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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Charles F. Kerchner, et al., Plaintiffs, v. Barack Hussein Obama II, President Elect of the United States of America, President of the United States of America, and Individually, a/k/a Barry Soetoro; United States of America; et al., Defendants.	HONORABLE JEROME B. SIMANDLE CIVIL ACTION NO.: 09-253 MOTION RETURN DATE: **JULY 20, 2009**

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND ALTERNATIVELY, TO STRIKE THE COMPLAINT UNDER RULE 12(f)

On the Brief:
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STATEMENT OF THE CASE

On January 20, 2009, Plaintiffs Charles F. Kerchner, Jr., Lowell T. Patterson, Darrell James LeNormand, and Donald H. Nelson, Jr. (collectively "Plaintiffs") filed the present action challenging President Barack Obama's eligibility to hold the Office of President of the United States.[1] Dkt. Entry 1. Plaintiffs claim that President Obama has failed to prove that he is a natural born citizen, which is a requirement of the Presidency under Article II, Section 1, Clause 4 ("Natural Born Citizen Clause") of the United States Constitution. See Dkt. Entry 3. Plaintiffs raise a bevy of constitutional claims against President Obama that are predicated on that basic argument. See id. Counts III (Fifth Amendment - substantive due process), VI (Ninth Amendment), VIII (Tenth Amendment).

In addition, Plaintiffs have named the following individuals and entities as Defendants: the United States Congress; the United States House of Representatives; the United States Senate; Richard B. Cheney (former President of the Senate and Vice-President of the United States), officially and individually; and, Nancy Pelosi (Speaker of the House), officially and individually (collectively "Congressional Defendants"). Id. Plaintiffs allege that the

[1] On January 21, 2009, Plaintiffs filed a first amended complaint. Dkt. Entry 2. On February 9, 2009, Plaintiffs filed a second amended complaint. Dkt. Entry 3. It is the second amended complaint that Plaintiffs served on the Defendants. See Dkt. Entries 5-13.

Congressional Defendants have abridged a variety of their constitutional rights. See id. Counts I (First Amendment), II (Fifth Amendment - procedural due process), IV (Fifth Amendment - substantive due process), V (Fifth Amendment - equal protection), VII (Ninth Amendment), IX (Tenth Amendment), X (Twentieth Amendment). The factual basis for these claims is that the Congressional Defendants failed to vet, investigate, and/or convene hearings to determine President Obama's citizenship status, and that they failed to act on the Plaintiffs' requests that they take such action. See id.

Defendants now move to dismiss this action in its entirety with prejudice because Plaintiffs lack standing to maintain this suit. In addition, the Congressional Defendants alternatively move to dismiss this complaint with prejudice because they are immune from this suit.

ARGUMENT

POINT I

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE THE PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION.

A. Standard: Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; . . . ." There are two types of Rule 12(b)(1) motions: those which "attack the complaint on its face" and those which "attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings." Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); Schwartz v. Medicare, 832 F. Supp. 782, 787 (D.N.J. 1993); Donio v. United States, 746 F. Supp. 500, 504 (D.N.J. 1990). On a facial attack, a court must read the complaint in the light most favorable to the plaintiff and consider the allegations of the complaint as true. Mortensen, 549 F.2d at 891.

Here, Defendants are making a facial attack on subject matter jurisdiction. For purposes of this motion, therefore, all of the factual allegations in the second amended complaint will be taken as true. Under that standard, this Court lacks subject matter jurisdiction over Plaintiffs' allegations in the second amended

complaint because the Plaintiffs lack standing.

B. Plaintiffs Lack Standing to Maintain This Action

To invoke the jurisdiction of the federal courts, a plaintiff must have standing. Freedom from Religion Found., Inc. v. Nicholson, 536 F.3d 730, 737 (7th Cir. 2008) (citation omitted). There are "two strands" of standing: Article III standing (i.e., constitutional standing) and prudential standing. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). Article III standing stems from the constitutional limitation on judicial authority to hear cases and controversies. Sprint Communications Co., L.P. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535 (2008); Elk Grove, 542 U.S. at 11 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992)). Prudential standing is a judicially created doctrine that "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" Elk Grove, 542 U.S. at 11 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). A plaintiff must satisfy both doctrines before he or she may seek redress in federal court. Taliaferro v. Darby Township Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006); Miller v. Nissan Motor Acceptance Corp., 362 F.3d 209, 221 (3d Cir. 2004).

In the present case, Plaintiffs lack standing to maintain this suit in federal court under either strand of the standing doctrine. Accordingly, this Court should dismiss the second amended complaint for lack of subject matter jurisdiction.

1. Article III Standing

The "irreducible constitutional minimum" of Article III standing is comprised of three components. McConnell v. Federal Election Comm'n, 540 U.S. 93, 225 (2003) (quotation omitted); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 254 (3d Cir. 2005) (citation omitted); UPS Worldwide Forwarding, Inc. v. United States Postal Serv., 66 F.3d 621, 625-26 (3d Cir. 1991). To establish Article III standing, the following elements must be satisfied: (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61 (internal quotation marks and citations omitted); see Taliaferro, 458 F.3d at 188; Berg v. Obama, 574 F. Supp. 2d 509, 516-17 (E.D. Pa. 2008). "The party bringing the claim . . . bears the burden to show his or her standing to bring it." Hollander v. McCain, 566 F. Supp. 2d 63, 67 (D.N.H. 2008) (citing Elk Grove, 542 U.S. at 12). In this case, Plaintiffs fail to satisfy the injury-in-fact and the redressability components of Article III standing.

The injury-in-fact component requires a plaintiff to demonstrate that he or she has sustained an invasion of a legally protected interest that is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167,

180 (2000) (citing Lujan, 504 U.S. at 560-61); Interfaith Cmty., 399 F.3d at 254 (citation omitted); UPS Worldwide, 66 F.3d at 625-26; Berg, 574 F. Supp. 2d at 516. A plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (emphasis added) (quotations omitted). Indeed, the United States Supreme Court has

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

Lujan, 504 U.S. at 573-74; Jones v. Bush, 122 F. Supp. 2d 713, 717 (N.D. Tex. 2000) ("A general interest in seeing that the government abides by the Constitution is not sufficiently individuated or palpable to constitute such an injury."), aff'd, 244 F.3d 134 (5th Cir. 2000) (per curiam) (unpublished opinion). To be sure, "standing to sue may not be predicated on an interest . . . which is held in common by all members of the public." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974).

Here, Plaintiffs' allegations are merely generalized grievances that they have in common with all American citizens. A reading of Plaintiffs' second amended complaint reveals numerous

examples that confirm these commonalities.

With respect to Defendant President Obama, Plaintiffs allege that if President Obama is not a natural born citizen, then irreparable harm will come to the "stability of the United States of America, its people, and the plaintiffs." Dkt. Entry 3, ¶ 196 (emphasis added). In Count III, the Plaintiffs assert that the President "represents the broad interest of United States citizens"; therefore, Plaintiffs can demand that President Obama prove that he meets the citizenship status of Article II, ostensibly to protect that broad interest. See id. Count III, ¶ 239 (emphasis added). Plaintiffs further allege that because they do not conclusively know the President's citizenship, they are "forced to live their lives feeling unsafe, insecure, and in fear for their peace, tranquility, and prosperity," presumably along with every other American who shares their view. See id. Count III, ¶ 251. In Counts VI and VIII, Plaintiffs allege that as members of the affected public (i.e., "the people"), they have the power under the Ninth and Tenth Amendments to challenge the President's eligibility to hold the Office of the President and to compel him to prove his citizenship. See id. Count VI, ¶¶ 291-92, Count VIII, ¶¶ 314-15. Plaintiffs also seek quo warranto relief against President Obama because by holding the Office of the President, they allege that President Obama is "usurping or intruding into or unlawfully holding that office, all to the

detriment and injury of the plaintiffs and the people of the United States of America." Id. Count XI, ¶ 371 (emphasis added).

With respect to the Congressional Defendants, Plaintiffs allege that those Defendants violated their First Amendment rights by ignoring their grievances, and those of "many other concerned Americans," regarding President Obama's citizenship, id. Count I, ¶ 206 (emphasis added); by not taking action and being indifferent toward the grievances of Plaintiffs and "many other concerned Americans," id. ¶ 207 (emphasis added); and, by failing to conduct hearings and/or investigate the concerns of Plaintiffs and "other concerned Americans," id. ¶ 208 (emphasis added).[2] In Count II, Plaintiffs allege that the Congressional Defendants violated their Fifth Amendment procedural due process rights by, among other things, failing to "vet and investigate" President Obama's qualifications to be President by ignoring the petitions of the Plaintiffs and "thousands of other people." Id. Count II, ¶ 229 (emphasis added). In Counts II and IV, Plaintiffs allege that because the President represents "the broad interest of United

[2] Even if these alleged injuries were particularized to the Plaintiffs, Plaintiffs are not asserting the invasion of a legally protected right against the Congressional Defendants. While the First Amendment guarantees the right "to petition the Government for a redress of grievances," U.S. Const. amend. I, this right to petition does not include a corresponding right to a response. Indeed, individuals do not have a "constitutional right to force the government to listen to their views . . . . The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283 (1984).

States citizens," Plaintiffs can demand that the President meets Article II citizenship requirements. Id. Count II, ¶ 219, Count IV, ¶ 257 (emphasis added). In Count V, Plaintiffs allege that the Congressional Defendants violated their Fifth Amendment equal protection rights by failing to treat their concerns, and those of "other concerned Americans," about the President's citizenship the same as the concerns of other similarly situated Americans, who petitioned Congress about Senator McCain's citizenship. Id. Count V, ¶¶ 279, 282 (emphasis added). In Counts VII and IX, Plaintiffs allege that as members of the affected public (i.e., the people), they have the power under the Ninth and Tenth Amendments to compel the Congressional Defendants to conduct congressional hearings regarding President Obama's citizenship pursuant to the Twentieth Amendment. Id. Count VII, ¶¶ 302-03, Count IX, ¶¶ 325-26. Lastly, in Count X, Plaintiffs allege that the Congressional Defendants violated Plaintiffs' Twentieth Amendment rights by failing to conduct an investigation or hearings into President Obama's citizenship, despite the petitions of Plaintiffs and "other concerned Americans." Id. Count X, ¶¶ 335-37, 341, 343-47, 353 (emphasis added). These numerous examples make it clear that Plaintiffs' alleged injuries are predicated on an interest that they share with all members of the public, or at least with those members of the general public who share their opinion.

Moreover, several federal courts have rejected similar

lawsuits on the basis that the respective plaintiffs lacked the requisite injury in fact (and thus, standing) to maintain such actions. See, e.g., Dawson v. Obama, No. 08-2754, 2009 WL 532617, at *1 (E.D. Cal. Mar. 2, 2009) (recommending dismissal of plaintiff's claim that President Obama is not eligible to hold the Office of President based on his citizenship because plaintiff suffered no cognizable injury and therefore, lacked standing); Cohen v. Obama, No. 08-2150, 2008 WL 5191864, *1 (D.D.C. 2008) (holding that plaintiff lacked standing to challenge President Obama's then-candidacy for President based on, among other things, President Obama's citizenship status, because plaintiff failed to present requisite injury in fact); Berg, 574 F. Supp. 2d at 518-19 (holding that plaintiff, who challenged President Obama's citizenship under Natural Born Citizen Clause, failed to establish standing because his alleged injury was "no greater . . . than that of millions of other voters"); Hollander, 566 F. Supp. 2d at 68 (holding that plaintiff lacked standing to challenge then-candidate Senator McCain's citizenship under Natural Born Citizen Clause, and thus, his eligibility to be President, because plaintiff's alleged injury not concrete or particularized); Jones, 122 F. Supp. 2d at 716-17 (holding that plaintiffs lacked standing to challenge George W. Bush and Richard B. Cheney's eligibility to receive Texas' electoral votes under the Twelfth Amendment based on their state citizenship).

Like the plaintiffs in Dawson, Cohen, Berg, Hollander, and Jones, Plaintiffs' allegations of injury here fail for the same basic reason: Plaintiffs have not alleged a particularized, palpable injury personal to them stemming from President Obama's election and/or his service as President of the United States. Rather, they have alleged an injury that they share with millions of other Americans. As a result, the Plaintiffs fail to meet the injury-in-fact component of standing.

In addition, Plaintiffs fail to demonstrate the third component of Article III standing; namely, that their alleged injuries would be redressed by a favorable decision of this Court. "The Art[icle] III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." Warth v. Seldin, 422 U.S. 490, 499 (1975) (emphasis added). Moreover, the redressability component requires a plaintiff to demonstrate a "substantial likelihood" that the requested relief would remedy the alleged particularized and personal injury in fact. McConnell, 540 U.S. at 225-26 (citing Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000)).

As stated above, Plaintiffs here have alleged nothing more than generalized, impersonal injuries that they hold in common with other American citizens. In that regard, Plaintiffs have not met

the third component of standing because a favorable decision of this Court would not redress any particularized grievances or injuries to them personally. For example, Plaintiffs seek the following relief with respect to Defendant President Obama: an Order requiring President Obama to prove that he is qualified under the Natural Born Citizen Clause to hold the Office of President, see Dkt. Entry 3, Prayer for Relief, ¶¶ 3-9, 16; a declaration that the Plaintiffs have the right to challenge President Obama's citizenship under various amendments to the United States Constitution, see id. ¶¶ 11-12; a declaration that the November 4, 2008 election is "null, void, and of no effect," see id. ¶ 13; and, a judgment that President Obama is not an Article II citizen, thereby excluding him from office and disqualifying him from the Presidency, see id. ¶¶ 10, 14-15. With respect to the Congressional Defendants, Plaintiffs seek similar relief, but they also seek an Order requiring the Congressional Defendants to hold hearings to determine if President Obama is a natural born citizen. Id. ¶¶ 24-28. At most, this requested relief might benefit the Plaintiffs collaterally, but that does not satisfy the redressability requirement of Article III standing. See Warth, 422 U.S. at 499. Accordingly, Plaintiffs have failed to establish Article III standing and thus, the Defendants urge this Court to dismiss the second amended complaint with prejudice.

2. Prudential Standing

Even if Plaintiffs can establish Article III standing, this Court lacks subject matter jurisdiction over their claims because the Plaintiffs lack prudential standing.[3] Prudential standing is a "judicially self-imposed limit[] on the exercise of federal jurisdiction." Allen, 468 U.S. at 750. Prudential standing has three components, all of which must be satisfied. Township of Piscataway v. Duke Energy, 488 F.3d 203, 209 (3d Cir. 2007); Miller, 362 F.3d at 221 (quotations omitted); Trump Hotels & Casino Resorts v. Mirage Resorts, Inc., 140 F.3d 478, 484-85 (3d Cir. 1998). First, a plaintiff can only assert his own legal rights and interests, not those of third parties. Valley Forge, 454 U.S. at 474 (quoting Warth, 422 U.S. at 499). Second, the courts will not adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Id. at 475 (quoting Warth, 422 U.S. at 499-500); see Elk Grove, 542 U.S. at 12 (quoting Allen, 468 U.S. at 751). Third, a plaintiff's complaint must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Valley Forge, 454 U.S. at 475 (quoting Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 153 (1970)); Township

[3] Constitutional standing must be satisfied before consideration of prudential standing issues. Miller, 362 F.3d at 221 n.16.

of Piscataway, 488 F.3d at 209; Miller, 362 F.3d at 221 (quotations omitted).

Here, even assuming Plaintiffs have asserted their own cognizable legal interests and/or rights,[4] Plaintiffs fail to establish the second component of prudential standing. As argued above, Plaintiffs' claims are generally available grievances regarding the President's eligibility for office that are no more particular to them than to every other member of the American public. Thus, such grievances are not a proper subject for the courts to address. "[A] 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . normally does not warrant exercise of jurisdiction." Warth, 422 U.S. at 499 (citations omitted). Indeed, as illustrated in Point I, Plaintiffs' second amended complaint provides the factual predicate that such grievances are widespread and pervasively shared. The fact that the Plaintiffs allege that they have the right to be governed by a constitutionally qualified President is not the type of particularized harm that confers standing.

Moreover, Plaintiffs are fully aware that the proper avenue to redress their grievances is through the representative branch of the government. See Dkt. Entry 3, ¶¶ 22-27 and Counts I, II, IV,

[4] To the extent that Plaintiffs have asserted the legal rights and interests of third parties (i.e., the American people), they have failed to establish the first component of prudential standing.

V, VII, IX, X. Plaintiffs acknowledge that they have petitioned Congress to investigate and hold hearings to verify President Obama's citizenship. See id. Count I, ¶¶ 200-214. Plaintiffs, however, are disgruntled that Congress did not act on their petitions. See id. If Plaintiffs are dissatisfied with the present response of their elected representatives, then voting is the mechanism in a democratic society by which such generalized grievances must be addressed -- not by invoking the jurisdiction of the federal courts.

Plaintiffs are asking this Court to exercise jurisdiction over a matter that it should not based on its role in the tripartite structure of the federal government. Plaintiffs' request fails to recognize the constitutional and judicial constraints that limit the jurisdiction of the federal courts to ensure the proper separation of powers. To elaborate:

> The exercise of the judicial power . . . affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," Chicago & Grand Trunk R. Co. v. Wellman, [143 U.S. 339], 345 [(1892)] . . . is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since Marbury v. Madison . . ., it has been recognized as a tool of last resort on the part of the federal judiciary

> throughout its nearly 200 years of existence . . . ."

Valley Forge, 454 U.S. at 474 (emphasis added). Given these bedrock principles, it is clear that this federal court is the wrong forum for the Plaintiffs to air their concerns regarding the President's citizenship. Accordingly, this Court should find that Plaintiffs lack prudential standing and dismiss this complaint with prejudice.

POINT II

THE CONGRESSIONAL DEFENDANTS ARE IMMUNE FROM SUIT.

Alternatively and independently, the Congressional Defendants are immune from suit. These immunities are explained more fully below.

A. Standard: Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly v. Bell Atl. Corp., 550 U.S. 544, 555-56 (2007) (internal citations omitted). Thus, a court must "'construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). A motion alleging that a defendant is immune from suit is the proper subject of a motion to dismiss under Rule 12(b)(6). See McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004).

B. Sovereign Immunity

Defendants United States, the United States Congress, the United States House of Representatives, the United States Senate,

Richard B. Cheney, in his official capacity, and Nancy Pelosi, in her official capacity, are immune from Plaintiffs' claims under the doctrine of sovereign immunity. The United States is immune from suit, absent an "unequivocally expressed" waiver of sovereign immunity. See United States v. King, 395 U.S. 1, 4 (1969) (citing United States v. Sherwood, 312 U.S. 584, 586-87 (1941)); Patentas v. United States, 687 F.2d 707, 711-12 (3d Cir. 1982). It follows, then, that a waiver cannot be implied. King, 395 U.S. at 4 (citation omitted).

Here, no such waiver has been effected. Indeed, the government has not waived its sovereign immunity for violations of federal law, including the United States Constitution. F.D.I.C. v. Meyer, 510 U.S. 471, 478 (1994) ("[T]he United States simply has not rendered itself liable . . . for constitutional tort claims."). As such, Defendants United States Congress, the United States House of Representatives, and the United States Senate, as institutions of the United States as sovereign, are shielded from this lawsuit under the doctrine of sovereign immunity. Rockefeller v. Bingaman, 234 Fed. Appx. 852, 855 (10th Cir.) (text in Westlaw) (citing Keener v. Congress, 467 F.2d 952, 953 (5th Cir. 1972)), cert. denied, 128 S. Ct. 619 (2007). Moreover, Mr. Cheney, in his official capacity, and Speaker Pelosi, in her official capacity, are entitled to sovereign immunity as to Plaintiffs' claims because "relief sought nominally against an officer is in fact against the

sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam); see Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Rockefeller, 234 Fed. Appx. at 855. Accordingly, these Defendants are immune from Plaintiffs' claims.

C. Absolute Immunity

In addition, Defendants Cheney and Speaker Pelosi in their legislative capacities are absolutely immune from liability under the Speech or Debate Clause of the United States Constitution. See U.S. Const. art. I, § 6, cl. 1.

The Speech or Debate Clause has been broadly interpreted to effectuate its purpose. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502-03 (1975) (collecting cases). The purpose of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary"; to "reinforc[e] the separation of powers so deliberately established by the Founders"; and to protect legislators from the burden of litigating issues arising from legislative activities. Id. at 502 (quotations and citations omitted); see Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 416 (D.C. Cir. 1995). Legislative immunity applies equally to civil and criminal actions, as well as to actions instituted by private parties. Eastland, 421 U.S. at 503.

The Speech or Debate Clause confers absolute legislative

immunity for actions taken in "the sphere of legitimate legislative activity." Tenney v. Brandhove, 341 U.S. 367, 376 (1951); see also Eastland, 421 U.S. at 504-05; Doe v. McMillan, 412 U.S. 306, 313 (1973); Gravel v. United States, 408 U.S. 606, 624-25 (1972). The United States Supreme Court has interpreted that sphere as not only including traditional legislative activities, but also "other matters which the Constitution places within the jurisdiction of either House." Gravel, 408 U.S. at 625. In Tenney, the Supreme Court confirmed that legislative immunity is conferred when the actions taken are "in a field where legislators traditionally have power to act." 341 U.S. at 379. For example, the United States Supreme Court has held that committee investigations and hearings fall within the legislative sphere. See Eastland, 421 U.S. at 504.

Here, Plaintiffs allege that the Congressional Defendants failed to vet, investigate, and/or convene hearings to determine President Obama's citizenship status, and that they failed to act on the Plaintiffs' requests that they take such action. Such claims, however, challenge legislative activities and are squarely barred by the Speech or Debate Clause. Accordingly, Defendants Cheney and Pelosi are absolutely immune from Plaintiffs' claims.

D. Qualified Immunity

President Obama, Mr. Cheney, and Speaker Pelosi, the Defendants that Plaintiffs have named in their individual capacities, are entitled to qualified immunity from Plaintiffs'

claims. The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see Pearson v. Callahan, 129 S. Ct. 808, 815 (2009). Qualified immunity is "an immunity from suit rather than a mere defense from liability" and "it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original). Therefore, immunity issues should be resolved at the "earliest possible stage in litigation." Pearson, 129 S. Ct. at 815 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)).

To resolve claims of qualified immunity, courts have followed a sequential, two-step analysis, set forth by the United States Supreme Court in Saucier v. Katz, 533 U.S. 194, 201 (2001). The Saucier test requires a court to determine initially whether a plaintiff has alleged a violation of a constitutional right. Pearson, 129 S. Ct. at 815-16 (citing Saucier, 533 U.S. at 201). If so, then a court must determine whether the right was "clearly established" at the time of the government official's alleged misconduct. Id. at 816 (citing Saucier, 533 U.S. at 201). In Pearson, the Court relaxed the rigid, two-step Saucier analysis by permitting courts to "exercise their sound discretion in deciding

which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S. Ct. at 818.

Here, Plaintiffs fail to satisfy the first prong of the Saucier test because they do not set forth any viable constitutional claims against President Obama, Mr. Cheney, or Speaker Pelosi. Plaintiffs allege that President Obama deprived them of a liberty interest in knowing whether the President was born in the United States. See Docket Entry 3, Count III, ¶ 248. Plaintiffs allege that because the President has not furnished them with "credible, objective, and sufficient evidence" proving that he was born in the United States, the President has violated their substantive due process rights. See id. ¶ 250. To sustain a substantive due process claim, a plaintiff must establish that action of the government "interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 746 (1987) (quotation omitted). Plaintiffs' contention that President Obama's act of allegedly failing to furnish "credible" proof of his citizenship simply does not establish the deprivation of a fundamental liberty interest.

With respect to Mr. Cheney, Plaintiffs allege that Mr. Cheney should have objected to the count of the electoral votes during the Joint Session of Congress because President Obama had not proven his qualifications to serve as President. Based on that act,

Plaintiffs extrapolate that Mr. Cheney violated their procedural due process rights under the Fifth Amendment and their rights under the Twentieth Amendment. See Docket Entry 3, ¶¶ 175-83, Count II, ¶¶ 230-32, Count X, ¶¶ 350-53. Plaintiffs, however, do not explain how Mr. Cheney's act, even if true, supports their claimed constitutional violations.

For example, Plaintiffs do not explain what process Mr. Cheney allegedly denied them. Although a right to procedural due process is clearly established, a plaintiff must establish a violation of that right beyond mere generalities. See Anderson v. Creighton, 483 U.S. 635, 639-40 (1987) (finding that although right to due process is clearly established, Court rejected as insufficient plaintiff's claim based on generalized right to due process of law). Likewise, Plaintiffs' claim under the Twentieth Amendment fails to state a constitutional violation. Section three of the Twentieth Amendment requires the Vice-President elect to act for the President elect if the President elect is not qualified for office. U.S. Const. amend. XX, § 3. Plaintiffs completely fail to explain how Mr. Cheney, as the Vice-President of the United States and President of the Senate, violated that constitutional provision when the responsibilities of those offices are not implicated by that constitutional provision. Moreover, Plaintiffs fail to connect the only act that they allege Mr. Cheney carried out –– the failure to object to the electoral vote count –– to a violation of

the Twentieth Amendment.

Likewise, Plaintiffs fail to allege a constitutional violation based on an act of Speaker Pelosi. Plaintiffs allege that Speaker Pelosi signed documents nominating President Obama for President without verifying his citizenship. See Docket Entry 3, ¶¶ 89-91. Yet, Plaintiffs do not explain how that act translates into any particular constitutional violation. Because Plaintiffs have failed to allege a violation of any constitutional rights against President Obama, Mr. Cheney, and Speaker Pelosi, they are entitled to qualified immunity as to Plaintiffs' claims against them in their individual capacities.

POINT III

PLAINTIFFS' SECOND AMENDED COMPLAINT SHOULD BE STRICKEN BECAUSE IT FAILS TO PROVIDE A SHORT AND PLAIN STATEMENT IN ACCORDANCE WITH FED. R. CIV. P. 8(a)(2).

Under Federal Rule of Civil Procedure 12(f), a motion to strike provides the appropriate remedy to eliminate redundant, immaterial, impertinent, or scandalous matter in any pleading. Fed. R. Civ. P. 12(f). A complaint "'laden with unnecessary factual narrative'" is the proper subject of a motion to strike. Downing v. York County Dist. Attorney, No. 05-0351, 2005 WL 1210949, *1 (M.D. Pa. Apr. 21, 2005) (quotations omitted). Indeed, "[c]ourts have looked with disfavor on complaints that appear to detail every instance of alleged wrongful conduct on the part of a defendant." Id. (citations omitted).

Pursuant to Federal Rule Civil Procedure 8(a)(2), a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." (Emphasis added).[5] Plaintiffs' second amended complaint in this case is anything but short and plain. Instead, its prolix nature invites the Defendants' attorneys to respond at their peril should they fail to adequately investigate each allegation, or fail to interview each

[5] Rule 8 places an emphasis on clarity and brevity in pleadings. In re Westinghouse Sec. Litig., 90 F.3d 696, 702 (3d Cir. 1996). Rule 8(a) is not merely aspirational. If a complaint does not comply, it may be stricken. Mendez v. Draham, 182 F. Supp. 2d 430, 433 (D.N.J. 2002).

person identified before answering the factual morass contained within it.

Defendants' attorneys are not required to undertake their own burdensome and time-consuming full-scale investigation of Plaintiffs' verbose complaint, before they may find themselves in a position where they are able to comprehend and respond to it. See, e.g., Untracht v. Fikri, 368 F. Supp. 2d 409, 414-15 (W.D. Pa. 2005) (collecting cases dealing with dismissal of pleadings laden with unnecessary factual narrative). The goal behind Rule 8(a) is to provide the opposing litigant with fair notice of what the plaintiff's claim is, and the grounds on which it rests, Conley v. Gibson, 355 U.S. 41, 47 (1957), with only enough facts pleaded to show the right to relief above the speculative level. Twombly, 550 U.S. at 555-56. In that respect, the Federal Rules of Civil Procedure discourage the pleading of evidence. Drysdale v. Woerth, No. 98-3090, 1998 WL 966020, *2 (E.D. Pa. Nov. 18, 1998) (dismissing prolix complaint that described in unnecessary and burdensome detail every instance of defendant's alleged misconduct); Burks v. City of Philadelphia, 904 F. Supp. 421, 424 (E.D. Pa. 1995) (dismissing complaint without prejudice because of its unnecessary, burdensome, and improper argumentative detail). "Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud." United States ex rel.

Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003), quoted in Parker v. Learn The Skills Corp., No. 03-6936, 2004 WL 2384993, *1 (E.D. Pa. Oct. 25, 2004) (dismissing complaint without prejudice because it was lengthy in its factual allegations of wrongful conduct and lacked clarity).

In this case, Plaintiffs' second amended complaint utterly fails to conform to the notice pleading requirements of Rule 8(a). The second amended complaint is 87 pages long, consisting of 387 paragraphs of allegations, a 30-paragraph prayer for relief, and 43 single-spaced endnotes, some of which are quite lengthy. See Dkt. Entry 3. Plaintiffs plead a host of needless detail, the relevancy of which is not clear, and to which Defendants cannot respond because it is drawn from various internet webpages and sundry outside sources. See, e.g., endnote 5 (CNN Electoral Map Calculator); endnote 8 (referencing Thomas Paine's Common Sense and the Magna Carta); endnote 10 (citation to the Honolulu Star Bulletin); endnote 12 (quotations from the State of Hawaii's Department of Health, Vital Records webpage); endnote 30 (references to Snopes and FactCheck). Defendants move to strike the second amended complaint under Rule 8(a) because it imposes an unduly burdensome task upon the Defendants in attempting to understand and respond to it in its present excessively lengthy form. Accordingly, Defendants urge this Court to strike Plaintiffs' second amended complaint.

POINT IV

PLAINTIFFS' SECOND AMENDED COMPLAINT SHOULD BE STRICKEN BECAUSE PLAINTIFFS FAILED TO FILE IT IN CONFORMANCE WITH FED. R. CIV. P. 15.

Alternatively, Defendants move to strike the second amended complaint under Federal Rule of Civil Procedure 12(f) because Plaintiffs failed to file it in conformance with Rule 15(a). Pursuant to Rule 15(a)(1), a plaintiff may only file one amended pleading as a matter of course before being served with a responsive pleading. Plaintiffs filed their original complaint on January 20, 2009. Dkt. Entry 1. On January 21, 2009, Plaintiffs filed a first amended complaint. Dkt. Entry 2. On February 9, 2009, Plaintiffs filed a second amended complaint. Dkt. Entry 3. To file a second amended pleading, Plaintiffs were required to secure the Defendants' written consent or leave of this Court. See Fed. R. Civ. P. 15(a)(2). Plaintiffs had neither before they filed their second amended complaint. Consequently, Defendants urge this Court to strike the second amended complaint.

CONCLUSION

For the foregoing reasons, Defendants respectfully urge this Court grant the present motion and dismiss the second amended complaint in its entirety with prejudice.

Respectfully submitted,

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Acting United States Attorney

s/Elizabeth A. Pascal
By: ELIZABETH A. PASCAL
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