

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 37-2012-CA-003857

MICHAEL C. VOELTZ,

Plaintiff,

BARACK HUSSEIN OBAMA, Winner of
the 2012 Florida General Election,
KEN DETZNER, Secretary of State of
Florida, and FLORIDA ELECTIONS
CANVASSING COMMISSION,

Defendants.

PRESIDENT OBAMA'S NOTICE OF APPLICABILITY OF TITLE 3 U.S.C. §5

Defendant Barack Obama ("President Obama"), through undersigned counsel, submits this notice regarding the applicability of Title 3 U.S.C. §5 to this action. The effect of this provision is to preclude the ability of this Court to render a conclusive determination regarding the results of the November 6, 2012 general election at which the electors pledged to support President Obama were chosen pursuant to Section 103.011, Florida Statutes, and to certify the electors for Mitt Romney as the winner of the Florida General Election.

Title 3 U.S.C. §5 provides as follows:

If any State shall have provided by laws enacted prior to the day fixed for the appointment of electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law existing on said day, and made at least six days prior to said time for the meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such state is concerned.

(Emphasis added.) Pursuant to Title 3 U.S.C. §7, “[t]he electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.” Thus, in accordance with federal law and Section 103.051, Florida Statutes,¹ the presidential electors will meet in Tallahassee, on Monday, December 17, 2012.

The United States Supreme Court has stated that Title 3 U.S.C. §5 “creates a ‘safe harbor’ for a State insofar as congressional consideration of its electoral votes is concerned. If a state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors.” *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77-78 (2000). Florida has created a process to “contest” a presidential election² and, pursuant to Title 3 U.S.C. §5, the date for any final determination of any dispute concerning the electors in order for that determination to be given conclusive effect by Congress is December 11, 2012. *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 1286, n. 17 (Fla. 2000); *see also* 772 So. 2d at 1290, n. 22.

In the instant case, there has been no determination, final or otherwise, of the contest filed by Plaintiff concerning the eligibility of President Obama to serve as President of the United States. Although Plaintiff, in his Prayer for Relief, “seeks an expedited ruling on this matter due to the time constraint of the approaching electoral voting day,” citing to Title 3 U.S.C. §5, he has taken

¹ Section 103.051, Florida Statutes, provides as follows:

103.051 Congress sets meeting dates of electors.—The presidential electors shall, on the day that is directed by Congress and at the time fixed by the Governor, meet at Tallahassee and perform the duties required of them by the Constitution and laws of the United States.

² See Section 102.168, Florida Statutes.

no steps to schedule this matter for an immediate hearing by the Court,³ nor has the Plaintiff filed notice of priority status pursuant to Rule 2.545(c), Florida Rules of Judicial Administration.

Accordingly, any ruling by the Court after December 11, 2012, would not be “conclusive;” in other words, any ruling would be advisory at best.⁴ With limited exceptions, Florida courts cannot render advisory opinions. “It is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.” *Montgomery v. Department of Health & Rehabilitative Services*, 468 So.2d 1014, 1016-17 (Fla. 1st DCA 1985) (citing 2 Am.Jur.2d *Administrative Law*, § 572, p. 389). As noted by the Second District Court of Appeal, “[t]he limitation on the exercise of judicial power to the decision of justiciable controversies has been attributed to judicial adherence to the doctrine of separation of powers. *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595 (Fla. 2d 2005) (citing *Ervin v. City of North Miami Beach*, 66 So.2d 235, 236 (Fla.1953) (quoting *Anderson on Declaratory Judgments*, Vol. 1, 2d ed., 66)).

Respectfully submitted on this 12th day of December, 2012, by:

_____/s/
Mark Herron
Florida Bar No. 199737
Joseph Brennan Donnelly
Florida Bar. No. 268895
Robert J. Telfer, III
Florida Bar. No. 128694
Messer, Caparello & Self, P.A.
Post Office Box 15579

³ Section 102.168(7), Florida Statutes, provides that “[a]ny candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing.”

⁴ President Obama has separately filed a motion to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a cause of action inasmuch as the purported election contest brought pursuant to Section 102.168, Florida Statutes, challenges the eligibility of President Obama to serve as the President of the of the United States.

Tallahassee, FL 32317
Telephone (850) 222-0720
Facsimile: (850) 558-0659

Stephen F. Rosenthal
Florida Bar No. 131458
Podhurst Orseck, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130-1720
Telephone (305) 358-2500
Facsimile: (305) 358-2382

Richard B. Rosenthal
Florida Bar No. 184853
The Law Offices of Richard B. Rosenthal, P.A.
1581 Brickell Avenue, Suite 1408
Miami, FL 33129
Telephone (305) 992-6089
Facsimile: (305) 675-8053

Attorneys for Defendant Barack Obama

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on this 12th day of December, 2012, to:

Larry Klayman, Esquire
Klayman Law Firm
2020 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
Email: leklayman@gmail.com

Ashley Davis, Assistant General Counsel
Department of State
500 South Bronough Street
Tallahassee, FL 32399
Email: ashley.davis@dos.myflorida.com

-----/s/-----

MARK HERRON