

not ripe for adjudication, and they may also raise a nonjusticiable political question. Moreover, even if Plaintiff's Complaint did present an actual case or controversy, dismissal would still be required because it names as defendants only private persons engaged in political speech and association protected by the First Amendment and therefore fails to state a claim upon which relief can be granted. Although these defects necessarily foreclose any possibility of reaching the substance of Plaintiff's allegations and the legal theories underlying them, those allegations are baseless in any event: Senator McCain, indisputably, is a "natural born Citizen" eligible to serve as President of the United States.

It is generally accepted that the Framers included the Natural Born Citizen Clause in the Constitution in response to a 1787 letter from John Jay (then serving as the Continental Congress's Minister of Foreign Affairs) to George Washington (then presiding over the Constitutional Convention at Philadelphia) that suggested that the new Constitution prohibit "Foreigners" from attaining the position of Commander in Chief. *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1, 5 (1968).¹ Although he was born in the Panama Canal Zone, Senator McCain is hardly a "Foreigner[]." He was born to two U.S. citizens, and Congress has recognized in successive federal statutes since the Nation's Founding that children born abroad to U.S. citizens are themselves U.S. citizens. 8 U.S.C. § 1401(c); *see also* Pub. L. No. 73-250, § 1, 48 Stat. 797, 797 (1934). In fact, the

¹ Jay wrote:

Permit me to hint, whether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural *born* Citizen.

³ Max Farrand, *The Records of the Federal Convention of 1787*, at 61 (1911) (emphasis in original).

statute that the First Congress enacted on this subject in 1790 not only established that such children are U.S. citizens, *but also expressly referred to them as “natural born citizens.”* 1 Stat. 103, 104 (1790) (emphasis added); *see also Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (the views of the First Congress provide “contemporaneous and weighty evidence of the Constitution’s meaning”) (internal quotation marks omitted). And the First Congress’s statutory recognition that persons born abroad to U.S. citizens were “natural born citizens” itself was in accord with the British tradition that necessarily informed the Framers’ understanding of the Natural Born Citizen Clause. *See, e.g.,* British Nationality Act, 1730, 4 Geo. 2, c. 21 (children born abroad to parents who were “natural-born Subjects” were also “natural-born Subjects . . . to all Intents, Constructions, and Purposes whatsoever”).

The fact that Senator McCain was born in 1936 rather than 1790 only strengthens his status as a “natural born Citizen” because both the U.S. Supreme Court and the other branches of the federal government have recognized that the Panama Canal Zone was sovereign U.S. territory when Senator McCain was born there. *See, e.g., 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”); *The President—Government of the Canal Zone*, 26 Op. Att’y Gen. 113, 116 (1907) (recognizing that the 1904 treaty between the United States and Panama “imposed upon the United States the obligations as well as the powers of a sovereign within the [Canal Zone]”). *But see Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948). It is well-established that “natural born” citizenship includes birth within the territory and allegiance of the United States. *See, e.g., United States v. Wong Kim Ark*, 169 U.S. 649, 655-66 (1898); *see also* U.S. Const. amend. XIV, § 1. Thus, although Senator McCain was not born within a State, he was nevertheless born within the sovereign territory of the United

States, which—even apart from his birth to U.S. citizen parents—provides an additional basis for his status as a “natural born Citizen.”

It is inconceivable that the Framers intended to exclude a child born of two U.S. citizens from holding the Office of President simply because of the historical accident that he or she happened to be born in a place that was not a State of the Union. And it is doubly inconceivable that the Framers intended to exclude such a child from holding the Office of President when he or she was born outside the continental United States only because the then-President dispatched his or her parents to that foreign location in the service of the United States. Put another way: Is there any reason to believe that Minister of Foreign Affairs Jay, who spent several years abroad in the service of his country and during those years welcomed into the world three of his six children, could have meant that another child born to him and his wife in Madrid or Paris should be ineligible to hold the Office of President? Of course not.

But this Court need not—indeed, may not—reach the merits of Plaintiff’s claims because Plaintiff’s Complaint fails to articulate a justiciable case or controversy and, in any event, fails to state a claim upon which relief can be granted. *See Nixon v. United States*, 506 U.S. 224, 226 (1993) (“[B]efore we reach the merits of . . . a claim, we must decide whether it is ‘justiciable,’ that is, whether it is a claim that may be resolved by the courts.”). While courts “should always be ready to meet any question confided to [them] by the Constitution, it is equally [their] duty not to pass beyond [their] appropriate sphere of action, and to take care not to involve [themselves] in discussions which properly belong to other forums.” *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case

may be disposed of.”). For the reasons set forth more fully below, Plaintiff’s Complaint should be dismissed in its entirety under Rules 12(b)(1) and 12(b)(6).

ARGUMENT

I. Plaintiff’s Claims Should Be Dismissed Because They Fail To Articulate A Justiciable Case Or Controversy.

Plaintiff’s claims are nonjusticiable—and therefore must be dismissed—for a host of independent reasons.

A. Plaintiff Lacks Constitutional Standing Because His Complaint Does Not Allege That He Suffered Any Concrete And Particularized Injury In Fact.

To invoke this Court’s jurisdiction, a plaintiff must allege, among other things, a sufficient “injury in fact”—“an invasion of a legally protected interest” that is both “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 omitted); *see also Sutcliffe v. Epping Sch. Dist.*, No. 06-cv-474-JL (D.N.H. Apr. 4, 2008). The plaintiff “bears the burden of establishing these elements” of standing. *Lujan*, 504 U.S. at 561. If construed charitably, Plaintiff’s Complaint can be read to allege four separate claims of injury: (1) disenfranchisement from the recent New Hampshire Republican primary election; (2) vote dilution in that New Hampshire Republican primary election; (3) future disenfranchisement in the 2008 general election for President; and (4) vote dilution in that general election for President. *See Compl.* ¶¶ 1, 12, 13, 28. Yet, none of these alleged injuries is sufficient to confer constitutional standing on Plaintiff to raise the present claims.

Plaintiff’s first three allegations of injury—disenfranchisement in the primary and general elections, and vote dilution in the primary election—do not remotely allege that Plaintiff in fact suffered, or is likely to suffer, a “concrete and particularized” injury that is an “invasion of a

legally protected interest” (*Lujan*, 504 U.S. at 560)—much less that these injuries were caused by the Defendants’ conduct.² Plaintiff’s allegation of disenfranchisement from the New Hampshire Republican primary is refuted by his own Complaint, which states that he voted in that election. *See* Compl. ¶ 7. His claim of disenfranchisement from the general election is similarly defeated by his allegation that he plans to vote in that general election and the fact that the Complaint contains no allegation that the Defendants will somehow attempt to prevent him from casting a ballot in November. *See id.* at ¶¶ 4, 7.

And Plaintiff’s claim that Senator McCain’s participation in the New Hampshire primary diluted the vote of every person who voted in that election is equally ineffectual. Plaintiff contends that if a party’s primary elections result in the nomination of a candidate who is ineligible to hold office, the votes cast in that party’s primary “will count less than those . . . in other parties’ primary elections.” Compl. ¶ 13. Setting aside the question whether the purported “vote dilution” under this theory is caused by—or “fairly traceable to” (*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006))—the candidate’s conduct or the voters’, Plaintiff’s Complaint contains no allegation that votes cast in the New Hampshire Republican primary were less effective at selecting the Republicans’ nominee than the votes cast in the State’s Democratic primary. Plaintiff seems to argue that, to the extent the Republicans nominate through their

² Thus, in addition to failing to allege an “injury in fact,” Plaintiff also does not meet the second element of standing, which requires “a causal connection between the injury and the conduct complained of.” *Lujan*, 504 U.S. at 560. Plaintiff does not allege that Senator McCain or the RNC prevented him from voting in the primary election (or will prevent him from voting in the general election) or that any conduct undertaken by the Defendants caused his vote in the primary election to count less than the vote of other primary voters. Moreover, Plaintiff is also unable to satisfy standing’s redressability requirement (*id.* at 561) because the relief that he seeks—a court order prohibiting the RNC from nominating Senator McCain and compelling the Senator to end his candidacy—would violate the First Amendment rights of both the RNC and the Senator. *See infra* Part II.A.

presidential primary a candidate who is ineligible to hold the Office of President, those primary votes will be less effective at selecting a President than the Democrats'. But the purpose of the primary election is only to select the party's *nominee* for an office—not the officeholder himself. And Plaintiff alleges no deficiency in the New Hampshire Republican primary in accomplishing *that* objective.

That leaves only Plaintiff's contention that the Republican Party's nomination of Senator McCain threatens to dilute the votes of Plaintiff "and an estimated 100 million additional voters who may otherwise cast their vote in the 2008 national election for a candidate who may later be declared ineligible to the Office of President." Compl. ¶ 1. Invoking an injury allegedly threatened to 100 million or more persons is an insufficient basis for standing, which requires, as an irreducible constitutional minimum, allegation of an injury that is "particularized" to the plaintiff. *Lujan*, 504 U.S. at 561. "[A] generally available grievance about government . . . seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large . . . does not state an Article III case or controversy." *Id.* at 573-74; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do.").

Accordingly, both the Supreme Court and lower federal courts have consistently held that voters do not have standing to challenge the qualifications of candidates for elected federal office. In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), for example, the Court held that the plaintiffs lacked standing to pursue a claim alleging that certain members of Congress were ineligible for office under the Constitution's Incompatibility Clause. *Id.* at 220. The Court explained that "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public" (*id.*) and that the standing requirement

carries “particular[]” weight in cases “seek[ing] an interpretation of a constitutional provision which has never before been construed by the federal courts.” *Id.* at 221; *see also Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam) (holding that the plaintiff lacked standing to challenge the eligibility of Hugo Black to serve on the U.S. Supreme Court because “it is not sufficient that [the plaintiff] has merely a general interest common to all members of the public”).

Similarly, in *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000), *aff’d without opinion*, 244 F.3d 134 (5th Cir. 2000), the court held that three Texas voters lacked standing to bring a suit alleging that George W. Bush and Richard B. Cheney were ineligible to receive Texas’s electoral votes under the Twelfth Amendment. *Id.* at 715. The court explained that the alleged “violation of [the plaintiffs’] right to cast a ‘meaningful vote’” (*id.* at 716) was insufficient to confer standing because their alleged injury was “undifferentiated and general” and the “plaintiffs [had] conspicuously fail[ed] to demonstrate how they, as opposed to the general voting population, will feel its effects.” *Id.* at 717; *see also Froelich v. FEC*, 855 F. Supp. 868, 870 (E.D. Va. 1994) (holding that the plaintiffs lacked standing to bring a suit alleging that they were “denied a meaningful vote” by U.S. Senate candidates’ acceptance of out-of-state campaign contributions because the plaintiffs’ alleged injury was “hypothetical,” “abstract,” and “common to all Virginia voters”), *aff’d without opinion*, 57 F.3d 1066 (4th Cir. 1995).

Plaintiff’s challenge to Senator McCain’s status as a natural-born citizen is precisely the type of “generally available grievance” about a candidate’s eligibility for office that is foreclosed by the Constitution’s particularized injury requirement. *Lujan*, 504 U.S. at 573. Plaintiff’s alleged injury—vote dilution in the general election—is no different than the injury purportedly suffered by *every* voter who intends to cast a ballot during the general election for the

Republican nominee for President. In fact, by his own admission, Plaintiff's alleged injuries are shared by "an estimated 100 million . . . voters." Compl. ¶¶ 1, 9, 23. Because Plaintiff's claims present an "undifferentiated, generalized grievance" (*Lance v. Coffman*, 127 S. Ct. 1194, 1198 (2007) (per curiam)), they should be dismissed for lack of standing.

B. Plaintiff's Claims Directed To The New Hampshire Primary Are Moot, And Those Directed To The General Election Are Not Ripe.

Plaintiff's claims of disenfranchisement and vote dilution in the New Hampshire primary election are also nonjusticiable for the additional reason that they are moot, and his claims regarding the general election are not ripe.

Plaintiff's claims of disenfranchisement and vote dilution in the New Hampshire Republican primary are raised belatedly and are therefore moot because "events [have] ma[d]e it impossible to grant [Plaintiff] effective relief" on those claims. *Pine Tree Med. Assocs. v. Sec'y of Health & Human Servs.*, 127 F.3d 118, 121 (1st Cir. 1997) (internal quotation marks omitted); *see also Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 66 (1st Cir. 2001) (a claim is moot where, due to the passage of time, there is no "reasonable chance of effective relief" being granted to the plaintiff). The New Hampshire primary has already taken place, and Plaintiff's request that this Court prohibit the RNC from nominating Senator McCain and compel the Senator to end his candidacy would not remedy the disenfranchisement and vote dilution that Plaintiff allegedly suffered during the primary, which preceded the filing of this action.

Moreover, Plaintiff's claims directed to the general election are not ripe. The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Plaintiff's claims of disenfranchisement and vote dilution in the general election purport to protect the interest of voters that will "cast their vote in the 2008 national election for a candidate

who *may* later be declared ineligible to the Office of President.” Compl. ¶ 1 (emphasis added). This formulation of the voters’ alleged injury implicitly acknowledges that, if Senator McCain is *not* elected to hold the Office of President, there will be no need for a court to address the constitutional question of his eligibility. The ripeness doctrine counsels ““avoidance of premature adjudication”” of such disagreements while they remain abstract—and does so with particular force where the ““abstract disagreements”” implicate constitutional questions. *Doe v. Bush*, 323 F.3d 133, 138 (1st Cir. 2003) (ripeness doctrine demands avoidance of “unnecessary constitutional decisions”). Inasmuch as Senator McCain has not been elected President (and, indeed, has not even been officially nominated as the Republican Party’s candidate), it would be “premature” as a constitutional matter for a court to address the issue.

C. Plaintiff’s Claims May Also Present A Nonjusticiable Political Question.

Even if Plaintiff could find a way to manufacture standing and overcome the jurisdictional hurdles posed by the mootness and ripeness doctrines, any complaint challenging Senator McCain’s eligibility to hold the Office of President would raise difficult issues under the political question doctrine and, at least at this juncture, may well be nonjusticiable on that ground.

The political question doctrine is “essentially a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). It serves to “restrain 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)) by prohibiting the courts from deciding issues that properly rest within the province of the political branches. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The Constitution indicates that issues relating to a candidate’s eligibility for the Office of President rest, in the first instance, with the voters and with the Electoral College, the constitutionally created body responsible for selecting the President of the United States. *See* U.S. Const. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct,” electors for the President and Vice President); *id.* amend. XXIII, § 1. The Constitution’s commitment to the Electoral College of the responsibility to select the President subsumes the authority to decide whether a presidential candidate is qualified for office because the examination of a candidate’s qualifications is an integral component of the electors’ decision-making process. If a court were to sit in judgment of a candidate’s qualifications *before* the Nation has voted, and *before* the Electoral College has cast its votes, such a judgment could “inappropriately interfer[e]” with the Electoral College’s constitutional authority to elect the President and to evaluate the qualifications of the candidates seeking that office. *Munoz-Flores*, 495 U.S. at 394.

The Constitution also provides that, after the Electoral College has voted, further review of a presidential candidate’s eligibility for office, to the extent such review is required, rests with Congress.³ Where no candidate receives a majority of the electoral votes, the Constitution commits to the House of Representatives the authority to select the President and, in so doing, to evaluate the candidates’ qualifications. *See* U.S. Const. amend. XII. Similarly, the Twentieth Amendment explicitly grants Congress the responsibility for selecting a President when a

³ Congress has already taken steps to express its view that Senator McCain is eligible for the Presidency. Senator Claire McCaskill, together with Senators Hillary Clinton and Barack Obama, has introduced a resolution recognizing that Senator McCain is a “natural born Citizen” because he was born to U.S. citizen parents serving their country on a U.S. military base. S. Res. 511, 110th Cong. (2008).

candidate elected by the Electoral College does not satisfy the Constitution’s eligibility requirements. *See id.* amend. XX, § 3 (“the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified”). Both the House and Senate have standing committees with jurisdiction to decide questions relating to presidential elections. *See* S. R. 25.1.n(1)(5) (the Senate Committee on Rules and Administration has jurisdiction over “proposed legislation, messages, petitions, memorials, and other matters relating to . . . Federal elections generally, including the election of the President, Vice President, and Members of the Congress,” as well as “Presidential succession”); *see also* H. R. 10(j)(12).

The Constitution therefore indicates that, in the first instance, the selection of the President—and the evaluation of a candidate’s qualifications—should be made by politically accountable bodies without judicial participation. If a court were to pass upon the eligibility of a candidate to hold the Office of President before the Electoral College and Congress have acted, it may involve itself in political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress to evaluate the qualifications of presidential candidates. The political question doctrine suggests that courts should not preempt the judgments of those governmental bodies that the Constitution designates as the forums for determining a presidential candidate’s eligibility to hold office. To permit them to do so could greatly aggrandize the power of the judicial branch and thereby seriously disrupt the Framers’ carefully calibrated separation of powers—“the absolutely central guarantee of a just Government.” *Munoz-Flores*, 495 U.S. at 394 (quoting *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting)); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,

635 (1952) (Jackson, J., concurring) (“the Constitution diffuses power the better to secure liberty”).

II. Plaintiff’s Complaint Should Be Dismissed Because It Fails To State A Claim Upon Which Relief Can Be Granted.

To the extent that Plaintiff’s claims of constitutional injury are justiciable—and, for the multiple reasons delineated above, they are not—this Court should still dismiss Plaintiff’s Complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff’s Complaint alleges that Senator McCain’s candidacy for President, and the possibility that the Republican Party will nominate Senator McCain as its candidate for that office, is inconsistent with the eligibility requirements set forth in Article II of the Constitution. But neither Senator McCain nor the RNC is a state actor. To the contrary, both Senator McCain and the RNC are private actors who, despite their political activity, retain their own rights under the Constitution, including their First Amendment rights of political association. The relief sought by Plaintiff—an injunction compelling Senator McCain to end his candidacy for President and requiring the RNC to select a different person to be its nominee in the general election—would improperly trench upon those rights.

A. Plaintiff’s Suit Infringes Upon The First Amendment Rights Of Senator McCain And The RNC.

Political candidates have “a constitutional right to run for office.” *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985). As the First Circuit has explained, the “right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association.” *Mancuso v. Taft*, 476 F.2d 187, 195 (1st Cir. 1973); *see also Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) (noting the First Amendment’s “protection of the freedom of association and of the rights to run for office, have one’s name on the ballot, and present one’s views to the electorate”). As to the former, “the individual’s expressive activity has two

dimensions: besides urging that his views be the views of the elected public official, he is also attempting to become a spokesman for a political party whose substantive program extends beyond the particular office in question.” *Mancuso*, 476 F.2d at 195-96. As to the latter, a candidate’s right to run for office implicates expressive association because “at some juncture his supporters and fellow party members may decide that he is the ideal person to carry the group’s standard into the electoral fray.” *Id.* at 196. Plaintiff’s suit therefore challenges both Senator McCain’s right to speak on behalf of the Republican Party’s platform and his right to represent his party as a whole before the electorate.

The Supreme Court has also repeatedly observed that political parties and their members “enjoy a constitutionally protected right of political association.” *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975). Indeed, “[i]n no area is the political association’s right [to free association] more important than in the process of selecting its nominee.” *Jones*, 530 U.S. at 575. This process “often determines the party’s positions on the most significant public policy issues of the day” and results in the nomination of a candidate “who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.” *Id.* Because the nomination process implicates core First Amendment freedoms, “a State, or a court, may not constitutionally substitute its own judgment for that of the Party.” *Democratic Party v. Wisconsin*, 450 U.S. 107, 123-24 (1981). This is true even though a plaintiff may believe that his party’s selection of a nominee was unwise or detrimental to the party’s interests. *See id.* at 124; *see also Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986).

Plaintiff’s requested remedy—a court order prohibiting Senator McCain from continuing his candidacy for President and requiring the RNC to select a new nominee—would profoundly intrude upon the First Amendment rights of both Senator McCain and the RNC. If successful,

Plaintiff's suit would preemptively prevent Senator McCain from exercising his constitutional right to run for elected office and overturn the result of the constitutionally protected nominating process that will likely culminate in Senator McCain's selection as the Republican Party's nominee. Indeed, if Plaintiff were granted the injunctive relief that he requests, the Republican Party would be compelled to select a new standard-bearer and would risk "being saddled with an unwanted . . . nominee." *Jones*, 530 U.S. at 579. The First Amendment prohibits such judicial interference with the internal workings of a party's nominating process.

This is not to say, of course, that merely because a political party has a First Amendment right to select its nominee, the nominee has an unqualified right to hold elective office. The First Amendment guarantees, however, that the choice of a nominee belongs to the political party and its members, *even if* the candidate ultimately proves "ineligible for office" or "unwilling to serve" (although that development is of no concern here given Senator McCain's irrefutable status as a "natural born Citizen"). *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). In fact, history provides several examples of political parties that have advanced their political agendas by nominating candidates known to be ineligible at the time. For example, in 1872, the Equal Rights Party nominated Victoria Woodhull, considered by many to be the first woman to run for President, despite the fact that she was not yet thirty-five years old and, as a woman, was then unable to vote. *See* Kate Havelin, *Victoria Woodhull: Fearless Feminist* 37 (2006). Similarly, in 2004, the American Socialist Workers Party nominated a presidential candidate who was a Nicaraguan immigrant. *See Third-Party Presidential Candidates*, USA Today, Oct. 23, 2004, at http://www.usatoday.com/news/politicselections/nation/president/2004-10-21-independent_x.htm. As the First Amendment prevents courts from interfering with a political party's decision to nominate such a candidate, Plaintiff's claims must be dismissed.

B. Neither Senator McCain Nor The RNC Is A State Actor.

Moreover, the relief that Plaintiff seeks is unavailable for the additional reason that courts are powerless to issue the requested form of relief unless the defendants are state actors whose conduct is “dominate[d]” by the government “to such an extent that . . . [they] must be deemed to act with [its] authority.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991); *see also Kay v. N.H. Democratic Party*, 821 F.2d 31, 33 (1st Cir. 1987) (“the Constitution provides no redress when private parties abridge the free expression of others”).

It is well-established that candidates for political office, like Senator McCain, are not state actors. In *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004), for example, the court dismissed a civil conspiracy suit against Representative Richard A. Gephardt arising out of his congressional reelection campaign in 2000. *Id.* at 758. The court concluded that Representative Gephardt was a “political candidate and private person,” and that the plaintiff had therefore failed to allege the state action that is a prerequisite to a conspiracy cause of action under 42 U.S.C. § 1985. *See id.* at 759.

It is equally well-established that political parties generally are not state actors. *See O’Brien v. Brown*, 409 U.S. 1, 4-5 (1972) (per curiam) (staying court of appeals order that national party seat certain delegates at its convention and expressing “grave doubts” that a political party could be considered a state actor).⁴ The First Circuit so held, for example, in *Kay*

⁴ In the “White Primary” cases, the Supreme Court recognized an exception to this general principle in the limited circumstance of a party’s practice of denying primary ballot access based on race, which the Court held to constitute “state action within the meaning of the Fifteenth Amendment.” *Smith v. Allwright*, 321 U.S. 649, 664 (1944). Because Plaintiff’s Complaint does not raise a claim under the Fifteenth Amendment, he may not rely on the “White Primary” cases—which rest upon the unique constitutional concerns raised by race-based ballot access restrictions—to establish state action in this case.

v. New Hampshire Democratic Party, 821 F.2d 31, where it dismissed a suit against the New Hampshire Democratic Party and two party officials for allegedly violating the plaintiff’s First Amendment right to speak at a presidential candidates’ forum. *Id.* at 33. The court explained that the party was not engaged in state action and that the party officials therefore “had the authority, for constitutional purposes, to exclude [the plaintiff] from participation in their private meeting.” *Id.* at 33 n.5; *see also Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192, 1196 (6th Cir. 1990) (“Absent some credible allegation that ward chairmen engage in a governmental function, the Republican Party is not subject to suit under section 1983 for irregularities in its internal ward chairmen elections.”).

Accordingly, neither Senator McCain—a private person running for political office—nor the RNC—a political committee—is a state actor. Plaintiff’s suit seeking declaratory and injunctive relief against Senator McCain and the RNC based on their alleged violation of the Natural Born Citizen Clause therefore fails as a matter of law.

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: April 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and supporting memorandum of law was served on the *pro se* plaintiff on April 30, 2008 by e-mail and overnight mail.

/s/ Charles G. Douglas, III
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