UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDUL KARIM HASSAN,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 11-2189 (EGS)

REPLY

FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

In response to the Federal Election Commission's ("Commission" or "FEC") motion to dismiss, Hassan has not refuted the Commission's argument that this case is not ripe, he has relied on only speculative and conclusory statements of fact to demonstrate standing, and he offers no sound legal support for his claim that the Fifth and Fourteenth Amendments have abrogated the Article II requirement that the President be a natural born citizen of the United States. This case should be dismissed.

I. HASSAN FAILS TO RESPOND TO THE COMMISSION'S SHOWING THAT THIS CASE IS NOT RIPE

In its opening brief (FEC's Memorandum of Points and Authorities in Support of Its Motion to Dismiss ("FEC Mem.")), the Commission explained (at 8-9) that Hassan has failed to present a controversy ripe for judicial intervention because it is speculative at best whether he will ever be in a position to accept public funds under the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-13. In his opposition, Hassan does not address this argument.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967)). Although Hassan argues (Opp. at 13) that it would be "logical" for him to ask a court to invalidate the alleged "discrimination against him in the fund Act" before seeking the nomination for President, the Supreme Court has rejected that kind of personal preference as a basis for finding that a case is ripe. In *National Park Hospitality*, the Court explained:

> Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded. If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions . . . . In short, petitioner has failed to demonstrate that deferring judicial review will result in real hardship.

538 U.S. at 811-12 (footnote omitted).

If and when Hassan becomes the nominee of a major or minor party whose candidate would qualify for public funds under the Fund Act (*see* FEC Mem. at 7-8), Hassan might be able to present an allegation "of an actual or imminent [violation] sufficient to present the constitutional issues in clean-cut and concrete form." *Renne v. Geary*, 501 U.S. 312, 313 (1991) (internal quotation marks omitted). Until then, however, this case is not ripe.

II. HASSAN FAILS TO MEET HIS BURDEN TO DEMONSTRATE STANDING UNDER ARTICLE III

Hassan fails to show the three essential elements of constitutional standing: injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-01 (1992).

First, Hassan conflates statutory and Article III standing. They are distinct, independent requirements; even if Hassan has statutory standing under 26 U.S.C. § 9011, it would have no bearing on whether he meets the requirements of Article III. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (holding that 2 U.S.C. § 437g(a)(8) — a provision allowing for limited judicial review of a Commission decision to dismiss an administrative complaint — "does not confer standing; it confers a right to sue upon parties who otherwise already have standing"). "[B]ecause Article III standing is always an indispensable element of the plaintiff's case, neither [the courts] nor the Congress can dispense with the requirement — even if its application renders a [statutory] violation irremediable in a particular case." *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1020 (D.C. Cir. 1998).

Second, Hassan cannot show an injury-in-fact by relying on *FEC v. Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480 (1985), and *FEC v. Akins*, 524 U.S. 11 (1998). In *NCPAC*, the Supreme Court held that the *Commission* had standing "to bring a declaratory action to test the constitutionality of a provision of the Fund Act . . . because a favorable declaration would materially advance the FEC's ability to expedite its enforcement of the Fund Act against political committees such as NCPAC. . ." 470 U.S. at 484-85. Hassan's posture is not remotely similar to the Commission's in *NCPAC*. In that case, political party

committees had brought a private right of action against NCPAC and thus intruded upon the Commission's *exclusive* jurisdiction to civilly enforce the Fund Act. To defend that jurisdiction, the Commission intervened and argued successfully that the private litigants had no "standing to bring a private action against another private party." *Id*. at 486. Hassan's speculative allegations of injury to his professed challenge to President Obama for the Democratic nomination for President bear no resemblance to the imminent and concrete threat to the Commission's exclusive enforcement authority at issue in *NCPAC*.

In *Akins*, the Supreme Court held that certain voter-plaintiffs had standing to challenge the Commission's dismissal of their administrative complaint because that complaint alleged that an organization had failed to register as a political committee and to file required disclosure reports about its campaign receipts and disbursements. The Court held that the plaintiffs had alleged a sufficient informational injury because the missing information would help them evaluate which candidates they would support or oppose. *See* 524 U.S. at 21. Although Hassan concedes (Opp. at 3) that *Akins* involved informational injury, his complaint is devoid of any allegation that he has been deprived of information, let alone that any such deprivation has caused him a concrete injury-in-fact.[1]

[1] Similarly, Hassan cannot show an injury-in-fact by relying on the Commission's "testing the waters" regulations. *See* 11 C.F.R. §§ 100.72, 100.131. Although those regulations allow someone who is considering becoming a candidate to receive donations without formally becoming a federal "candidate," the funds received must comply with the Federal Election Campaign Act's limits on contributions. *See* 2 U.S.C. § 441a(a). And once the person becomes an actual candidate, the funds received count against the donors' contribution limits. Thus, while allowing a prospective candidate some flexibility, the regulations function as an *anti-circumvention* provision to prevent the receipt of excessive contributions under the pretense that they are meant only to help someone decide whether to become a federal candidate. Hassan's suggestion (Opp. at 4) that these regulations are part of a statutory design to help candidates "identify and overcome obstacles at an early stage" is pure fiction.

Third, Hassan cannot demonstrate an injury-in-fact by relying on conclusory generalities about his alleged candidacy. Despite the general rule that the court must accept the allegations in Hassan's complaint as true, "the Federal rules do not require courts to credit a complaint's conclusory statements [made] without reference to its factual context." *Ashcroft v. Iqbal*, 556 U.S. 662, __, 129 S. Ct. 1937, 1954 (2009). Hassan's alleged candidacy for President of the United States is essentially *ipse dixit*. He has filed nothing with the FEC to establish a principal campaign committee,[2] and his "campaign" for President appears to consist of a website and a series of lawsuits (*see* FEC Mem. at 7 n.3). "Hassan's bare assertion that he 'intends to seek the Presidency of the United States in the year 2012, and thereafter if necessary,' is, by itself, insufficient to establish the sort of 'actual or imminent, not conjectural or hypothetical' injury required to establish standing." *Hassan v. United States*, 441 Fed. Appx. 10, 11 (2nd Cir. 2011) (citations omitted), *cert. denied*, 132 S. Ct. 1016 (2012).[3]

Fourth, in response to the Commission's argument (FEC Mem. at 6-7) that he has not alleged that he seeks the nomination of a political party — a prerequisite to obtaining money under the Fund Act — Hassan has now added a sentence to his website stating, "I am running for and intend to be the Presidential candidate of the Democratic Party in 2012 . . . . " http://www.abdulhassanforpresident.com. But he implicitly concedes that his complaint contains no such allegation when he states (Opp. at 11) that this sentence "now clarifies" that he is

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[2] A search for "Hassan" at the Commission's disclosure website, http://www.fec.gov/finance/disclosure/srssea.shtml, yields no record of any Hassan candidacy.

[3] Hassan is easily distinguished from the contractor in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212 (1995), that presented concrete evidence that it would "very likely" continue to submit relevant bids in competition with favored "disadvantaged businesses." Although, to demonstrate standing, the contractor did not have to show that it would have been awarded a contract but for the preference for disadvantaged businesses, it still had to show an "imminent" injury that was "*certainly* impending." *Id*. at 211 (citation and internal quotation marks omitted). Hassan does not come close to meeting that standard. (*See* FEC Mem. at 6-8.)

seeking the Democratic nomination.[4] While this new clarification is also too conclusory to survive a motion to dismiss under *Iqbal*, it comes too late. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed."* *Lujan*, 504 U.S. at 569 n.4 (emphasis in original; internal quotation marks and citation omitted). Injury-in-fact "may not be established by a development that occurs after the commencement of the litigation." *Park v. Forest Serv.*, 205 F.3d 1034, 1038 (8th Cir. 2000). Hassan cannot, therefore, "retroactively create[] . . . jurisdiction," *Lujan*, 504 U.S. at 569 n.4, by now announcing that he is seeking the Democratic nomination, especially when he has not alleged a single fact to support that conclusory assertion. "The requirements of standing must be satisfied from the outset and in this case, they were not." *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999).

Fifth, Hassan offers only unsupported speculation when he suggests that the Fund Act has *caused* the problems with his candidacy, or that a favorable decision would redress any such deficiencies. For example, he argues (Opp. at 5) that "whether a candidate can receive tens of millions in public funding is a significant factor that would influence whether a voter would vote for plaintiff as the candidate of the Democratic Party." But he does not allege that any single voter — let alone a significant number of voters — has actually been influenced by his ineligibility for public funding.[5] Even more speculative, Hassan also argues (Opp. at 8) that "having a candidate who is ineligible for . . . public funding will seriously hurt the political party

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[4] Paragraph 26 of his complaint merely alleges that "his chances of becoming the nominee of a major political party" has been injured, not that he is actually seeking the nomination of any particular political party or that he has taken any concrete steps to do so. Likewise, Hassan relies (Opp. at 7) on paragraphs 14, 15, 17, and 22 of his complaint to argue that he has been "promoting his candidacy," but none of these paragraphs allege that is seeking the nomination of any political party.

[5] *See also Hassan*, 441 Fed. Appx. at 12 (noting that "Hassan does not allege, for example, that any potential voter or contributor has declined to support him in light of his ineligibility for office if elected").

and the party's members and because of this, voters will not logically vote or are significantly less likely to vote to nominate plaintiff . . . ." This argument, however, is flatly contradicted by recent history. President Obama — Hassan's obvious competition for the Democratic nomination — was the first Presidential candidate who chose not to accept public funding in the last general election campaign. Yet he was still able to win the Democratic nomination in 2008, and it is wildly speculative to suggest that his lack of public funding would have any impact on his chances of being nominated again later this year.

In sum, Hassan's lack of standing under Article III is an independent and sufficient basis for dismissing his complaint.

III. HASSAN'S COMPLAINT FAILS TO STATE A CLAIM

The Commission has shown that the Constitution's requirement that the President be a natural born citizen has not been implicitly or explicitly repealed. (FEC Mem. at 9-13.) In his opposition, Hassan argues (Opp. at 13-25) that this requirement is inconsistent with the equal protection guarantees in the Fifth and Fourteenth Amendments, but this argument fails as a matter of law. Fundamentally, Hassan asks this Court to hold that a provision of the Constitution is itself unconstitutional. But "this Court lacks the power to grant the relief sought because the Court, as interpreter and enforcer of the words of the Constitution, is not empowered to strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent." *New v. Pelosi*, No. 08-9055, 2008 WL 4755414, at *2 (S.D.N.Y. Oct. 29, 2008) (internal quotation marks and citation omitted), *aff'd*, 374 Fed. Appx. 158 (2d Cir. 2010). Thus, contrary to Hassan's suggestion (Opp. at 14-15), the natural born citizenship requirement should not be treated like a statute or presumed invalid because it makes a distinction based on national

origin. Instead, unless the requirement is explicitly repealed through the amendment process specified in the Constitution, it remains in full force.

A. The Constitution's Natural Born Citizen Requirement Has Not Been Repealed

Relying on *Schneider v. Rusk*, 377 U.S. 163, 165 (1964), and a long line of other cases, the Commission has demonstrated (FEC Mem. at 9-12) that the national born citizen requirement has not been explicitly or implicitly repealed by the Fifth and Fourteenth Amendments. Decided long after the ratification of the Fourteenth Amendment, *Schneider* reiterated that "[t]he only difference [between naturalized and natural born citizens] drawn by the Constitution is that *only the 'natural born' citizen is eligible to be President.* Art. II, § 1." 377 U.S. at 165 (emphasis added). Rather than grappling with this established precedent, Hassan offers a flawed critique (Opp. at 13-19) of the district court decision in *Hassan v. United States*, No. 08-938, slip op. at 3-7 (E.D.N.Y. June 15, 2010) (rejecting Hassan's substantive arguments), *aff'd on other grounds*, 441 Fed. Appx. 10 (2nd Cir. 2011). *See also Hassan v. New Hampshire*, No. 11-552, 2012 WL 405620, at *3 (D.N.H. Feb. 8, 2012) (holding "Hassan has not carried the high burden necessary to demonstrate that the Natural Born Citizen Clause has been implicitly repealed by the Fourteenth Amendment" (footnote omitted)).

Although Hassan suggests (Opp. at 17) that the *Schneider* line of precedent has been superseded by *Afroyim v. Rusk*, 387 U.S. 253 (1967), nothing in that case casts doubt on the continuing force of either *Schneider* or the national born citizen requirement. Indeed, the Court in *Afroyim* does not even mention, let alone interpret, that requirement, but instead merely held that a naturalized citizen could not be deprived of his citizenship, once obtained, by voting in a foreign country's election. Hassan seizes (Opp. at 17) on a statement in *Afroyim*, where the Court explains that a naturalized citizen generally possesses "all of the rights of a native citizen"

and stands "on the footing of a native," but Hassan fails to point out that the Court was actually quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824).[6] *Afroyim*, 387 U.S. at 261. Because *Osborn* was decided long before the Fourteenth Amendment was ratified, it obviously cannot lend any support to Hassan's flawed argument about the impact that subsequent Amendment had on the natural born citizenship requirement. Thus, Hassan's reliance on *Afroyim*, and its quotation from *Osborn*, is entirely misplaced.[7]

B. The Natural Born Citizen Requirement Can Be Abrogated Only by Constitutional Amendment

As previously explained (FEC Mem. at 12-13 & n.7), repeal of the natural born citizen requirement was considered and rejected by Congress around the time of the Fourteenth Amendment. *See also* Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. Rev. 53, 148 (2005) (citing H.R.J. Res. 52, 42d Cong. (2d Sess. 1871)); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 B.Y.U. L. Rev. 927, 947 (2005) (citing H.R.J. Res. 166-169, 42nd Cong. (3d Sess. 1872) and S.R. 284, 41st Cong. (3d Sess. 1871)). And as recently as 2002, Congress has considered amending the Constitution to repeal the requirement. *See, e.g.*, S. J. Res. 15, 108th Cong. (1st Sess. 2003) (proposing amendment). These debates clearly suggest that Congress

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[6] The Court in *Afroyim* relied upon *Osborn* when it explained that *Congress* did not have the power to "enlarge or abridge" the rights of naturalized citizens. 387 U.S. at 261, 268. But *Afroyim* did not suggest that other provisions of the *Constitution* cannot determine the rights of naturalized citizens.

[7] Hassan also argues (Opp. at 18) that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), is an example of constitutional abrogation by implication. However, as previously shown (FEC Mem. at 11 n.5), in that case the Supreme Court relied on *explicit* language in the Fourteenth Amendment that limited state authority.

itself does not believe that the Fourteenth Amendment silently accomplished the repeal that Hassan advocates.

Hassan also suggests (Opp. at 15) that because the Constitution is difficult to amend, the courts should more easily find an implicit repeal of a constitutional provision than a similar statutory provision. Hassan offers no legal support for this extraordinary proposition, which ignores the Constitution's own very specific, arduous, and carefully balanced amendment process. *See* U.S. Const. art. V. Moreover, the amendment process is primarily vested in the legislative branches of the federal and state governments. *Id.* The judicial branch has no role in amending the Constitution. *See McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (rejecting the proposition that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made"); *New v. Pelosi*, 2008 WL 4755414, at *2 ("Whatever the merits, Plaintiff's remedy lies in the constitutional amendment process, not the courts.").[8]

Indeed, in the few instances in which the qualifications for federal office have changed, they were accomplished by constitutional amendment. In particular, the Fourteenth Amendment

[8] Hassan relies (Opp. at 23-25) on *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and speculates how that case could have been decided differently. Regardless of the flaws in that opinion, the fundamental issues in that case were ultimately resolved through constitutional amendment. Hassan also relies (Opp. at 15-16) on *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059-60 (2010), to argue that courts should find an implicit repeal of a portion of the Constitution when its provisions appear to be "irreconcilable" with each other. But Hassan fails to note that he is citing Justice Thomas's concurrence, which does not engage in the kind of constitutional interpretation that Hassan advocates (and which was joined by no other Justice). Instead, Justice Thomas, as part of his explanation of how best to interpret the Fourteenth Amendment, notes by way of background that slavery was "irreconcilable with the principles of equality" and that after the Civil War "a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused" and that the Fourteenth Amendment "unambiguously overruled" the decision in *Dred Scott*. *Id.* at 3060. Nothing in Justice Thomas's concurrence supports Hassan's theory that courts should infer that provisions of the Constitution have been repealed by implication.

restricts persons who had held certain offices and engaged in insurrection against the United States from holding federal office absent a congressional waiver, and the Twenty-Second Amendment prohibits a president from serving more than two terms. *See* Const. amend. XIV and XXII. Any amendment to the natural born citizen requirement must follow the process spelled out in the Constitution itself.

Finally, Hassan relies on (Opp. at 21-22) the "absurdity doctrine," but he cites no authority for the proposition that it has ever been applied to find the implicit repeal of any provision of the Constitution, let alone the natural born citizen requirement in particular. When it rejected substantially the same argument, the district court in *Hassan v. New Hampshire* explained that "Hassan's argument that the Absurdity Doctrine requires avoidance of the plain language of the Natural Born Citizen Clause is . . . unavailing" and further held that the "contention that the original rationale for the Natural Born Citizen Clause is no longer relevant does not provide the basis for ignoring the plain language of the Constitution." 2012 WL 405620, at *4 n.5. As the Commission has previously explained, the natural born citizen requirement can be reconciled with the Fifth and Fourteenth Amendments without leading to absurd results, and numerous Supreme Court decisions have noted the requirement's continuing force. (*See* FEC Mem. at 9-11 (citing cases).) At most, Hassan presents policy arguments in favor of a constitutional amendment, but until the amendment process specified in the Constitution itself takes place, the natural born citizen requirement will remain in the Constitution and, by definition, be constitutional.

IV. CONCLUSION

For the foregoing reasons, and those explained in the Commission's opening brief, the Commission respectfully requests that this Court dismiss Hassan's complaint with prejudice for

lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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