IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES TISDALE,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 12-1124
v.	)	
	)	INFORMAL BRIEF
BARACK OBAMA, *et al.*,	)	
	)	
Defendants-Appellees.	)	

APPELLEE FEDERAL ELECTION COMMISSION'S
INFORMAL BRIEF FOR AFFIRMANCE

Appellant Charles Tisdale's suit against the Federal Election Commission ("Commission"), President Barack Obama, and other defendants appears to rest on the erroneous legal theory that a person is not eligible to be President unless both of his or her parents were born in the United States. Although the district court correctly rejected this argument, this Court need not reach the merits of Tisdale's claims in order to affirm the dismissal of his complaint because the federal courts lack jurisdiction over this case. The Court should affirm the district court's judgment of dismissal with prejudice.

BACKGROUND

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce the Federal

Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-57.[1] *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. The Act regulates 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 . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to civilly enforce against violations of the Act, 2 U.S.C. § 437g; and to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f.

Although Tisdale's complaint contains numerous allegations against various defendants, his only claim against the Commission involves an advisory opinion the Commission issued in response to a request by someone else: Abdul Hassan, a naturalized citizen who has announced that he is running for president. *See* Verified Complaint ("Compl.") ¶¶ 34-37; Advisory Opinion ("AO") 2011-15, 2011 WL 3917133. In that advisory opinion, the Commission stated that although

[1] The Commission is also empowered to administer and enforce the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), 26 U.S.C. §§ 9031-9042. The Fund Act provides a voluntary program of public financing of the general election campaigns of eligible party nominees for the offices of president and vice president of the United States. The Matching Payment Act provides partial federal financing for the campaigns of presidential primary candidates who qualify and choose to participate.

Hassan could become a federal "candidate" within the meaning of 2 U.S.C. § 431(2), he could not become eligible to receive federal funds under the Matching Payment Act because he was not born in the United States and was thus ineligible to serve as president. In Tisdale's prayer for relief, he asks for a declaration ordering the United States Attorney for the Eastern District of Virginia to review Commission AO 2011-15 and "report its findings to the Court." (*See* Compl., Request for Relief, ¶ C.)

ARGUMENT

I. APPELLANT LACKS STANDING TO BRING HIS CLAIMS AGAINST THE COMMISSION

Tisdale lacks standing to bring his claims, and he thus fails to bring a "case or controversy" under Article III of the Constitution. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States." *AtlantiGas Corp. v. Columbia Gas Transmission Corp.*, 210 Fed. Appx. 244, 247 (4th Cir. 2006) (citing *Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001)). *See generally 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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). 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. *Id.* at 560-61.

The first element, an injury-in-fact, 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. *Id.* at 573-74; *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[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.").

Tisdale's grievances are undifferentiated and widely shared, and thus fail to satisfy the injury-in-fact requirement for standing. Tisdale never asserts that the allegedly unconstitutional candidacies or presidencies of Obama, Romney, or Paul will result in any harm that redounds particularly to his detriment. Rather, he

suggests that the president's political decisions will affect American citizens in terms of their rights or privileges under programs such as Medicare and Medicaid and with respect to issues such as unemployment, foreign policy, acts of war, and housing (*see, e.g.*, Plaintiff's Memorandum of Law to Support Plaintiff's Case (Doc. No. 3-1 at ¶¶ 2, 6, 7)) — matters that affect all or a large class of citizens in substantially equal measure. Thus, Tisdale's generalized grievance about constitutional governance on behalf of the American citizenry cannot satisfy Article III. *See Berg v. Obama*, 586 F.3d 234, 239 (3rd Cir. 2009) (holding that voter who challenged then-Senator Obama's eligibility to be a candidate or serve as president under Natural Born Citizen Clause suffered "no injury particularized to him"); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215-227 (1974) (holding that citizens who had brought suit under the Incompatibility Clause challenging the eligibility of Members of Congress to serve in the military reserves had only generalized interests and lacked standing).

Moreover, Tisdale's alleged injury is neither traceable to the Commission's advisory opinion nor redressable by the remedy he seeks from this Court. Indeed, when a plaintiff's asserted injury stems from "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," the fairly traceable and redressability prongs of standing analysis require more exacting scrutiny. *Lujan*, 504 U.S. at 562 (1992) (emphasis in original). "[W]hile not necessarily fatal to

standing," the indirectness of injury "'may make it substantially more difficult to meet the minimum requirements of Art. III: To establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.'" *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976) (quoting *Warth*, 422 U.S. at 505). Here, Tisdale cannot show that Advisory Opinion 2011-15 will cause any future president or candidate to injure *him*, or that any personal injury to Tisdale could possibly be remedied by having a United States Attorney — who has no authority to review any action by the Commission — assess AO 2011-15. (*See* Compl., Request for Relief, ¶ C.)

In sum, because he has not suffered a particularized injury-in-fact caused by the Commission that could be remedied by the courts, Tisdale lacks standing under Article III to pursue his claims against the Commission.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE NATURAL BORN CITIZEN CLAUSE DOES NOT REQUIRE BOTH PARENTS TO BE BORN IN THE UNITED STATES

Even if Tisdale had standing to bring his claim against the Commission, his legal theory is frivolous. As the district court correctly observed, the Supreme Court has long held that "those born in the United States are considered natural born citizens." *Tisdale v. Obama*, No. 12-00036 (E.D.Va. Jan. 23, 2012) (order dismissing case with prejudice), slip op. at 2 (*citing United States v. Ark*, 169 U.S. 649, 702 (1898)). And "citizenship by birth is established by the mere fact of birth

under the circumstances defined in the [C]onstitution." *Ark*, 169 U.S. at 702. Thus, regardless of whether a natural born citizen's parents were born in the United States, any person born in the United States meets the natural born citizen requirement in the Constitution. U.S. Const. art. II, sec. 1, cl. 5.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal with prejudice of Tisdale's complaint.

Respectfully submitted,

Anthony Herman
General Counsel
aherman@fec.gov

David Kolker
Associate General Counsel
dkolker@fec.gov

Steve N. Hajjar
Attorney
shajjar@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

March 8, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES TISDALE,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 12-1124
v.	)	
	)	CERTIFICATE OF SERVICE
BARACK OBAMA, *et al.*,	)	
	)	
Defendants-Appellees.	)	

CERTIFICATE OF SERVICE

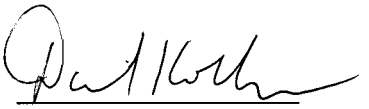
I hereby certify that on March 8, 2012, I served a copy of this Informal Brief on all parties, addressed as shown below, by first class mail:

Charles Tisdale
P.O. Box 401
Richmond, VA 23219

President Barack Obama
c/o Attorney General Eric Holder
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Don Palmer, Secretary
Virginia State Board of Elections
Washington Building, First Floor
1100 Bank Street
Richmond, VA 23219

Neil H. MacBride
US Attorney for the Eastern District of Virginia
600 East Main Street
Richmond, VA 23219-2447



David Kolker