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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

CAPTAIN PAMELA BARNETT, et al., Plaintiffs, v. BARACK H. OBAMA, et al. Defendants.	No. SACV 09-00082 DOC (ANx) DATE: October 5, 2009 TIME: 8:30 a.m. CTRM: 9D Hon. David O. Carter

(1) NOTICE OF MOTION AND MOTION TO DISMISS; AND

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on October 5, 2009 at 8:30 a.m., defendants Barack Obama, Michelle Obama, Hillary Clinton, Robert Gates and Joseph Biden will bring on for hearing the within Motion to Dismiss, before the Honorable David O. Carter, in his courtroom located at 411 West Fourth Street, Santa Ana, California 92701. Defendants, by and through undersigned counsel, hereby move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing plaintiffs' action against them with prejudice. This motion is made on the ground that this Court lacks subject matter jurisdiction over Plaintiffs' claims against Defendants, and on the further ground that, as to certain claims and Defendants, Plaintiffs fail to state claims upon which this Court may grant relief.

Further, with respect to any and all claims or causes of action alleged herein under the Freedom of Information Act, this Court should also dismiss said claims pursuant to Federal Rules of Civil of Civil Procedure 12(b)(3), on the additional ground that venue does not properly lie as to said claims in this District.

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This Motion is based on the attached Memorandum of Points and Authorities, pleadings, exhibits, and upon such other and further arguments, documents and grounds as may be advanced in the future. This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on August 25, 2009.

Respectfully submitted,

DATED: September 4, 2009

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I.

INTRODUCTION

Plaintiffs ask this Court to entertain a challenge to the 2008 election of President Barack Obama by requiring the President to disprove, in this Court, their innuendo alleging that he is not a "natural born citizen" within the meaning of the United States Constitution. Plaintiffs cannot use this Court to investigate and decide the President's fitness for office or their related claims, however, without contravening the very Constitution that they purport to uphold, which provides that the Electoral College and the Congress have exclusive jurisdiction of such political disputes.

Plaintiffs also seek to litigate in this Court a variety of vaguely-defined claims purportedly related to a hodgepodge of constitutional provisions, civil and criminal statutes, and the Freedom of Information Act. These claims are equally flawed, either because Plaintiffs have failed to meet the jurisdictional and statutory prerequisites or again seek to have this Court adjudicate issues that are textually committed to other branches.

This Court, therefore, is without jurisdiction to determine any issues related to the President's fitness to hold office, and this case should be dismissed with prejudice and judgment entered accordingly.

II.

STATEMENT OF THE CASE AND SUMMARY OF ALLEGATIONS

Distilled to its essence, this case seeks relief from this Court in the form of an adjudication of the fitness and

qualifications of President Barack Obama to be the President of the United States. Indeed, the opening paragraph of the First Amended Complaint (hereafter "FAC") states:

> "Plaintiffs bring this lawsuit to seek, above all, a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202, deciding whether Defendant Barack Hussein Obama can show by clear and convincing evidence that he is a natural born citizen of the United States of America within the meaning of Article II, Section I (sic) of the Constitution of the United States, and therefore whether he is qualified, or unqualified, for the position which he has held, de facto if not de jure since January 20, 2009."

Paragraph 34 of the FAC alleges that President Obama

> "is a foreign National, citizen of Indonesia, and possibly still citizen of Kenya, usurping the position of the President of the United States of America and the Commander-in-Chief." (emphasis supplied).

At paragraph 35 of the FAC, Plaintiffs make reference to a decision by United States District Judge James L. Robertson in a case entitled Hollister v. Soetoro, 601 F. Supp. 179 (2009), asserting that Judge Robertson was "obviously biased" and unwilling to hear the issue of whether President Obama is a "natural born" citizen of the United States on the merits. Thereafter, at paragraph 36 of the FAC, Plaintiffs allege as follows:

> "Due to the fact that legitimacy of the presidency (sic) is the most important issue in the history of this Nation, and 305 million American citizens cannot and should not be held hostage to one biased court, it is imperative for this Honorable court to hear this petition on the merits."

The FAC contains numerous other references demonstrating that what Plaintiffs are seeking is nothing less than a trial concerning the fitness, competence, and qualifications of President Barack Obama to hold office. At paragraph 120 of the FAC, Plaintiffs allege that this Court "has the power to conduct hearings . . . to investigate all . . . matters related to Count I of Plaintiffs' original (January 20, 2009) Complaint." A review of Plaintiffs' January 20, 2009 Complaint, which is incorporated by reference into the FAC by virtue of paragraph 120, reveals that it is replete with challenges to the validity of the Presidency of Barack Obama. One prime example is contained at paragraphs 41 and 42 of the original Complaint, wherein Plaintiffs alleged that Defendant President Obama has a duty to produce records demonstrating that he is constitutionally eligible to hold the office of President, and that, in the absence of such proof,

> "the Electoral College having elected Defendant Obama to President-elect, the President-elect (sic.), must be determined to have failed to qualify a valid President, whereby the Vice President becomes the acting President under U.S. Constitution Amendment 20 (sic)."

Although Plaintiffs make scattered reference to other claims they might seek to bring, the gravamen of the FAC is plainly this purported "challenge" to the President's qualifications. By virtue of the fact that Plaintiffs herein seek a trial in this Court regarding their contentions that President Barack Obama is not qualified to be President, because he is not a "natural born citizen" of the United States, and on other allegations contained within the First Amended Complaint, this case must be dismissed because it presents non-justiciable political questions, because Plaintiffs lack standing, and for other reasons, as the following discussion will demonstrate.

III.

ARGUMENT

1. This Court Lacks Subject Matter Jurisdiction Of This Action

A. Plaintiffs Lack Standing Herein

The question of standing is a threshold determination concerning "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d. 343 (1975). A plaintiff bears the burden of establishing proper standing "at the outset of its case." Sierra Club v. Environmental Protection Agency, 292 F.3d 895, 901 (D.C. Circuit 2002). In so doing, the Plaintiffs must allege facts sufficient to satisfy the "irreducible Constitutional minimum" of Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d. 351 (1992). To have standing, Plaintiffs must first allege that they "suffered 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' . . . Id. at 560, 112 S.Ct. 2130 (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of." Id. (quotations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. (quotations omitted). In the FAC, Plaintiffs have failed to establish their standing to sue. See Berg v. Obama, 574 F.Supp.2d 509, and cases cited therein.

1. **No Plaintiff Can Show The Required Concrete, Traceable Injury-in-Fact To Provide Standing Herein**

The FAC lists 44 Plaintiffs. At paragraph 5 thereof, it is alleged that four Plaintiffs have "unique political standing": Wiley S. Drake, Alan Keyes, Gail Lightfoot, and Markham Robinson. Wiley Drake and Markham Robinson have previously voluntarily dismissed this case, and are no longer Plaintiffs. With respect to Alan Keyes, and Gail Lightfoot, it is alleged that they "appeared on the California ballot as candidates for President or Vice President in the 2008 National Presidential elections . . ." It is further alleged that these Plaintiffs "were injured in their business interests because they had business interests in their candidacies."

None of the Plaintiffs alleged to have "unique political standing" has suffered anything remotely resembling the required "injury-in-fact," traceable to Defendants' conduct, to vest them with standing in this case. Plaintiffs do not make clear the precise nature of their "unique political" injury, but to the extent that they are alleging that President Obama's actions

interfered with their prospects for successful election, such an injury is not a result of the actions of the Defendants. The FAC does not allege, nor could it allege, that any of these Plaintiffs were even on the ballot in enough states in the year 2008 to gain the requisite 270 electoral votes to win the Presidential election. Accordingly, the "unique[ly] political" Plaintiffs cannot establish standing on this basis.

Nor can these Plaintiffs establish standing on the basis of their amorphous allegations of injury to unspecified "business interests." Plaintiffs may not establish standing as competitor candidates based on hypothetical speculation that, for example, their fundraising prospects could have been increased under different circumstances. See, e.g., ASARCO, Inc. v. Kadish, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) ("[C]laims of economic injury . . . depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict."). And to the extent that Plaintiffs are alleging that their "business interests" have been affected as a result of policies promulgated subsequent to the election, they allege only that they "suffer[] in some indefinite way in common with people generally," an insufficient basis for standing. Hein v. Freedom From Religion Foundation, 551 U.S. 587, __, 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007) (quotations omitted). Consequently, these Plaintiffs lack standing to bring this case.

The "military" Plaintiffs herein similarly fail to establish the requisite "injury-in-fact" to vest them with standing. At Paragraph 6 of the FAC, it is alleged that Plaintiff Lieutenant

Jason Freese is on active military duty in Alaska, and "thus has standing to challenge and demand clear-and-convincing proof of the Constitutional qualifications of the Commander-in-Chief and legality of the current chain of command . . ." At Paragraph 7 of the FAC, the other military plaintiffs allege that "they are subject to recall and service at any time . . ." Neither of these allegations includes any "injury-in-fact."

As an initial matter, aside from references to the chain-of-command, Plaintiffs have not alleged anything that could even remotely be construed as an "injury." See FAC at ¶¶ 6-7. Their presence in the chain-of-command does not itself establish an injury sufficient to satisfy Article III's requirements. The President's position atop the chain-of-command is conferred by the Constitution, see U.S. Constitution Article II, § 2, cl. 1, and is common to all serving members of the armed forces. The Supreme Court has "consistently stressed that a plaintiff's Complaint must establish that he has a 'personal stake' in the alleged dispute and that the alleged injury suffered is particularized as to him." Raines v. Byrd, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (emphasis supplied). In short, the injuries alleged by Plaintiff Freese and the other military Plaintiffs herein, are not particularized as to them, but, rather, would be shared by all members of the military and is an inadequate basis on which to establish standing. See generally Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). Moreover, the claims of the retired and reservist Plaintiffs add a layer of speculation atop their non-injury: without providing any basis for believing that their return to duty

is likely or probable, they have not established an injury-in-fact. See Bates v. Rumsfeld, 271 F. Supp. 2d 54, 62 (D.D.C. 2002)(Where the likelihood "is remote," as with a recall to active duty, "plaintiffs who are no longer on active duty . . . cannot satisfy Lujan's first prong."). In summary, the " military" Plaintiffs herein cannot establish the requisite "injury-in-fact" to confer standing upon them.

At paragraph 8 of the FAC, Plaintiffs "who are State Representatives" allege their own "unique standing," because they are responsible for receipt of federal funds, and expenditures thereof, and "receipt of funds from any officer without legal authority would be complicity in theft or conversion." These allegations are neither actual or imminent, are highly speculative, and wholly insufficient to constitute injury-in-fact. In fact, these allegations do not withstand any logical scrutiny. Theft and conversion require intent. These Plaintiffs are alleging that President Obama is the President of the United States at the present time. They are also alleging that they do not know whether or not he has the qualifications to be President. They, therefore, at this point in time cannot logically contend that they are knowingly accepting monies from an illegitimate Administration.

Finally, it is well settled that an injury to "the generalized interest of all citizens in Constitutional governance" is too abstract to satisfy standing requirements. See Schlesinger v. Reservists Comm. to Stop the War, supra, 418 U.S. 208, 217, 220 (1974). In summary, Plaintiffs have not alleged, and cannot allege, the requisite "injury-in-fact" to support standing herein.

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2. **Plaintiffs Cannot Satisfy The Redressability Requirement For Standing**

As outlined above, an essential element of standing requires that it be likely, as opposed to merely speculative that the injury alleged by Plaintiff will be redressed by a favorable decision.

Even assuming that some of the purported "injuries" alleged by Plaintiffs satisfied the Article III requirements of "injury-in-fact," no Plaintiff can demonstrate that any injury complained of herein can be redressed by this Court. First, as discussed below, the political question doctrine precludes redress to any Plaintiffs because such redress would improperly arrogate to this Court jurisdiction over political questions as to the fitness and qualifications of the President which the Constitution entrusts exclusively to the House and Senate.

Plaintiffs' allegations suffer from other defects of redressability as well. As noted, the FAC does not set forth, with any precision at all, any injury which the military Plaintiffs are suffering. Certainly, however, the military Plaintiffs face risks of injury in the course of combat or other dangerous duties, but these are the sort of injuries that are sufficiently speculative as to differ from the meaning of an "injury" cognizable by an Article III Court. Even if the Court could find standing on the basis of such injuries, however, it is even more highly speculative that any such injury would be redressed by a change in the identity of the Commander-in-Chief. The military plaintiffs therefore cannot meet

the redressability prong on this basis.[1]

Finally, Plaintiffs further fail to meet the redressability element required for Article III standing because this Court is without power to enjoin the President. It appears that, in order to redress Plaintiffs' alleged injuries herein, the Court would need to issue an injunction against President Obama that, inter alia, would require him to prove his eligibility and qualifications to be President of the United States. At page 4 of the FAC, Plaintiffs further state that they are seeking injunctive relief from this Court to enjoin the appointment of Article III judges, the U.S. Attorney for the District of Columbia, and a new Supreme Court Justice. Additionally, at page 4 of the FAC, Plaintiffs seek to enjoin President Obama from making new military deployments overseas. However, this Court cannot, consistent with the doctrine of separation of powers, issue any such injunctions herein. See, e.g., Newdow v. Bush, 355 F.Supp.2d 265, 280-283 (D.C. Dist. 2005), and cases cited therein. Similarly, to the extent that Plaintiffs assert that they do not wish to enjoin the President to do

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[1] The military Plaintiffs also lack standing herein because members of the military cannot challenge the orders of a superior in a judicial forum. See, e.g., Chappell v. Wallace, 462 U.S. 296, 300, 304, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1984) (holding that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers" because "that relationship is at the heart of a necessarily unique structure of the military establishment" and noting the "disruption" of the "peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hail his superiors into court." (quotation omitted); United States v. Stanley, 483 U.S. 669, 682-83, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (holding that members of the military cannot raise Constitutional claims against military officials for injuries incident to service because "Congressionally uninvited intrusion into military affairs by the Judiciary is inappropriate").

anything, but are rather simply asking that a declaratory judgment be rendered, they also fail to satisfy the redressability element necessary for standing herein because such a judgment would be a legal nullity. Id.

In summary, Plaintiffs lack standing to bring this action because, inter alia, they utterly fail to satisfy the redressability requirement.

B. This Case Presents Non-Justiciable Political Questions

It is well settled that when the United States Constitution makes a "textually demonstrable commitment" of an issue to another branch of the government, other than the judiciary, that issue presents a non-justiciable political question. See Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d. 663 (1962). The political question doctrine serves to "restrain the Judiciary from inappropriate interference in the business of the other branches of Government" by prohibiting the courts from deciding issues that properly rest within the province of the political branches. United States v. Munoz-Flores, 495 U.S. 385, 394, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). Because "disputes involving political questions lie outside of the Article III jurisdiction of federal courts," such cases are to be dismissed for want of jurisdiction. Corrie v. Caterpillar, 503 F.3d 974, 980, 982 (9th Cir. 2007).

The issues sought to be raised by Plaintiffs in this case regarding both whether President Obama is a "natural born citizen of the United States," and therefore qualified to be President, as well as any purported claims raised by any criminal statutes cited in the First Amended Complaint are to be judged, according to the text of the Constitution, by the legislative branch of the

government, and not the judicial.

At the outset, the Constitution indicates that issues related to a candidate's eligibility for the Office of President rest, in the first instance, with the voters and with their Electoral College, the Constitutionally created body responsible for selecting the President of the United States. See U.S. Constitution, Article II, section 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct," electors for the President and Vice President); Id. Amend. XXIII section 1; Williams v. Rhodes, 393 U.S. 23, 43, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (Harlan, J., concurring) ("The [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation."). The Constitution's commitment to the Electoral College of the responsibility to select the President includes the authority to decide whether a presidential candidate is qualified for office because the examination of a candidate's qualifications is an integral component of the electors' decision-making process.[2]

The Constitution also provides that, after the Electoral College has voted, further review of a presidential candidate's eligibility for office, to the extent such review is required, rests with Congress. Where no candidate receives a majority of the electoral votes, the Constitution commits to the House of

[2] Explaining this provision of the Constitution, Alexander Hamilton stated that: "the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government who shall assemble within the State, and vote for some fit person as President." [emphasis added]. See Federalist Papers, No. 68.

Representatives the authority to select the President and, in so doing, to evaluate the candidates' qualifications. See U.S. Constitution Amendment XII. Similarly, the Twentieth Amendment exclusively grants Congress the responsibility for selecting a President when a candidate elected by the Electoral College does not satisfy the Constitution's eligibility requirements. See id. Amendment XX, § 3 ("the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."). Thus, review of Presidential qualifications after the Electoral College has acted rests in Congress, pursuant to the Constitution.

The Constitution's textual commitment of this responsibility is a responsibility that Congress has embraced. Both the House and Senate have standing committees with jurisdiction to decide questions relating to Presidential elections. See S.R. 25.1n(1)(5) (the Senate Committee on Rules and Administration has jurisdiction over "proposed legislation, messages, petitions, memorials, and other matters relating to . . . federal elections generally, including the election of the President, Vice President, and members of Congress, as well as "Presidential succession") (copy attached for Court's convenience as Exhibit 1 hereto). See also H.R. 10(j)(12). (Copy attached as Exhibit 2).

Federal legislation further details the process for counting electoral votes in the Congress. Under 3 U.S.C. § 15, Congress is directed to be in session on the appropriate date to count the

electoral votes for President, with the President of the Senate presiding. The statute further directs that the electoral votes be counted, and then the results be presented to the President of the Senate, who shall then "announce the state of the vote." The statute then provides a mechanism for objections to be registered and resolved in the following language:

> "[e]very 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 before the same shall be received. When all objections so made . . . shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision."

In summary, it is clear, from the text of the Constitution, and the relevant statutory law implementing the Constitution's textual commitments, that challenges to the qualifications of a candidate for President can, in the first instance, be presented to the voting public before the election, and, once the election is over, can be raised as objections as the electoral votes are counted in the Congress. Therefore, challenges such as those purportedly raised in this case are committed, under the

Constitution, to the electors, and to the Legislative branch.[3]

Barack Obama has been President of the United States for seven months. The issues which Plaintiffs seek to litigate in this case, and the allegations which they make in the First Amended Complaint all relate to the fitness, competence, and qualification of President Obama to continue to serve in office. As the D.C. Circuit observed under vastly different circumstances, these issues are political questions for a very good reason:

> "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . to the Senate, the need for finality also demands it. See Baker v. Carr, 369 U.S. at 210, 82 S.Ct. at 706 . . . [T]he intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos. Even if the courts qualified a finding of justiciability with a rule against stays or specific relief of any kind, their review would undermine the new President's legitimacy . . . for at least as long as the process took. And a declaratory action without final

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[3] To the extent that Plaintiffs may claim that their allegations about the President's fitness, competence, or qualification are based on information not available at a previous time, the Constitution also makes a textual commitment of the power to review the President's continuing service to a branch other than the Judiciary, and such allegations also include political questions. See U.S. Constitution Amendment XXV; Baker, 369 U.S. at 217. Likewise, Plaintiffs' vague claims under Title 18, see FAC at 5, 10, 36, are equally committed by the text of the Constitution to a coordinate branch. See U.S. Constitution Article I, § 2, cl. 5; Article I, § 3, cl. 6; Nixon v. United States, 938 F.2d 239, at 243 ("the framers simply assumed that the courts had nothing whatever to do with impeachments.") (D.C. Circuit 1991), aff'd, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d. 1 (1992); Hyland v. Clinton, 208 F.3d 213, 2000 WL 125876 (6th Cir. 2000).

relief awarding the Office to one person or the other could confound matters indefinitely." [emphasis supplied].

Nixon v. United States, 938 F.2d 239, at 245(D.C. Cir. 1991), aff'd, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d. 1 (1992).

Litigation of these issues in this Court would be an equal intrusion of the courts into the political life of the other branches. Such an intrusion would do violence to the principle of separation of powers, an equally-important basis to recognize that such political questions are outside the jurisdiction of the Court. See Baker v. Carr, supra, 369 U.S. at 210 ("The non-justiciability of a political question is primarily a function of the separation of powers."); id. at 217 (setting forth the elements typically describing a political question).

In summary, the issues which Plaintiffs seek to litigate in this case are, under the Constitution, within the sole and exclusive jurisdiction of the House of Representatives and the Senate of the United States. Additionally, litigation of these issues in this Court, and the granting of some or all of the relief sought by Plaintiffs herein would violate the doctrine of separation of powers. Accordingly, this case must be dismissed, because it presents non-justiciable political questions.

C. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Quo Warranto Claims

Plaintiffs appear to be seeking a writ in the nature of Quo Warranto from this Court to determine whether President Obama is lawfully qualified to be the President of the United States.

"Quo Warranto is an ancient Writ used by the

> King of England to determine if an individual's claim to an office or franchise is well founded. If the individual is found to be in unlawful possession of the office, the individual is ousted."

Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1131 (9th Cir. 1994) (citations omitted). The question of whether a quo warranto writ should issue in this case clearly involves non-justiciable political questions, as discussed above. In addition, Plaintiffs' attempt to invoke the writ suffers from numerous serious flaws that preclude this Court's jurisdiction.

As the Supreme Court has long held, in the absence of an authorizing statute, a writ of quo warranto may not be brought by anyone other than the United States:

> "[G]eneral public interest is not sufficient to authorize a private citizen to institute such [Quo Warranto] proceedings; for if it was, then every citizen and every taxpayer would have the same interest and the same right to institute such proceedings, and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title."

Newman v. U.S. ex rel., Frizzell, 238 U.S. 537, 548, 35 S.Ct. 881, 59 L.Ed.1446 (1915). The authorizing statute for the District of Columbia sets forth a number of requirements, including a requirement that any quo warranto action be heard by the United States District Court for the District of Columbia. See D.C. Code Sections 16-3501 through 16-3503. Indeed, Plaintiffs acknowledge

this requirement in their pleading, but seek to have this Court ignore it because of their apparent dissatisfaction with the precedents in the District of Columbia. See FAC at ¶¶ 35-36.[4]

Accordingly, for all of the reasons set forth above, this Court lacks subject matter jurisdiction in re Plaintiffs' claims and causes of action purporting to sound in Quo Warranto.

D. This Court Does Not Have Subject Matter Jurisdiction Of This Action Under Either 42 U.S.C. § 1983, Or 42 U.S.C. § 1988

At paragraph 1 of the FAC, Plaintiffs allege that this Court has subject matter jurisdiction pursuant to, inter alia, the provisions of 42 U.S.C. §§ 1983 and 1988. Plaintiffs' reliance upon these statutes for subject matter jurisdiction in this case is misplaced. To state a claim under 42 U.S.C. § 1983, Plaintiffs must allege both the violation of a right secured by the Constitution and laws of the United States, and that the alleged deprivation was committed by a person acting under color of *state* law. West v. Adkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d. 40 (1988). Plaintiffs have not properly pled any violation of constitutional or federal law. Even if Plaintiffs had properly alleged that one or more of the Defendants herein violated a right secured to them by the Constitution and laws of the United States, however, Plaintiffs have not, and cannot, allege that any of the Defendants herein was acting under color of state law. Therefore,

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[4] Although California also has a quo warranto statute, that state statute cannot confer jurisdiction on this Court. Nor does it appear that this action meets the requirements set out therein, including, *inter alia*, that such action be brought by the attorney general. See Cal. Code. Civ. Proc. § 803 et seq.

any and all causes of action predicated herein upon 42 U.S.C. § 1983 must be dismissed.

In their FAC, Plaintiffs also allege that this Court has subject matter jurisdiction of this case, and that they are entitled to relief, pursuant to the provisions of 42 U.S.C. § 1988(a). Plaintiffs' reliance upon this section is completely misplaced. In the first place, Section 1988(a) is a procedural statute, which does not create rights or confer jurisdiction. Caldwell v. Green, et al., 451 F.Supp.2d 811 (W.D. VA 2009); Harrison v. Obenshain, 452 F.Supp. 1172 (E.D. VA 1978). Moreover, as the Supreme Court explained in Moor v. County of Alameda, 411 U.S. 696, 93 S.Ct. 1785, 36 L.Ed.2d. 596 (1973), the provisions of Section 1988 only apply to cases which are properly brought under one or more sections of the Civil Rights Acts. Therefore, Plaintiffs cannot rely at all upon the provisions of 42 U.S.C. § 1988(a) in this case, because they have no claim against Defendants herein under 42 U.S.C. § 1983.

2. This Court Lacks Subject Matter Jurisdiction And Plaintiffs Fail To State A Claim For Relief In Re Their FOIA Claims

The FAC lists 44 plaintiffs in the caption. Nowhere in the body of the FAC is there any specific reference to any specific request made by any specific plaintiff, pursuant to the provisions of the Freedom of Information Act, to any agency of the United States. Moreover, there is no reference anywhere in the FAC regarding the exhaustion of administrative remedies, and the issuance of a final agency decision, on any FOIA request made by any plaintiff herein.

It is well settled that the exhaustion of a party's administrative remedies "is required under the FOIA before that party can seek judicial review." United States v. Steele, 799 F.2d 461, 465 (9th Cir. 1986); Dettmann v. U.S. Department of Justice, 802 F.2d 1472, 1476 (D.C. Cir. 1986) ("It goes without saying that exhaustion of remedies is required in FOIA."); Hyman v. Merit Systems Protection Board, 799 F.2d 1421, 1423 (9th Cir. 1986)(FOIA requires administrative appeals to be exhausted before suit may be brought in federal court). The obvious purpose of the exhaustion requirements under FOIA is to allow the federal agency to exercise its discretion and authority, as well as to create a descriptive factual record for the district court to review if necessary. Under FOIA, a party who makes a record request "must request specific information in accordance with published administrative procedures," and "have the request properly refused before that party can bring" suit in federal court. Steele, supra, 799 F.2d at 466. "Where no attempt to comply fully with the agency procedures has been made," judicial review will not be had. Id. See also Gasparutti v. United States, 22 F. Supp. 2d 1114, 1116 (C.D. Cal. 1998) (Where plaintiffs have "not complied with [FOIA] procedures, district courts lack jurisdiction . . . under the exhaustion doctrine and will dismiss the claim for lack of subject matter jurisdiction.").

In the instant case, Plaintiffs have not even attempted to plead exhaustion under FOIA, nor have they named any agency as a defendant herein. Indeed, a reading of paragraphs 86-109 of the FAC suggests that Plaintiffs believe that they can use the FAC in the first instance to request documents under FOIA. As the legal

discussion above demonstrates, FOIA does not convert this Court into a free-standing investigative body with the power to resolve Plaintiffs' far-reaching document requests at will.

In addition to the foregoing, it is submitted that any and all FOIA claims or causes of actions herein must be dismissed for improper venue. At Paragraph 2 of the FAC, Plaintiffs allege that venue is proper in this case under the Freedom of Information Act, because:

> "Several Plaintiffs, including Plaintiff Wiley S. Drake, live in Orange County within the Southern Division of the Central District of California."

As outlined above, Plaintiff Wiley S. Drake has been voluntarily dismissed as a Plaintiff from this action. Additionally, as noted above, the FAC is utterly silent regarding whether any other specific Plaintiff has made any specific request to any specific agency of the United States under the Freedom of Information Act, and, moreover, it is silent regarding the question of exhaustion of administrative remedies.

Venue in an action brought pursuant to the Freedom of Information Act is governed by the provisions of 5 U.S.C. § 552(a)(4)(B), which provides as follows:

> "On complaint, the District Court of the United States in the District in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from

> withholding agency records and to order the production of any agency records improperly withheld from the complainant."

Applying this provision to this case in its present posture, it is submitted that venue is improper in this District. This is so because Plaintiffs have failed to allege in the FAC that any of the Plaintiffs who may reside in this District have exhausted the required administrative remedies under the FOIA, and/or that any records subject to any such requests are situated in this District.

For the reasons set forth above, Plaintiffs' claims under the Freedom of Information Act must be dismissed for lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and for improper venue.

3. This Case Must Be Dismissed As To Secretary Hillary Rodham Clinton, And Secretary Robert M. Gates, For Lack of Subject Matter Jurisdiction, And Failure By Plaintiffs To State A Claim For Relief.

The caption of the FAC lists as Defendants Secretary of State Hillary Rodham Clinton, and Secretary of Defense Robert M. Gates. The only general mention of Secretary Clinton appears at page 4 of the FAC, wherein Plaintiffs state that they desire this Court to enter quo warranto writs to, among others, the Secretary of State, to enjoin certain Presidential appointments. As discussed elsewhere in this brief, neither a Writ of Quo Warranto, nor any other injunction regarding appointments may be issued in this case. With respect to Secretary Clinton, therefore, Plaintiffs fail to state any claim for relief, and this case must be dismissed for lack of subject matter jurisdiction and failure to state a claim.

With respect to Secretary of Defense Gates, he is only mentioned twice in the FAC. At page 4 thereof, he, like Secretary Clinton, is mentioned as a person to whom a Quo Warranto Writ should issue to enjoin appointments. As discussed above, no Quo Warranto Writ may issue herein. The only other mention of Secretary Gates anywhere in the FAC is at Paragraph 41 thereof, which provides, in pertinent part, as follows:

> ". . . and there is a need for a Writ of Mandamus from the Supreme Court for the Secretary of Defense, Robert Gates to release the original certificate of the selective service with the U.S. military, for it to be analyzed by the forensic document examiners of the Plaintiffs."

In the first place, this allegation is nonsensical, because Plaintiffs are talking about a Writ of Mandamus which they wish to seek from the United States Supreme Court, and, apparently, not this Court. Secondly, even assuming, arguendo, that Plaintiffs were seeking a Writ of Mandamus from this Court to Secretary Gates to release some selective service records regarding President Obama, this Court would lack subject matter jurisdiction.

The statute governing mandamus, 28 U.S.C. § 1361,[5] states that "The District Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mandamus is an extraordinary remedy. Barron v. Reich, 13 F.3d 1370 (9th Cir. 1994); Stang v. IRS, 788 F.2d 564, 565 (9th

[5] This statute is not cited by Plaintiffs at all in their FAC.

Cir. 1986). A Writ of Mandamus should only issue when three factors have been met: (1) the plaintiff's claim is "clear and certain"; (2) the defendant official's duty to act is ministerial, and "so plainly prescribed as to be free from doubt"; and (3) no other adequate remedy is available. Barron v. Reich, supra, quoting Fallini v. Hodel 783 F.2d 1343, 1345 (9th Cir. 1986). Applying these factors to the instant case, it is clear that Plaintiffs lack standing to seek mandamus relief herein, and accordingly this Court lacks subject matter jurisdiction and Plaintiffs fail to state a claim for relief. This is so because Secretary Gates has absolutely no ministerial duty so plainly prescribed as to be free from doubt to provide any Plaintiff herein with any selective service record which might deal with President Barack Obama.

As the foregoing discussion demonstrates, this case must be dismissed as to Secretary Hillary Rodham Clinton and Secretary Robert M. Gates for lack of subject matter jurisdiction and failure by Plaintiffs to state a claim for relief.

4. This Case Must Be Dismissed As To First Lady Michelle Obama And Vice President Joseph Biden Because Plaintiffs Have Failed To State Any Claim Whatever Against Them

First Lady Michelle Obama and Vice President Joseph Biden are named as Defendants in this case in the caption of the FAC. The body of the FAC contains absolutely no reference whatever to any act or omission by either of these Defendants.

The only reference to the First Lady in the body of the FAC appears at Paragraphs 3-4, wherein Plaintiffs allege that someone named Michelle Obama either resides in, or maintains business

offices, in this District. No other mention of a "Michelle Obama" appears anywhere in the FAC. Additionally, the body of the FAC does not contain any allegations whatever regarding Vice President Biden. Accordingly, as to these Defendants, the action must be dismissed for lack of subject matter jurisdiction, because there is literally a failure by Plaintiffs to state any claim for relief against them.

IV.

CONCLUSION

For the foregoing reasons, this action should be dismissed in its entirety for lack of subject matter jurisdiction and for failure by Plaintiffs to state any claim upon which relief may be granted by this Court, and, as to the FOIA claims, for lack of venue. Moreover, because the defects with Plaintiffs' First Amended Complaint cannot be cured, it should be dismissed with prejudice, and judgment should be entered accordingly.

Respectfully submitted,

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