of *Keyes v Obam*a, which was heard in the 9th Circuit, ruled that injunctive relief can be obtained until the cutoff date of the swearing in, however there was no cutoff date for issuing a declaratory relief. As a matter of fact attorney for plaintiffs in the case at hand, was also an attorney for ambassador Keyes, Captain Barnett and others and argued before the 9th Circuit. During the oral argument in the 9th Circuit Judge Berzon questioned attorney for Barack Obama: what happens if the plaintiffs discover fraud and lack of eligibility of the candidate after the election and after the president is sworn in? She did not get an answer and the decision of the court left this part of the issue unsettled.

Based on the court decisions in aforementioned *NLRB v New Vista* as well as *Paulsen v. Renaissance Equity Holdings, LLC* United States District Court, E.D. New York. March 27, 2012 849 F.Supp.2d 335 2012 WL 1033339 and other cases dealing with eligibility of officials subject to Congressional impeachment, it was held that eligibility of an impeachable official does not represent a non-justiciable political question. As such, even if Obama was already sworn in as a president and subject to impeachment, Article 3 court can issue a declaratory opinion on his legitimacy for office, his Indonesian citizenship and his fabricated IDs, whether

those can be a basis for eligibility and the US Congress can commence an impeachment based on this declaratory relief.

CONCLUSION

Based on all of the above, the Appellants' brief, the excerpt of record and the oral argument to be presented, the court should rule in favor of appellants and reverse the decision of the lower court.

Respectfully submitted,

Orly Taitz ESQ,

Counsel for Appellants

03.14.2014

CERTIFICATE OF SERVICE

I, Orly Taitz, counsel for the Appellants attest that all the parties in this case were served with the attached "Reply to the Appellees' brief " via ECF.

/s/ Orly Taitz

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US Court of Appeals for the 9th Circuit

Transcription of Court Recording 13-15085.wma

Recording from http://www.ca9.uscourts.gov/media/

Case Name:	Peta Lindsay, et al v. Debra Bowen
Case Number:	13-15085
Case Panel:	JUDGES KOZINSKI, O'SCANNLAIN, MURGUIA
Hearing Location:	San Francisco, CA
Attorney for Appellants:	ROBERT EDWARD BARNES
Attorney for Appellee:	ALEXANDRA ROBERT GORDON

--- START OF RECORDING ---

00:00 ATTORNEY BARNES: Good morning. May it please the court, I'm Attorney Robert Barnes. I represent the Appellants, Peta Lindsay, the Peace and Freedom Party, and Richard Becker. In 2012, Peta Lindsay and the Peace and Freedom Party, and Richard Becker wanted to submit her name to be nominated as a potential nominee of the Peace and Freedom Party for the Presidency of the United States.

00:22 JUDGE KOZINSKI: But she's clearly ineligible for that office.

00:25 ATTORNEY BARNES: That would be a decision for Congress to make and that is our assertion here. Because what happened here is, in fact the procedural history is such, that she submitted it, the Election Code 60-41 provides that the Secretary shall place a candidate on the ballot if they're generally recognized as a candidate. It was unquestioned that she was generally recognized as a candidate. The

Secretary then took the position, initially just denied it, did not know on February 6, after court proceedings began the Secretary said that the reason was because of "age". But the only document they could cite was something that was one week after the Secretary had actually made her decision. But independent of that, the key question here, is whether the Secretary of State has the authority to interpret--

01:10 JUDGE KOZINSKI: Who disputes that she is under age? Underage in terms of the Constitutional standard. She is or was at that time less than 35, right?

01:23 ATTORNEY BARNES: Yes, your Honor, that is correct.

01:24 JUDGE KOZINSKI: OK, so you said something at the beginning that sounded like you were disputing - but you are not disputing that?

01:30 ATTORNEY BARNES: I'm not disputing that fact, your Honor, no. What we are disputing is the Secretary's authority to be the person to adjudicate, interpret, and enforce the qualifications provisions of the US Constitution.

01:39 JUDGE KOZINSKI: You mentioned something about the role of Congress in your response.

01:43 ATTORNEY BARNES: Yes, your Honor. The Constitution carefully creates a system whereby any dispute about the qualification of a person to hold the office of the Presidency is determined by the 12th Amendment, the 20th Amendment, and--

01:55 JUDGE KOZINSKI: Where does it say it's exclusive?

01:59 ATTORNEY BARNES: The interpretation of it being exclusive is that Congress is the one that it had been delegated to. The question of whether another state official can act in that capacity is definitely a novel question. Now in the context of adding qualifications, this court determined in Schaeffer v Townsend that the California State Legislature cannot add qualifications to what was explicitly delegated to Congress. In the term limits case it was determined that no additional qualifications could be added and that the Elections Clause gave Congress the preemptive right to--

02:28 JUDGE KOZINSKI: But this is not an addition, this is a qualification that is in the Constitution itself.

02:34 ATTORNEY BARNES: It is, your Honor. But for example, could the State of Arizona, which passed legislation, or attempted to pass legislation, that said a candidate had to have certain forms of documentary proof in order to meet the qualifications provision; would that statute be Constitutional? In fact--

02:49 JUDGE KOZINSKI: That's a hypothetical question we don't need to deal with, because in this case, if you are saying "Look, there is no proof she is less than 35, and we're disputing California's requirement that prove up that she is less than 35", then we would have that question. But we don't, because you've already said you don't dispute she's less than 35. So how the Secretary came to that knowledge, or what procedure she used, or whether she could use any procedures, is not before us. It's not something we need to decide right now.

03:25 ATTORNEY BARNES: The key question is whether she has this

authority in general. For example, in the incidents in both the Robinson case, in Robinson v Bowen, in the Northern District of California, and in the California Appeals Court case, in Keyes--

03:36 JUDGE KOZINSKI: I think its you can determine that it's a person. Like somebody ran a dog for President, she would have a, she would have a-- I mean let's say, some party, not the Peace and Freedom party, but some party nominated a dog for President. I take it the Secretary of State would have authority to keep that off the ballot, right?

04:00 ATTORNEY BARNES: I believe that too would be submitted to Congress. And the reason for that is this. Let's take the logical conclusion the other way. In the McCain case, it was undisputed that Senator McCain was not born inside the United States. One interpretation of the Natural Born provision of the clause of the Constitution was that was required. Under the Secretary's interpretation, a future Secretary of State could have excluded Senator McCain from the ballot on her interpretation and application of that provision. For example, in the various "birther" laws that are being passed, and still being considered by states across the country, they were going to require certain forms of documentation that it was undisputed that Senator Obama and then President Obama would not have been able to meet. Under this interpretation of what the District Court allowed, a State official anywhere in the country could have excluded Mr Obama from the ballot on the grounds that the interpretation of the Natural Born clause provision he didn't suffice to meet the documentary proof. There's also another provision the President--

04:50 JUDGE KOZINSKI: But again, that's a question we would have if there were a dispute now as to whether or not she meets the Constitutional standard. But in this case she doesn't dispute it. If she said "Look, 35 doesn't mean 35. Thirty-five means 34 or 32", for whatever reason then,-- But she doesn't dispute it. She admits she doesn't meet the Constitutional standard.

05:19 ATTORNEY BARNES: She doesn't meet the standard to hold the office of Presidency. I believe she does meet the standard to be President-elect. The Twentieth Amendment provides for a provision where it says "If a President-elect"--

05:28 JUDGE KOZINSKI: But that's different, right? That's different from the McCain situation, right? Because of a "birther"-- Of the examples you gave, those are all disputes about whether somebody meets the Constitutional standard. But in this case, you've sort of given that up. You've said "We admit that she does not have the requirements under the Constitution to be President." So all these mechanics about what the State can do to figure that question out are not before us.

06:00 ATTORNEY BARNES: No. But what is before us is whether the Secretary of State has the authority to make that determination.

06:04 JUDGE MURGUIA: Well let me ask you. Are both the analyses conducted in the District Court and the State's brief rely on case law, discussing codified election regulations or laws? I'm just curious, does the analysis change because Ms Bowen was not acting pursuant to certain election law but under her discretion? Do we have to use the same test? I think the cases Amberson and Burdick, that those cases set out some tests. Do we use those tests?

06:38 ATTORNEY BARNES: Your Honor, here I would say the Secretary of State has a higher burden, because the California State Legislature has never authorized this for her. They've never said that unless a candidate is age 35, they are not allowed to be a candidate for Presidency in California. No such law has actually been passed by the State of California. The Secretary of State's interpretation is that because she took an oath to the US Constitution she can interpret it, adjudicate it, and enforce it wherever she wants. Today we face these particular facts, but tomorrow we may face an entirely different set of facts.

07:04 JUDGE MURGUIA: What's the harm? Is there any harm for your client, the Peace and Freedom party, when it has to place on the ballot a candidate who is 35 and older, versus someone who is 27 years of age?

07:20 ATTORNEY BARNES: Yes, your Honor. Because they are not being allowed the opportunity to have that issue or question, if she were to be elected, submitted to Congress, and be submitted. And the Twentieth Amendment anticipates that someone can be a candidate for Presidency, be qualified to be a candidate for Presidency, and not be qualified to yet hold the office. Hence, the Twentieth Amendment says that someone who has not qualified, but may at some future point qualify. That clearly applies to someone that wouldn't fit the Natural Born citizen provision. It likely wouldn't be the Fourteen Year Resident provision. Which, by the way, that would be another provision that election officials across the states could start to interpret, different states in the country. That provision could have excluded Eisenhower, and other people from the Presidential Ballot, if we are going to allow state officials to now interpret, adjudicate and enforce Constitutional

qualification provisions for the Presidency. So here, because she wasn't- What happens when a young candidate- For example in the past California has allowed underage candidates on the ballot, or people who didn't qualify for office on the ballot. For example, in State legislative race cases, including at Leland, 127 P 643; McGee, 226 P 2nd 1; Fuller, 138 California Reporter 3d 396; a person was clearly not a resident and didn't meet the residency qualifications to be, to run for California legislative office. It was challenged. The Court said neither the Secretary of State, nor the County official, nor the Courts, could determine whether or not that person was qualified. Qualifications of an elected official are best left to the elected body, for a lot of very good and sound reasons. It may be easy to say that this age one is simple, so let's open up Pandora's box just a little bit and see how it goes. But once it gets opened, all those other qualifications are going to come into question and state officials are going to start--

09:01 JUDGE O'SCANNLAIN: What about segregating the obvious disqualifications from those that are marginal, such as you have suggested, the "birther" issue and so forth? Where it's clear that age is expressed in the Constitution. What's the problem?

09:18 ATTORNEY BARNES: I think the problem is that it should always be- Like the residency issue. Here there are several residency--

09:24 JUDGE O'SCANNLAIN: Well I can see. Residency, room for discussion. But when it's age, and this person was at that time 8 years below eligibility?

09:37 ATTORNEY BARNES: Two different reasons, your Honor. I think

that the Twentieth Amendment provides for an underage person to be elected, and not hold office. It allows the Vice-President instead, or the Congress, to make a determination until they're qualified. It's almost the only reasonable--

09:48 JUDGE O'SCANNLAIN: But she's not running for Vice-President.

09:50 ATTORNEY BARNES: No she isn't. But you usually have a ticket and the Vice-President would be elected. So they anticipated this possibility and they left it to the public and to Congress to make a decision. And that's the best place to do it. Once we open the door and say executive officials can start to interpret the Constitution and apply it. Even if it may seem simple--

10:07 JUDGE KOZINSKI: Well, it's one thing to say they may have anticipated the problem of this arising. It's another thing to say that they are the only ones who have authority to deal with it. It's not clear to me why, well-- If a state were to nominate somebody who's underage and they were to get elected, then Congress is who should deal with it. But what precludes, what makes exclusive remedy? Why can't state officials anticipate along the way, and say "Look, we don't want to create these kinds of problems. We don't want to have a candidate from our state who gets disqualified, we know will get disqualified."

10:44 ATTORNEY BARNES: What the District Court in the Northern District of California in the Robinson case, William Alsop determined was that it was the kind of question that should always be submitted to an elected body. At a minimum that elected body should have the first choice. And given the Twelfth and Twentieth Amendments role in Federal elections, it's too risky to give a state official any role in that

process. The California Court of Appeals in Keyes v Bowen went further. Where they said "It would be a truly absurd result if every state election official could determine the qualifications of the criteria and whether they meet the eligibility criteria of the Presidency." I would note that the Secretary of State actually urged that position before the California Court of Appeals in 2010, when it served its interests to do so. Here there would be a second question, independent of that first one, about whether or not the Secretary of State should be afforded this power, or is Constitutionally, or is under California legislation. Here, the only person the Secretary of State has ever asserted this authority concerning, has been two candidates of the Peace and Freedom party, Eldridge Cleaver in 1968, and this candidate in 2012. Both of them were African-American candidates for small parties. She has never asserted this power or this authority in any other context. We asserted that that raised an equal protection question at least worthy of doing discovery. As to what the Secretary of State's actual motivation--

11:59 JUDGE KOZINSKI: Just a second, it would have been March Fong Yu probably who would have been Secretary of State then.

12:06 ATTORNEY BARNES: In 2010. In 1968 it was a different Secretary of State, your Honor.

12:11 JUDGE KOZINSKI: Probably March Fong Yu, right? Secretary of State forever. OK, thank you. You're out of time.

12:23 ATTORNEY BARNES: I'd reserve my last two minutes if I can for-

12:24 JUDGE KOZINSKI: You have minus two minutes.

12:25 ATTORNEY BARNES: My apologies. Thank you, your Honor.

12:31 JUDGE KOZINSKI: We'll hear from the Secretary.

12:32 ATTORNEY GORDON: May it please the Court, Alexandra Robert Gordon, from the office of California Attorney General for Appellee California Secretary of State Debra Bowen. So just to remind the court of the procedural posture of this case, this is an appeal from a dismissal of Plaintiff's complaint with prejudice. So there are really only two questions before the Court. Did Plaintiffs meet their pleading burden? Does the complaint state claims for relief under the First and Fourteenth Amendments, the Equal Protection clause, or the Twentieth Amendment? And two, could Plaintiffs state claims under these provisions as a matter of law? And since the answer to both of these questions is "no", the District Court should be affirmed. Just to sort of touch briefly on some of the things Counsel has said, as the Court has noted, it is undisputed that at the time that she was running in 2010, Ms Lindsay was 27 years old, and a person under the US Constitution has to be 35 to be President of the United States. Although Plaintiffs maintain that the Secretary does not have the authority to exclude Ms Lindsay from the ballot, that's wrong as a matter of law--

13:50 JUDGE O'SCANNLAIN: As a matter of State or Federal law?

13:52 ATTORNEY GORDON: Actually, as a matter of both, Your Honor. The Supreme Court has made it clear, in cases such as Storer vs Brown for example, that state elections officials, and the Secretary of State is the chief elections official of the State of California, and under

the Government Code she has the power to make sure that all of the State election laws, as well as the Federal election laws, are enforced. States maintain a lot of discretion over elections generally in the US Constitution, and over the ballot, and the Supreme Court has made it clear that a state official certainly can protect the integrity of the electoral process by not clogging the ballot with frivolous candidacies.

14:33 JUDGE O'SCANNLAIN: Suppose you had a Secretary of State that was part of the "birther" movement, and declined to let Barack Obama on the ballot. What then?

14:43 ATTORNEY GORDON: Well, Your Honor, that's a different question.

14:45 JUDGE O'SCANNLAIN: Why?

14:46 ATTORNEY GORDON: Why is it a different question? Because I think we can all agree that whether or not President Obama is a US Citizen is very much in dispute. There's no dispute here that Ms Lindsay is 27 years old. And so what the courts have said in the cases that Plaintiffs have cited, Keyes and Robinson, is that the Secretary of State has, one, that the Secretary of State has no ministerial duty to investigate the qualifications. So in all these case where they're alleging that President Obama, or Senator McCain is not a US citizen, and she should, the Secretary of State, should get verification. Or he's using a forged birth certificate. The Secretary of State has no ministerial duty to investigate. And it is in fact committed to Congress to resolve disputes about a candidate's qualifications. However it's a stretch to say that the Constitution gives to Congress the sole ability to resolve disputes about qualifications and then say

that, for example, if a party wanted to run a dog on the ballot that that would go to Congress. That a state election official couldn't say "My goodness, that this is not a human, or that this party would like to put an inanimate object on the ballot."

15:57 JUDGE O'SCANNLAIN: Well, opposing Counsel suggests that she might qualify as President-elect. What's your response to his argument?

16:05 ATTORNEY GORDON: My response to that argument is that I suppose she could qualify as President-elect until such time I guess as someone made an objection, found out she wasn't qualified, and then she's not qualified to be President. So I'm not sure that that sort of changes the legal analysis about whether or not a state official can keep someone who's manifestly and admittedly unqualified off the ballot.

16:29 JUDGE MURGUIA: So it doesn't matter that the California Code, Elections Code, states very clearly that the Secretary of State shall place the name of a candidate upon the Peace and Freedom Party Presidential preferential ballot, and so on. You're saying that despite that language or any other codified law, statute, or anything like that, the Secretary of State's discretion is enough. What's the authority? Just the discretion is enough?

17:05 ATTORNEY GORDON: Right, so the authority is-- First of all, in Keyes vs Bowen, a case that Plaintiffs have cited today, and we have cited in our brief, the Court made clear that under the provision-- It's actually the Democrat-- Its the Democratic primary provision, but it's identical to the Peace and Freedom, that the Secretary actually does maintain some discretion to exclude people from primary ballots,

but not from the General Election ballot. And although it's not really explained why that's the case, and this is beyond the scope of the briefing, I will answer it. Under the California Supreme Court's interpretation of "shall", "shall" is not always mandatory. "Shall" is construed by looking at the statutory scheme as a whole. And where the statutory scheme calls for an exercise of discretion, which it does here, for example even to determine whether a candidate is generally recognized calls for an exercise of discretion. "Shall" is not construed to be as mandatory, and still allows for an exercise of discretion by an official. And I'm happy to cite some cases if you would like them.

18:14 JUDGE MURGUIA: The Secretary of State sounds like has been confronted with similar types of issues. I guess the residency requirement, are those similar to the age requirement?

18:25 ATTORNEY GORDON: No, they're not your Honor. Because what happens in cases about residency requirements, or asking for additional proof of citizenship for example in Arizona, what's being litigated is the burden that those laws place. The Constitutionality of those laws. Here the US Constitution says you have to be 35 years old to be President of the United States. That's the law. We're not revisiting that. The Secretary of State has not added a qualification to what one has to be to exercise a right to vote or be President. She's merely reading the US Constitution and enforcing it.

19:02 JUDGE KOZINSKI: Does the record show how does the Secretary of State know how old Ms Lindsay is?

19:13 ATTORNEY GORDON: It's not alleged in the complaint, but the way

the Secretary of State knows is that in doing the investigation to find whether or not Ms Lindsay is generally recognized, which means things like, does she have a campaign office in California, is she on the ballot of any other state, does she qualify for Federal Matching Funds? It became clear that Ms Lindsay was 27 years old. The Secretary of State is required to publish a preliminary list, which she did on February 6, 2012. It did not have Ms Lindsay's name in it. Ms Lindsay's counsel wrote a letter to the Secretary of State, demanding that she be put on the ballot, and in that letter, which is part of the supplemental excerpts of record, and it was judicially noticed by the Court, her counsel admits that she is 27 years old. So when she was excluded from the ballot there was absolutely no dispute that Lindsay was 27. The sole argument is whether the Secretary of State can exclude someone who is admittedly and indisputably unqualified from the ballot.

20:18 JUDGE MURGUIA: Do you dispute whether this is moot?

20:23 ATTORNEY GORDON: The Court found that it was not moot because it falls into the repetition evading review.

20:30 JUDGE O'SCANNLAIN: Do you agree with that?

20:32 ATTORNEY GORDON: I understand why it would lend itself to repetition evading review, but this gets to another point, which is that Plaintiff's did not actually bring an action for violation of the Elections Code, which is very much what they're suggesting here, and to do that the Election Code specifies you bring a writ of mandate, and you have a specified time to do that, so that I don't actually think that Plaintiffs can ever bring the kind of claim they are bringing

here. And the second point would be that by the time they moved for a preliminary injunction, the Secretary had already distributed the certified list to the 58 county officials who print the ballot. At that point, by Code, she can't touch the ballot any more. She can't add and cannot subtract names to it. So it was already too late by the time they brought their action for them to get the relief that they were seeking from the Secretary.

21:20 JUDGE O'SCANNLAIN: Can I go back to your state authority issue. What is the specific statute you're relying on? Is it the Election Code 67-20?

21:30 ATTORNEY GORDON: I'm sorry, the specific authority for?

21:33 JUDGE O'SCANNLAIN: For deleting her name. For not allowing her name to be on the ballot.

21:39 ATTORNEY GORDON: The code at issue is 67-20.

21:43 JUDGE O'SCANNLAIN: And you're relying on the discretion that goes with determining whether she is generally advocated and so forth.

21:49 ATTORNEY GORDON: Yes, and as well looking at the Elections Code as a whole, and the Government Code which gives the Secretary of State significant power and authority to regulate--

21:57 JUDGE O'SCANNLAIN: But there's no other State statute that you're relying upon?

22:02 ATTORNEY GORDON: No.

22:03 JUDGE O'SCANNLAIN: Very well. Thank you.

22:05 ATTORNEY GORDON: Just briefly in the thirty seconds that have left, I want to explain that it was not actually the Secretary's position in Robinson that she had no authority to exclude an admittedly unqualified candidate. Just to be very, very clear, although it was undisputed that Senator McCain was born in Panama, the meaning of that was very much in dispute and required interpretation. Because he was born in the Panama Canal Zone in 1936 to two American born parents, there was some question about whether or not he qualified as an American citizen. That obviously is a legal determination that was going to be made by someone other than the Secretary. But that case has- It's that would require investigation and interpretation. That's not the case here. Finally I would just repeat that because the complaint is nothing more than boilerplate legal conclusions and because all of these claims have to fail as a matter of law I would just ask that this Court affirm the District Court. Thank you.

23:12 JUDGE KOZINSKI: Thank you. You are out of time. If you would like to take a minute for rebuttal, you can take it.

23:23 ATTORNEY BARNES: Just briefly, I know of no State or Federal Court that has ever authorized a Secretary of State to interpret or enforce a qualifications provision of the United States Constitution for the Office of Presidency or for Congress. That's a novel case that is presented here. In Storer v Brown the question was whether or not the Disaffiliation Provision could be utilized in terms of which party you could be associated with. So that provision has never been interpreted to be expanded past that to the actual--

23:49 JUDGE KOZINSKI: What happened with Eldridge Cleaver?

23:51 ATTORNEY BARNES: I'm sorry Your Honor?

23:52 JUDGE KOZINSKI: What happened with Eldridge Cleaver?

23:54 ATTORNEY BARNES: The cases all ended up unpublished. Mr Cleaver ended up still running but not being on the ballot. He was 34. He actually would have been 35 within the time of the Presidential election period. And the issue was left unresolved. When it was approached--

24:11 JUDGE KOZINSKI: But there were decisions, they just weren't published?

24:14 ATTORNEY BARNES: Yes, Your Honor. I just know that there was a denial of the Petition for Cert. Beyond that I don't know of what happened. I haven't found the underlying records.

24:22 JUDGE KOZINSKI: OK, thank you.

24:23 ATTORNEY BARNES: Thank you.

24:25 JUDGE KOZINSKI: Case assigned, it will stand submitted.

--- END OF RECORDING ---

AFFIDAVIT

State of Florida
County of Manatee

I, Terence Brennan, declare under penalty of perjury, that I am over 18 years of age, do not suffer from any mental impairment, and attest that to the best of my knowledge and belief, that this is a true and correct transcription of the recording made available to the public by the United States Courts for the Ninth Circuit as "13-15085.wma" at website www.ca9.uscourts.gov/media/ on February 15, 2014.

_____ _____

Terence Brennan Date

AFFIDAVIT

State of Florida
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Terence Brennan

17 FEB 2014
Date

2-17-2014

LEONORE VANNORMAN
Notary Public, State of Florida
My Comm. Expires Nov. 03, 2016
No. EE 843750