

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

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| FRED HOLLANDER,                     | : |                           |
|                                     | : |                           |
| Plaintiff,                          | : |                           |
|                                     | : |                           |
| -against-                           | : |                           |
|                                     | : | Civ. No. 1:08-cv-00099-JL |
| SENATOR JOHN MCCAIN, and REPUBLICAN | : |                           |
| NATIONAL COMMITTEE,                 | : |                           |
|                                     | : |                           |
| Defendants.                         | : |                           |
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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
FIRST AMENDED COMPLAINT**

Defendants Senator John McCain and the Republican National Committee (“RNC”) respectfully submit the following reply memorandum in support of their motion to dismiss Plaintiff’s Corrected First Amended Complaint (“Complaint”) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

**INTRODUCTION**

Narrowing somewhat the broad allegations made in his Complaint, Plaintiff now asserts that he is bringing this lawsuit “pursuant to 42 U.S.C. § 1983 to remedy his disenfranchisement in the New Hampshire Republican primary and consequently in the national selection of the Republican candidate for the Office of President.” Pl. Opp’n to Mot. to Dismiss (“Opp’n”) 1. Plaintiff claims that the “Defendants have disenfranchised” him (*id.*), even though his own Complaint alleges that he voted in New Hampshire’s January 2008 Republican presidential primary. He argues that the Defendants did not “count[] his vote” (*id.* at 3), even though state

law assigns that function to local election officials (N.H. Rev. Stat. Ann. § 659:58-63), who, Plaintiff does not dispute, diligently did so. And notwithstanding the fact that New Hampshire's Secretary of State, in accordance with state law (*id.* § 659:93), awarded to Plaintiff's chosen candidate a share of the State's delegates commensurate with the proportion of votes received by that candidate, Plaintiff claims that the Defendants have deprived him of a voice "in the national selection of the Republican presidential candidate." Opp'n 3.

Whether disguised as a claim of "disenfranchisement" or "vote dilution," Plaintiff's allegation of injury to *his vote* is a sham. Plaintiff is not seeking simply to have his New Hampshire primary vote "counted." If he were, he would be asking this Court to throw out the results only of *New Hampshire's* Republican primary, and to reallocate only *New Hampshire's* delegates to the Republican Convention. That would suffice to remedy *Plaintiff's* alleged "disenfranchisement." But instead, Plaintiff asks this Court to throw out not just New Hampshire's, but *every State's* nominating contest and to "reassign *any and all delegates* currently assigned to Senator John McCain to other candidates." Opp'n 7 (emphasis added). That breathtaking request for relief exposes Plaintiff's real gripe—that the Republican Party appears poised to nominate for the Office of President a candidate, Senator McCain, who Plaintiff thinks ineligible to hold the office.

That gripe is baseless. Plaintiff asserts that Senator McCain was born outside of the United States, and that, therefore, he is a "naturalized"—not a "natural born"—citizen. Opp'n 3. At the core of Plaintiff's argument is an assumption, purportedly rooted in the Fourteenth Amendment, that any citizen who was not "born in the United States" must have obtained citizenship by being "naturalized." *Id.*; *see also* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States"). That assumption, however, is demonstrably wrong as a matter of law.

“Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.” *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892). Federal law confirms that naturalization is “the conferring of nationality of a state upon a person *after birth*.” 8 U.S.C. § 1101(a)(23) (emphasis added). Before the ratification of the Fourteenth Amendment, as after, Congress, pursuant to its constitutionally delegated power “[t]o establish a uniform Rule of Naturalization” (U.S. Const. art. I, § 8 cl. 4), prescribed whether and under what circumstances foreigners can undergo a process of naturalization and thereby become U.S. citizens. *Compare* 1 Stat. 103, 103 (1790) (permitting naturalization of “any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years”), *with* 8 U.S.C. §§ 1422-1429. The process of naturalization culminates now—just as it did in 1790—with the foreign person swearing an oath to support the Constitution of the United States. *Compare* 1 Stat. at 103, *with* 8 U.S.C. § 1448.

Congress has *never* treated children born abroad to U.S.-citizen parents as foreigners in need of naturalization. To the contrary, in successive statutes dating to the Founding, Congress has always deemed such children to be citizens simply by virtue of their birth—no oath required. *See* 1 Stat. at 104; Pub. L. No. 73-250, § 1, 48 Stat. 797, 797 (1934); 8 U.S.C. § 1401(c). Indeed, the First Congress expressly referred to such children as “natural born citizen[s].” 1 Stat. at 104.<sup>1</sup>

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<sup>1</sup> That the naturalization law enacted in a lame duck session of the Third Congress (1 Stat. 414 (1795)) failed to designate children born abroad to U.S. citizens “natural born citizens”—the 1795 Act instead prescribed that they would be “citizen[s] of the United States”—is of no consequence. As Plaintiff himself recognizes (at 10), Congress cannot, by legislative act, define the terms of the Constitution. The Supreme Court has recognized, however, that the legislative acts of the First Congress are powerful indicators—“contemporaneous and weighty evidence”—of the “true meaning” of constitutional terms and phrases because “many of [the First Congress’s] members had taken part in framing [the Constitution].” *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (internal quotation marks omitted). The Supreme Court has not accorded any similar significance to the positive legislative acts of the Third Congress—much less its repeals.

The Fourteenth Amendment did not somehow convert into “foreigners” persons born outside of the United States but nevertheless entitled to citizenship at birth. The Amendment’s citizenship provision rather was intended to nullify the infamous holding of *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1856), that a slave born in the United States was merely property and not a citizen of the United States. See *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). It extended the privilege of citizenship—as a matter of constitutional law—to all persons born or naturalized in the United States. The Amendment did not diminish Congress’s authority to determine which among the persons born outside of the United States are U.S. citizens by birth, and which must obtain citizenship, if at all, through a process of naturalization. Similarly, the Fourteenth Amendment did not alter—and most certainly did not narrow—the meaning of the constitutional term “natural born Citizen.” Both the origins of the Clause—it was the brainchild of a man, John Jay, three of whose six children were born overseas—and the First Congress’s use of the identical term powerfully demonstrate that it includes any person who is a citizen by virtue of his birth.

Here, there can be no doubt that Senator McCain is a “natural born Citizen” because not only was he born to two United States citizens—a status that would confer citizenship on him even if he were born abroad—but, in fact, he was born in the sovereign territory of the United States. True, over several decades, the Supreme Court has offered contradictory statements concerning the status of the Panama Canal Zone. Compare *O’Connor v. United States*, 479 U.S. 27, 28 (1986) (“[f]rom 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone”), with *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948) (describing the Canal Zone as “territory over which we do not have sovereignty”). But the Hay-Bunau-Varilla Convention is clear: Contrary to Plaintiff’s characterization of that treaty, it does not preserve Panama’s sovereignty over the Canal Zone. Quite the opposite, it “grants to the United States all the rights, power and authority within the

zone . . . which the United States would possess if it were the sovereign,” and does so “to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.” Hay-Bunau-Varilla Convention, U.S.-Pan., art. III, Nov. 18, 1903, 33 Stat. 2234, 2235. In accordance with the plain language of the treaty, the Executive Branch recognized that the Hay-Bunau-Varilla Convention “imposed upon the United States the obligations as well as the powers of a sovereign within the Canal Zone.” *The President—Government of the Canal Zone*, 26 Op. Att’y Gen. 113, 116 (1907). In matters of foreign affairs, it is the Executive Branch’s views, not the judiciary’s, that are entitled to deference. *See Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (“Ordinary principles of judicial review . . . recognize Executive Branch primacy in foreign policy matters.”).<sup>2</sup>

But this Court need not, and indeed must not, reach the merits of the constitutional question posed by Plaintiff’s Complaint. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Plaintiff’s real complaint—that the Republican Party, over his objection, is set to nominate a candidate Plaintiff believes to be ineligible to hold office—is a nonjusticiable generalized grievance shared at least by every member of the Republican Party. Moreover, Plaintiff’s complaint, which names as defendants only private

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<sup>2</sup> The fanciful speculation offered by Plaintiff (at 2) that it is “reasonable to assume that [Senator McCain] was born in the city of Colón in the Republic of Panama” is a canard, debunked even within the mists of the blogosphere from whence Plaintiff’s outlandish theories are derived. *See* Michael Dobbs, *The Fact Checker: John McCain’s Birthplace*, WashingtonPost.com, May 20, 2008, at [http://blog.washingtonpost.com/fact-checker/2008/05/john\\_mccains\\_birthplace.html](http://blog.washingtonpost.com/fact-checker/2008/05/john_mccains_birthplace.html) (last visited June 3, 2008). Dobbs set out to “fact check” the allegation, published on the Newsbusters.com blog in February 2008, that “John McCain . . . COULD NOT have been born in Coco Solo Hospital and probably wasn’t born in the Canal Zone at all.” *Id.* After examining Senator McCain’s birth certificate and exhaustively searching the archives of the Coco Solo Naval Air Station, Dobbs concluded that “there is no foundation for the rumors that have surfaced on the Internet that John McCain was born in the Panamanian city of Colon, rather than inside the U.S.-administered Panama Canal Zone.” Dobbs awarded the NewsBusters.com story four Pinocchios, the Fact Checker’s designation for “a whopper.” *Id.*

actors engaged in protected political speech, fails to state a claim upon which relief can be granted. Plaintiff's complaint must be dismissed.

**I. Plaintiff Has Failed To Demonstrate That His Complaint Is Justiciable.**

Plaintiff's Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because his claims are nonjusticiable on multiple grounds.

Plaintiff asserts that his "actual injury is the loss of his vote in the primary election." Opp'n 6.<sup>3</sup> But as demonstrated above, that claim of injury is a thin subterfuge: Plaintiff's quarrel is not with the conduct of the New Hampshire Republican primary, but rather its result: Plaintiff is aggrieved by the fact that the RNC appears ready to "select[] a candidate for the 2008 election to the Office of President who is not eligible to that office." Opp'n 1. *That* grievance suffers from all the same jurisdictional defects as Plaintiff's trumped-up claims of disenfranchisement.

First, Plaintiff's purported injury, which he alleges is shared by "an estimated 100 million additional voters" (Compl. ¶ 1), is a paradigmatic generalized grievance insufficient to confer standing. Plaintiff alleges that he will "be injured by the Constitutional violation" (Opp'n 8), but at no point identifies an interest that is particularized to himself rather than "held in common by all members of the public." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). In this respect, Plaintiff is identical to the voters who brought suit in *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000), *aff'd without opinion*, 244 F.3d 134 (5th Cir. 2000), where the court held that "plaintiffs [had] conspicuously fail[ed] to demonstrate how they, as opposed to the general voting population, will feel its effects." 122 F. Supp. 2d at 717. It is well-established

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<sup>3</sup> Plaintiff's brief in opposition also refers to the "imminent loss of his vote in the general election," but acknowledges that the supposedly "imminent" loss will occur only "should McCain win the general election." Opp'n 7. This is precisely the type of "conjectural [and] hypothetical" injury that is insufficient to confer standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

that, to invoke this Court’s Article III jurisdiction, an “interest shared generally with the public at large in the proper application of the Constitution and laws will not do.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

Second, Plaintiff’s asserted “Constitutional violation” is not ripe for review. Opp’n 8. Even if the Republican Party were obligated to nominate for President a candidate eligible to hold the office—and, as demonstrated in the motion to dismiss, it is not—the Party will not select its presidential nominee until its convention in September 2008. Plaintiff presumes that all the delegates pledged to nominate Senator McCain will be seated at the convention, and that a majority of convention delegates will vote for him, but the law does not. The ripeness doctrine bars such “premature adjudication,” particularly of constitutional questions. *Doe*, 323 F.3d at 138.

Third, this Court cannot possibly grant the relief Plaintiff seeks. Recognizing that Senator McCain could obtain the Republican nomination “even without the delegates awarded based on the New Hampshire primary,” Plaintiff asks the court to order the RNC to “reassign *any and all delegates* currently assigned to Senator John McCain to other candidates.” Opp’n 7, 11 (emphasis added). Plaintiff fails to recognize, however, that in New Hampshire, as in other States, state election law—not the RNC—“assigns” delegates to a particular candidate. *See, e.g.*, N.H. Rev. Stat. Ann. § 659:93. Even under order of this Court, the RNC is powerless to alter the States’ designations of their delegates.

Finally, Plaintiff’s suit likely presents a nonjusticiable political question. Plaintiff does not dispute that the Constitution provides the voters, the Electoral College, and Congress each with opportunities to pass upon a candidate’s eligibility to hold the Office of President. Nor does he dispute that the judicial branch has never before in the history of the Nation passed on such a question. Yet on Plaintiff’s view, it is the Judiciary—not the voters or politically accountable branches—that should be the first and only arbiter of questions concerning eligibility to that

office. *See* Opp’n 9. The function of the political question doctrine is to preserve the Framers’ separation of powers by “restrain[ing] the Judiciary from inappropriate interference in the business of the other branches of Government.” *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). One can scarcely imagine a greater aggrandizement of the Judiciary’s authority, and a greater intrusion upon the business of the coordinate branches, than for the Judiciary to arrogate to itself control over who serves in the coordinate branches of government.

**II. Plaintiff Has Failed To State A Claim Entitling Him To Relief Against Private Actors Engaged In Political Speech.**

Even if Plaintiff’s claims were justiciable, dismissal would still be required under Fed. R. Civ. P. 12(b)(6) because Plaintiff has failed to state a claim upon which relief can be granted.

Plaintiff blithely ignores the fact that his request for a court order requiring Senator McCain to end his candidacy and compelling the Republican Party to nominate some other candidate would severely infringe upon the First Amendment rights of both Senator McCain and the Republican Party. *See Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) (political candidates have a “constitutional right to run for office”); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (“In no area is the political association’s right [to free association] more important than in the process of selecting its nominee.”). In light of Plaintiff’s total inability to respond to any of the serious First Amendment concerns raised by his suit, this Court should reject Plaintiff’s invitation to trench upon Senator McCain’s constitutionally protected right to run for office and the Republican Party’s right to nominate a candidate of its own choosing. Indeed, Plaintiff’s entire Complaint is premised on the flawed assumption that the Republican Party is required to nominate for the Office of President a candidate eligible to hold that office. Precedent and history establish that this is decidedly not the case. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also* Defendants’ Mem. of Law 15. While there

is no doubt that Senator McCain is eligible for the office he seeks, it is equally certain that, even if that were not the case, Plaintiff's Complaint fails to state a claim.

Moreover, neither Senator McCain nor the Republican Party is a state actor amenable to the relief that he seeks. It is well-established that a candidate for political office is not a state actor. *See, e.g., Welch v. McKenzie*, 765 F.2d 1311, 1316 (5th Cir. 1985) (“Because Section 2 [of the Voting Rights Act] only affords redress for voting practices imposed or applied by any State or political subdivision, [the candidate's] chicanery is not a Voting Rights Act infringement.”) (internal quotation marks omitted); *Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (conduct that Representative Gephardt allegedly undertook while seeking reelection did not constitute state action). Plaintiff seeks to distinguish *Federer* on the ground that the Eighth Circuit's decision purportedly relied on the fact that the candidate in that case was also a government employee at the time he was seeking office. Plaintiff's effort to evade *Federer* is unavailing not only because Senator McCain—like Representative Gephardt in *Federer*—is both a government employee and a candidate for office, but also because if a *government employee* is not “a governmental actor for all purposes” (*id.*), then it follows *a fortiori* that someone who is merely seeking government employment through the electoral process is not a state actor.

Plaintiff's effort to paint the Republican Party as a state actor is equally unavailing. The First Circuit has already authoritatively determined that political parties are not state actors. *See Kay v. N.H. Democratic Party*, 821 F.2d 31, 33 (1st Cir. 1987) (*per curiam*); *see also Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192, 1196 (6th Cir. 1990) (“the Republican Party is not subject to suit under section 1983”). The Supreme Court decisions that apply provisions of the Constitution to the conduct of political parties arise in exceptional—and readily distinguishable—circumstances that involve racial discrimination in ballot access in violation of the Fifteenth Amendment. *Smith v. Allwright*, 321 U.S. 649, 664 (1944). Those decisions are demonstrably inapplicable here.

## CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed in its entirety for its failure to present justiciable claims to this Court.

Respectfully submitted.

Dated: June 5, 2008

/s/Charles G. Douglas, III

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**Certificate of Service**

I hereby certify that a copy of the foregoing reply memorandum of law was served on June 5, 2008, on the *pro se* Plaintiff by overnight mail at 56 Dorchester Way, Nashua, NH 03064, and on Movant United States Citizenship and Immigration Service by electronic means through the Court's transmission facilities and by overnight mail.

/s/Amir C. Tayrani  
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