IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILIP J. BERG,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 08-4340
v.	)	
	)	OPPOSITION
BARACK HUSSEIN OBAMA, *et al.*,	)	
	)	
Defendants-Appellees.	)	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO EMERGENCY MOTION FOR AN IMMEDIATE INJUNCTION TO STAY THE PRESIDENTIAL ELECTION OF NOVEMBER 4, 2008

Plaintiff Philip J. Berg ("Berg") has sued defendants Senator Barack Obama, the Democratic National Committee, multiple John Does, and the Federal Election Commission ("Commission"). He alleges that Senator Obama, the Democratic candidate for President of the United States, is ineligible for that position because he is not a "natural born" citizen as required by Article II, Section 1, of the Constitution. In the district court, Berg sought, *inter alia,* a judicial declaration of that ineligibility and a permanent injunction barring Obama from running for that office. The court below correctly dismissed his action, holding, *inter alia*, that Berg lacks standing under Article III.

In this Court, Berg now seeks different relief: an injunction to stay the presidential election on November 4, 2008. However, as we demonstrated in our brief to the district court (attached hereto), the federal courts lack subject matter jurisdiction over Berg's complaint because Berg lacks standing to raise his claims. In any event, even if Berg had standing to raise the issue of Senator Obama's constitutional eligibility to be President, the Federal Election

Commission has no responsibility for or oversight over the Constitution's Presidential Qualifications Clause, nor any authority to administer the voting process to take place on November 4, 2008. The Commission's jurisdiction relates instead to the administration, interpretation, and enforcement of federal campaign finance laws. *See* 2 U.S.C. § 437c. Finally, Berg fails to meet his heavy burden of demonstrating why he is entitled to the extraordinary relief he seeks. *See P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore*, 428 F.3d 504, 508 (3d Cir. 2005) (preliminary injunction standard). Even if it were within the Court's power to enjoin this presidential election as requested, that remedy would irreparably harm the public interest.

The Commission respectfully requests that the Court deny Berg's emergency motion.

Respectfully submitted,

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October 31, 2008

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. BERG,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 08-cv-4083
v.	)	
	)	Memorandum
BARACK HUSSEIN OBAMA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

This action is before the Court on the complaint for declaratory, injunctive, and other appropriate relief filed by pro se plaintiff Philip J. Berg ("Berg") against defendants Senator Barack Obama, the Democratic National Committee, multiple John Does, and the Federal Election Commission ("FEC" or "Commission"). Berg alleges that Senator Obama, the Democratic candidate for President of the United States, is ineligible for that position because he is not a "natural born" citizen as required by Article II, Section 1 of the Constitution. Berg seeks a judicial declaration of that ineligibility and a permanent injunction barring Obama from running for that office. However, as we shall demonstrate below, this case should be dismissed for a lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) because Berg lacks standing to raise this claim. Moreover, even if Berg had standing to raise the constitutional eligibility issue, the Commission should be dismissed as a party to this case because it has no responsibility for or oversight over the Constitution's Presidential

Qualifications Clause. The Commission's jurisdiction relates instead to the administration, interpretation, and enforcement of federal campaign finance laws.

I. PLAINTIFF LACKS STANDING TO MAINTAIN THIS LITIGATION

Berg's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because he lacks standing and thus fails to bring a "case or controversy" under Article III of the Constitution; Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); the dispute he raises is not one "appropriately resolved through the judicial process." Id. "Standing must be determined as a threshold jurisdictional matter." Kucinich v. Bush, 236 F. Supp. 2d 1, 3 n.5 (D.D.C. 2002) (citing Whitmore, 495 U.S. at 155, and Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101-02 (1998)). The doctrine of standing identifies those disputes that are properly resolved through the judicial process. See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471–76 (1982).

Berg's complaint fails on its face to demonstrate standing to invoke this Court's jurisdiction. "The party invoking federal jurisdiction bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the [party] bears the burden of proof." FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 838 (3rd Cir. 1996) (internal citations omitted). In deciding this facial challenge, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." Gould Electronics Inc. v. US, 220 F.3d 169, 176 (3rd Cir. 2000); McCann v. Newman Irrevocable Trust, 458 F.3d 281, 290 (3rd Cir. 2006). This Court's threshold inquiry into standing "in no way

depends on the merits of [Berg's] contention that particular conduct is illegal." Warth v. Seldin, 422 U.S. 490, 500 (1975).

Three elements constitute the "irreducible constitutional minimum" of standing: (1) an injury-in-fact, (2) a causal connection between the injury and the challenged conduct of the defendant (traceability), and (3) a likelihood that the injury will be redressed by a favorable decision of the court. Lujan v Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted). The injury-in-fact required by Article III is an invasion of a legally protected interest that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural" or "hypothetical." Id., (citations omitted). The injury cannot be merely a generalized grievance about the government that affects all citizens or derives from an interest in the proper enforcement of the law. FEC v. Akins, 524 U.S. 11, 23 (1998); Lujan, 504 U.S. at 573-74.

Any injury alleged by Berg is not particularized and thus fails to satisfy the injury-in-fact requirement for standing. "[P]articularized" "mean[s] that the injury must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560 n.1. "[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Warth, 422 U.S. at 499. Berg never asserts that the putatively unconstitutional candidacy of Barack Obama results in any harm that redounds particularly to his detriment; rather, he identifies those who may suffer as:

- "Plaintiff as well as other Democratic Americans," Compl. ¶ 6;
- "supporters of legitimate citizens," id. ¶ 38;
- "everyone who voted in the Democratic Primary for a nominee that is a fair representation of the voters," id. ¶ 41;
- "Plaintiff and the American Citizens," id. ¶64; and
- "Plaintiff and the American people," id. ¶¶ 65, 66, 67.

Berg does not claim that he has suffered any injury or harm that, if true, would not also be felt by a more generalized collection of citizens, all of whom appear to suffer in substantially equal measure. In short, Berg has done nothing more than assert a generalized grievance on behalf of the American citizenry and his fellow voters. It is well-settled that claims advanced on behalf of such all-encompassing groups do not satisfy the injury-in-fact requirement. "Several other Circuit Courts have also concluded that a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate." Crist v. Commission on Presidential Debates, 262 F.3d 193, 195 (2nd Cir. 2001) (per curiam) (citing cases).

In Hollander v. McCain, No. 08-99, 2008 U.S. Dist. LEXIS 56729 (D.N.H. July 24, 2008), the plaintiff brought an action similar to the present case, challenging the eligibility of John McCain to serve as president of the United States in light of his birth in the Panama Canal Zone to American parents. The court held that any harm from McCain's ascension to the presidency would "adversely affect only the generalized interest of all citizens in constitutional governance," and that Hollander thus lacked standing to pursue his claim. Hollander, 2008 U.S. Dist. LEXIS 56729, at *12 (internal citations omitted). Such a claim alleges "only an abstract injury insufficient to confer standing." Page v. Shelby, 995 F. Supp. 23, 27 (D.D.C. 1998).

With respect to Hollander's assertion that his individual right to vote would be harmed by McCain's election, the court reasoned that the presence of an allegedly ineligible candidate on the ballot would not impair that right because voters would still be able to vote for other candidates of their choice. Hollander, 2008 U.S. Dist. LEXIS 56729, at *12. The inclusion of a putatively ineligible candidate (in contrast with the illegal exclusion of a qualified candidate) does "not impede the voters from supporting the candidate of their choice and thus does not

cause the legally cognizable harm necessary for standing." Id. at *14 (internal citations omitted) (citing Gottlieb v FEC, 143 F.3d 618, 622 (D.C. Cir. 1998)). Berg, like Hollander, is not himself a candidate who would have standing to challenge the inclusion of an ineligible candidate. Rather, he is a voter who has "no standing to complain about the participation of an ineligible candidate in an election, even if it results in the siphoning of votes away from [the] candidate [he] prefer[s]." Id.

Accordingly, Berg has failed to articulate any concrete or particularized injury-in-fact. His claims are coexistent with those of American voters generally and such generalized grievances do not confer standing. As the Supreme Court noted in Lujan:

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch - one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 170 (1803) "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.

504 U.S. at 576.

Berg also fails to establish the two remaining standing requirements: causation, that the challenged conduct of the FEC bears a causal connection to Berg's alleged injuries, and redressability, that the claimed injury will be redressed by a favorable decision of the court. Regarding causation, Berg's Complaint makes no allegation that any action taken by the FEC injured him or, indeed, that any FEC action or omission has had any effect whatsoever on Senator Obama's eligibility to serve as President. His only reference to the FEC in the entire Complaint appears in paragraph 13 where he correctly identifies the FEC as having been created

in 1975 "to administer and enforce the Federal Election Campaign Act (FECA)."[1] But Berg does not even allege that Commission's administration of that statute has had any impact on himself, Senator Obama, or the Senator's candidacy.

Finally, Berg cannot meet the redressability requirement because there is no remedy involving the Commission that this Court could grant Berg to provide the relief he seeks. Even if his lawsuit had merit, Berg does not allege or explain how this Court's remedy would in any way involve the Commission or the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-55 ("Act" or "FECA"). Because any conceivable relief would be directed against parties other than the Commission, Berg's alleged injury could not be redressed by relief against the Commission.

In short, Berg fails to establish standing because he cannot demonstrate an injury in fact caused by the FEC that could be redressed by this Court. Because Berg fails to bring an Article III case or controversy, this case should be dismissed for lack of subject matter jurisdiction.

II. BECAUSE THE COMMISSION HAS NO JURISDICTION TO ENFORCE WHETHER CANDIDATES MEET THE CONSTITUTIONAL CRITERIA FOR PRESIDENTIAL ELIGIBILITY, IT SHOULD BE DISMISSED FROM THIS CASE

The Commission is the independent agency of the United States government vested with exclusive jurisdiction to administer, interpret and enforce civilly the FECA. See 2 U.S.C. §§ 437c(b)(1), 437d(a), 437d(e) and 437g. The Commission also exercises jurisdiction over the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 et seq., and the Presidential

[1] Consistent with Berg's failure to allege any FEC-initiated injury or harm, Berg does not request any remedy involving the Commission. See Compl. ¶¶ 46–71.

Primary Matching Payment Account Act, 26 U.S.C. §§ 9031 et seq.[2] These statutes only confer on the Commission jurisdiction over issues concerning the financing of federal campaigns: regulating the organization of campaign committees; the raising, spending, and disclosing of campaign funds; and the receipt and use of public funding for qualifying candidates.

None of these statutes delegates to the FEC authority to determine the constitutional eligibility of federal candidates, and Berg does not allege otherwise. Although the Commission determines whether certain presidential candidates are eligible for public funding, it has no power to determine who qualifies for ballot access or who is eligible to serve as president. Thus, because the Commission has no authority to take action against Senator Obama as suggested by Berg, the Commission should be dismissed from this case with prejudice.

CONCLUSION

The Federal Election Commission respectfully requests that the Court dismiss the Complaint in this case pursuant to Federal Rule 12(b)(1) for lack of subject matter jurisdiction with prejudice or dismiss the Commission as a defendant from this case with prejudice.

Respectfully submitted,

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/s/ David Kolker
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[2] Senator Obama has not sought public financing for his campaign.

/s/ Kevin Deeley
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