CASE NO. 08-4340

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILIP BERG,

Appellant

v.

BARACK OBAMA, et al.

Appellees

BRIEF OF APPELLEES PRESIDENT BARACK OBAMA AND THE DEMOCRATIC NATIONAL COMMITTEE

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INTRODUCTION

This appeal is yet another in a long line of frivolous and vexatious filings by Appellant Philip Berg. His allegations regarding President Barack Obama are patently false, but, as the district court properly concluded, even taking them as true for purposes of this motion, his suit must be dismissed: Berg lacks standing and his complaint fails to state a claim upon which relief can be granted. This Court should affirm the judgment of the district court.

ISSUES PRESENTED

Whether the district court properly found that Berg failed to establish the court's subject matter jurisdiction and to state a claim upon which relief could be granted.

STATEMENT OF THE CASE

On August 21, 2008, 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 "DNC"), the Federal Election Commission and Does 1-50. Berg made the preposterous and entirely baseless allegation that President—then Senator—Obama was not eligible to serve as President under Article II, Section 1, Clause 4 of the U.S. Constitution, because he was not a "natural born citizen." Berg sought a declaratory judgment

that Obama was ineligible to run for President, an injunction barring Obama from running for that office, and an injunction barring the DNC from nominating him.

On September 24, 2008, Defendants the DNC and Obama filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12 (b)(1) and 12(b)(6), on the grounds that the court lacked subject matter jurisdiction over the claims asserted and that the complaint failed to state a claim upon which relief could be granted. On October 6, 2008, Berg filed a Motion for Leave to File a First Amended Complaint, together with a First Amended Complaint for Declaratory and Injunctive Relief. The basis of Berg's amended complaint was the same as that of his original complaint, but Berg added four new defendants: the Pennsylvania Bureau of Commissions, Elections and Legislation; Pedro Cortes, the Secretary of the Commonwealth of Pennsylvania; the United States Senate Committee on Rules and Administration; and Senator Diane Feinstein (D-CA), Chair of the U.S. Senate Commission on Rules and Administration. In addition to the causes of action included in the original complaint, Berg purported to assert new causes of action under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 and 1986; the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*; the Freedom of Information Act, 5 U.S.C. § 552; and the Immigration and Nationality Act, 8 U.S.C. § 1481.

On October 20, 2008, President Obama and the DNC again moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The following day, the Federal Election Commission moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Three days later, on October 24, 2008, the district court granted the motions to dismiss. *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008). Taking as true the allegations of the amended complaint, the court held that Berg had not established an injury in fact, and therefore standing, to bring a challenge under the Natural Born Citizenship Clause. *Id.* 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. The Court denied Berg's Emergency Motion on October 31, holding 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." October 31, 2008 Order at 2.

On December 4, Berg moved this Court for an Immediate Injunction Pending the Resolution of Petitioner's Appeal. He asked the Court to stay the

certification of electors, stay the casting of any votes for Obama in the Electoral College 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, again noting that he had not shown a likelihood of success with respect to his appeal. This Court wrote: "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 . . . no justiciable controversy is presented, as [Berg] seeks adjudication of a political question." December 9, 2008 Order at 2.

Berg has also filed numerous frivolous lawsuits and motions in other courts alleging essentially the same claims. For example, on October 31, 2008, Berg filed a Petition for a 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. Justice Souter denied the motion on November 3, 2008. A little more than two months later, on January 12, 2009, the Court denied the petition for a writ of certiorari. Then, on December 31, 2008, Berg, as counsel, filed suit in the District Court for the District of Columbia on behalf of another plaintiff. *See Hollister v. Soetoro*, No. 1:08-cv-02254-JR (D.D.C.). In that case, Berg is attempting to use interpleader as a means to sidestep prior decisions denying

challenges to President Obama's citizenship status; thus far, his motion to file interpleader and deposit funds with the court has been denied as frivolous.[1]

SUMMARY OF THE ARGUMENT

Appellant Berg's allegations are preposterous and patently false. But even taking them as true for purposes of this appeal, this Court should affirm the court below. First, the district court correctly concluded that it lacks subject matter jurisdiction, for Berg has not met the constitutional requirements for standing. He did not—and cannot—allege any concrete, specific injury in fact to himself. In

[1] Notably, courts throughout the nation have dismissed similar suits filed by others. *See, e.g., Wrotnowski v. Bysiewicz*, 958 A.2d 709, 713 (Conn. 2008) (dismissing case regarding Obama for lack of statutory standing and subject matter jurisdiction); *Stamper v. United States*, 2008 WL 4838073, at *2 (N.D. Ohio Nov. 4, 2008) (dismissing suit regarding Obama and McCain for lack of jurisdiction); *Roy v. Fed. Election*, 2008 WL 4921263, at *1 (W.D. Wash. Nov. 14, 2008) (dismissing suit regarding Obama and McCain for failure to state a claim); *Marquis v. Reed*, No. 08-2-34955 SEA (Wash. Super. Ct. Oct. 27, 2008) (dismissing suit regarding Obama); *Hollander v. McCain*, 566 F. Supp. 2d 63, 71 (D.N.H. 2008) (dismissing suit regarding McCain on standing grounds); *In re John McCain's Ineligibility to be on Presidential Primary Ballot in P.*, 944 A.2d 75 (Pa. 2008); *Lightfoot v. Bowen*, Case No. S168690 (Cal. Dec. 5, 2008) (Original Proceeding) (denying Petition for Writ of Mandate/Prohibition and Stay regarding Obama); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (dismissing suit regarding McCain for lack of standing and lack of a state court remedy); *Constitution Party v. Lingle,* 2008 WL 5125984, at *1 (Haw. Dec. 5, 2008) (unpublished) (dismissing election contest challenging Obama's Nov. 4, 2008 victory); *Martin v. Lingle,* No. 08-1-2147 (Haw. Oct. 22, 2008) (Original Proceeding) (rejecting original writ petition regarding Obama on several grounds); *Cohen v. Obama*, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008) (dismissing suit regarding Obama on standing grounds); *Donofrio v. Wells* (N.J. 2008) (Motion No. AM-0153-08T2 before the N.J. App. Div.).

addition, subject matter jurisdiction is lacking because the case is moot and presents a political question. Second, the district court correctly found that Berg failed to state a claim upon which relief can be granted. He failed to allege a cognizable claim under any of the many statutes he invoked.

ARGUMENT

I. The District Court Correctly Dismissed the Suit for Lack of Subject Matter Jurisdiction.

The district court correctly found that Berg lacks standing to bring his Natural Born Citizenship Clause claim. A plaintiff must satisfy three elements to meet the constitutional requirements for standing. *First*, he must demonstrate that he has suffered an "injury in fact,"—i.e., an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). *Second*, he must establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). *Third*, he must show a substantial likelihood that the requested relief will be redressed by a favorable decision; mere speculation is not enough. *Id.*; *see also*

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); *Goode v. City of Phila.*, 539 F.3d 311 (3d Cir. 2008); *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 158 (3d Cir. 2007).

As the court below properly concluded, and as numerous other courts have held, a voter lacks standing to challenge the qualifications of a candidate for President of the United States. *See Berg*, 574 F. Supp. 2d at 519; s*ee also Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (dismissing, for lack of standing, suit by voters challenging the qualifications of then-Governor George W. Bush and Richard Cheney to be elected President and Vice-President of the United States, respectively, on the grounds that they were both "inhabitants" of Texas in violation of the requirement of the Twelfth Amendment), *aff'd without opinion*, 244 F.3d 134 (5th Cir. 2000); *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008) (dismissing, for lack of standing, a voter's suit against Senator John McCain and the Republican National Committee, which alleged that, because Senator McCain was born in the Panama Canal Zone, he is not a "natural born citizen" and is therefore ineligible to hold the office of President).

As with the plaintiffs in *Jones* and *Hollander*, in this case, Berg did not—and cannot—allege any concrete, specific injury in fact to himself. Rather, Berg alleged that if Obama were elected as President and then discovered to be ineligible, "Plaintiff as well as other Democratic Americans will suffer Irreparable

Harm including but not limited to: (1) Functional or Actual, Disenfranchisement of large numbers of Citizens, being members of the Democratic Party, who would have been deprived of the ability to choose a Nominee of their liking . . . . " Complaint at 3. It is well established, however, that a voter's loss of the ability to vote for a candidate of his liking does not confer standing; in such cases "the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate." *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) (per curiam); *accord Becker v. Fed. Election Comm'n*, 230 F.3d 381, 389-390 (1st Cir. 2000) (supporters of a candidate lacked standing to challenge exclusion of that candidate from Presidential debates); *Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618 (D.C. Cir. 1998) (supporter of a candidate had no standing to challenge dismissal of agency action against a competing candidate). Berg's reliance, in his appeal brief, on the Tenth Amendment of the U.S. Constitution in no way changes the fundamental flaw in his case. In short, Berg's stake is "no greater and his status no more differentiated than that of millions of other voters." *Berg*, 574 F. Supp. 2d at 519.

Because Berg lacks standing to assert his claim regarding the eligibility of Obama to serve as President, this Court should affirm the district court's dismissal for lack of subject matter jurisdiction.[2]

II. The District Court Properly Concluded that Berg Has Failed to State a Claim Upon Which Relief Can Be Granted.

The complaint also fails to state a claim upon which relief can be granted because it fails to establish a cause of action. In his complaint, Berg cited the Declaratory Judgment Act, 28 U.S.C. § 2202, but that Act "has only a procedural effect. Although it enlarges the range of remedies available in federal courts, it does not create subject matter jurisdiction. Thus, a court must find an independent basis for jurisdiction . . . ." *Mack Trucks, Inc. v. Int'l Union, UAW*, 856 F.2d 579, 583 n.4 (3d Cir. 1988). Contrary to Berg's contention below, there is no federal

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[2] Subject matter jurisdiction is also lacking because the case is moot and presents a political question. In his complaint, Berg sought a declaratory judgment that then-Senator Obama was ineligible to run for President, an injunction barring him from running for that office and an injunction barring the DNC from nominating him. Barack Obama has since run for president and the DNC has nominated him; he is now President of the United States. Thus, the relief Berg sought would no longer have any effect and the case is moot. *See, e.g.*, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Larsen v. U.S. Navy*, 525 F.3d 1, 3-4 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 738 (2008). And as this Court recognized in its prior ruling, "[e]ven if [Berg] possessed standing . . . no justiciable controversy is presented, as [Berg] seeks adjudication of a political question." December 9, 2008 Order at 2. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), *cert denied*, 129 S. Ct. 195 (2008).

cause of action under or created by Article II of the Constitution. *See, e.g.*, *Catholic Charities CYO v. Chertoff*, 2007 WL 2344995 (N.D. Cal. Aug. 16, 2007).

With respect to Counts Two, Three and Four of the amended complaint, invoking the Civil Rights Act, the district court correctly held that the complaint does not set out factual allegations sufficient to state a claim. *Berg*, 574 F. Supp. 2d at 522-24. "'To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.'" *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 189 (3d Cir. 2005) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). Berg did not set forth any specific allegations that would show a deprivation of plaintiff's constitutional or statutory rights by virtue of the DNC or Obama exercising any state governmental authority. Indeed, as the district court correctly concluded, Berg alleged no violation of any right independently secured by the Constitution or laws of the United States. *Berg,* 574 F. Supp. 2d at 522-23.

The district court also properly concluded that Berg failed to allege a cognizable § 1985 claim: 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. Moreover, Berg made no factual allegations that would support claims under any of § 1985's three subsections: (1) interference with officers of the United States;

(2) conspiracies to intimidate parties in a federal case; and (3) conspiracies motivated by racial animus. *Id.* at 523-24. Nor did he make sufficiently specific allegations of conspiracy. *See, e.g.*, *Conroy v. City of Phila.*, 421 F. Supp. 2d 879, 888 (E.D. Pa. 2006) (§ 1985 conspiracy claims "must be pled with some degree of specificity").

Finally, as the court below correctly concluded, because Berg failed to state a predicate violation of § 1985, he failed to state a claim under § 1986. *Berg*, 574 F. Supp. 2d at 524; *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994) ("transgressions of § 1986 by definition depend on a preexisting violation of § 1985") (internal quotation marks and citation omitted).

As to the remaining counts of the amended complaint, Berg does not appear to contest the district court's ruling. Even assuming, *arguendo*, that he had appealed these portions of the court's opinion, his appeal would fail. With respect to Count Five, as the district court recognized, the Federal Election Campaign Act does not address the issues alleged by Berg; it regulates the *financing* of campaigns. *Berg*, 574 F. Supp. 2d at 525. Moreover, there is no private right of action to enforce the Federal Election Campaign Act unless and until an administrative complaint has been filed with the Federal Election Commission and the Commission has disposed of or failed to act on that complaint. *E.g.*, *Perot v.*

Fed. Election Comm'n, 97 F.3d 553, 557-58 (D.C. Cir. 1996). Berg did not allege that he filed any administrative complaint with the Commission.

Likewise, no cause of action can be asserted against the DNC or Obama under the Freedom of Information Act, 5 U.S.C. § 552, as neither is a federal agency subject to the provisions of FOIA. *See Berg*, 574 F. Supp. 2d at 526-28.

With respect to Count Seven, there is no private right of action under the Immigration and Nationality Act or any other statute to have a federal court make a determination under that Act about a third person.

Finally, Berg's new argument—that the district court violated his due process rights by dismissing the action—is wholly without merit. There is simply no due process right to proceed with frivolous litigation.

CONCLUSION

For the foregoing reasons, President Obama and the DNC respectfully ask this Court to affirm the district court's order dismissing Berg's amended complaint.

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CERTIFICATE OF COMPLIANCE

I, John P. Lavelle, Jr., Esquire, the attorney for Defendants President Barack Obama and the Democratic National Committee, hereby certify that the foregoing Brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rule of Appellate Procedure. The total number of words in the foregoing Brief is 3,087.

/s/ John P. Lavelle, Jr.
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CERTIFICATE OF BAR MEMBERSHIP

I, John P. Lavelle, Jr., Esquire, hereby certify that I am admitted in the Third Circuit Court of Appeals.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.

Dated: February 19, 2009

CERTIFICATION OF IDENTICAL FILING AND VIRUS

I hereby certify that the text of the E-Brief and hard copies of the brief are identical.

I further certify that a virus check was performed by the McAfee anti-virus software program and is free of viruses according to that program.

/s/ John P. Lavelle, Jr.
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Dated: February 19, 2009

CERTIFICATE OF SERVICE

I, John P. Lavelle, Jr., Esquire, hereby certify that two copies of the foregoing Brief of Appellees President Barack Obama and the Democratic National Committee were served upon the following counsel by first class mail, postage prepaid, this 19th day of February, 2009:

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