

CASE NO. 08-4340

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILIP BERG,

Appellant

v.

BARACK OBAMA, et. al.,

Appellees

RESPONSE OF APPELLEES SENATOR BARACK OBAMA
AND DEMOCRATIC NATIONAL COMMITTEE
TO APPELLANT'S EMERGENCY MOTION

John P. Lavelle, Jr.
Attorney I.D. Pa. 54279
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 864-8603
(215) 864-9125 (Fax)
lavellej@ballardspahr.com

Of Counsel:

Joseph E. Sandler
General Counsel, Democratic National Committee
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. #1102
Washington, D.C. 20003
Telephone: (202) 479-1111
Fax: (202) 479-1115

Robert F. Bauer
General Counsel, Obama for America
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003
Telephone: (202) 628-6600
Fax: (202) 434-1690
RBauer@perkincoie.com

Attorneys for Appellees
Senator Barack Obama and
Democratic National Committee

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
STATEMENT OF THE CASE.....	2
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

	<u>Page(s)</u>
<u>Berg v. Obama</u> , Civ. No. 08-cv-4083	1
<u>Crist v. Com'n on Presidential Debates</u> , 262 F.3d 193	6
<u>Hilton v. Braunskill</u> , 481 U.S. 770	6
<u>Hollander v. McCain</u> , No. 08-0099, 2008 U.S. Dist. LEXIS 56729	6
<u>Jones v. Bush</u> , 122 F.Supp.2d 7133	6
<u>Lujan v. Defenders of Wildlife</u> , 504 U.S. 555	6
<u>In re Montes</u> , 677 F.2d 415	4
<u>United States ex. Rel. Barnwell v. Rundle</u> , 461 F.2d 768	5
<u>United States v. Rowlands</u> , 451 F.3d 173	5

FEDERAL STATUTES

2 U.S.C. §§431 <i>et seq</i>	2
Civil Rights Acts, 42 U.S.C. §§1983	2
Fed. R. Civ. P. 12(b)	2
Freedom of Information Act, 5 U.S.C. §552	2
Immigration and Nationality Act, 8 U.S.C. §1481	2
Nor does the All-Writs Act, 28 U.S.C. §1651	4
Civil Rights Acts, §§1983, 1985	6
U.S. under Article II, section 1, clause 4	2

Appellant Philip Berg has appealed from the decision of the District Court dismissing his complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Memorandum and Order, *Berg v. Obama*, Civ. No. 08-cv-4083 (E.D. Pa. filed Oct. 24, 2008)(“District Court Decision”), attached hereto as Exhibit 1. Berg has now filed an “Emergency Motion for an Immediate Injunction to Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petitioner’s Appeal” (“Emergency Motion”). Pursuant to FRAP 27(a)(3) and this Court’s Order of October 30, 2008, appellees Senator Barack Obama and the Democratic National Committee (“DNC”) hereby respond to the Emergency Motion.

The Emergency Motion should be denied for three reasons. *First*, Berg’s Emergency Motion is effectively a new original case, seeking directly from this Court relief not sought below and based largely on facts and legal grounds not raised in his complaints. Accordingly this Court lacks jurisdiction over the Emergency Motion. The All-Writs Act does not afford any basis for jurisdiction in this case. *Second*, Berg failed to comply with Rule 8(a) of the Federal Rules of Appellate Procedure, requiring that he move first in the district court for any order granting an injunction while an appeal is pending. *Third*, there is no possibility that Berg will prevail on the merits. Not only are Berg’s allegations patently false, but, as the District Court correctly found, he lacks standing to bring the action and

there is no federal cause of action in any event for enforcement of the constitutional provision he invokes.

STATEMENT OF THE CASE

On August 21, 2008, appellant Philip Berg filed a complaint in the District Court alleging (falsely) that Senator Barack Obama is not a “natural born citizen” and is therefore ineligible to serve as President of the U.S. under Article II, section 1, clause 4 of the Constitution, the Natural Born Citizen Clause. Berg sought a declaration that Senator Obama is ineligible to run for President and a permanent injunction enjoining him from running for President and enjoining the DNC from nominating him. On September 24, 2008, defendants Senator Obama and the Democratic National Committee (“DNC”) filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

On October 6, 2008, Berg filed a First Amended Complaint, adding several new defendants and asserting causes of action under the Civil Rights Acts, 42 U.S.C. §§1983 and 1985, the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §431 *et seq.*, the Freedom of Information Act, 5 U.S.C. §552 and the Immigration and Nationality Act, 8 U.S.C. §1481(b). In his First Amended Complaint, Berg sought the same relief as that sought in the original complaint and, additionally, an order compelling the FEC and the U.S. Senate Rules

Committee to conduct an investigation into Senator Obama's citizenship status and an injunction barring the Pennsylvania Department of State and the DNC from placing Senator Obama's name on the presidential general election ballot. On October 20, 2008, defendants Obama and the DNC filed a motion to dismiss the First Amended Complaint. That motion was granted by the District Court on October 24, 2008. *See* Exhibit 1 hereto. The District Court found that Berg lacked standing to assert any claim under the Natural Born Citizen Clause and that his complaint did not state a claim under any of the other statutory provision he invoked.

Berg has now filed his Emergency Motion, again alleging falsely that Senator Obama was not born in the United States, setting forth various other allegations about the Senator, and requesting an injunction "to stay the Presidential Election of November 4, 2008 pending the resolution of Petitioner's Appeal." Emergency Motion at 17.

ARGUMENT

The Emergency Motion should be denied. First, this Court has no jurisdiction to entertain the Emergency Motion. It is not a motion for stay of the judgment or order of the District Court pending appeal and does not address the merits of the District Court's decision at all. Nor does it request that the relief sought from the District Court be granted during the pendency of the appeal.

Rather, the Emergency Motion seeks a form of relief which was not requested at all in either the original Complaint or First Amended Complaint, namely, an order enjoining the conduct of the Presidential general election next Tuesday, November 4, 2008. Further, the Emergency Motion includes a number of factual allegations not included in either the original Complaint or First Amended Complaint and not otherwise raised in the District Court. See Emergency Motion ¶¶ 4, 5, 6, 19-25. Among other things, attached to the Emergency Motion are two affidavits, one from a “Bishop Ron McRae” and another from a “Reverend Kiori,” both executed after the District Court issued its decision.

In these circumstances, this Court lacks jurisdiction to consider the Emergency Motion. The Emergency Motion is an original action seeking relief not sought in the court below and based substantially on different factual grounds. In the absence of a special statutory basis for jurisdiction, however, a Court of Appeals “cannot take evidence or hear matters initially.” *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982).

Nor does the All-Writs Act, 28 U.S.C. §1651(a), relied upon by Berg (Emergency Motion at 11), provide any basis for the relief sought in the Emergency Motion. Relief under the All-Writs Act is not available unless the applicant has “no other ‘adequate means to attain the [desired] relief’...” *In re School Asbestos Litigation*, 921 F.2d 1310, 1314 (3d Cir. 1990), *quoting Kerr v.*

U.S. District Court, 426 U.S. 394, 403 (1976). Such a showing cannot be made where the petitioner has “made no effort to secure relief from the trial court involved....” *In re Montes*, 677 F.2d at 416.

To be sure, this Court may also issue a writ in order to preserve its own jurisdiction over an appeal. *E.g.*, *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006). Berg has not made any showing, however, that enjoining the Presidential election is necessary in order for this Court to review the District Court’s ruling that Berg lacked standing to assert his constitutional claim and that his complaint failed to state a claim under any of the other statutory provisions invoked in his complaint.

Second, Berg also failed to comply with FRAP 8(a)(1) and (2) by failing to seek the requested relief first from the District Court. “Application for a stay may be made in the first instance to the court of appeals only when application to the district court for the relief sought is not practicable.. Since the [appellant] has not applied to the district court for a stay we cannot consider such a motion.” *United States ex. Rel. Barnwell v. Rundle*, 461 F.2d 768, 769 (3d Cir. 1972).

Finally, the factors regulating issuance of a stay or injunction pending appeal dictate denial of the Emergency Motion. Those factors are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Here there is no possibility whatsoever, let alone a likelihood, that Berg will succeed on the merits.

As the District Court correctly concluded, Berg does not have standing under Article III to bring a claim under the Natural Born Citizen Clause. District Court Decision at 9-17. Standing requires an injury in fact that is concrete and particularized *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is well established that a “voter fails to present an injury in fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate.” *Crist v. Com’n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001)(per curiam). For that reason, a voter does not have standing to challenge the qualifications of a presidential candidate under the Constitution. *Hollander v. McCain*, No. 08-0099, 2008 U.S. Dist. LEXIS 56729 (D.N.H. 2008); *Jones v. Bush*, 122 F. Supp. 2d 7133 (N.D. Tex. 2000).

With respect to the other causes of action asserted by Berg in his First Amended Complaint, it is clear, and the District Court correctly held, that no cause of action lies under the Civil Rights Acts, §§1983, 1985 or 1986; the Federal Election Campaign Act of 1971, as amended; the Freedom of Information Act; the Immigration or Nationality Act; or under theory of promissory estoppel. Berg does

not, in his Emergency Motion, take issue with the District Court's rulings that none of these theories affords Berg any basis for the relief he sought.

CONCLUSION

For the reasons set forth above, the Emergency Motion should be denied.



John P. Lavelle, Jr.
Attorney I.D. Pa. 54279
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 864-8603
(215) 864-9125 (Fax)
lavellej@ballardspahr.com

Of Counsel:

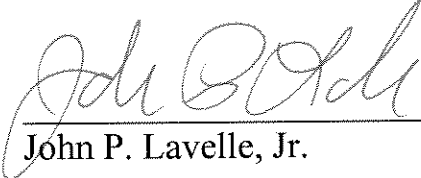
Joseph E. Sandler
General Counsel, Democratic National Committee
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. #1102
Washington, D.C. 20003
Telephone: (202) 479-1111
Fax: (202) 479-1115

Robert F. Bauer
General Counsel, Obama for America
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003
Telephone: (202) 628-6600
Fax: (202) 434-1690
RBauer@perkincoie.com

Attorneys for Appellees
Senator Barack Obama and
Democratic National Committee

FED.R.APP.P. 32(a)(7)(c) CERTIFICATE OF COMPLIANCE

I, John P. Lavelle, Jr., Esquire, the attorney for Defendants Senator Barack Obama and Democratic National Committee, hereby certify that the foregoing Response of Appellees Senator Barack Obama and Democratic National Committee to Appellant's Emergency Motion complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The total number of words in the foregoing Brief is 1,495.



John P. Lavelle, Jr.

CERTIFICATE OF BAR MEMBERSHIP

I, John P. Lavelle, Jr., Esquire, hereby certify that I am admitted in the
Third Circuit Court of Appeals.



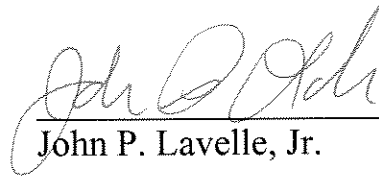
John P. Lavelle, Jr.

Dated: October 31, 2008

CERTIFICATION OF IDENTICAL FILING AND VIRUS CHECK

I hereby certify that the text of the E-Brief and hard copies of the brief are identical.

I further certify that a virus check was performed by the McAfee VirusScan Enterprise 8.5i, and is free of viruses according to that program.



John P. Lavelle, Jr.


Dated: October 31, 2008

CERTIFICATE OF SERVICE

I, John P. Lavelle, Esquire, hereby certify that two copies of the foregoing Response of Appellees Senator Barack Obama and Democratic National Committee to Appellant's Emergency Motion was served upon the following counsel for Appellant by first class mail, postage prepaid, this 31st day of October, 2008:

Philip J. Berg, Esquire
555 Andorra Glen Court, Suite 12
Lafayette Hill, PA 19444-2531

Benjamin A. Streeter, III, Esquire
The Federal Election Commission (FEC)
999 E. Street, NW
Washington, DC 20463


John P. Lavelle, Jr.

Date: October 31, 2008