U.S. District Court,
Eastern District of Pennsylvania Case Number: 08-cv-4083

Court of Appeal No.08-4340

IN THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

——————— o ———————

PHILIP J. BERG, ESQUIRE

Plaintiff - Appellant

v.

BARACK HUSSEIN OBAMA, JR., et al,

Respondents - Appellee

——————— o ———————

ON APPEAL FROM THE UNTIED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

——————— o ———————

APPELLANT'S BRIEF & APPENDIX VOL. I

Appendix, Volume II is filed separately

Oral Argument is Requested

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LIST OF PARTIES

1.) PHILIP J. BERG, ESQUIRE, Plaintiff and Appellate;

2.) BARACK HUSSEIN OBAMA, a/k/a
BARACK HUSSEIN DUNHAM a/k/a
BARACK HUSSEIN SOETORO a/k/a
BARRY OBAMA a/k/a
BARRY DUNHAM a/k/a
BARRY SOETORO, [hereinafter "Obama"], Defendant;

3.) THE DEMOCRATIC NATIONAL COMMITTEE,
[hereinafter "DNC"], Defendant;

4.) THE FEDERAL ELECTION COMMISSION,
[hereinafter "FEC"], Defendant;

5.) SECRETARY OF THE COMMONWEALTH, Pennsylvania State Department, Defendant;

6.) PEDRO A, CORTÉS, Secretary of the Commonwealth, Pennsylvania Department of State, [hereinafter "Cortes"], Defendant;

7.) U.S. SENATE, COMMISSION ON RULES AND ADMINISTRATION, Defendant; and

8.) DIANE FEINSTEIN, Chairman, U.S. Senate, Commission on Rules and Administration, [hereinafter "Feinstein"], Defendant.

PLAINTIFF-APPELLANT'S RULE 26.1
CORPORATE DISCLOSURE STATEMENT

Petitioner-Appellant, Philip J. Berg, Esquire, is a natural person. As such, a corporate disclosure statement is not required. Federal Rules of Appellate Procedure, 26.1(a).

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Federal Rule of Appellate Procedure 34(a), counsel for Petitioner-Appellant respectfully request oral argument. We believe that oral argument will assist the Court in deciding this appeal, which involves a number of important legal issues. Oral Argument will enable the parties rto address these issues adequately and respond to the Court's questions and concerns.

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STATEMENT OF JURISDICTION

This is an action for Declaratory and Injunctive Relief wherein the U.S. District Court had original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1343 and 1344. This is an appeal from a final judgment of the United States District Court for the Eastern District of Pennsylvania, entered on October 24, 2008. Notice of Appeal was timely filed on October 30, 2008. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioner is unable to comply with L.A.R. 28.1(a)(1) as there were no hearings affording Petitioner the right to object and present his issues prior to the dismissal of his case.

1. Whether the U.S. District Court Judge abused his discretion when he stated that "Plaintiff would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of the most hotly contested presidential primary in living memory," since this statement indicates the Judge's bias in favor of Defendant and assumption of facts based on his own beliefs formed outside this case?

2. Whether, in the absence of legislation providing a mechanism to challenge the qualifications of the president-elect following the counting of the votes in Congress, Petitioner has standing to make such a challenge under the Tenth Amendment of the United States Constitution, which provides that "powers

not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states or to the people"?

3. Whether the District Court erred in dismissing Petitioner's case based on standing when the Supreme Court, in *Gregory v. Ashcroft,* 501 U.S. 452, 463 (1991) "clearly recognizes the authority of the people of the States to determine the qualifications of their most important government officials, and it is this authority that lies at the heart of our representative government"?

4. Whether the District Court erred in denying "standing" under 42 U.S.C. §1983 based on lack of state action, when in fact each State's action in placing an apparently ineligible candidates name on the ballot and certifying the electoral vote for such candidate constituted state actions which resulted in the infringement on Petitioner's fundamental right to cast an informed vote for an eligible candidate?

5. Whether under *Robinson v. Bowen, et al*, 2008 U.S. Dist. LEXIS 82306 (N.D. Ca. 2008) Petitioner is granted automatic standing since the electoral votes were counted on January 8, 2009 pursuant to 3 U.S.C. §15 and no objections were raised by any Senator or Congressman concerning Obama's qualifications?

6. Whether the President of the Senate's violation of 3 U.S.C. § 15, in failing to call for Objections from Congress, in the counting of the Electoral votes, constituted a *per se* infringement upon Petitioner's fundamental right to cast a meaningful vote?

7. Whether the President of the Senate's violation of 3 U.S.C. § 15, in failing to call for Objections from Congress during the counting of the Electoral votes constituted an abridgement of Petitioner's First Amendment right to the Freedom of Speech by denying Petitioner the opportunity to cast his objections through his Representatives to the counting of the electoral votes?

8. Whether the District Court "in taking the facts in Petitioner's Complaint to be true" abused its discretion in denying Petitioner standing based on the Court's finding Petitioner's injury-in-fact was too generalized because other democratic Americans suffered the same harm.

9. Whether the U.S. District Court erred in dismissing Petitioner's claims under Promissory Estoppel finding the DNC [Democratic National Committee] and Obama's promise to uphold the United States Constitution are simply statements of principle and intent in the political realm and are not enforceable promises?

STATEMENT OF RELATED CASES

This case has been before the U.S. Supreme Court however, no Opinions were rendered. See *Berg v. Obama, et al*, [Docket No. 08-570] _____ U.S. _____ (2009). To counsel's knowledge, there are no other related cases or proceedings that are before any other court or agency, state or federal.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the presumptive scope of the United States Constitution, Article III, Section 2 Standing issues

which pertain to questioning the qualifications and eligibility of a Presidential Candidate, pursuant to Article II, Section I, Clause 5 of the United States Constitution, to serve as President of the United States. On October 24, 2008, the District Court dismissed Petitioner's case by granting Defendants Motions for Summary Judgment pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1) and 12(b)(6). The Notice of Appeal is attached as **Appendix "A"** to Volume I and the U.S. District Court's Memorandum and Order is attached as **Appendix "B"** in Volume I.

Petitioner's case raises the issues of: (1) who has the right to question the qualifications of a Presidential candidate; (2) who is delegated the responsibility of ensuring the Presidential candidates are in fact qualified; and (3) who has standing in our Court systems to raise these issues with the appropriate Courts.

This case involves national security, extraordinary public significance and requires action urgently as Obama is due to be inaugurated on the 20th of January, 2009 and take the Office of President of the United States.

Obama's birth is reported as occurring at two (2) separate hospitals, Kapiolani Hospital and Queens Hospital. The *Rainbow Edition News Letter*, published by the Education Laboratory School, attached as **Appendix "C"**, produced in its November 2004 Edition, an article from an interview with Obama and his half-sister, Maya Soetoro, in which the publication reports that Obama was

born August 4, 1961 at Queens Medical Center in Honolulu, HI. Four years later, in a February 2008 interview with the Hawaiian newspaper *Star Bulletin*, attached as **Appendix "D"**, Maya Soetoro states that her half-brother, Obama, was born August 4, 1961, this time in Kapiolani Medical Center for Women & Children.

Through extensive investigation, Petitioner learned that Obama was born in Kenya. Obama's biological father was a Kenyan citizen and Obama's mother a U.S. citizen. Under the laws in effect between December 24, 1952 and November 14, 1986 (Obama was born in 1961), a child born outside of the United States to one citizen parent and one foreign national, could acquire "natural born" United States citizenship if the United States citizen parent had been physically present in the United States for ten (10) years prior to the child's birth, five (5) of those years being after age fourteen (14). Nationality Act of 1940, revised June 1952; *United States of America v. Cervantes-Nava*, 281 F.3d 501 (2002), *Drozd v. I.N.S.*, 155 F.3d 81, 85-88 (2d Cir.1998), *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). Obama's mother was only eighteen (18) when Obama was born in Kenya and therefore, did not meet the age and residency requirements for her child to have acquired "natural born" U.S. citizenship. Therefore, Obama is not considered a "natural born" United States citizen. The law that applies to a birth abroad is the law in effect at the time of birth, *Marquez-Marquez a/k/a Moreno v. Gonzales*, 455 F. 3d 548 (5th Cir. 2006), *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir.1990)

(holding that "the applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth").

Obama's Kenyan grandmother, Sarah Obama, has repeatedly stated Obama was born in Kenya and she was present, in the hospital, during his birth. Bishop Ron McRae, who oversees the Anabaptists Churches in North America, and Reverend Kweli Shuhubia, had the opportunity recently to interview Sarah Obama. Reverend Kweli Shuhubia went to the home of Sarah Obama located in Kogello, Kenya. Reverend Kweli Shuhubia called Bishop McRae from Ms. Obama's home and placed the call on speakerphone. Bishop McRae obtained permission from the parties to tape the interview. Because Ms. Obama only speaks Swahili, Reverend Kweli Shuhubia and another grandson of Ms. Obama's, translated the telephone interview. Bishop McRae asked Ms. Obama where Obama was born; Ms. Obama answered in Swahili and was very adamant that Obama was born in Kenya and she was present during his birth. A copy of Bishop Ron McRae's Affidavit is attached as **Appendix "E"**.

After the interview of Sarah Obama in October 2008, Reverend Shuhubia interviewed personnel at the hospital where Ms. Obama said Obama was born in Kenya. Thereafter, Reverend Shuhubia had meetings with the Provincial Civil Registrar. Reverend Shuhubia learned there were records of Ann Dunham giving

birth to Barack Hussein Obama, Jr. in Mombosa, Kenya on August 4, 1961. Reverend Shuhubia spoke directly with an Official, the Principal Registrar, who openly confirmed that the birthing records of Senator Barack H. Obama, Jr. and his mother were present; however, the file on Barack H. Obama, Jr. was classified. The Official explained Barack Hussein Obama, Jr.'s birth in Kenya is top secret. See the Affidavit of Reverend Shuhubia, attached as **Appendix "F"**.

Obama allowed the Daily Kos, Factcheck and his campaign website to post a Hawaiian Certification of Live Birth, purported to be Obama's on their websites. The image posted on dailykos.com, factcheck.org and fightthesmears.com has been deemed an altered and forged document according to document image specialists. Even if this document purported to be Obama's Certification of Live Birth was an accurate document, it does not prove "natural born" U.S. citizenship status. The Hawaii Department of Health issues a Certification of Live Birth to births that occurred abroad in foreign countries as well as birth's that occurred at home and not in a Hospital. Certifications of Live Birth are issued to those births as "naturalized" U.S. citizens as well as "natural born" U.S. citizens. A Certification of Live Birth is <u>not</u> sufficient evidence to prove you are in fact a "natural born" U.S. citizen.

Dr. Fukino, Director of the Hawaiian Department of Health released a press release stating she saw Obama's "vault" version birth certificate in a file. Dr.

Fukino does not claim Obama was born in Hawaii or the U.S. for that matter, she simply confirms Obama's "vault" version birth certificate exists. Once again, Obama has not released access to his "vault" version birth certificate, which shows doctors signatures, city, state and country of birth and of course would solve the issue of where Obama was in fact born.

In or about 1965, when Obama was approximately four (4) years old, his mother, Stanley Ann Dunham, after being divorced on March 5, 1964 from Barack H. Obama, married Lolo Soetoro, a citizen of Indonesia and moved to Indonesia with Obama. A minor child follows the naturalization and citizenship status of their custodial parent. A further issue is presented that Obama's Indonesian stepfather, Lolo Soetoro, either (1) signed a governmental acknowledgement legally "acknowledging" Obama as his son or (2) adopted Obama, either of which changed any citizenship status of Obama to a "natural citizen" of Indonesia.

Obama admits in his book, *Dreams from my Father*, that after his mother's marriage to Lolo Soetoro, Lolo Soetoro left Hawaii rather suddenly and he and his mother left shortly thereafter. Obama admits when he arrived in Indonesia, he had already been enrolled in a public school.

Obama was registered in a public school as an Indonesian citizen by the name of Barry Soetoro and his father was listed as Lolo Soetoro, M.A. Indonesia did not allow foreign students to attend their public schools in the 1960's and any

time a child was registered for a public school, their name and citizenship status was verified through the Indonesian Government. The school record indicates that Obama's name is "Barry Soetoro;" his nationality is "Indonesia;" and his religion as "Islam;" attached as **Appendix "G".** There was no other way for Obama to have attended school in Jakarta, Indonesia as Indonesia was under tight rule and was a Police State. These facts indicate that Obama is an Indonesian citizen, and therefore, he is not eligible to be President of the United States.

Under Indonesian law, when a male acknowledges a child as his son, it deems the son — in this case Obama — to be an Indonesian State citizen. Constitution of Republic of Indonesia, Law No. 62 of 1958 Law No. 12 concerning Citizenship of Republic of Indonesia; Law No. 9 concerning Immigration Affairs and Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesie).

Furthermore, under the Indonesian adoption law, once adopted by an Indonesian citizen, the adoption severs the child's relationship to the birth parents, and the adopted child is given the same status as a natural child. Indonesian Constitution, Article 2.

The Indonesian citizenship law was designed to prevent apatride (stateless) or bipatride (dual citizenship). Indonesian regulations in the 1960's recognized neither apatride nor bipatride citizenship. Since Indonesia did not allow dual

citizenship, neither did the United States, and since Obama was a "natural" citizen of Indonesia, the United States would not step in or interfere with the laws of Indonesia. Hague Convention of 1930.

As a result of Obama's Indonesia "natural" citizenship status, Obama would never regain U.S. "natural born" status, if he in fact he ever held such. Obama could have **only** become "naturalized" if the proper paperwork were filed with the U.S. State Department, in which case, Obama would have received a Certification of Citizenship, after U.S. Immigration.

Petitioner is informed, believes and thereon alleges Obama was never naturalized in the United States after his return. Obama was ten (10) years old when he returned to Hawaii to live with his grandparents. Obama's mother did not return with him. If citizenship of Obama had been applied for in 1971, Obama would have a Certification of Citizenship. If Obama returned in 1971 to Hawaii without going through U.S. Immigration, today he would be an illegal alien – and obviously not able to serve as President, but also his term as a United States Senator from Illinois for the past three (3) years was illegal in the absence of a Certification of Citizenship.

Obama's mother, Stanley Ann Dunham, a/k/a Soetoro divorced Lolo Soetoro in 1980 in Honolulu, Hawaii. In the divorce papers, which are attached as **Appendix "H"**, it clearly states the couple had two (2) children. Stanley Ann

Dunham a/k/a Soetoro and Lolo Soetoro, M.A. only birthed one child, Maya, thus the second child being Obama.

Obama traveled to Indonesia, Pakistan and Southern India in 1981. The relations between Pakistan and India were extremely tense and Pakistan was in turmoil and under martial law. The country was filled with Afghan refugees; and Pakistan's Islamist-leaning Interservices Intelligence Agency (ISI) had begun to provide arms to the Afghan mujahideen and to assist the process of recruiting radicalized Muslim men – jihadists - from around the world to fight against the Soviet Union. Pakistan was so dangerous that it was on the State Department's travel ban list for US Citizens. According to the State Department records, Non-Muslim visitors were not welcome unless sponsored by their embassy for official business. A Muslim citizen of Indonesia traveling on an Indonesian passport would have success entering Indonesia, Pakistan and India. Therefore, it is believed Obama traveled on his Indonesian passport entering the Countries. Indonesian passports require renewal every five (5) years. At the time of Obama's travels to Indonesia, Pakistan and India, Obama was twenty (20) years old. If Obama would have been a U.S. citizen, 8 USC §1481(a)(2) provides loss of nationality by native born citizens upon "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state...after having attained the age of eighteen years," in violation of 8 U.S.C. §1401(a)(1).

As a result of the above, Petitioner filed suit August 21, 2008 for Declaratory and Injunctive Relief. At the same time, Petitioner filed a Motion for a Temporary Restraining Order [TRO] prohibiting the Democratic National Committee [DNC] from nominating Obama as the Democratic Presidential Nominee and prohibiting Obama from further campaigning for Office of the President of the United States, which was denied on August 22, 2008. Petitioner filed a Motion for Expedited Discovery, Extensive Discovery and Appointment of a Special Master on September 9, 2008. Although unopposed, the District Court failed to rule upon or set a hearing on the matter. Petitioner served upon Defendants Request for Admissions, attached as **Appendix "I"**, and Request for Production of Documents, **which were not objected to and/or answered by Defendants**. On September 24, 2008, Defendants filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). At request of the Court, Petitioner filed his Opposition in response to Defendants Motion to Dismiss on September 29, 2008. On October 6, 2008, Defendants filed a Motion for a Protective Order Staying all Discovery. Petitioner filed his response in Opposition to Defendants Motion for Protective Order on October 9, 2008. Defendants Motion for Protective Order was not ruled upon by the District Court. On October 21, 2008, Petitioner filed a Motion for Summary Judgment as there were no undisputed material facts remaining as Obama failed to object to and/or

answer Petitioner's request for Admissions and therefore they were deemed admitted. Petitioner filed a Motion for an expedited ruling on his Motion for Summary Judgment. The District Court failed to rule upon Petitioner's Summary Judgment Motion and instead granted Defendants Motions to Dismiss on October 24, 2008. Petitioner immediately appealed.

The citizenship status of Obama is a critical issue; an issue which needs to be addressed and confirmed prior to Obama's taking the Inaugural Oath to uphold the Constitution of the United States. If Obama's citizenship status is not ascertained prior to January 20, 2009, and Obama is sworn in as President and later found to be ineligible to serve as the President of the United States due to his non-natural born citizen status, the consequences could provide long-term damage to America. This would set a precedent for future variances from our United States Constitution without due process of law, and ultimately, all citizens of the United States would no longer enjoy the same protections secured by the United States Constitution.

Therefore, it is incumbent on this Honorable Court to allow the ascertainment of truth concerning Obama's constitutional qualifications to serve as President of the United States.

STANDARD OF REVIEW

This Court's review is plenary, based on the issues presented in this appeal which include the District Court's abuse of discretion and the District Court's error in formulating and applying legal precepts. In addition, this Court's review of a dismissal for lack of subject matter jurisdiction is plenary. *See* Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). Likewise, this Court exercises plenary review over whether a District Court has properly granted dismissal of Petitioner's case by granting Defendants Motions to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6). Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006). In reviewing Petitioner's Complaint on Appeal, this Court accepts as true all of the allegations in the Complaint and all reasonable inferences that can be drawn from them and view them in the light most favorable to the nonmoving party. Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir.1997), Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006). This Court reviews a dismissal of claims for failure to comply with Federal Rule of Civil Procedure 8 for abuse of discretion. See In re Westinghouse Sec. Litig., 90 F.3d 696, 702 (3d Cir. 1996).

SUMMARY OF ARGUMENT

The United States Constitution, Article II, Section I, states, "No person except a natural born citizen...shall be eligible to the office of President…." In

view of abundant evidence indicating there are substantial questions as to Obama's citizenship status and his eligibility to serve as President of the United Sates, pursuant to the latter section, Petitioner, a United States Citizen, has a right to question such individual's qualifications. Petitioner's rights to challenge falls under his umbrella of rights guaranteed by the United States Constitution, including but not limited to his fundamental right to cast a meaningful vote and his First Amendment right to Freedom of Speech. Since Petitioner has been deprived of his constitutionally guaranteed rights which includes State Action, he is granted standing pursuant 42 U.S.C. §1983. Further, Petitioner has standing under the Tenth Amendment of the United States Constitution.

ARGUMENT

A. How Judge Surrick Decided the Issues:

The District Court based its decision on the flawed premise that Petitioner lacks standing because his injury, shared by "other Democratic Americans", is not particularized.

The District Court reviewed the Defendants, the DNC, Obama and the FEC's Motions to Dismiss and issued its Memorandum and Order granting the Defendants Motions to Dismiss based on standing. The Court found, "[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" quoting *Crist v.*

*Comm'n on Presidential Debates*t, 262 F.3d at 193, 194 (2d Cir. 2001); *Jones v. Bush*, 122 F.Supp. 2d 713 (N.D. Tex. 2000) at 717 (holding that harm experienced by "Petitioner[s] *and all other American citizens*" was too "undifferentiated and general nature" to confer standing on voters). "The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirement of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing. See *Hollander v. McCain*, 2008 U.S. Dist. LEXIS 56729 at *12 (noting that such harm "would adversely affect only the generalized interest of all citizens in the constitutional governance")." In taking the facts asserted in the Complaint as true for purposes of determining Defendants Motion to Dismiss, specifically, Petitioner's contention that Defendant is not a "natural born" American citizen, it is unjust to deny Petitioner standing just because other voters have suffered the same harm.

Petitioner has suffered Injury-in-Fact. In this case, the particular harm suffered by Petitioner is the following: (1) He was denied information concerning the qualifications of Obama, thereby infringing on his fundamental right to cast an informed, meaningful vote for a Democratic candidate; (2) Petitioner's fundamental First Amendment right to Freedom of Speech has been violated because he was denied the opportunity to object through his representatives to the

counting of votes when the President of the Senate failed to call for objections upon counting the electoral votes; (3) Petitioner was harmed by each state's action in placing Defendant on the ballot when there were substantial questions concerning his citizenship status and certifying the electoral votes; and (4) Petitioner's reputation has been harmed by constant accusations that he is a racist when Petitioner's quest for the truth is not, by any stretch of the imagination, related to race, and in fact, Petitioner is a life-long member of the NAACP; and (5) Petitioner has spent a huge amounts of money and time in trying to ascertain an uncomplicated truth, and Defendant has brazenly continued denying Petitioner this information knowing full well the expense of this litigation.

The District Court Judge abused his discretion in granting Defendants' Motion to Dismiss based on his personal belief that Obama underwent "excessive vetting."

The District Court Judge abused his discretion when he used his own personal beliefs basing the assumption of facts outside this case in judging the disputed facts, as follows:

> "Plaintiff would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of the most hotly contested presidential primary in living memory." District Court Opinion, Footnote 9.

That the candidate "underwent excessive vetting" is obviously in dispute.

Perhaps the District Court Judge should have disqualified himself under 28 U.S.C. § 455, which provide as follows:

> Disqualification of justice, judge, or magistrate [magistrate judge]
>
> (a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning party, or personal knowledge of disputed evidence facts concerning the proceeding.

Further, the District Court's ruling failed to address the issues regarding the Request for Admissions served upon Defendants, which were deemed Admitted and Petitioner's Summary Judgment Motion. **A copy of Petitioner's Request for Admissions is attached as Appendix "I".**

B. <u>Petitioner Has Standing Under the Tenth Amendment</u>:

Petition has standing under the Tenth Amendment because the power to determine the qualifications of the President-elect is left to the states and the people after the Congressmen and Senators failed to object to the counting of the electoral votes on January 8, 2009. The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

3 U.S.C. §15 provides a method for challenges to any Presidential candidate to be presented. This statute provides the process for counting electoral votes in Congress and a mechanism for objections then to be registered and resolved:

> "Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives.… Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any…"

If only one [1] Member of the House and one [1] Member of the Senate object to the Electoral Vote in any/every state, the counting of the votes would stop and the Joint Session would cease until the House and Senate meet, discuss and vote on each States Electoral Votes. When the electoral votes were counted in Congress on January 8, 2009, the President of the Senate failed to call for objections at the end of the counting of each state's electoral votes and Petitioner has no knowledge of any objections that were submitted by any Congressman and Senator. Since the legislative mechanism for challenging the qualifications of the President has expired, the power to make such a challenge is "reserved to the states respectively, or to the people" pursuant to the Tenth Amendment.

That the power to challenge the qualifications of the President-elect is left to the states or to the people is consistent with the decision in *Robinson v. Bowen,* 2008 U.S. Dist. LEXIS 82306 (N.D. Ca. 2008), where the District Court stated at *7:

> "It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review - if any - should occur only after the electoral and Congressional processes have run their course. *Texas v. United States*, 523 U.S. 296, 300-02, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)." *Robinson v. Bowen*, at *7.

Since the "electoral and Congressional processes have run their course" this Court's review of Petitioner's challenges to the President-elect's qualifications is required.

C. Petitioner has Standing to Challenge the Qualifications of the President-Elect under *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991):

Petitioner has standing to challenge the qualifications of the President-elect under *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), which recognizes the authority of the people of the States under the Tenth Amendment to determine the qualifications of their "most important government officials:" In the face of challenges under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621-634 and the Equal Protection Clause, U.S. Constitution, Amendment XIV, the Court in *Gregory v. Aschcroft* upheld a state constitutional provision

which provided that all judges other than municipal judges must retire at the age of 70 years. The Court compared the situation presented in *Gregory* to a group of Supreme Court cases discussing the degree to which the Equal Protection Clause of the Fourteenth Amendment restricted a state from prohibiting aliens from gaining public employment. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In those cases, the Court held that while the Equal Protection Clause posed a check on state power to exclude aliens from service, the standard of reviewing exclusions would be lowered in "recognition of the authority of the people of the States to determine the qualifications of their most important government officials":

> "In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See *Bernal* v. *Fainter*, 467 U.S. 216, 220, 81 L. Ed. 2d 175, 104 S. Ct. 2312 (1984). See also *Nyquist* v. *Mauclet*, 432 U.S. 1, 11, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977); *Foley* v. *Connelie*, 435 U.S. 291, 295-296, 55 L. Ed. 2d 287, 98 S. Ct. 1067 [*463] (1978); *Ambach* v. *Norwick*, 441 U.S. 68, 73-74, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979); *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 439-441, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982). "We have...lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.'" *Bernal*, 467 U.S. at 221 (citations omitted)..."

> "**These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at 'the heart of representative government.'" Ibid. It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."** U.S. Const., Art. IV, § 4. See *Sugarman, supra*, at 648 (citing the Guarantee Clause and the

[***426] Tenth Amendment). See also Merritt, 88 Colum. L. Rev., at 50-55." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) **[emphasis added].**

Under this standard, the power to determine the qualifications of the President-elect lies with the people of the States, including the Petitioner. This precept lies at the heart of our representative government.

D. Petitioner has Raised Issues that are of Political Interest; however they are strictly a Question of Law and do not fall Under the Political Question Doctrine:

Political questions include such areas as the conduct of foreign policy, the ratification of constitutional amendments, and the organization of each state's government as defined in the Constitution, none of which is the basis of Petitioner's suit. The Political Question Doctrine only applies in cases where a specific interpret of power is granted by the Constitution to branches of Government other than the Judiciary. The Courts continued to evidence the view that only questions textually committed to another branch are political questions. See *Baker v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969) and *Nixon v.United States*, 506 U.S. 224 (1993).

Petitioner raised questions as to Obama's citizenship status and qualifications to serve as President of the United States pursuant to the United States Constitution, which are questions of law, even though they are of political interest. The issues concern the inherent rights secured to Petitioner and all

citizens of the United States by the United States Constitution and are therefore, clear legal questions of law.

Article II, Section I, Clause 5 of the United States Constitutions dictates the qualifications of the President of the United States. The Constitution clearly states our President must be a "natural born" citizen. Although the Constitution dictates the qualifications of our President, the Constitution does not confer the responsibility to ensure this portion of our U.S. Constitution is upheld to any branch of Government, thus, it is not a political question; it is a question of law. *Baker v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969), *Nixon v. United States*, 506 U.S. 224 (1993).

The Court in *Powell v. McCormack*, 395 U.S. 486 (1969) at P. 517 stated:

> "In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" Quoting *Baker v. Carr,* 369 U.S. 186 supra, at 198.

Petitioner's litigation is justiciable because the claims presented and the relief sought, which is Ordering Obama to prove he is constitutionally qualified to serve as President of the United States by turning over his "vault" version birth Certificate; turning over certified Court documents showing his name was legally changed from Barry Soetoro to Barack Hussein Obama, Jr.; and provide satisfactory proof he is in fact a "natural born" U.S. Citizen and not an Indonesian Citizen, all of which are within the Court's power. The Court can mold the right

asserted by Petitioner. The relief Petitioner is seeking is susceptible of judicial resolutions since regardless of the appropriateness of a coercive remedy, declaratory relief is independently available. *Powell v. McCormack*, 395 U.S. 486 (1969), *Baker v. Carr,* 369 U.S. 186, *Nixon v. United States*, 506 U.S. 224 (1993).

E. The District Court Erred in denying Petitioner Standing under 42 U.S.C. §1983 Based on Lack of State Action, when in fact each State's Action in Placing an Apparently Ineligible Candidate's Name on the Ballot and Certifying the Electoral Vote for such Candidate Constituted State Action which resulted in the Infringement on Petitioner's Fundamental Right to Cast an Informed Vote for an Eligible Candidate.

The District Court erred in denying Petitioner Standing under 42 U.S.C. §1983 based on lack of state action, when, in fact, each state effectuated Defendant's scheme by placing Defendant on the ballot without ascertaining his citizenship status and certifying the electoral vote in each respective state. 42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

The Court in *Donohue v. Board of Elections of State of New York*, 435 F. Supp. 957, 966-68 (S.D.N.Y. 1976), affirmed, 559 F.2d 1202 (2d Cir. 1977), cert. Denied, 434 U.S. 861 (1977), recognized its jurisdiction and authority to provide an equitable remedy for electoral irregularities under 42 U.S.C.S. § 1983, provided

that the plaintiffs met their burden of proof. The *Donohue* Court established a four-factor test for applying § 1983 to electoral disputes. First, one must "plead and prove specific acts of misconduct, including time, place and circumstances of the alleged deprivation of the right to vote." Second, one must show intentional or purposeful discrimination. The court clarified that intentional or purposeful discrimination included not only traditional race or gender discrimination, but also intentional conduct designed to deprive any qualified voter of his or her right to vote. Third, one must prove that the defendant acted under color of state law. It is important to note that the court included the actions of "private persons acting jointly with state officials within the category of state actions." Finally, one must prove that the "fraud or other unlawful behavior changed the outcome of the election." *Donohue v. Board of Elections of State of New York*, 435 F. Supp. 957, 966-68 (S.D.N.Y. 1976), affirmed, 559 F.2d 1202 (2d Cir. 1977), cert. Denied, 434 U.S. 861 (1977). Petitioner will show that these four factors have been met, conferring Standing upon Petitioner to seek redress for the infringement upon his fundamental right to vote.

Petitioner has plead and proven specific acts of misconduct by Obama and the DNC, namely, the failure to provide proof of Obama's citizenship and the posting on several websites of a document intended to mislead the public into believing that Obama was presenting genuine proof of his "natural born"

citizenship status. This deception was intended to deprive citizens of their right to make an informed voting decisions, thereby debasing and diluting Petitioner's legitimate vote. Defendants have acted jointly with state officials to commit this deception by allowing each state to put Obama's name on the ballot and by allowing the certification of each state's electoral votes without providing proof of Obama's citizenship. Further, the statement made on October 31, 2008 by the Director of Hawaii's Department of Health, Dr. Chiyome Fukino, that she has "personally seen and verified that the Hawaii State Department of Health has Senator Obama's original birth certificate on record in accordance with state policies and procedures" appears to be a deliberate attempt by a state official to misrepresent proof of Obama's birth in Hawaii when such statement did not confirm this fact.

Finally, Defendants' fraudulent misrepresentation and other unlawful behavior, including but not limited to the violation of 18 U.S.C. 1028(a),[1] changed

[1] It appears that Obama has violated Section 1028 of Title 18 of the United States Code, which prohibits the knowing production, transfer, possession, or use of a "false identification document." 18 U.S.C. 1028(a). The term "false identification document" means a "document of a type intended or commonly accepted for the purposes of identification of individuals," such as a birth certificate, but is "not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit." 18 U.S.C. 1028(d)(4). The term "transfer" includes making either false identification documents or the software or data used to make them available online. 18 U.S.C. 1028(d)(10). Obama's website "fightthesmears.com" states:

"Smears claiming Barack Obama doesn't have a birth certificate aren't actually about that piece of paper — they're about manipulating people into thinking Barack is not an American citizen. The truth is, Barack Obama was born in the State of Hawaii in 1961, a native citizen of the

the outcome of the election. Millions of United States citizens voted for Obama and he won based on his misrepresentations. Since Petitioner satisfies the *Donohue* test, he has Standing under 42 U.S.C. §1983 and is entitled to redress pursuant to this section. Ordering a new Presidential election would not be beyond the equity jurisdiction of this Court. In *Donohue v. Board of Elections of State of New York*, the Court stated:

> "[t]he point, however, is not that ordering a new Presidential election in New York State is beyond the equity jurisdiction of the federal courts. Protecting the integrity of elections particularly Presidential contests is essential to a free and democratic society. It is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by fraudulent registration or voting, ballot-stuffing or other illegal means. Indeed, entirely foreclosing injunctive relief in the federal courts would invite attempts to influence national elections by illegal means, particularly in those states where no statutory procedures are available for contesting general elections. Finally, federal courts in the past have not hesitated to take jurisdiction over constitutional challenges to the validity of local elections and, where necessary, order new elections. The fact that a national election might require judicial intervention, concomitantly implicating the interests of the entire nation, if anything, militates in favor of interpreting the equity jurisdiction of the federal courts to include challenges to Presidential elections." *Donahue*, at pp. 967-968.

The District Court clearly erred in dismissing Petitioner's claims under 42 U.S.C. §1983.

United States of America. Next time someone talks about Barack's birth certificate, make sure they see this page."

The website then presents "**Barack Obama's Official Birth Certificate"**. This so-called "Official Birth Certificate" is a "false identification document." It is dated 11/01 at the bottom left hand side and the certification number has been blacked out ("altered").

F. Petitioner has Standing Because was deprived his Fundamental Right to Vote and his Right to Free Speech when the President of the Senate Failed to Call for Objections at the End of the Counting of the Electoral Votes of Each State

When the President of the Senate failed to call for objections during the counting of the electoral votes from each state, the electoral process was corrupted and Petitioner's fundamental right to vote was compromised. 3 U.S.C. §15 provides

> "Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any…"

This section is vital in our democratic electoral process because it affords a final opportunity for our Congressmen and Senators to object to any irregularities in the election process. When the President of the Senate fails to call for objections the democratic election process was corrupted in effect diluting Petitioner's legitimate vote.

Further, Petitioner's fundamental right to Freedom of Speech under the First Amendment of the United States Constitution was infringed upon when he was denied the opportunity to express his objection through his elected Representatives. The deprivation of constitutional rights, which Petitioner has suffered, constitutes a particularized injury which affords him Standing in this Court.

G. The District Court Violated Petitioner's Fundamental Right to Due Process by Depriving him of his Right to be heard and Erred in Dismissing the Action for Lack of Jurisdiction

The district court erred in dismissing the action on grounds that it was not within the jurisdiction of the Court, as it directly involved the construction and application of the United States Constitution, and such an error cannot be deemed harmless beyond a reasonable doubt, as the outcome of the case would likely have been different save for the erroneous dismissal. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Swafford v. Templeton*, 185 U.S. 487, 491 (1902).

Further, the District Court erred, which was extremely prejudicial to Petitioner, by making evidentiary findings claiming Obama had been properly vetted, which assumed facts not in evidence, without a hearing and failing to allow Petitioner the opportunity to respond and/or be heard. Petitioner's case was based on the failure of Defendants to properly vet Obama and the failure of Obama to prove he was constitutionally qualified to run for and/or serve as President of the United States. Defendants did not submit any proof of Obama's constitutional eligibility nor did they claim Obama was born in Hawaii or the United States. Defendants merely claimed Petitioner's allegations were patently false.

Moreover, on September 09, 2008 Petitioner filed a Motion for Expedited Discovery, Extensive Discovery, Depositions and the Appointment of a Special Master. Defendants failed to respond to Petitioner's Motion, thus leaving it

unopposed. Petitioner was not afforded the opportunity to be heard on his Motion or the right to litigate his Motion; instead the District Court erred and abused its discretion by ignoring Petitioner's Motion and failing to allow Petitioner to be heard. This happened a second time when Petitioner filed a Motion for Summary Judgment on or about October 20, 2008, based on the Request for Admissions served upon Defendants and Defendants failure to respond, thus deeming the Admissions, Admitted and leaving absolutely no undisputed facts.

The United States Supreme Court has held the basic Constitutional requirement of due process of law is the right to be heard. *See* LaChance v. Erickson, 522 U.S. 262, 266, 118 S.Ct 753, 756, 139 L. 2d 695, 700 (1998), Los Angeles v. David, 538 U.S. 715, 716-717, 123 S.Ct. 1895, 1896, 155 L.2d 946, 949 (2003), U.S. v. Board of School Commissioners, 128 F.4d 507, 512 (7th Cir. 1997).

The Due Process Clause is essentially a guarantee of basic fairness. Fairness can, in various cases, have many components: notice, an opportunity to be heard at a meaningful time in a meaningful way, a decision supported by substantial evidence, etc. The essence of procedural due process is that the parties be given notice and opportunity for a hearing. Twining v. New Jersey, 211 U.S. 78, 110-11, 29 S.Ct. 14, 24, 53 L.Ed. 97 (1908). See also Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 17 L.Ed. 531 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.") Both

the right to be heard from and the right to be told why are integral elements of this notion of due process. As noted by Justice Frankfurter, [t]he validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72, 71 S.Ct. 624, 649, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring).

The District Court erred and abused its discretion by refusing Petitioner his fundamental right to be heard on the issues.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court to reverse the decision rendered by the United States District Court for the Eastern District of Pennsylvania and hear the merits of the case.

Dated: January 20, 2009

Respectfully submitted,

s/ Philip J. Berg

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on the Brief of Appellant was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in 1983, and is presently a member in good standing at the Bar of said court.

Dated: January 20, 2009

s/ Philip J. Berg
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IDENTICAL PDF AND HARD COPY CERTIFICATE

The undersigned hereby certifies that the PDF file and hard copies of this brief are identical.

Dated: January 20, 2009

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VIRUS SCAN CERTIFICATE

This e-mail and the attached brief have been automatically scanned during preparation and upon sending by the following virus detection programs: Norton Anti-Virus software program, and no viruses were detected.

Dated: January20, 2009

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,778 words excluding the parts of the brief excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Office Professional (2000) in font 14, Times New Roman.

Dated: January 20, 2009

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CERTIFICATE OF SERVICE

I, Philip J. Berg, Esquire, hereby certify that Petitioner's Appellant Brief, Appendix Volume I and Appendix Volume II were served upon Defendants via electronic filing on the ECF System, this 20 day of January 2009 upon the following:

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3rd Circuit Court of Appeals Case No. 08-4340

Berg v. Obama, et al

On Appeal from the United States District Court,
Eastern District of Pennsylvania
Case #08-04083

APPENDIX

Volume I

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APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. BERG, ESQUIRE,	:
	:
Plaintiff	:
vs.	:CIVIL ACTION NO: 08-cv- 4083
	:
BARACK HUSSEIN OBAMA, et al ,	:
	:
Defendants	:

NOTICE OF APPEAL TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiff, Philip J. Berg, Esquire [hereinafter "Plaintiff"], appeals to the United States Court Of Appeals from the final Order of the United States District Court, Eastern District of Pennsylvania, Honorable R. Barclay Surrick entered in this case on October 24, 2008

Judge R. Barclay Surrick issued an Order on Friday, October 24, 2008 dismissing Plaintiff's complaint in its entirety for lack of standing.

The parties to the Order appealed from and the names and addresses of their respective attorney's are as follows:

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APPENDIX “B”

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. BERG,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 08-4083
BARACK OBAMA, et al.	:	

SURRICK, J. **OCTOBER 24, 2008**

MEMORANDUM & ORDER

Presently before the Court are the Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) and the Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24). For the following reasons, the Defendants' Motions to Dismiss will be granted.

I. BACKGROUND

A. Procedural History

Philip J. Berg (hereinafter "Plaintiff") is an attorney who is representing himself in this matter. On August 21, 2008, just prior to the Democratic National Convention, Plaintiff filed a Complaint for Declaratory and Injunctive Relief (Doc. No. 1) and a Motion For Temporary Restraining Order and for Expedited Discovery (Doc. No. 2 "TRO") against Barack Obama ("Obama"), the Democratic National Committee ("DNC"), the Federal Election Commission ("FEC"), and Does 1-50 Inclusive. The Complaint and request for TRO alleged that Obama is not eligible to run for the Office of President of the United States because he is not a "natural born citizen" as required by Article II, Section 1, Clause 4 of the United States

Constitution (the "Natural Born Citizen Clause"). Plaintiff sought a TRO prohibiting Obama from running for President and enjoining the DNC from selecting Obama as the nominee. Plaintiff also sought declaratory and injunctive relief in the form of a declaration that Obama is ineligible to run for the office of President under the United States Constitution and a permanent injunction enjoining Obama from running for President and enjoining the DNC from making Obama the Democratic presidential nominee.

On August 22, 2008, a hearing was held on Plaintiff's Motion for Temporary Restraining Order.[1] At the conclusion of the hearing an Order was entered denying the Motion. (Doc. No. 4.)

On September 9, 2008, service of the summons and Complaint was made on Defendants Barack Obama and the DNC. (Doc. No. 7.) On September 12, 2008, service was made on Defendant FEC. (Doc. No. 9.) On September 24, 2008, a Motion to Dismiss was filed by Barack Obama and the DNC. (Doc. No. 12.) Plaintiff's Response in Opposition to the Motion to Dismiss was filed on September 29, 2008. (Doc. No. 13.) On October 6, 2008, Plaintiff filed a Motion for Leave to File a First Amended Complaint. (Doc. No. 14.) Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") was attached to the Motion. (Doc. No. 14-2.)[2] In addition to Defendants Barack Obama, the DNC,

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[1] Defendants were not represented at the hearing. Plaintiff advised the Court that he had faxed a copy of the Complaint and Motion for Temporary Restraining Order as well as notice of the hearing to Defendants, but that he could not confirm that they had been received by Defendants. (Hr'g. Exs. P-1, P-2, & P-9.)

[2] Federal Rule of Civil Procedure 15(a) provides that "a party may amend its pleading once as a matter of course . . . before being served with a responsive pleading." A motion to dismiss is not a responsive pleading. The motion seeking leave to amend was unnecessary. The Amended Complaint is deemed filed.

and the FEC, Plaintiff's Amended Complaint includes the following Defendants: the Secretary of the Commonwealth of Pennsylvania Department of State, Pedro A. Cortés; Secretary of the Commonwealth in his Official Capacity; Diane Feinstein, Chairman of the U.S. Senate Commission on Rules and Administration in her Official Capacity; U.S. Senate Commission on Rules and Administration; and Does 1-50 Inclusive.[3] On October 20, 2008, a Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint was filed. (Doc. No. 20.) On October 21, 2008 Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1) was filed. (Doc. No. 24.)

The Amended Complaint adds claims that were not included in the original Complaint. In addition to the claim that Obama is not a "natural born citizen" and is therefore not eligible to be President, Plaintiff alleges that the Defendants have deprived him of his rights in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986 (Counts Two, Three, & Four). The Amended Complaint also adds a Claim for Promissory Estoppel (Count Seven) and includes claims for violation of the Federal Election Campaign Act ("Campaign Act"), 2 U.S.C. § 437 (Count Five), violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (Count Six), and a Claim of Loss of Nationality under 8 U.S.C. § 1481(b) (Count Eight).[4]

B. Factual Background

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[3] As of this date, there is no indication in this record that any of these newly added Defendants have been served.

[4] The claims in Counts Five, Six and Eight were not included as claims in Plaintiff's original Complaint; however, they did appear in Plaintiff's brief in opposition to the Motion to Dismiss (Doc. No. 13) as arguments in support of Plaintiff's standing to bring this lawsuit.

The Amended Complaint alleges that Plaintiff is a life-long member of the Democratic Party (Doc. No. 14-2 ¶ 3) who fears that Defendant DNC's nomination of Defendant Obama as the Democratic Party's presidential nominee for the 2008 election will result in irreparable harm to Plaintiff and other "Democratic Americans." (*Id.* ¶ 7.) Obama cannot be a presidential nominee, Plaintiff contends, because Obama is not a "natural born citizen" of the United States and is therefore barred from holding the office of President by the Natural Born Citizen Clause.[5] (*Id.* ¶ 36.)

Plaintiff claims that if the evidence shows that Obama is not a natural born citizen, his nomination (and presumably his election to the Presidency if he wins) will be null and void. (*Id.* ¶ 7.) Plaintiff asserts that Defendants' collective knowledge of this fact, or their failure to assist Plaintiff in obtaining information from Obama and the DNC, has deprived Plaintiff of "liberty, property, due process of law and equal protections of the laws," (*id.* ¶ 89), and has caused "significant disenfranchisement of the Democratic Party" generally (*id.* ¶ 173).

Various accounts, details, and ambiguities from Obama's childhood form the basis of Plaintiff's allegation that Obama is not a natural born citizen of the United States. To support his contention, Plaintiff cites sources as varied as the Rainbow Edition News Letter, (*id.* ¶ 39), and the television news tabloid *Inside Edition* (*id.* ¶ 45). These sources and others lead Plaintiff to conclude that Obama is either a citizen of his father's native Kenya, by birth there or through operation of U.S. law; or that Obama became a citizen of Indonesia by relinquishing his prior

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[5] The Natural Born Citizen Clause reads: "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ." U.S. Const. art. II, § 1, cl. 5.

citizenship (American or Kenyan) when he moved there with his mother in 1967. Either way, in Plaintiff's opinion, Obama does not have the requisite qualifications for the Presidency that the Natural Born Citizen Clause mandates. The Amended Complaint alleges that Obama has actively covered up this information and that the other named Defendants are complicit in Obama's cover-up.

Plaintiff seeks the following relief from the Court:

1. An order compelling Defendants to turn over: (a) a certified copy of Obama's "vault" (original long version) birth certificate; (b) certified copies of all reissued and sealed birth certificates of Obama in the names referred to in the caption of this lawsuit; (c) a certified copy of Obama's Certification of Citizenship; (d) a certified copy of Obama's Oath of Allegiance taken upon age of majority; (e) certified copies of Obama's admission forms for Occidental College, Columbia University and Harvard Law School; and (f) certified copies of any court orders or legal documents changing Obama's name from Barry Soetoro to Barack Hussein Obama;

2. A declaration that Obama is not a natural-born citizen or naturalized citizen of the United States;

3. A declaration that Obama is ineligible to run for the President under the United States Constitution, Article II, Section 1;

4. A preliminary and permanent injunction enjoining Obama from any further campaigning and from running for President;

5. An order compelling the FEC, Feinstein and the U.S. Senate Commission on Rules and Administration to immediately open and conduct an investigation into the fraudulent tactics of Obama and immediately open and conduct an investigation into the citizenship status of Obama; and

6. A preliminary and permanent injunction enjoining the DNC, the Pennsylvania Department of State, Pedro A. Cortés, Pennsylvania Secretary of the Commonwealth, and the Bureau of Commissions, Elections and Legislation from placing Obama's name on the presidential election ballot.

II. LEGAL STANDARD

A. Rule 12(b)(1) – Lack of Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(1), a court must grant a motion to dismiss if it lacks subject matter jurisdiction over the case. Fed. R. Civ. P. 12(b)(1). The party asserting that jurisdiction is proper bears the burden of showing that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993). A challenge to jurisdiction may be either factual or facial. *See CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008) (*citing* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, at 147-55 (3d ed. 2004)). Where the challenge is facial, as Obama and the DNC's is here, courts must take the well-pleaded facts of the complaint as true and must draw all inferences in a manner most favorable to the plaintiff, as with ruling on a Rule 12(b)(6) motion to dismiss. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

B. Rule 12(b)(6) – Failure to State a Claim

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings Ltd*., 292 F.3d 361, 374 n.7 (3d Cir. 2002). However, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted).[6]

[6] Obama and the DNC are the only Defendants that have moved this Court to dismiss under Rule 12(b)(6). (*See* Doc. No. 20.) However, we evaluate Plaintiff's claims against all Defendants. The Court "may on its own initiative dismiss the complaint for failure to state a

Thus, both the 12(b)(1) and the 12(b)(6) challenges to the Amended Complaint raise strictly legal questions. For purposes of this opinion, we take as true the well-pleaded facts of the Amended Complaint.[7]

III. LEGAL ANALYSIS

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claim upon which relief can be granted, pursuant to [Rule] 12(b)(6), where the inadequacy of the complaint is apparent as a matter of law." *Coggins v. Carpenter*, 468 F. Supp. 270, 279 (E.D. Pa. 1979) (*citing* 5 Wright and Miller, Federal Practice and Procedure § 1357). This practice "promotes the prompt and efficient disposition of cases and protects valuable judicial resources by expediting the dismissal of cases that lack 'a shred of a valid claim.'" *Pa. State Troopers Ass'n v. Pennsylvania*, No. 06-1079, 2007 WL 853958, at *9 (M.D. Pa. Mar. 20, 2007), *modified*, 2007 WL 1276914 (M.D. Pa. May 1, 2007) (*citing Baker v. U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990)). The court must accept all of a plaintiff's allegations as true, as we have done here. *See Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980). In addition, the court must give the plaintiff notice and an opportunity to be heard on the legal viability of his complaint. *See Dougherty v. Harper's Magazine Co.*, 537 F.2d 758, 761 (3d Cir. 1976); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006); *see also Bethea v. Nation of Islam*, 248 Fed. Appx. 331, 333 (3d Cir. 2007) ("However, although disfavored, a . . . dismissal may stand even if the plaintiff is not provided notice and an opportunity to respond where it is clear that the plaintiff cannot prevail and that any amendment would be futile."). This notice and opportunity to be heard may be provided by the act of a single defendant who raises a defense applicable to all defendants. *See Pourghoraishi*, 449 F.3d at 765-66; *Coggins*, 468 F. Supp. at 279 (dismissing the complaint with respect to defendants who were not properly served, where other defendants had filed motion to dismiss pursuant to Rule 12(b)(6)). In the instant case, Plaintiff is on notice that Obama and the DNC raised a Rule 12(b)(6) defense applicable to all Defendants. (*See* Doc. No. 20 (discussing all counts of the Amended Complaint and alleging that "none of the additional counts contained in the Amended Complaint sets forth any viable federal cause of action").) Since the filing of the Motion to Dismiss First Amended Complaint (Doc. No. 20), Plaintiff has filed five different Motions, including a Motion for Summary Judgment. (*See* Doc. Nos. 21, 22, 25, 26 & 27). We assume that if Plaintiff wished to respond to those issues raised in the Motion to Dismiss First Amended Complaint that he did not already address in his Response in Opposition to the initial Motion to Dismiss (Doc. No. 13) he would have done so.

[7] We note that while we take Plaintiff's allegations as true for purposes of this motion (as we must), Defendants Obama and DNC characterize them as "patently false." (Doc. No. 20 at 9.)

A. Count One – The Natural Born Citizen Clause[8]

Defendants Obama and the DNC argue that Plaintiff does not have Article III standing to bring a challenge under the Natural Born Citizen Clause and that as a result this Court does not have jurisdiction to hear the case. That Article III "restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies'" is a "basic doctrinal principle." *Sprint Commc'ns. Co. v. APCC Servs.*, 128 S. Ct. 2531, 2535 (2008). The requirement that there be a case or controversy "is satisfied only where a plaintiff has standing." *Id.*

Standing can be a difficult concept for lawyers and non-lawyers alike. The doctrine was so vague that it led Justice Douglas to quip, "[g]eneralizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970). Judge Posner has framed the topic in the following way:

> [D]esire does not create standing. If you become indignant reading about a case of police brutality, you cannot sue the responsible officers in federal court under 42 U.S.C. § 1983, though the (immediate) victim might well have a suit; much less can you sue to force the state to conduct a referendum on police brutality, even if the referendum would alleviate your outrage at the officers' violation of federal civil rights law. If you happen to think it a scandal that less than half the eligible voters actually vote in most American elections, still you cannot sue the government demanding that it be ordered to punish nonvoters – and you could not even if, as in some other countries, the law required people to vote. The injury brought about by a violation of law must, to support a federal court action, be more direct and immediate than this. It must at least resemble the type of injury that would support a lawsuit under traditional principles of common law or equity; it must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined and not just one's opinions, aspirations, or ideology. It must in short be fairly describable as an injury personal to the plaintiff – a deprivation of his right – rather than a concern with another's injury.

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[8] Because we dispose of Count One on jurisdictional grounds, we need not address whether Plaintiff can state a claim for relief under the Natural Born Citizen Clause. *See Ibraimi v. Chertoff*, No. 07-3644 (DMC), 2008 U.S. Dist. LEXIS 61406, at *12 (D.N.J. Aug. 11, 2008).

. . . .

> [I]f you have no right to demand assistance the failure to assist you is not an injury that will support a federal suit, even though such a failure may make the rights you do have, which include the right of political advocacy, less fruitful in achieving your goals.

People for Organized Welfare and Employment Rights v. Thompson, 727 F.2d 167, 171-72 (7th Cir. 1984) (Posner, J.) (citations omitted).

The Supreme Court has clarified the doctrine since Justice Douglas's time. It is now clear that standing is an "irreducible constitutional minimum" that has three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 290-91 (3d Cir. 2005) (employing *Lujan*'s three-pronged test). First, a party must have experienced an injury in fact: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted). Second, there must be a causal connection between the injury in fact and the defendant's conduct that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, a favorable decision must be likely to redress the complained of injury. *Lujan*, 504 U.S. at 561 (citations omitted). Where a plaintiff cannot establish each of the three elements, the plaintiff does not have standing and the court therefore does not have jurisdiction over the case and cannot rule on the merits. *See Goode v. City of Phila.*, 539 F.3d 311, 327 (3d Cir. 2008) ("[O]nce the District Court determined that [plaintiffs] did not have standing, it necessarily determined that it did not have jurisdiction and thus it could not decide the merits of the case.").

The Supreme Court has

> consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74. These decisions include the somewhat rare cases that have reached the Supreme Court where plaintiffs allege constitutional harms (other than taxpayer standing under the Establishment Clause of the First Amendment) that affect broadly-defined groups of citizens or voters. *See Lance v. Coffman*, 127 S. Ct. 1194, 1198 (2007) (per curiam) (holding that Colorado voters did not have standing under the Elections Clause of the Constitution, art. I, § 4, cl. 1, to challenge a provision of the Colorado constitution limiting the state's congressional redistricting to once per census); *Ex parte Levitt*, 302 U.S. 633, 633 (1937) (per curiam) (holding that a citizen did not have standing to challenge appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, art. I, § 6, cl. 2); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1976) (holding that an anti-war group did not have standing to invoke the Incompatibility Clause, art. II, § 6, cl. 2, to have members of Congress stricken from the Armed Forces Reserve List); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding that a taxpayer did not have standing to obtain information about the expenditures of the Central Intelligence Agency under the Constitution's Accounts Clause, art I, § 9, cl. 7).

Standing has been a consistent barrier to lower courts hearing generalized, undifferentiated claims by voters and citizens. *See Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001) (per curiam) (affirming trial court's determination that voter

did not have standing to challenge policy of non-profit corporation responsible for organizing presidential debates); *Becker v. FEC*, 230 F.3d 381, 389-90 (1st Cir. 2000) (holding that supporters of presidential candidate Ralph Nader did not have standing to challenge FEC's debate regulations under which Nader experienced the alleged harm); *Gottlieb v. FEC*, 143 F.3d 618, 620-22 (D.C. Cir. 1998) (holding that voters, among others, did not have standing to challenge FEC's decision to dismiss an administrative complaint alleging violations of the Campaign Act); *Jones v. Bush*, 122 F. Supp. 2d 713, 716-18 (N.D. Tex. 2000) (holding that voters did not have standing to seek injunctive relief under the Twelfth Amendment to prevent Texas members of the Electoral College from casting votes for both George W. Bush and Dick Cheney).[9] Most recently, in a well-reasoned and concise opinion, Judge Laplante of the District of New Hampshire ruled on a question very similar to the one before us and determined that

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[9] This is not to say that voters never have standing to challenge practices that restrict their rights as voters. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134, 143-44 (1992) (allowing voters to intervene in suit challenging the constitutionality of prohibitively expensive filing fees that kept voters' desired candidates off the ballot where the fees in question had a "real and appreciable impact on the exercise of the franchise"). At first blush what concerned the Supreme Court in *Bullock* appears to be present here: Plaintiff argues that if Obama is permitted to run and is subsequently shown to be ineligible, voters will be denied their "right" to vote for an eligible candidate. (Doc. No. 13 at 17.) However, upon further review, it becomes apparent that there are stark differences between Plaintiff's position and the position of the voters in *Bullock*.

In *Bullock*, the plaintiffs (both voters and aspiring candidates) challenged the constitutionality of filing fees whose expense kept aspiring candidates off the ballot. *Bullock*, 405 U.S. at 135. The Supreme Court held that the filing fees were an unconstitutional legislative barrier that kept otherwise legitimate, aspiring candidates from appearing on the ballot. Thus, state action, in the form of a statute, prevented voters from voting for legitimate candidates of their choice. That concern is not present here.

Moreover, the Court in *Bullock* did not limit or in any way invalidate votes that had already been cast; nor did it void the results of the elections that had taken place. *See id.* at 136-37, 149 (affirming trial court's permanent injunction of the filing fee law). By contrast, Plaintiff would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of the most hotly contested presidential primary in living memory.

voters do not have standing to bring a claim under the Natural Born Citizen Clause to exclude a candidate from the presidential primaries. *See Hollander v. McCain*, No. 08-0099, 2008 U.S. Dist. LEXIS 56729 (D.N.H. July 24, 2008).

1. Plaintiff Does Not Have Standing

"[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*, 262 F.3d at 193; *Jones*, 122 F. Supp. 2d at 717 (holding that harm experienced by "Plaintiff[s] *and all other American citizens*" was too "undifferentiated and general nature" to confer standing on voters) (emphasis in original). The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing. *See Hollander*, 2008 U.S. Dist. LEXIS 56729, at *12 (noting that such harm "would adversely affect only the generalized interest of all citizens in constitutional governance") (citations omitted).

Hollander and *Jones* are instructive. In *Hollander*, the plaintiff alleged that the Republican party primary candidate, John McCain,[10] was ineligible to be President because he was born in the Panama Canal Zone and, therefore, was not a "natural born citizen" as that term is used in the Natural Born Citizen Clause. *Hollander*, 2008 U.S. Dist. LEXIS 56729 at *2-9. The plaintiff believed that if the Republican National Committee were permitted to nominate McCain, and McCain were subsequently found ineligible to run for President, then plaintiff and "100 million additional voters" would be disenfranchised. *Id.* at *7-8. The district court ruled that the plaintiff did not have standing because the harm plaintiff alleged was too generalized.

[10] John McCain has since secured the Republican Party's nomination for President.

Id. at *12.

In *Jones*, the plaintiffs alleged that George W. Bush and Dick Cheney were both inhabitants of Texas and that members of the Electoral College from Texas could not cast votes for both of them in the 2000 presidential election because of the Twelfth Amendment's requirement that Electors "shall . . . vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of that same state with themselves." *Jones*, 122 F. Supp. 2d at 715 (*quoting* U.S. Const. amend. XII). The plaintiffs claimed their status as voters was sufficient to confer standing. *Id.* According to the plaintiffs, by casting ballots for both Bush and Cheney, the Texas Electors would be "infringing [plaintiffs'] right to cast a meaningful vote." *Id.* at 717. The court found plaintiffs' alleged harm insufficient to establish standing because it was not a "particularized, palpable injury." *Id.*

Plaintiff's allegations of harm in the instant case suffer from the same fundamental flaws as the plaintiffs' allegations in *Hollander* and *Jones*: Plaintiff's stake is no greater and his status no more differentiated than that of millions of other voters. Plaintiff acknowledges as much in the Amended Complaint when he avers that he and "other Democratic Americans" (Doc. No. 14-2 ¶ 7) will experience irreparable harm.[11] This harm is too vague and its effects too attenuated to confer standing on any and all voters. *See Becker*, 230 F.3d at 390 (holding that voter-

[11] One substantive problem with Plaintiff's disenfranchisement theory is that it is unlikely that "the removal of an elected official by non-electoral means amounts to 'disenfranchisement' of the voters who put him there." *Hollander*, 2008 U.S. Dist. LEXIS 56729, at *17 (*citing Powell v. McCormack*, 395 U.S. 486, 547 (1969)); *see also id.* at *18-*19 n.7 ("There is also the question of whether the 'disenfranchisement' resulting from a vote for an ineligible candidate is [a] sort of 'self-inflicted' harm caused by the voter, rather than any state actor, which therefore does not amount to an infringement of the franchise right." (*citing* 1 Lawrence H. Tribe, American Constitutional Law § 13-24, at 1122-23 (2d ed. 1988)).

plaintiffs' "concern for corruption of the political process 'is not only widely shared, but is also of an abstract and indefinite nature,' comparable to the 'common concern for obedience to law'" (*quoting FEC v. Akins*, 524 U.S. 11, 23 (1998))).

The party asserting that jurisdiction is proper must establish each of the elements established by the Supreme Court in *Lujan*. 505 U.S. at 561 ("Since [elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, *each* element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . .") (emphasis added). Failure to establish any of the elements leaves the plaintiff without standing. Plaintiff does not, and we believe cannot, establish an injury in fact. Therefore, he does not have standing to pursue this matter and we do not have jurisdiction to hear it.

2. Plaintiff's Standing Arguments are Unpersuasive

Plaintiff attempts to establish standing on several additional grounds, but his arguments do not solve the fundamental problem that the harm he alleges does not constitute an injury in fact. His most reasonable arguments attempt to distinguish *Hollander*. (Doc. No. 13 at 16-17.) For example, he asserts that the harm he has experienced is sufficient to constitute an injury in fact under *Akins* (*id.* at 18-22). However, Plaintiff ventures into the unreasonable with arguments based on a number of federal statutes (*id.* at 17-18, 22-27). We give consideration to each argument.

(a) *Hollander v. McCain*

In an effort to establish standing, Plaintiff attempts to distinguish *Hollander* on four grounds. First, he asserts that the plaintiff in *Hollander* challenged McCain's candidacy at the

primary stage, and thus McCain's alleged ineligibility was "hardly a restriction on voters' rights." (*Id.* at 16.) By contrast, Plaintiff argues that Obama is now a candidate in the general election, which "prevents citizens from voting for Hillary Clinton despite her immense popularity." (*Id.* at 16-17.) Plaintiff is correct that the narrow issue in *Hollander* was the inclusion of an allegedly ineligible candidate in a primary field of multiple (presumptively) eligible candidates. *See* 2008 U.S. Dist. LEXIS 56729, at *13-14. Whereas a Republican in New Hampshire could vote for any one of twenty-one Republican candidates in the primary (*id.* at *16 n.6), Plaintiff, as a life-long Democrat, arguably faces a Hobson's choice in the general election: Obama or nothing. Thus, we do not expect Plaintiff to take solace in the *Hollander* court's admonition that "McCain's candidacy for the presidency, whatever his eligibility, is 'hardly a restriction on voters' rights' because it in no way prevents them from voting for somebody else." *Id.* at *14 (citation omitted).

That does not mean, however, that Plaintiff has experienced an injury in fact. The plaintiff and the court in *Hollander* specifically contemplated McCain winning his party's nomination:

> Unlike [plaintiff's] other "disenfranchisement" theory, this one does not depend on the failure of his chosen candidate *because of* McCain's alleged ineligibility, but on the success of [plaintiff's] chosen candidate – who is McCain in this scenario – *despite* his alleged ineligibility. On this theory, however, [plaintiff's] alleged "disenfranchisement" flows not from the actions he has challenged here, *i.e.*, McCain's presidential campaign or the RNC's likely selection of him as its nominee, but from his subsequent removal from office at the hands of someone else (presumably one of the co-equal branches), resulting (presumably, yet again) in a President different from the one [plaintiff] helped to elect.

Id. at *17-18 (emphasis in original).[12] The court found that the plaintiff still could not meet the standing requirements on causation grounds; the harm experienced was not traceable to the defendants' conduct "but to the conduct of those – whoever they might turn out to be – responsible for ultimately ousting McCain from office." *Id.*

We agree that such causation considerations pose an impediment to a plaintiff obtaining standing in this context, but we also believe that, regardless of questions of causation, the grievance remains too generalized to establish the existence of an injury in fact. To reiterate: a candidate's ineligibility under the Natural Born Citizen Clause does not result in an injury in fact to voters.[13] *Cf. Lance*, 127 S. Ct. at 1198 (voters did not allege harm sufficient to invoke the Elections Clause); *Ex parte Levitt*, 302 U.S. 633, 633 (citizen could not articulate harm under the Ineligibility Clause). By extension, the theoretical constitutional harm experienced by voters

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[12] Plaintiff's argument that Obama's nomination will deny him "the constitutional right to vote for an eligible candidate" is the same as the argument that the plaintiff made in *Hollander*. (Doc. No. 13 at 17.) The fact that the plaintiff in *Hollander* called the harm "disenfranchisement" and Plaintiff identifies it as a constitutional right to vote for an eligible candidate is a distinction without a difference. Indeed, Plaintiff does not appear to distinguish between the two terms. (*Compare* Doc. No. 13 at 17 *with* Doc. No. 14-2 ¶ 173 (alleging disenfranchisement will result from Obama's nomination and election).)

[13] We find Chief Justice Burger's observation in *Richardson* pertinent here:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of a particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

418 U.S. at 179. If, through the political process, Congress determines that citizens, voters, or party members should police the Constitution's eligibility requirements for the Presidency, then it is free to pass laws conferring standing on individuals like Plaintiff. Until that time, voters do not have standing to bring the sort of challenge that Plaintiff attempts to bring in the Amended Complaint.

does not change as the candidacy of an allegedly ineligible candidate progresses from the primaries to the general election.

Plaintiff's second attempt to distinguish *Hollander* folds into his first. He argues that because he is denied his constitutional right to vote for an eligible candidate, his harm is more particularized than the plaintiff's in *Hollander*. (*See* Doc. No. 13 at 17.) As we explained above, however, there is no meaningful distinction between the harm alleged here and the harm alleged in *Hollander*.

Plaintiff's third and fourth arguments are factual in nature. He argues that the harm created by Obama's ineligibility is a result of subterfuge and fraud by Obama as opposed to the situation in *Hollander* where there was no substantive dispute about where McCain was born. (*Id.*) He also claims that Defendants – presumably in their Motion to Dismiss – "have failed to show that Mr. Obama is 'unquestionably an American citizen.'" (*Id.* (*quoting Hollander*, 2008 U.S. Dist. LEXIS 56729, at *3).) These distinctions fail to take into account the procedural posture of the case here and in *Hollander*. We have taken Plaintiff's factual allegations as true and drawn all inferences in his favor. The court in *Hollander* operated under the same standard. *Hollander*, 2008 U.S. Dist. LEXIS 56729, at *2. Raising these factual discrepancies is unavailing to Plaintiff.

(b) Statutory standing arguments

Plaintiff also attempts to obtain standing to bring his Natural Born Citizen Clause claim under the Campaign Act, 2 U.S.C. § 431 *et seq*.; the Administrative Procedure Act ("APA"), 5 U.S.C. § 702; the Immigration and Nationality Act, 8 U.S.C. § 1481(b); FOIA, 5 U.S.C. § 552; 28 U.S.C. § 1343; and 28 U.S.C. § 1331. Plaintiff cites no authority under which any of these

statutes would confer standing on him to bring his Natural Born Citizen Clause claim and we are aware of none. We therefore find that Plaintiff's attempt to use these statutes to gain standing to pursue his Natural Born Citizen Clause claim are frivolous and not worthy of discussion. Plaintiff avers violations of some of these statutes as freestanding causes of action in the Amended Complaint. We address the merit of those causes of action below.

B. Counts Two, Three, & Four – Civil Rights Violations, 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986

The Amended Complaint alleges deprivation of Plaintiff's civil rights in violation 42 U.S.C. § 1983 (Count Two), 42 U.S.C. § 1985 (Count Three), and 42 U.S.C. § 1986 (Count Four). The DNC and Obama argue that Plaintiff has failed to properly allege a deprivation of his constitutional or statutory rights by state action and has failed to properly allege a conspiracy. We address each of Plaintiff's claims in turn.

1. 42 U.S.C. § 1983

Plaintiff makes several allegations that he believes entitle him to § 1983 relief. First, he claims that he "has been deprived of money and billable hours by fraudulent means as a result of donating money and billable hours to secure, as promised, an eligible Democratic candidate for Office of the President . . . [and that he] has been deprived of his right to vote for an eligible Democratic Nominee for the U.S. Office of the President." (Doc. No. 14-2 ¶ 93.) Second, he claims that he has been a victim of racial animosity perpetrated by Obama's supporters, including being labeled in public as a racist for bringing this suit. (*Id.* ¶¶ 94-99.) Third, he claims that Defendants are "attempting to change our United States Constitution without proper due process of law by allowing Obama to continue his campaign . . . ." (*Id.* ¶ 100.) Fourth, he claims that his "Life, Liberty and Property rights guaranteed by the Fourteenth Amendment of

the U.S. Constitution will further be violated if Obama is allowed to be voted into the position of President . . . ." (*Id.* ¶ 101.) Finally, he claims that all the Defendants (other than Obama) have damaged Plaintiff by failing to act in their official capacities to stop Obama from running. (*Id.* ¶¶ 104-08.)

> Section 1983 protects civil rights. It creates a cause of action against
>
> > [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 U.S.C. § 1983. A § 1983 claimant must allege violations of "rights independently 'secured by the Constitution and laws' of the United States." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). "One cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything." *Id.* (*citing Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979)). We therefore must inquire into whether Plaintiff has alleged a violation of a right that would entitle him to redress under § 1983.

The irreducible basis of all Plaintiff's alleged violations is that Obama might be elected to the Office of President despite being constitutionally ineligible under the Natural Born Citizen Clause. This alleged fact underscores his claim that he has been deprived of money and billable hours, his claim that he has been insulted in public, his claim that he is being deprived of a chance to vote for an eligible candidate, his claim that he will be deprived of life, liberty and property, and his claim that the non-Obama Defendants are causing him harm by not stopping Obama. The question, therefore, is straightforward: Does the Natural Born Citizen Clause create a federal right the violation of which results in a cognizable § 1983 claim? We think not.

After a diligent search, we have been unable to find any cases that address the matter and the parties have not offered any. However, other courts have addressed the application of § 1983 in analogous situations. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439 (1991) ("The Supremacy Clause . . . is 'not a source of any federal rights'; rather, it '"secure[s]" federal rights by according them priority whenever they come in conflict with state law.'" (*citing Chapman*, 441 U.S. at 613)); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir.) (amended opinion), *cert. denied*, 479 U.S. 1060 (1987) ("[T]he Supremacy Clause, standing alone, secures federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it secure such rights within the meaning of 42 U.S.C.S. § 1983."); *Maryland Pest Control Ass'n. v. Montgomery County*, 884 F.2d 160 (4th Cir. 1989) (same); *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 811 (9th Cir. 2004) (Graber, J., concurring) ("[T]he foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 42 U.S.C. § 1983."). Like the Supremacy Clause and the foreign affairs powers, the Natural Born Citizen Clause does not confer an individual right on citizens or voters. Therefore, Plaintiff cannot state a cognizable § 1983 claim.[14]

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[14] State action is also a necessary element of a § 1983 claim. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141-45 (3d Cir. 1994) (discussing state action requirement). While we do not need to reach this question because Plaintiff does not allege the violation of any legally protected right, we note that he would likely have difficulty showing that either Obama or the DNC are state actors or acting under color of law. We have found no cases where a presidential candidate has been treated as a state actor merely for running for office. To the contrary, the few cases that we have found suggest that presidential candidates are not state actors or engaged in state action for purposes of § 1983. *See, e.g.*, *Fulani v. McAuliffe*, No. 04-6973, 2005 U.S. Dist. LEXIS 20400, at *17 (S.D.N.Y. Sept. 19, 2005) (dismissing § 1983 claim against defendants, including the DNC and 2004 presidential candidate John Kerry, because they were not "acting under color of state law"); *Riches v. Giambi*, No. 07-0623, 2008 U.S. Dist. LEXIS 53123, at *20 (N.D. Cal. Jan. 2, 2008) (dismissing § 1983 claim against 2008 Republican presidential candidate Mike Huckabee because he was a private individual). The claim that the DNC is not a

2. 42 U.S.C. § 1985

The facts that Plaintiff alleges in support of his 42 U.S.C. § 1985 claim are substantively the same as the facts he alleges in support of his § 1983 claim.[15] (*See* Doc. No. 14-2 ¶¶ 110-22.) He believes that the Defendants are promoting and assisting Obama's candidacy knowing that Obama is ineligible to take office. Plaintiff avers that Defendants' conduct amounts to a conspiracy in violation of § 1985. He does not, however, indicate the sub-section of § 1985 on which he premises his claim.

As a preliminary matter, where there is no federal right that creates a basis for a § 1983 claim there is similarly no basis for a § 1985 claim. *See Escamilla v. Santa Ana*, 606 F. Supp. 928, 934 (C.D. Cal. 1985) (granting summary judgment to defendants on plaintiff's § 1985 and § 1986 claims where plaintiff could not establish a § 1983 claim); *Wiggins v. Hitchens*, 853 F. Supp. 505, 510 (D.D.C. 1994) ("There can be no recovery under section § 1985(3) absent a violation of a substantive federal right."). This alone stands as an impediment to Plaintiff stating a cognizable § 1985 claim.

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state actor or acting under color of state law in conducting a presidential campaign is slightly more ambiguous, but the more recent cases appear to conclude that the DNC is not a state actor. *See Larouche v. Fowler*, 152 F.3d 974, 990 (D.C. Cir. 1998) ("If a party must produce the nation's 'uncontested choice' for President of the United State to qualify as a state actor, the Democratic (or Republican) Party plainly does not qualify"). *But cf. Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965) ("The people, when engaged in primary and general elections for the selection of their representatives in government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws.").

[15] Plaintiff makes additional claims about Obama and his campaign "abus[ing] their position and the law for intimidation purposes to stop people from free speech when the speech includes criticism or questioning of Obama . . . ." (Doc. No. 14-2 ¶ 115.) The Amended Complaint makes no attempt to allege facts in support of these claims, which standing on their own are nothing more than conclusory allegations.

Moreover, none of the § 1985 clauses apply here. Section 1985(1) deals with interference with officers of the United States, and Plaintiff has not alleged that he is an officer of the United States. *See Silo v. City of Phila.*, 593 F. Supp. 870, 873 (E.D. Pa. 1984). Section 1985(2) "creates a claim for conspiracy to intimidate witnesses, jurors, or parties in a federal case." *Id.* Plaintiff has made no allegations that would support such a claim. That leaves § 1985(3). A claim under § 1985(3) arises when:

> (1) two or more persons conspire to deprive any person of the equal protection of the law; (2) one or more of the conspirators performs or causes to be performed any overt act in furtherance of the conspiracy; and (3) that overt act injures the plaintiff in his person or property or deprives the plaintiff of any right or privilege of a citizen of the United States.

Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151, 162 (3d Cir. 2001). In addition, § 1985(3) "requires allegation of 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. . . .'" *Silo*, 593 F. Supp. at 873 (*citing Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

We do not reach an analysis of the three elements of § 1985(3) because Plaintiff has made no allegations that the purported conspiracy is motivated by racial animus.[16] Instead, the Amended Complaint is focused entirely on an alleged conspiracy to conceal Obama's true nationality. Therefore, Plaintiff cannot state a cognizable § 1985 claim.

3. 42 U.S.C. § 1986

It is well settled that "[a] plaintiff must establish a valid § 1985 claim in order to state a

[16] We note that the Amended Complaint alleges that Obama's supporters have made racially charged remarks (*see* Doc. No. 14-2 ¶ 94) and that Obama "is furthering racial tension" (*see id.* ¶ 96), but there are no factual allegations whatsoever that tie any Defendant to any racially motivated tortious conduct of the sort § 1985 was intended to redress.

claim under § 1986." *Carrington v. City of Jersey City*, No. 06-5367, 2008 U.S. Dist. LEXIS 38808, at *19 (E.D. Pa. May 12, 2008) (*citing Clark v. Clabaugh*, 20 F.3d 1290 (3d Cir. 1994)). Since the Amended Complaint does not articulate a cognizable § 1985 claim, Plaintiff's § 1986 claim must fail as well.

C. Count Five – Campaign Act Claims, 2 U.S.C. § 431 *et seq.*

Count Five of the Amended Complaint alleges a violation of the Campaign Act. 2 U.S.C. § 431 *et seq*. Specifically, it alleges that "[t]he DNC, FEC, Feinstein and the U.S. Senate Commission on Rules and Administration" are aware of "Obama's illegal activities, encouraging racial tension, encouraging violence, his fraudulent campaigning, fraudulently attempting to secure the position of President of the United States." (Doc. No. 14-2 ¶ 139.) Despite this knowledge, these Defendants "have allowed Obama's illegal and fraudulent campaign, [through] which Obama has received in excess of $450 Million in donations." (Doc. No. 14-2 ¶ 141.) Plaintiff argues that this entitles him to the information regarding Obama that he seeks in the Amended Complaint.

The Amended Complaint does not allege any facts regarding Plaintiff's attempts to obtain the information he seeks by means of the Campaign Act. However, Plaintiff's Opposition informs us that he "complained" to the FEC prior to instigating his current suit and that the FEC has "completely ignored" him. (Doc. No. 13 at 18.) Although Plaintiff alleged these facts in his Opposition and not in the Amended Complaint, in the interest of rendering a decision that addresses Plaintiff's arguments, we will construe the allegations in a light most favorable to Plaintiff and treat the Amended Complaint as if it had alleged that the FEC failed to act on an administrative complaint.

Congress has charged the FEC with administering the Campaign Act, 2 U.S.C. § 437c(b). "As commonly understood, the [Campaign Act] seeks to remedy any actual or perceived corruption of the political process . . . ." *Akins*, 524 U.S. at 14. The Campaign Act confers standing on "[a]ny person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred" to file an administrative complaint with the FEC. 2 U.S.C. § 437g(a)(1). When the FEC fails to act on an administrative complaint, as Plaintiff seems to argue here, a party may file a suit in district court.[17] 2 U.S.C. § 437g(a)(8); *Stockman*, 138 F.3d at 153, 156 n.18 (5th Cir. 1998) (noting that § 478g(a)(8) is the only private remedy afforded by the Campaign Act). There are, however, two fatal flaws with Plaintiff's theory: one procedural and one substantive.

First, if the FEC failed to act on a complaint filed by Plaintiff, this is the wrong court to hear the action. The Campaign Act specifically requires that grievances regarding the FEC's failure to enforce the Act must be filed in the District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8); *Beam v. Gonzales*, 548 F. Supp. 2d 596, 611-12 (N.D. Ill. 2008) ("[T]he only FECA provision empowering private parties to seek judicial review extends to administrative complainants . . . . Even if such a suit were proper [here], FECA would require that it be brought in the United States District Court for the District of Columbia.").

Second, neither the Amended Complaint nor the Opposition identifies a specific

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[17] If we have extended Plaintiff too favorable an inference and he in fact did not file an administrative complaint, then he lacks standing to pursue the theory outlined in his Amended Complaint because section 437d(e) of the Campaign Act provides that "the power of the [FEC] to initiate civil actions . . . shall be *the exclusive* civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e) (emphasis added). *See also Stockman*, 138 F.3d at 152 ("The [Campaign Act] provides a strong basis for scrupulously respecting the grant by Congress of 'exclusive jurisdiction' to the FEC . . . .").

provision of the Campaign Act that entitles Plaintiff to information concerning Obama's citizenship. Instead, Plaintiff relies on generalized arguments about political corruption and the purpose of the Campaign Act. (*See* Doc. No. 13 at 20-22.) Congress intended the Campaign Act to combat the corrupting influence of money on the political process. *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1281 (5th Cir. 1994) ("The primary purpose of [the Campaign Act] . . . is to regulate campaign contributions and expenditures in order to eliminate pernicious influence – actual or perceived – over candidates by those who contribute large sums . . . ." (footnote omitted)). It seems clear that the Campaign Act does not address the sort of corruption that Plaintiff alleges in his Complaint. Nevertheless, Plaintiff cites to the Supreme Court's decision in *Akins*, 524 U.S. 11 *passim*, to support his claim of standing. (*See* Doc. No. 13 at 20-22.) Reliance on *Akins*, however, merely accentuates the problems with Plaintiff's argument.

Akins involved a challenge by voters to the FEC's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee" within the meaning of the Campaign Act. 524 U.S. at 13. The effect of this determination was to shield AIPAC from the Campaign Act's disclosure requirements and deprive plaintiffs of information regarding, among other things, AIPAC's lobbying activities. *Id.* at 15-16. On certiorari, the Supreme Court addressed whether the plaintiffs (respondents) had "standing to challenge the [FEC's] decision not to bring an enforcement action in this case." *Id.* at 18. In holding that the plaintiffs did have standing, the Court determined that "[t]he 'injury in fact' that [plaintiffs] have suffered consists of their inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures – that, on [plaintiffs'] view of the law, the statute requires that AIPAC make public." *Id.* at 21. Plaintiff reasons that he has

standing because his request for information is analogous to the plaintiffs in *Akins*. (*See* Doc. No. 13 at 21-22.)

Plaintiff's argument has superficial appeal, but does not take into account the underlying consideration in *Akins* that was necessary to the Supreme Court's determination. There, plaintiffs sought disclosures that were required by the Campaign Act. *See Akins*, 524 U.S. at 16. Here, the Campaign Act does not require Defendants to disclose the sort of information that Plaintiff seeks in the Amended Complaint. Accordingly, even if Plaintiff had followed the proper administrative procedure, Plaintiff still would face an insurmountable obstacle to obtaining the information he now seeks through the courts. *See Gottlieb*, 143 F.3d at 620-21 (holding that voters did not have standing to challenge "supposed injury to their 'ability to influence the political process'" because such a claim was too vague to constitute an injury in fact – even where voters had followed the appropriate procedure under § 437g(a)(8)). If Congress had intended the Campaign Act to require presidential candidates to make public disclosures of the sort that Plaintiff requests here – and therefore expose candidates to legal challenges permitted by the broad grant of standing pursuant to § 437g(a)(1) of the Act – then it would have done so explicitly.

D. Count Six – Freedom of Information Act, 5 U.S.C. § 552 *et seq*.

In Count Six of the Amended Complaint, Plaintiff alleges violations of FOIA. 5 U.S.C. § 552 *et seq*. The gravamen of Plaintiff's allegation is that he "attempted to secure documents proving the citizenship status of Obama from Obama[,] the FEC, DNC, Feinstein, [and the] U.S. Senate, Commission on Rules and Administration," but "has been refused." (Doc. No. 14-2 ¶ 146.) Plaintiff's allegation fails to state a claim under FOIA for at least three reasons.

First, FOIA applies only to government agencies. Here, all but one of the Defendants are not government agencies as Congress has defined them. Under FOIA, "[e]ach agency shall make available for public inspection and copying" certain government records. 5 U.S.C. § 552(a)(2). Congress defined the term "agency" under FOIA to include:

> any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Id. at § 552(f)(1) (emphasis added). Congress is not subject to FOIA. *Id.* at § 551(1) (noting that for purposes of FOIA, the term agency "does not include the Congress."). Defendants Obama, the DNC, Feinstein, and the U.S. Senate, Commission on Rules and Administration are not federal executive departments. *See id.* at § 552(f)(1). They are not independent regulatory agencies. *Id.* Indeed, they are not even in the executive branch. *Id.* Accordingly, Plaintiff cannot state a claim against them under FOIA.[18] *See, e.g.*, *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995) (affirming dismissal of FOIA complaint where the plaintiff sought records from an entity that "was not an agency"); *St. Michael's Convalescent Hosp. v. State of*

[18] Plaintiff does not assert that he "attempted to secure documents" under FOIA from Defendant Cortés, the Secretary of the Commonwealth of Pennsylvania. Even if he had, such an allegation would not state a claim. Defendant Cortés is an official of a Pennsylvania state agency. State agencies and officials are not subject to FOIA. *See Dunleavy v. New Jersey*, 251 Fed. App'x 80, 83 (3d Cir. 2007) (unpublished opinion) ("FOIA does not impose [an] obligation on state agencies."); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) ("[I]t is beyond question that FOIA applies only to federal and not to state agencies."); *Philip Morris, Inc., v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997) ("FOIA . . . applies only to federal executive branch agencies"); *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994) (APA "pertains to federal agencies"); *Brown v. Kelly*, No. 93-5222, 1994 WL 36144, at *1 (D.C. Cir. Jan. 27, 1994) (per curiam) (FOIA does not apply to state agencies); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of "agency" under FOIA "does not encompass state agencies or bodies"); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) (state board of parole not agency within meaning of FOIA).

California, 643 F.2d 1369, 1373 (9th Cir. 1981) (FOIA applies only to "agencies" as defined in 5 U.S.C. §§ 551(1) & 552(f)); *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 559 F. Supp. 2d 9, 19 (D.D.C. 2008) (granting motion to dismiss and finding that plaintiff failed to state a FOIA claim where defendant was not an agency under FOIA); *Aitro v. Clapper*, No. 05-3120, 2005 WL 1384063, at *2 (W.D. Mo. Jun. 8, 2005) ("As neither [entity] is a government agency, FOIA is inapplicable and Plaintiff has failed to state a claim . . . for which relief can be granted by this court.").

Second, FOIA requires a valid request for records, and Plaintiff does not allege that he made such a request from the FEC. The FEC is an independent regulatory agency, so it is subject to FOIA. FOIA "requires federal agencies to allow access to their records to any person who complies with the procedures set forth in the Act." *St. Mary Hosp. v. Phila. Prof. Standards Review Org., Inc.*, No. 78-2943, 1980 WL 19448, at *1 (E.D. Pa. June 25, 1980). However, Plaintiff does not allege that he complied with FEC guidelines regarding FOIA requests. *See generally* 11 C.F.R. § 4.7(b) (setting forth FEC guidelines for record requests under FOIA). It is entirely unclear from Plaintiff's Amended Complaint what type of request he actually made to the FEC. This alone warrants dismissal of the claim. *See, e.g.*, *Caraveo v. EEOC*, 96 Fed. App'x 738, 2004 WL 608590, at *3 (2d Cir. Mar. 26, 2004) (unpublished opinion) (affirming dismissal of FOIA claim where Plaintiff "failed to allege that he complied with [agency] guidelines regarding FOIA requests."). Moreover, it is unclear when or if Plaintiff made his alleged FOIA request to the FEC. *See* 11 C.F.R. § 4.7(c) (establishing procedures and deadlines for the FEC to respond to FOIA requests). "Without any showing that the agency received the request, the agency has no obligation to respond to it." *Hutchins v. Dep't of Justice*, No.

00-2349, 2005 WL 1334941, at *1-2 (D.D.C. June 6, 2005).

Third, before bringing a FOIA claim in federal court, a plaintiff must exhaust the available administrative remedies. *See Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) ("Exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."); *McDonnell v. United States*, 4 F.3d 1227, 1240 (3d Cir. 1993) (holding that plaintiff had an obligation to pursue administrative remedies prior to filing suit). In addition, a plaintiff must allege in his complaint that "he exhausted his remedies under FOIA" in order to properly plead a case. *Scherer v. Balkema*, 840 F.2d 437, 443 (7th Cir. 1988) (*citing Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979)). Exhaustion allows "the agency [ ] an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Wilbur*, 355 F.3d 675, 677. "In the absence of such an allegation, [a plaintiff] states no claim upon which relief can be granted." *Scherer*, 840 F.2d at 443. Plaintiff alleges that the FEC has "ignored" his request. (Doc. No. 14-2 ¶ 146.) While FOIA "recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines," *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987), Plaintiff does not allege expiration of any FOIA deadlines. Indeed, Plaintiff alleges no facts in his Amended Complaint that allow us to invoke the constructive exhaustion doctrine. Accordingly, Plaintiff's FOIA claim must be dismissed for this additional reason.

E. Count Seven – Promissory Estoppel

In Count Seven, Plaintiff brings a promissory estoppel claim against Obama and the DNC. (*See* Doc. No. 14-2 ¶¶ 153-79.) Plaintiff asserts that he has "donated money and billable hours to Democratic Presidential candidates as well as the Democratic National Committee."

(*Id*. ¶ 154.) In support of his claim, Plaintiff alleges, among other things, that the DNC promised to (a) "'use technology to make government more transparent, accountable, and inclusive,'" (*id*. ¶ 159), (b) "maintain and restore our Constitution to its proper place in our government and return our Nation to the best traditions, including their commitment to government by law" (*id*. ¶ 161), and (c) "'work fully to protect and enforce the fundamental Constitutional right of every American vote – to ensure that the Constitution's promise is fully realized'" (*id*. ¶ 163). The source of these "promises" is a document titled "Renewing America's Promise," which presents the 2008 Democratic National Platform. Plaintiff alleges that the DNC breached these promises by (1) promoting an "illegal candidate" to serve as President; (2) failing to investigate Obama's citizenship; and (3) failing to provide "accurate information" about Obama's eligibility for presidential office. (*Id*. ¶¶ 162, 165.) Plaintiff also asserts that Obama "has promised to uphold the United States Constitution and to be open and honest with all questions presented." (*Id*. ¶ 167.) He claims that Obama has violated both of these promises by refusing to provide proof of his citizenship status and by running for office even though "he is aware he is ineligible to serve as the Pressident [sic] of the United States." (*Id*. ¶ 167.) Plaintiff also claims that Obama has breached his promise to uphold the Constitution by committing massive voter fraud to the tune of more than $450 million. (*Id*.) Plaintiff concludes:

> All elements required to invoke Promissory Estoppel have been met by Plaintiff. The DNC and Obama made a promise to Plaintiff, which Plaintiff relied upon and expected. Not only has Plaintiff suffered economic losses; [sic] he has lost his constitutional right to vote for an eligible Democratic candidate who can serve as the President of the United States, if elected. The only way justice can be served is by the Court enforcing the promise of the DNC and Obama.

(*Id*. ¶¶ 177-78.)

Although Plaintiff does not specify the law on which he bases his claim, under any

definition of promissory estoppel there must be an enforceable promise. *See, e.g.*, *168th & Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 955 (8th Cir. 2007) (finding, under Nebraska law, that "[p]romissory estoppel requires evidence that the promisor made a 'promise' to the promisee. A statement of opinion or future intent is insufficient to give rise to a promise"); *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 702, 706 (7th Cir. 2004) (finding, under Indiana law, that "the promise relied on to trigger an estoppel must be definite in the sense of being clearly a promise and not just a statement of intentions" and that "if the statements are not reasonably understood as legally enforceable promises there can be no action for promissory estoppel"); *DeVoll v. Burdick Painting*, 35 F.3d 408, 412 n.4 (9th Cir. 1994) (finding that, "[u]nder both California and federal common law, to establish an enforceable contract based on promissory estoppel, the promisee must show (1) the existence of a promise . . . ."); *Ankerstjerne v. Schlumberger Ltd*, No. 03-3607, 2004 U.S. Dist. LEXIS 9927, at *13-14 (E.D. Pa. May 12, 2004) (finding that, under Pennsylvania law, "[a] broad and vague implied promise is not enough to satisfy" the promissory estoppel requirement that a promisor make a promise that he should reasonably expect will induce action or forbearance on the part of promisee) (*citing C & K Petroleum Prods., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988), *aff'd* 155 Fed. Appx. 48 (3d Cir. 2005); *see also Minehan v. United States*, 75 Fed. Cl. 249, 260 (2007) (finding that "the IRS's mission statement ['to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all'] is aspirational, and it makes no specific promise or offer which could be deemed the basis for a contract"); *Estate of Bogley v. United States*, 514 F.2d 1027, 1033 (Ct. Cl. 1975) (finding that the passing of a motion and adopting of a resolution by a

corporation's board of directors did not constitute an offer or promise because "'[a] gratuitous and unsolicited statement of policy or of intention which receives the concurrence of the party to whom it is addressed, does not constitute a contract" (*quoting Goetz v. State Farm Mut. Auto. Ins. Co.*, 142 N.W. 2d 804, 807 (Wis. 1966))). The Restatement Second of Contracts provides that a "Promise Reasonably Inducing Action or Forbearance" is

> [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90(1) (1981). The Restatement defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement § 2(1).

The "promises" that Plaintiff identifies are statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contract enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises. Federal courts, however, are not and cannot be in the business of enforcing political rhetoric.

F. Count Eight – Immigration and Nationality Act, 8 U.S.C. § 1481(b)

In Count Eight of the Amended Complaint, Plaintiff alleges "loss of nationality" under an expatriation provision of the Immigration and Nationality Act, 8 U.S.C. § 1481(b). That provision provides:

> Whenever the loss of United States nationality is put in issue . . ., the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by

> a preponderance of the evidence. Any person who commits or performs . . . any act of expatriation . . . shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

8 U.S.C. § 1481(b). The provision establishes the burden of proof in expatriation proceedings where "nationality is put in issue." In such a case, the Act places the burden of proving loss of citizenship "upon the person or party claiming that such loss occurred." *Id.* The provision on which Plaintiff relies sets up rules of evidence; it does not establish a private cause of action. *See Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (*citing* H.R. Rep. No. 1086, 87th Cong., 1st Sess., 41, U.S. Code Cong. & Admin. News, p. 2985 (1961) ("The provision 'sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government.'")). Because the provision does not establish a cause of action, Plaintiff fails to state a claim under 8 U.S.C. § 1481(b).

IV. CONCLUSION

For the foregoing reasons, we will grant Defendants' Motions to Dismiss.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. BERG	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 08-4083
BARACK OBAMA, et al.	:	

ORDER

AND NOW, this 24th day of October, 2008, upon consideration of the Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) and the Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24), it is ORDERED that:

1. The Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) is GRANTED;
2. Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24) is GRANTED; and
3. Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief is DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

/s/ *R. Barclay Surrick*, Judge