Case No. 11-3401

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FREDERICK CARLTON "CARL" LEWIS,

Plaintiff-Appellant,

v.

SECRETARY OF STATE KIMBERLY GUADAGNO, ATTORNEY GENERAL PAULA DOW, CAMDEN COUNTY CLERK JOSEPH RIPA, BURLINGTON COUNTY CLERK TIMOTHY TYLER, ATLANTIC COUNTY CLERK EDWARD P. McGETTIGAN, and JOHN DOES I-X (fictitious names), jointly, severally, and in the alternative,

Defendants-Respondents.

On Appeal from the September 6, 2011 Order of the United States District Court for the District of New Jersey, Docket No. 1:11-cv-02381
(Hon. Noel L. Hillman, U.S.D.J.)

PETITION FOR REHEARING EN BANC

DRINKER BIDDLE & REATH LLP
A Delaware Limited Liability Partnership
500 Campus Drive
Florham Park, New Jersey 07932-1047
973-549-7000
Attorneys for William Layton and Ted Costa

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STATUTES/RULES

STATEMENT REQUIRED BY FRAP 35(B)(1) AND LOCAL RULE 35.1

The undersigned counsel express a belief, based upon reasoned and studied professional judgment, (a) that the constitutional issues in this appeal present substantial questions of significant importance to the regulation of elections, namely: whether the citizens of a state have the right to insist on compliance with a universally applicable residency requirement in the state constitution; and (b) that the panel decision is contrary to precedent of the Supreme Court of the United States in Clements v. Fashing, 457 U.S. 957, 963 (1982) (Rehnquist, J., plurality), Anderson v. Celebrezze, 460 U.S. 780, 788 (1983), and Burdick v. Takushi, 504 U.S. 428, 433 (1994), and consideration by the full Court is necessary to secure and maintain uniformity of decisions of this Court.

This Petition is urgent because, in light of the panel decision, the county clerks are expected to print the ballots, which will contain a candidate that was found ineligible by the State courts to hold the office he seeks.

SUMMARY OF GROUNDS FOR REHEARING EN BANC

This appeal addresses a constitutional question of profound importance, as well as the many other states that have and enforce universally applicable residency requirements for state office: whether an "as applied" challenge to a facially neutral, non-discriminatory state constitutional residency restriction should be reviewed under the rational-basis standard where it does not unduly burden a

fundamental right. The majority concluded that under Wellford v. Battaglia, 485 F.2d 1151 (3d Cir. 1973), it should apply strict scrutiny and find that Frederick Carlton "Carl" Lewis' ("Lewis") testimony as to his ties to New Jersey was sufficient to overcome the State's interests in regulating elections, and the citizen's interests in assuring themselves that representatives meet minimum standards.

The majority's interpretation of precedent was incorrect and it failed to apply the appropriate standard of review. The decision in Wellford predated the Supreme Court's consistent holdings in Clements, Anderson, and Burdick, which severely undercut the Wellford court's reasoning. Furthermore, Wellford was expressly limited to the review of an intrastate residency requirement for a local office that was found in a city charter, unlike the statewide office and the 167 year old state constitutional requirement at issue here.

Since the Court's decision in Wellford, the Supreme Court has consistently found that residency requirements for candidates are only indirectly related to and do not significantly burden the right to vote or the right to travel. Strict scrutiny, therefore, is too harsh a condition to impose on citizens and States that have a recognized right to minimal, universally applicable requirements for state office.

STATEMENT OF THE CASE

When exactly Lewis actually began residing in New Jersey is unclear, even by his own testimony. Lewis claims to have "manifested an intent" to reside in

New Jersey at least by November 16, 2007, when he purchased a property for himself in this State. (See Appellant's Appendix ("AA"), Tambussi Exhibit L61 Vol. 2 at 45:6-15). The nature and extent of Lewis' activities in New Jersey around and after that time is based on a combination of his testimony, a number of newspaper articles and utility bills. (See AA, Tambussi Exhibit L-66). In essence, Lewis volunteered in different capacities and attended church in the state, remained in touch with his family in the state and frequently gave statements to local newspapers. (See AA, Certification of Carl Lewis). Lewis, however, also voted in California until 2009, paid taxes in California, registered his non-profit organization in California, maintained property in California and listed his residence in California. (See Respondent's Supplemental Appendix ("SA") at 13-14). No court that has reviewed this matter has been given any sense of Lewis' activities in California during this time, because Lewis offered no testimony on this topic. In 2011, Lewis began a campaign to become State Senator. He would subsequently run unopposed for the primary election and garner more than 2000 votes from Democratic Party members. (See Appellant's Opening Brief at 35).

As a candidate for State Senate, Lewis, like all others seeking that office, is required to meet the requirements of Article IV of the New Jersey Constitution (the "Residency Requirement"):

> No person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and resident of

> the State for four years, and of the district for which he shall be elected one year, next before his election. [. . .]

N.J. Const. Art. 4, §1, ¶2. During the primary election, Appellees-Petitioners brought Lewis before a State agency to hear proofs as to his residency. The Secretary of State (the "Secretary") found that, while Lewis gave testimony about his own ties and commitment to New Jersey, the objective proofs showed that Lewis had declared himself a domiciliary of California until at least 2009. (See SA at 13-14). Because she could not reconcile an intent to reside in New Jersey with an intent to reside in California, the Secretary determined that she could not certify Lewis as a candidate. (See SA at 17). The New Jersey Appellate Division, on review, affirmed this decision as supported by substantial credible evidence. (See SA at 34). The New Jersey Supreme Court declined certification. (See SA at 38).

In parallel federal court proceedings, Lewis maintained that the Residency Requirement was unconstitutional. (See Lewis v. Guadagno, no. 11-cv-02381-NLH-AMD, Doc. No. 88 at 5). The District Court found that it was supported by compelling state interests, and denied Lewis' challenge. (See id. at 6). The Third Circuit subsequently affirmed the facial challenge, but remanded for the District Court to hear Lewis' "as applied" challenge. (Id. at 6). Lewis maintained that his contacts with the State satisfied the standards of the New Jersey Constitution, and the Residency Requirement was a severe burden on him. (Id. at 13).

The District Court denied Lewis' as-applied challenge, holding that the interests of the State were sufficient to justify applying the Residency Requirement to Lewis under both rational basis, as required by Supreme Court precedent, and an intermediate balancing test, the highest potential level of scrutiny. (See id. at 32 n.18). It also found that it could not revisit the State Court decisions, which held that Lewis had not manifested an intent to permanently reside in New Jersey for the past four years. (See id. at 24 n. 14). Therefore, the District Court held that the law applied equally to all, and for all: Lewis could not show that the law irrationally discriminated against him, and there was no evidence that Lewis' showing of fame and volunteerism could satisfy the concerns of those who neither voted for Lewis nor cared for the activities Lewis participated in. Lewis must be treated like all other potential candidates, and commit to be a resident of New Jersey for four years before running for State Senator. (Id. at 33).

The Third Circuit panel reversed the District Court's decision. It applied strict scrutiny based on Wellford, and found that the compelling interests supporting the Residency Requirement disappeared when confronted with Lewis' testimony about his ties to New Jersey, and this requirement was unconstitutional in Lewis' case. (See Attached Order). Judge Scirica dissented. (Id.)

ARGUMENT

I. THE MAJORITY DECISION CONFLICTS WITH SUPREME COURT PRECEDENT HOLDING THAT NEUTRAL REGULATIONS ON CANDIDATES ARE NOT SUBJECT TO STRICT SCRUTINY.

The majority improperly applied strict scrutiny based on Wellford, overlooking subsequent Supreme Court precedent. See Clements, 457 U.S. 957; Anderson, 460 U.S. 780; Burdick, 504 U.S. 428. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where state action does not burden a fundamental constitutional right or target a suspect class, however, a challenged classification must be upheld if there is any rational basis for it. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Donatelli v. Mitchell, 2 F. 3d 508, 513 (3d Cir. 1993). Lewis has not shown that he is treated unequally in any sense protected by the fourteenth amendment. He is not a member of a suspect class, and candidacy is not fundamental right. Rational basis therefore applies.

A. The Majority Failed To Consider Supreme Court Precedent Holding That Candidacy Does Not Directly Affect A Fundamental Right.

Following the emergence of the issue in the 1970's, the Supreme Court has consistently ruled after Wellford that electoral laws placing requirements on candidates are not subject to strict scrutiny because there is no fundamental right to run for office. In Bullock v. Carter, 405 U.S. 134, 142-43 (1972), the Court

concluded that it "has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." Though the Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters," it did *not* find that imposing prerequisites on candidates directly infringes the right to vote. Id. at 143. In reaching this conclusion, the Court made clear that simply because candidacy derives its meaning from the right to vote did not mean it was a fundamental right. Rather, it cautioned that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." Id.

Subsequently, in the 1982 case Clements v. Fashing, the Supreme Court clarified Bullock: "Far from recognizing candidacy as a 'fundamental right' we have held that the existence of barriers to a candidate's access to the ballot 'does not itself compel close scrutiny.'" 457 U.S. at 963 (Rehnquist, J., plurality) (citing Bullock, 405 U.S. at 143). The Court, therefore, declined to apply a strict scrutiny standard to a "waiting period" of two years before eligibility for office, concluding that the wait was "hardly a significant barrier to candidacy." Id. at 967. It noted that a waiting period which did not discriminate "on the basis of political affiliation []or any other factor unrelated to a candidate's qualifications to hold political office" was subject to traditional equal protection principles. Id. at 967. Thus, the

Court held that a durational requirement constitutes an "insignificant interference with access to the ballot [that] need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." Id. at 968.

Shortly thereafter, in the 1983 decision of Anderson, 460 U.S. at 788, and again later in Burdick v. Takushi, 504 U.S. at 433, the Supreme Court emphasized that candidate requirements are simply not subject to strict scrutiny. Anderson expressly noted that the Court had "upheld restrictions on candidate eligibility which serve legitimate state goals", citing to Clements. 460 U.S. at 788 n.9. Further, the Burdick Court noted that "to require that every voting regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Id. In sum, the Supreme Court has *never* viewed candidacy as a fundamental right. (Hankins v. State of Hawaii, 639 F. Supp. 1552, 1555 (D. Haw. 1986) (recognizing there is no right to candidacy on Supreme Court precedent).

The majority has not identified, and cannot identify, a fundamental right implicated by the facts recited by Lewis. A court has no justification for applying the stringent, punitive analysis of strict scrutiny to a universally applicable law which does not infringe on a fundamental right. The Residency Requirement in no way constrains Lewis from voting, and the Supreme Court has also found that there is no "fundamental right to be a candidate." Thus, the Residency Restriction

does not impermissibly impede Lewis' right to travel because it does not force him to choose between travel and another fundamental right. See Hankins 639 F. Supp. at 1555 (finding that because a residency requirement for governor "hinders the exercise of no fundamental right, the durational residency requirement does not truly penalize the right to travel.").

Neither does the Residency Requirement impermissibly limit the choice of voters. The potential pool of candidates for election has not evaporated; the Residency Requirement in this as-applied challenge does no more than remove a single ineligible candidate from the ballot. Cf. Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972) (finding that a local, intrastate residency require would disqualify approximately 7% of the population from mayoral office annually). The fact that the time before election has been further and further abbreviated by this litigation should not in equity be allowed to counsel for Lewis' inclusion on the ballot because it is due in part to unwarranted requests for discovery and tactics of delay undertaken by Lewis himself. His continued presence on the ballot is the result of a political choice by a single party to include a candidate who remains ineligible to run under state law. See New Jersey Democratic Party, Inc. v. Samson, 175 N.J. 178 (2002) (allowing substitution shortly before an election).

Finally, Lewis has failed to establish that he is a member of an unconstitutionally affected suspect class. The Residency Requirement applies to

all persons equally, making it unlike state restrictions that discriminate against a particular political segment with signature requirements, Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S. Ct. 983 (1979), or impose stringent registration requirements for a particular party, Anderson, 460 U.S. 780. It is dissimilar, too, to the concerns noted in Clements, 457 U.S. at 965 (observing that a state "may not act to maintain 'status quo' by making it virtually impossible for any but two major parties to achieve ballot positions for their candidates").

In other words, because candidacy is not itself a fundamental right, because there is no suspect class involved in Lewis' challenge, and because residency requirements such as the one at issue are too attenuated from the right to vote or the right to travel to truly pose a significant burden upon either right, no fundamental right is implicated and strict scrutiny simply cannot apply. See, e.g., City of Akron v. Beil, 660 F.2d 166, 169 (6th Cir. 1981); Hankins, 639 F. Supp. at 1555; MacDonald v. City of Henderson, 818 F. Supp. 303 (D. Nev. 1993); Joseph v. City of Birmingham, 510 F. Supp. 1319, 1330 (E.D. Mich. 1981); Walker v. Yucht, 352 F. Supp. 85 (D. Del 1972); Blevins v. Chapman, 47 So. 3d 227, 234 (Ala. 2010); Cox v. Barber, 568 S.E.2d 478, 481 (Ga. 2002).

B. The Majority Improperly Relied On Wellford v. Battaglia.

The majority's reliance on Wellford v. Battaglia is misplaced. First, the Wellford decision specifically distinguishes itself from the present case because it involved a local office, based on local residency requirements. Second, Wellford predated Clements, Anderson, and Burdick; by relying on a case antecedent to the Supreme Court's holdings, the majority effectively ignored those precedents.

First, the critical distinction between Wellford and the current case is that Wellford only assessed the validity of a five-year, intra-city, local residence requirement. Id. at 144. Both the district court and the Third Circuit explicitly found this fact to be determinative, particularly when contrasted with a statewide office. The district court in Wellford, contrasting the Presidential office with the mayoral, expressly noted a "dramatic distinction between the practical significance of national and city boundaries." 343 F. Supp. at 150 n.13. Similarly, in applying the compelling state interest test, the Third Circuit held that "[t]he facts of [Wellford], including length of the disqualification and the limited territory of the unit of government, distinguish it from [Walker]." Wellford, 485 F.2d at 1152 n.2.

Walker involved a candidate for the statewide office of Delaware General Assembly who moved from Georgia to Delaware 17 months before the election, in violation of the three-year residency requirement for that office. 352 F. Supp. at 87. He was stricken from the ballot, and brought an equal protection challenge.

Id. at 88. The court, recognizing that there was no fundamental right to candidacy, reviewed the impact of the three-year requirement on the right to vote and the right to travel, and then concluded:

> [B]ecause the Supreme Court has not held broadly that all state-imposed choices between interstate travel and other benefits require the application of the compelling interest test, we hold that Delaware's durational residency requirement must be examined under the more flexible, traditional equal protection standard.

Id. at 97. There is no justification for applying the same analysis to a city and a state. New Jersey is a sovereign unit, accorded rights and protections delicately balanced with the republican form of government. Moreover, the durational requirement here is shorter by a year, is set forth in the New Jersey Constitution (as opposed to a city Charter), and it parallels directly the term of office it supports. The state boundaries at issue here do not suffer from the same mutability as district lines. Recognizing all of this, the Wellford panel did not overrule or otherwise limit the applicability of the Walker analysis, even when it had a clear opportunity to do so. Rather, it limited the application of its *own* holding: "The facts of *this* case . . . distinguish it from [Walker v. Yucht]." 485 F.2d at 1152 n.2.

Second, and of critical importance here, is that in 1974, the Wellford court did not have the Supreme Court guidance which is available today. That precedent sets forth the clear rule of law that residency requirements for candidates are a legitimate part of state control of elections, and universally applicable laws of that

nature are not subject to strict scrutiny. Specifically, what the majority misses is that neither the Walker (1972) court nor the Wellford (1974) Third Circuit panel had the benefit of Clements (1982), Anderson (1983), or Burdick (1992). Indeed, the Walker court was prescient; at the time of its decision, the district court noted "the absence of clearer guidance from the Supreme Court than provided by Dunn." 352 F. Supp. at 97. It is clear that Dunn is not applicable here because it does not discuss candidacy. See Hankins v. State of Hawaii, 639 F. Supp. 1552, 1555 (D. Haw. 1986). In Dunn, the Court held that a residency requirement for voters – *not candidates* – posed a direct barrier to the fundamental right to vote. 405 U.S. at 342. The holdings since Clements have clarified the correct review of durational requirements for *candidates*, finding that such laws "need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." 457 U.S. at 968.

II. THERE IS NO EVIDENCE THAT LEWIS MEETS THE INTERESTS AND CONCERNS OF THE RESIDENCY REQUIREMENT.

The Residency Requirement is supported by compelling interests, and the concerns of the citizens of the State do not disappear because Lewis has provided a list of his ties to New Jersey. This is even more true where there is no testimony of Lewis' activities outside of New Jersey, and the State court marked Lewis' significant ties to California in the past four years, including ownership of residences, voting on California issues, paying taxes in California, and repeatedly

declaring his intent to reside in California

A. The Residency Requirement Is Constitutional And This Court Cannot Redefine Residency.

To be clear: the Court's obligation in this as-applied challenge is not to redefine residency, and it cannot find that Lewis sufficiently meets the citizenry's definition of "resides" as used in the language of the Residency Requirement. As no fundamental right is impacted in this case, the Court should apply rational basis to determine whether any interests presented by Lewis render the Residency Requirement irrational or unfair. This Court has found the inherent rationality of requiring a person who runs for office to have first lived there, Wellford, 485 F.2d at 1152, and it cannot say that the Residency Requirement is irrational (indeed, the vast majority of courts have found residency requirements support by compelling interests – including this Court in Lewis' earlier "facial challenge"). Because the Residency Requirement rests on a rational predicate, and Lewis has failed to prove he was a resident for the past four years, the Court cannot find that Lewis meets the concerns of the Residency Requirement without finding that Lewis has, in essence, resided in New Jersey for the past four years.

The meaning of "residency" to the citizens who are protected by the Residency Requirement cannot easily be captured. It represents a belief in the fiction of a home, a domicile – of which a person can only ever have one at a time. The *clear* manifestation of an intent to reside in New Jersey is the truly important

element: it is a reassurance for all citizens that a representative will remain attentive and accountable throughout his tenure, without simply setting his sights on political opportunity. While courts may be permitted to define what residency means when called to, see King v. Lopez, no. HUD –L - 3303-09, 2010 WL 4940051 at *6 (N.J. Super. App. Div. Dec. 7, 2010), the State courts have already done that here. No one – not the courts, not the State, and possibly not even Lewis himself –can know what Lewis was doing at all times, or where his commitments were and future prospects lay for the past four years. Lewis asserts that he had an intent to reside in New Jersey. The State Courts, however, saw only a person affected with a desire to vote and, at least partially, reside in California, and who declined to even register to vote in New Jersey until he filed his nominating petition. Lewis' claim that one could never bring an as-applied challenge if the Residency Requirement is upheld is incorrect; the State courts looked at the same facts to determine residency. A federal court cannot review that decision under the auspices of an "as applied challenge" and find that Lewis has met these interests.

CONCLUSION

For these reasons, this Court should affirm the decision of the District Court and deny the relief sought by Lewis.

Respectfully submitted,

Dated: September 14, 2011

/s/ *Mark D. Sheridan*
Mark D. Sheridan

COMBINED CERTIFICATIONS

MARK D. SHERIDAN hereby certifies as follows:

1. **Bar Membership.** I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Service and Filing.** Pursuant to Fed. R. App. P. 35 (d) and L.A.R. 35.2(a), on September 14, 2011, I caused a true and correct copy of the Petition for Rehearing En Banc of Defendant-Respondents William Layton and Ted Costa to be served by electronic filing upon all counsel of record in this matter. In addition, on September 14, 2011, I caused one electronic copy of the Brief and Exhibits of Defendants-Respondents William Layton and Ted Costa to be filed with the Clerk of Court via the Court's electronic filing system.

3. **Identical Compliance of Brief.** The text of the Petition for Rehearing of Defendants-Respondents William Layton and Ted Costa, which was electronically transmitted to the Court in .pdf format, and any hard copy of the Petition so requested are identical.

4. **Certification of Compliance with Typeface Requirements.** I hereby certify that this Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), applicable to this filing pursuant to Fed. R. App. P. 32(c)(2), because it was prepared in a

proportionally spaced typeface using Microsoft Word® 2003, in Times New Roman 14 point type.

5. Virus Check. The .pdf version of the Brief and Exhibits of Defendants-Respondents William Layton and Ted Costa was scanned for viruses, and no virus was detected.

Dated: September 14, 2011

s/ Mark D. Sheridan
Mark D. Sheridan

PANEL JUDGMENT
ATTACHED PER LOCAL RULE 35.2(a)
(Opinion Not Yet Issued as of Filing)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11-3401

Frederick Carlton Lewis,
Appellant

v.

Kim Guadagno, Secretary of State; Paula Dow, Attorney General;
Joseph Ripa, Camden County Clerk; Timothy Tyler, Burlington County Clerk;
Edward P. McGettigan, Atlantic County Clerk; John Does I-X (fictitious names), jointly
and severally and in the alternative,
Appellees

William Layton; Ted Costa,
Intervenors/Appellees

(D.N.J. No. 11-cv-02381)

Present: SCIRICA*, AMBRO and VANASKIE, Circuit Judges

ORDER

The judgment of the District Court, entered September 7, 2011, is hereby reversed. The District Court, *inter alia*, incorrectly applied a rational basis standard of review of this as-applied challenge, rather than the stricter compelling state interest standard. See Wellford v. Battaglia, 343 F.Supp. 143 (D. Del. 1972), aff'd, 485 F.2d 1151 (3d Cir. 1973). The State has failed to demonstrate a compelling state interest in the application of this durational residency requirement to this particular candidate. Accordingly, it is hereby ordered that the ballots at issue in this appeal include the name of Appellant. Opinion of the Court to follow.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

* Judge Scirica dissents.

Dated: September 13, 2011

DWB/cc:

William J. Cook, Esq.
Robert T. Lougy, Esq.
Donna Kelly, Esq.
Peter H. Nelson, I, Esq.
James T. Dougan, Esq.
Mark D. Sheridan, Esq.
William M. Tambussi, Esq.