UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4340

PHILIP J. BERG, Plaintiff-Appellant,
v.
BARACK OBAMA, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF APPELLEE FEDERAL ELECTION COMMISSION

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COUNTERSTATEMENT OF JURISDICTION

Philip J. Berg ("Berg") alleged that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 5 U.S.C. § 702. (Am. Compl. ¶¶ 12-14.) The district court granted the defendants' motions to dismiss by opinion and order dated October 24, 2008. *Berg v. Obama*, *et al.*, 574 F. Supp. 2d 509 (E.D. Pa. 2008). The district court held that it did not have jurisdiction over Berg's Natural Born Citizen Clause claim because he lacked Article III standing to bring it. *Id*. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over the appeal of the district court's dismissal of Berg's First Amended Compliant for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Berg filed his notice of appeal on October 30, 2008. (App. 1-3).

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court properly dismissed Berg's Natural Born Citizen Clause claim for lack of subject matter jurisdiction because any injury alleged by Berg is undifferentiated and widely-shared, and thus fails to satisfy the injury-in-fact requirement for standing under Article III.

2. Whether the district court properly dismissed Berg's First Amended Complaint because he had failed to plead valid causes of action under (1) 42 U.S.C. § 1983; (2) 42 U.S.C. § 1985; (3) 42 U.S.C. § 1986; (4) the Federal

Election Campaign Act, 2 U.S.C. §§ 431-55; and (5) the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq*.

COUNTERSTATEMENT OF THE CASE

Philip J. Berg attempts through this case to present the claim that Barack Obama is ineligible to be President of the United States because he is not a "natural born" citizen as required by Article II, Section I of the Constitution (the "Natural Born Citizen Clause"). In the district court, Berg sought a declaration that Obama could not become President, as well as permanent injunctions barring him from running for the office, and barring the Democratic National Committee ("DNC") from selecting him as the party's nominee. On October 24, 2008, the district court granted the defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court correctly held that Berg had not established injury-in-fact, and therefore standing, to bring a challenge under the Natural Born Citizen Clause because the alleged injuries were widely-shared and undifferentiated. The district court also correctly held that Berg had otherwise failed to bring a claim for which relief could be granted under various federal statutes, including 42 U.S.C. §§ 1983, 1985 and 1986; the Freedom of Information Act; and the Federal Election Campaign Act, the statute the appellee Federal Election Commission is empowered to administer and enforce. Berg now appeals the district court's ruling.

For the first time on appeal, Berg attempts to raise new alleged facts, legal arguments, and causes of action concerning events that took place after the district court reached its decision. In particular, Berg raises (Br. 18-19) new arguments about the counting of the electoral votes on January 8, 2009, and 3 U.S.C. § 15. *See, e.g.*, Berg's Statement of Issues Presented, Nos. 2, 4-7.

COUNTERSTATEMENT OF FACTS

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes: the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-55, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013,[1] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.[2] *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. These statutes regulate the manner in which campaigns for federal elective office are financed and how information about that financing is disclosed to the public. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules

[1] The Presidential Election Campaign Fund Act ("Fund Act") provides for a voluntary program of public financing of the general election campaigns of eligible major and minor party nominees for the offices of President and Vice President of the United States.

[2] The Presidential Primary Matching Payment Account Act ("Matching Payment Act") provides partial federal financing for the campaigns of presidential primary candidates who qualify and choose to participate.

. . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce against violations of the Act. 2 U.S.C. § 437g.

On August 21, 2008, Philip J. Berg filed a complaint for declaratory and injunctive relief and a motion for a temporary restraining order and for expedited discovery against Barack Obama, the Democratic National Committee, the Federal Election Commission, and Does 1-50. (Compl. for Declaratory and Injunctive Relief, Docket No. 1; Mot. for TRO and for Expedited Disc., Docket No. 2.) In his Complaint and motion for a TRO, Berg alleged that then-Senator Obama was constitutionally ineligible to become President of the United States because he was not a "natural born" citizen as required by Article II, Section 1. Berg sought a declaration that Obama could not become President, as well as permanent injunctions barring him from running for the office, and barring the DNC from selecting him as the party's nominee.

On October 6, 2008, Berg filed an Amended Complaint for declaratory and injunctive relief that added several defendants, including Pedro Cortes, the Secretary of the Commonwealth of Pennsylvania, and the U.S. Senate Committee on Rules and Administration as well as its Chairman, Senator Dianne Feinstein. (Docket No. 14.) The Amended Complaint also added seven new claims to the original National Born Citizen Clause allegation (Count 1). The new claims were

brought under 42 U.S.C. §§ 1983, 1985, and 1986 (Counts 2-4, respectively), as well as provisions of the FECA (Count 5); the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (Count 6); and the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1481(b) (Count 8). Berg's Amended Complaint also included a claim for Promissory Estoppel (Count 7). Counts 1-6 are directed to all defendants. The promissory estoppel claim (Count 7) is directed to defendants Obama and the DNC, while the INA claim (Count 8) is directed only to the former.

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Obama and the DNC moved to dismiss Berg's First Amended Complaint on October 20, 2008. (Mot. to Dismiss, Docket No. 20.) The following day, the Commission moved to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (Mot. to Dismiss, Docket No. 24, Oct. 21, 2008.) Three days later, on October 24, the district court dismissed Berg's Amended Complaint. Taking as true the well-pleaded facts of the Amended Complaint, the court held that Berg had not established injury-in-fact, and therefore standing, to bring a challenge under the Natural Born Citizen Clause. *Berg*, 574 F. Supp. 2d at 515-21. The court also held that Berg had not otherwise brought a claim for which relief could be granted. *Id*. at 521-30.

Berg filed a notice of appeal in this Court on October 30, 2008, as well as an Emergency Motion for an Immediate Injunction to Stay the Presidential Election of

November 4, 2008, pending resolution of the appeal. This Court denied Berg's Emergency Motion on October 31. The Court held that "[f]or the reasons ably expressed by the District Court — and not addressed in [Berg's] Emergency Motion — it appears that [Berg] lacks standing to challenge Senator Obama's candidacy for the Presidency of the United States. Accordingly, [Berg] has not shown a likelihood of success with respect to his appeal."

On December 4, 2008, Berg returned to this Court moving for an Immediate Injunction Pending the Resolution of Petitioner's Appeal. In his motion, Berg asked the Court to stay the certification of electors, stay the Electoral College from casting any votes for Obama on December 15, 2008, and to stay the counting of any votes in Congress on January 6, 2009. The Court denied Berg's Motion on December 9, once again finding that he had not shown a likelihood of success with respect to his appeal. The Court explained, "As ably expressed by the District Court, it appears that [Berg] lacks standing to challenge the election of Barack H. Obama to the Presidency of the United States. Even if [Berg] possessed standing to raise the issue of President-Elect Obama's constitutional eligibility to be President, no justiciable controversy is presented, as [Berg] seeks adjudication of a political question."

On January 16, 2009, the Commission moved for summary affirmance of the lower court's opinion. The motion remains pending.

COUNTERSTATEMENT OF RELATED CASES & PROCEEDINGS

On October 31, 2008, Berg filed a Petition for Writ of Certiorari Before Judgment in the Supreme Court, as well as an application with Justice Souter for an Immediate Injunction to Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petition for Certiorari. *Berg v. Obama, et al.*, No. 08-570. Justice Souter denied Berg's motion on November 3, 2008. A little more than two months later, on January 12, 2009, the Court denied his petition for a writ of certiorari. *Berg v. Obama, et al.*, 129 S. Ct. 920 (2009).

STANDARD OF REVIEW

This Court's review of a district court's dismissal for lack of subject matter jurisdiction or for failure to state a claim is plenary. *See Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3rd Cir. 2000) (lack of subject matter jurisdiction); *Lora-Pena v. FBI*, 529 F.3d 503, 505 (3rd Cir. 2008) (failure to state a claim). Plenary review requires the Court to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff. *Id*.

SUMMARY OF ARGUMENT

The court below correctly held that Berg has neither established standing, nor pled a valid cause of action, to bring his claim that President Barack Obama is

ineligible to be president because he is not a "natural born" citizen as required by Article II, Section I of the Constitution (the "Natural Born Citizen Clause").

Berg lacks standing to bring a challenge under the Natural Born Citizen Clause. The injuries he claims to have suffered are undifferentiated and widely-shared by all voters generally, and thus do not satisfy Article III's injury-in-fact requirement. Obama's alleged unconstitutional candidacy results in no harms that redound particularly to Berg's detriment.

In this Court, Berg now argues for the first time that the alleged failure of Members of Congress to object to the counting of the electoral votes on January 8, 2009, gives him standing under the Tenth Amendment. This argument is not properly before the Court. In any event, this argument does not suggest that Berg's purported injuries are personal to him, as opposed to generalized grievances that affect all voters in substantially equal measure.

Moreover, even if Berg could show that he has suffered an Article III injury-in-fact, he nonetheless cannot establish the two remaining standing requirements to sue the *Commission*: causation, that the challenged conduct of the Commission bears a causal connection to Berg's alleged injuries, and redressibility, that the claimed injury will be redressed by a favorable decision of the Court.

Berg has also failed to plead a valid cause of action under 42 U.S.C. §§ 1983, 1985 and 1986; the Federal Election Campaign Act; and the Freedom of

Information Act. As to section 1983, Berg has yet to cite any case which suggests that the Natural Born Citizen Clause creates an individual right redressible under that section. Having failed to establish such a right cognizable under section 1983, Berg's derivative section 1985 and section 1986 claims must fail as well. Berg has failed to state a cognizable claim under the FECA, and has no standing to pursue it, because no provision of this statute entitles Berg to the information regarding Obama's citizenship that Berg seeks. Berg has also failed to state a cognizable claim under FOIA because he does not allege that he actually made a FOIA request to the Commission, let alone that he complied with the FEC's regulations for making such a request. In any event, Berg has waived appeal of his FECA and FOIA claims by failing to mention them in his opening brief.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT BERG LACKS STANDING TO BRING A CLAIM UNDER THE NATURAL BORN CITIZEN CLAUSE AND THEREFORE CORRECTLY DISMISSED THIS CLAIM FOR WANT OF JURISDICTION

The court below correctly dismissed Berg's Natural Born Citizen Clause claim for lack of subject matter jurisdiction. Berg lacks standing to bring this claim, 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 Berg 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 Env't*, 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 Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982).

"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 quotations and citation omitted). In deciding this case, "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 Elecs., Inc. v. United States*, 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) (citations omitted).

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, 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, 560-61 (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*. at 560 (citations omitted). "[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. Thus, 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; *see also Warth*, 422 U.S. at 499 ("[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.").

"Standing has been a consistent barrier to lower courts hearing generalized, undifferentiated claims by voters and citizens." *See Berg*, 574 F. Supp. 2d at 517-18 (citing cases). "'[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.'" *Id*. at 518 (quoting *Crist v. Comm'n on Presidential Debates*, 262

F.3d 193, 195 (2nd Cir. 2001)). Any injury alleged by Berg is undifferentiated and widely-shared, and thus fails to satisfy the injury-in-fact requirement for standing. Berg never asserts that the purportedly unconstitutional candidacy of Barack Obama results in any harm that redounds particularly to his detriment. Rather, he broadly identifies those who may suffer as: "Plaintiff as well as other Democratic Americans" (Am. Compl. ¶ 7), "Plaintiff and the American Citizens" (*id.* ¶133), and "Plaintiff and the American people" (*id.* ¶¶ 134, 135).

Thus, as the lower court correctly held, Berg's stake is "no greater and his status no more differentiated than that of millions of other voters." 574 F. Supp. 2d at 519. Berg does not claim that he has suffered any injury or harm that, if true, would not also be shared by every American, all of whom would appear to suffer, if at all, in equal measure. Because it is well-settled that claims advanced on behalf of such all-encompassing groups do not satisfy the injury-in-fact requirement, Berg's generalized grievance on behalf of the American citizenry cannot satisfy Article III. *See Crist* 262 F.3d at 195 (citing cases) ("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."). Accordingly, the court below correctly concluded that the harm allegedly suffered by Berg and "other Democratic Americans" is "too vague and its

effects too attenuated to confer standing on any and all voters." 574 F. Supp. 2d at 519.

The district court properly explained that Berg's allegations of harm are as flawed as the plaintiff's allegations in *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008). In *Hollander*, the plaintiff brought an action similar to Berg's, challenging the eligibility of Senator John McCain to serve as president of the United States in light of his birth in the Panama Canal Zone to American parents. The *Hollander* court held that the plaintiff lacked standing because any harm from McCain's election would "adversely affect only the generalized interest of all citizens in constitutional governance." *Id*. at 68 (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).

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.

For the first time on appeal, Berg relies (Br. at 19) upon 3 U.S.C. § 15 and asserts (Br. at 18) that he 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." This claim lacks merit for several reasons and is not properly before this Court. First, it relies upon alleged facts that took place after the district court reached its decision. Berg obviously could not have raised these facts for the district court to consider in the first instance, and he relies upon 3 U.S.C. § 15 for the first time before this Court. Absent exceptional circumstances, "[i]t is well established that a point not raised in the district court generally will not be heard by an appellate court." *United States v. Williams*, 510 F.3d 416, 430 (3rd Cir. 2007); *accord Franki Found. Co. v. Alger-Rau & Assocs., Inc.*, 513 F.2d 581, 586 (3rd Cir. 1975) ("[A]bsent exceptional circumstances, an issue not raised in the district court will not be heard on appeal.").[3] Second, the

[3] This Court has explained that exceptional circumstances include, "*e.g.*, the public interest requires that the issues be heard or manifest injustice would result from the failure to consider such issues." *Brown v. Philip Morris Inc.*, 250 F.3d

"existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan*, 504 U.S. at 569 n.4 (internal quotation marks and citation omitted). Standing cannot be acquired by facts that may develop subsequently.

Third, even if this claim were properly before the Court, neither the Tenth Amendment, 3 U.S.C. § 15, nor *Gregory v. Ashcroft*, 501 U.S. 452 (1991), confers Article III standing on Berg. The Tenth Amendment 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." We are aware of no case that has ever construed that Amendment to provide standing to an individual voter. Berg relies heavily (Br. at 20-22) upon *Gregory*, but that case neither addressed standing in general nor relied upon the Tenth Amendment to find standing. The plaintiffs in that case were state judges who argued that a Missouri statute which provided for their own mandatory retirement at age 70 violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, and the Equal Protection Clause. Their personal stake in the outcome was unquestioned, and the Supreme Court's limited discussion of the Tenth Amendment was in the context of Missouri's power to determine the qualifications of its own government

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789, 799 (3rd. Cir. 2001). Given the weakness of Berg's arguments, no such exceptional circumstances exist here.

officials, not part of any discussion of standing. Berg does not explain how the authority of the people through their state legislature to set mandatory retirement ages has any relationship to any of Berg's alleged injuries from Obama's allegedly ineligible candidacy. Nor does Berg does explain how any purported injury under the Tenth Amendment is personal to him, as opposed to a "generalized grievance shared in substantially equal measure by all or a large class of citizens," *Warth*, 422 U.S. at 499 (internal quotation omitted).[4]

For his Tenth Amendment argument, Berg also relies (Br. at 19-20) on *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D.Cal. 2008), but that case supports the Commission's position, not his. The *Robinson* plaintiff, slated to appear on the California presidential ballot as an elector pledged to a third-party candidate, brought suit challenging Senator John McCain's eligibility to serve as president due to his birth in the Panama Canal Zone to American parents. The court specifically held that the plaintiff, having "no greater stake in the matter than a taxpayer or voter," had no standing to bring his claim. *Id*. at 1146.

[4] Berg's reliance (Br. at 19) on 3 U.S.C. § 15 is unclear. On its face, the provision he cites gives Members of Congress the ability to "call for objections" to the electoral vote count; it provides no such right for individual citizens. Berg also argues (Br. at 28) that his free speech rights and fundamental right to vote were infringed because he was purportedly denied "the opportunity to express his objection [to Obama's election] through his elected representatives." Again, this new claim was not raised before the district court and, in any event, Berg does not cite any evidence that he was denied an opportunity to make his objections known to his own representatives. Berg also fails to explain how these purported injuries are personal to him and not widely shared by all other citizens.

Similarly, in *Hollander*, the district court explained that an individual voter does not have standing to bring a claim that an allegedly unlawful candidacy infringed the voter's right to vote. Addressing the plaintiff'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*, 566 F. Supp. 2d at 68-71. 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 69 (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 might arguably 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*.

Even if Berg could demonstrate an Article III injury-in-fact, Berg nonetheless fails to establish the two remaining standing requirements vis-à-vis the FEC: causation, that the challenged conduct of the Commission bears a causal connection to Berg's alleged injuries, and redressibility, 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 Commission injured him. Berg claims repeatedly that the Commission allowed Obama's ineligible candidacy to proceed by failing to verify the candidate's citizenship. But nowhere does Berg cite to any provision of law that requires the Commission to take such action. Berg cites (Am. Compl. ¶ 83) the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, which authorizes the Commission to distribute public funds to finance the general election campaigns of certain presidential and vice presidential candidates. But Berg does not allege that the Commission distributed any public funds to Obama, nor could he.

Finally, Berg cannot meet the redressibility 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's powers and responsibilities as set forth in its enabling statutes. 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.

Since Berg does not have standing to bring a claim under the Natural Born Citizen Clause against the Commission or any of the other defendants, the Court should affirm the dismissal of this claim for lack of subject matter jurisdiction.

II. THE COURT SHOULD AFFIRM THE DISMISSAL OF BERG'S REMAINING CLAIMS, NONE OF WHICH STATES A VALID CAUSE OF ACTION

In his First Amended Complaint, Berg added seven claims to his Natural Born Citizen Clause claim. Five of those additional claims, Counts 2-6, were directed at all the defendants, including the Federal Election Commission. Counts 2-6 alleged violations of 42 U.S.C. §§ 1983, 1985, 1986, FECA, and FOIA, respectively. The court below correctly dismissed these claims for failure to state a claim. 574 F. Supp. 2d at 521-24. This Court should affirm the district court's decision on these counts.

A. 42 U.S.C. § 1983

The court below properly concluded that Berg had failed to allege a cognizable section 1983 claim. 574 F. Supp. 2d at 521-23. Section 1983 provides 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. *See generally Richardson v. McKnight*, 521 U.S. 399, 403 (1997). "A § 1983 claimant must allege violations of 'rights independently secured by the Constitution and laws of the United States.'" *Berg*, 574 F. Supp. 2d at 522 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002)). Thus, the

district court properly framed the relevant inquiry as whether Berg had alleged a violation of a right under the Natural Born Citizen Clause that would entitle him to relief under section 1983. *Id*. at 522. The Court correctly concluded that he had not. *Id*. at 522-23.

No case even suggests that the Natural Born Citizen Clause creates a federal right for which violations are redressible under section 1983. *Id*. at 522. Absent any precedent supporting Berg, the court properly concluded that the Natural Born Citizen Clause "does not confer an individual right on citizens or voters." *Id*. at 522-23.

Berg attempts (Br. at 16, 24, 26) to recast his claim as alleging a violation of his right to cast an informed vote for an eligible candidate. As the district court explained, "the irreducible basis of all [Berg's] alleged violations" is that Obama is constitutionally ineligible to be president under the Natural Born Citizen Clause. *Id*. at 522. Yet in this Court, Berg again fails to cite to any case which suggests that the Natural Born Citizen Clause creates an individual right redressible under section 1983. *Donohue v. Board of Elections of New York*, 435 F. Supp. 957 (E.D. N.Y. 1976), upon which Berg relies, involved allegations of equal protection and

due process violations from the casting of illegal votes, and makes no mention of the Natural Born Citizen Clause.[5]

Even if Berg had brought a cognizable claim to vindicate an individual right redressible under section 1983, he cannot state a claim for relief against the FEC under this section. "In order to prevail in a § 1983 action, a plaintiff must establish . . . that the conduct complained of was committed by a person acting under color of state law." *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1141-42 (3rd Cir. 1990) (internal quotation marks omitted). The Commission, an independent agency of the federal government, is clearly not a state actor within the meaning of section 1983, and Berg does not allege any facts to show otherwise. *See Accardi v. U.S.*, 435 F.2d 1239, 1241 (3rd Cir. 1970) ("Under Section 1983, only 'persons' may be sued for deprivation of civil rights. The United States and other governmental entities are not 'persons' within the meaning of Section 1983."); *Hindes v. FDIC*, 137 F.3d 148, 158 (3rd Cir. 1998) ("Because section 1983 provides a remedy for violations of federal law by persons acting pursuant to state law, federal agencies and officers are facially exempt from section 1983 liability inasmuch as in the normal course of events they act pursuant to federal law.").

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[5] Much of Berg's section 1983 argument is devoted to the contention (Br. at 24-27) that the district court wrongly dismissed this count of his Amended Complaint for want of state action. As that court explained, however, it did "not need to reach this [state action] question because Plaintiff does not allege the violation of any legally protected right . . ." 574 F. Supp. 2d at 523 n.14.

Regardless, because Berg has failed to allege the violation of any right independently secured by the Constitution and laws of the United States, this Court should affirm the ruling in the court below that Berg has brought no cognizable claim under 42 U.S.C. § 1983.[6]

B. 42 U.S.C. § 1985

The district court properly concluded that Berg had failed to allege a cognizable section 1985 claim. 574 F. Supp. 2d at 523-24. Section 1985 creates a cause of action for various conspiracies which deprive individuals of federal rights or privileges. As the court below observed, however, "where there is no federal right that creates a basis for a § 1983 claim there is similarly no basis for a § 1985 claim." *Id*. at 523. Accordingly, the court properly held that because Berg had not stated a cognizable § 1983 claim, he could not state a cognizable § 1985 claim. *Id*.

Moreover, as the court below specifically explained, *id*. at 523-24, section 1985(1) involves interference with officers of the United States, section 1985(2) creates a claim for conspiracies to intimidate witnesses, jurors, or parties in a federal case, and section 1985(3) involves alleged conspiracies motivated by racial animus. Because Berg has not made any factual allegations that would support any

[6] Although the district court dismissed Berg's § 1983 claim as not cognizable, Berg mischaracterizes (Br. at 24-27) the district court's decision as having erred by finding that he had no "standing" to bring this claim.

claims under any of the three subsections, this Court should affirm the lower court's ruling that Berg has not stated any cognizable claims under section 1985.

C. 42 U.S.C. § 1986

It is well-settled that a plaintiff must state a cognizable claim under section 1985 in order to state a claim under section 1986, and the court below correctly concluded that Berg had not stated a cognizable claim under the latter section. *See* 574 F. Supp. 2d at 524; *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3rd Cir. 1994) ("§ 1986 constitutes an additional safeguard for those rights protected under 42 U.S.C. § 1985, and transgressions of § 1986 by definition depend on a preexisting violation of § 1985 . . . ") (citation, footnote, and internal quotation marks omitted). This Court should affirm that ruling.

D. Federal Election Campaign Act, 2 U.S.C. §§ 431-55

Berg has failed to state a cognizable claim under FECA. 574 F. Supp. 2d at 524-26. Berg alleges that the defendants have allowed Obama's purportedly illegal campaign to receive more than $450 million in donations (Am. Compl. ¶ 141) and that this somehow entitles him to the information he seeks regarding Obama's citizenship. 574 F. Supp. 2d at 524.

The court below correctly observed, however, that no provision of FECA entitles Berg to such information. *Id*. at 525-26. FECA and the public financing statutes only regulate 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. *See generally* 2 U.S.C. §§ 431-55, 26 U.S.C. §§ 9001-9013, 26 U.S.C. §§ 9031-9042. Nothing in FECA or the public financing statutes addresses determinations of the constitutional eligibility of federal candidates or otherwise requires the Commission to provide information regarding their eligibility. The Commission's jurisdiction relates solely to the administration, interpretation, and enforcement of federal campaign finance laws. *See* 2 U.S.C. § 437c. The FECA nowhere grants the Commission any responsibility for, or oversight over, the Constitution's Presidential Qualifications Clause, or any authority to administer any activity by the Electoral College or the counting of votes for the Presidency. As the district court aptly explained, "[i]t seems clear that the [Federal Election] Campaign Act does not address the sort of corruption that [Berg] alleges in his Complaint." 574 F. Supp. 2d at 525.

For the same reasons, Berg has no standing to bring a claim under FECA to obtain information regarding Obama's citizenship. In the court below, Berg had argued that he had standing to pursue his FECA claim under *FEC v. Akins*, 524 U.S. 11 (1998). In *Akins*, the Supreme Court held that the plaintiff voters could suffer "informational injury" if they lacked particular information directly related to voting that the FECA specifically required the Commission to disclose. The

district court properly rejected Berg's argument, explaining that while the plaintiff voters in *Akins* sought campaign finance-related information the FECA required to be disclosed, the FECA does not "require defendants to disclose the sort of information that [Berg] seeks in the Amended Complaint" regarding Obama's citizenship. 574 F. Supp. 2d at 526.

In any event, Berg has waived his appeal of the district court's dismissal of his FECA claim. "It is well-settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal." *United States v. Pelullo*, 399 F.3d 197, 222 (3rd Cir. 2005). Berg does not make any FECA-related arguments in this Court. Nowhere in his opening brief, in fact, does Berg even mention the FECA, the Commission, or Count 5 of his Complaint.

Since Berg has failed to state a claim under FECA for which relief can be granted, and failed to argue otherwise here, this Court should affirm the district court's dismissal by the court below of this claim.

E. Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.*

Finally, the court below correctly held that Berg had failed to state a cognizable FOIA claim against any of the defendants, including the Commission. 574 F. Supp. 2d at 526-28. As the court explained, *id*. at 526, FOIA applies only to government agencies. *See* 5 U.S.C. § 552(a)(2) (requiring "each agency" to make certain records available for public inspection and copying). Because the

Commission is the only government agency defendant here within the meaning of FOIA, the district court correctly concluded that Berg had not stated a FOIA claim against the non-FEC defendants. 574 F. Supp. 2d at 526-27.

Although the Commission is subject to FOIA, the court below properly held that Berg had failed to state a FOIA claim against the Commission for at least two reasons. First, Berg does not allege that he actually made a FOIA request to the Commission, let alone that he complied with the FEC's regulations for making such a request. 574 F. Supp. 2d at 527. The court below correctly held these failures sufficient to dismiss Berg's FOIA claim. *Id*. Second, a FOIA claimant must exhaust available administrative remedies before bringing a FOIA suit; the exhaustion requirement allows an agency sufficient time to exercise its discretion and compile a record supporting its decision. *See Wilbur v. CIA*, 355 F.3d 675, 676-77 (D.C. Cir. 2004). As detailed by the district court, however, Berg's complaint contains no allegations that any applicable FOIA deadlines expired before he brought suit under the statute. 574 F. Supp. 2d at 527-28.

In any event, Berg has also waived his appeal of the district court's holding that he has not brought a cognizable FOIA claim. Just like his FECA claim, Berg does not make any FOIA-related arguments in his opening brief, or even so much

as mention that statute. Consequently, this Court should affirm the dismissal by the court below of this count as well.[7]

CONCLUSION

For the foregoing reasons, the district court's opinion granting the defendants' Motions to Dismiss should be affirmed.

Respectfully submitted,

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[7] The Court should also affirm the dismissal of the remaining two counts of Berg's First Amended Complaint against the other defendants. Berg does not challenge the district court's dismissal of these claims in his opening brief. Moreover, the promissory estoppel claim (Count 7) is frivolous on its face, and it is beyond dispute that the INA does not establish the alleged cause of action (Count 8). *See Berg*, 574 F. Supp. 2d at 528-30.

CERTIFICATION OF BAR MEMBERSHIP

Counsel represent the Federal Election Commission, an agency of the United States, and therefore need not be admitted to the Court's bar to practice before it. *See* Committee Comments, 3rd Cir. L.A.R. 28.3.

CERTIFICATION OF WORD COUNT

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE UPON COUNSEL

I hereby certify that on February 19, 2009, I electronically filed the foregoing using the Court's CM/ECF system, which sent a notification of such filing to the following:

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Also on this day, I sent 10 copies of the foregoing to the Office of the Clerk of Court.

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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I certify that the E-Brief and Hard Copies of the brief are identical.

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CERTIFICATION OF VIRUS CHECK

I hereby certify that a virus check was performed on the E-Brief using McAfee VirusScan Enterprise 8.0.0 and that no viruses were found.

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