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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES GRINOLS, ROBERT ODDEN, in their capacity as Presidential Electors; EDWARD C. NOONAN, THOMAS GREGORY MACLERAN, KEITH JUDD, in their capacity as candidates for the U.S. President; ORLY TAITZ in her capacity as candidate for office in the state of California; EDWARD NOONAN and ORLY TAITZ in their capacity as registered voters in CA and candidates for office in CA,

Plaintiffs,

v.

GOVERNOR OF CALIFORNIA, SECRETARY OF STATE OF CALIFORNIA, U.S. CONGRESS; ELECTORAL COLLEGE; BARACK (BARRY) SOETORO, AKA BARACK HUSSEIN SOEBARKAH, AKA ALIAS BARACK HUSSEIN OBAMA, AKA ALIAS BARACK A. OBAMA, AKA ALIAS HARRISON (HARRY) J. BOUNEL, AKA ALIAS S.A. DUNHAM, in his capacity as an individual and candidate for the U.S. President, and JOHN DOES AND JANE DOES 1-300,

Defendants.

CASE NO. 2:12-CV-02997-MCE-DAD

**FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Date: March 21, 2013
Time: 2:00 p.m.
Place: Courtroom 7, 14th Floor
Judge: Morrison C. England, Jr.

[Fed. R. Civ. P. 12(b)(1) and 12(b)(6)]

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## I. INTRODUCTION

Plaintiffs – one of whom is currently serving a 210-month sentence for extortion at the Federal Correctional Institution in Texarkana, Texas – have filed a First Amended Complaint ("Amended Complaint") alleging that President Barack Obama is ineligible for the presidency under Article II, section 1, clause 5 of the United States Constitution, which provides: "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President." Plaintiffs contend that, despite the fact that the President has made available his birth certificate from the State of Hawaii, he was actually born in Kenya and is a citizen of Indonesia, thus making him ineligible to be President. *See* Amended Complaint at 2.

Defendants respectfully ask the Court to dismiss this action under Fed. R. Civ. P. 12(b)(1) for the following reasons: (1) the case is moot; (2) plaintiffs lack standing to bring their claims; (3) plaintiffs' claims are barred by the political question doctrine; (4) plaintiffs' claims are barred by the Speech or Debate Clause; and (5) sovereign immunity protects Congress from suit. In addition, Plaintiffs' claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Defendants also respectfully ask the Court to stay any discovery – including issuance of subpoenas – pending the Court's resolution of defendants' motion to dismiss.

## II. THE PARTIES

### A. The Plaintiffs

The Amended Complaint lists three candidates for President as plaintiffs – Edward Noonan (alleged to have won the American Independent Party's presidential primary in California), Thomas Gregory MacLeran (alleged to have been a candidate for President), and Keith Judd (alleged to have been a Democratic Party candidate for President). The Amended Complaint does not allege that any of these candidates were actually on the ballot in any state in the General Election on November 6, 2012. A review of the California Secretary of State's Statement of Vote for the November 6, 2012 General Election reveals that none of these candidates received a single vote for President in California. *See* http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf.[1] The Amended Complaint also

[1] The Court may take judicial notice of information on government websites. *See* Fed. R. Evid. 201(b)(2) (allowing a court to take judicial notice of facts capable of accurate and ready determination

does not allege that any electors were pledged to any of these candidates. In California, for example, on or before October 1st of the presidential election year, each party's nominee must file a list containing the names, addresses, and telephone numbers of the 55 electors pledged to him or her. *See* http://sos.ca.gov/elections/electoral-college.htm.

Although the Amended Complaint alleges that Edward Noonan was the winner of the American Independent Party primary, an individual by the name of Thomas Hoefling was actually nominated as the American Independent Party's candidate for President, not Mr. Noonan. *See* http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf at 7. The Amended Complaint does not allege with which party Thomas Gregory MacLeran was affiliated, nor does it provide any other details regarding his candidacy for President. Although the Amended Complaint alleges that Keith Judd received forty percent of the vote in the West Virginia Democratic Party Primary, Judd is currently serving a prison sentence at the Federal Correctional Institution in Texarkana, Texas, and is not scheduled for release until June 24, 2013. *See* http://www.bop.gov/iloc2/LocateInmate.jsp.

The Amended Complaint also lists two electors as plaintiffs – James Grinols (alleged to have been a Republican Party elector) and Robert Odden (alleged to have been a Libertarian Party elector). The Amended Complaint does not allege from which state either of these individuals was designated by their respective parties to be electors or to which Presidential candidate these electors were pledged.

The Amended Complaint finally lists Orly Taitz and Edward Noonan "in their capacity as registered voters in CA and candidates for office in CA." Ms. Taitz alleges that she ran for Secretary of State in California in 2010 and for the United States Senate in 2012. *See* Amended Complaint at 4. The Amended Complaint does not allege that Edward Noonan was a candidate for President in the 2012 General Election.

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by resort to sources whose accuracy cannot reasonably be questioned); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 n.18 (2008) (taking judicial notice of information on government website).

**B. The Defendants**

The Amended Complaint lists Barack Hussein Obama in his capacity as a candidate for the U.S. President, the U.S. Congress, the Electoral College, the Governor of California, and the California Secretary of State, as defendants.[2] *See* Amended Complaint at 4-5. Although plaintiffs name the Electoral College as a defendant, the Electoral College is actually comprised of individual electors chosen by each state and the District of Columbia. *See* Art. II, § 1, cl. 2. The electors of each state vote in their home states, not in a common assembly. *See* U.S. Const. amend. XII. "The Electoral College itself is not an agency or person subject to suit." *See Hollman v. United States Electoral College*, 2009 WL 1114146, at *1 (W.D. Ark. Apr. 24, 2009).

## III. LEGAL STANDARD

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(1), plaintiff bears the burden of proving that the court has subject matter jurisdiction to hear his claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A court has an affirmative duty to ensure that it is acting within the scope of its jurisdictional authority. *See United Investors Life Ins. v. Waddell & Reed Inc.*, 360 F.3d 960, 966 (9th Cir. 2004). The court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of subject matter jurisdiction. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the legal sufficiency of the complaint. *See North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580-81 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

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[2] The undersigned represents the United States, Congress, and any federal employees and officials named in their official capacity. In addition, the undersigned appears here to "attend to the interests of the United States." 28 U.S.C. §§ 517, 547.

defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

## IV. BRIEF OVERVIEW OF THE ELECTORAL PROCESS

Under Article II, section 1, clause 2 of the United States Constitution, the voters of each state choose electors on Election Day to serve in the Electoral College. The number of electors in each state is equal to the number of members of Congress to which the state is entitled. *See* Art. II, § 1, cl. 2. In most states, the political parties nominate their electors at state conventions or central committee meetings. *See* www.archives.gov.federal-register/electoral-college/electors.html. In most states, each state appoints its electors on a winner-take-all basis, based on the statewide popular vote on Election Day – all electors pledged to the presidential candidate who wins the most votes become electors for that state. There are a total of 538 electors because there are 435 representatives and 100 senators, plus 3 electors allocated to Washington, D.C. under the Twenty-Third Amendment. *See* Art. II, § 1, cl. 2.

As soon as the election results are final, the Governor of each State is required to prepare and send to the Archivist of the United States a Certificate of Ascertainment, which is a formal list of the names of the electors chosen in that state, as well as the names of all other candidates for elector, and the number of votes cast for each. *See* 3 U.S.C. § 6. In addition, on or before December 17, 2012, the Governor of each state is required to deliver to the electors of his or her state six duplicate-originals of the Certificate of Ascertainment sent to the Archivist of the United States. *See id.*

The electors chosen on Election Day meet in their respective state capitals on the Monday after the second Wednesday in December (December 17, 2012), at which time they cast their votes on separate ballots for President and Vice-President. *See* U.S. Const. amend. XII; 3 U.S.C. §§ 7, 8. After the electors have voted, they prepare and sign six certificates of their votes containing two distinct lists, one being the votes for President and the other the votes for Vice President. *See* 3 U.S.C. § 9; *see also* Jack Maskell & Elizabeth Rybicki, Cong. Research Serv., RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress* 2 (2012). The electors in each state then attach to these lists the certificate furnished to them by the Governor; seal the certificates; and send one certificate to the President of the Senate and two certificates to the state's secretary of state. *See* 3 U.S.C. § 11. On the day after their meeting (December 18, 2012), the

electors must then forward by registered mail two of the certificates and lists to the Archivist of the United States and one of the certificates and lists to the federal judge in the district where the electors have assembled. *See id.*

The electoral votes are counted at a joint session of the Senate and the House of Representatives, meeting in the House Chamber. *See* Maskell & Rybicki at 3. The date for counting electoral votes at the joint session is fixed by law. *See id.* Under 3 U.S.C. § 15, that date is January 6th, although because January 6th in 2013 falls on a Sunday, a Joint Resolution was enacted on December 28, 2012, moving the date of the joint session to January 4, 2013. *See* Pub. L. No. 122-228, 126 Stat. 1610 (2012). The President of the Senate is the presiding officer. *See* 3 U.S.C. § 15. The President of the Senate opens and presents the certificates of the electoral votes of the states and the District of Columbia in alphabetical order. *See id.* After the votes of each state and the District of Columbia have been opened and read, the votes are counted and the presiding officer announces whether any candidates have received the required majority votes for President and Vice President. *See id.* The Twelfth Amendment requires the winning candidate to receive "a majority of the whole number of Electors appointed." "[A]nnouncement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States." 3 U.S.C. § 15.

Under 3 U.S.C. § 15, when the certificate from each state is read, "the President of the Senate shall call for objections, if any." 3 U.S.C. § 15. An objection must be made in writing and must be signed by at least one Senator and one Representative. *See id.* The objection "shall state clearly and concisely, and without argument, the ground thereof . . . ." *Id.* If and when an objection is made, each house is to meet and debate it separately. *See id.* An objection may be made on the grounds that the electoral vote was not "regularly given" by an elector or that the elector was not "lawfully certified" according to state statutory procedures. *See id.* Both houses must vote separately to agree to the objection to an electoral vote; otherwise, the electoral vote is counted. *See id.*

Under the Twentieth Amendment to the Constitution, the President is inaugurated at noon on January 20th. *See* U.S. Const. amend. XX, § 1.

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## V. DISCUSSION

### A. Plaintiffs' Action Is Moot

The Court should dismiss this case for lack of subject matter jurisdiction because plaintiffs' claims are moot.

The "exercise of judicial power under [Article] III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). A "live" controversy exists "[a]s long as effective relief may still be available to counteract the effects of the violation." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988). A case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 1244 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). Federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "Where the activities sought to be enjoined have already occurred, and . . . courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978). When a case becomes moot, federal courts cease to have jurisdiction over it. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

In this case, the Governor of California has already prepared and delivered his Certificates of Ascertainment, which he was required to do under 3 U.S.C. § 6 on or before December 17, 2012. The members of the Electoral College have already convened and cast their votes for President. *See* 3 U.S.C. §§ 7, 8 (stating that the electors of each state must meet at the place designated by that state on the first Monday after the second Wednesday in December (December 17, 2012) to cast their votes for President of the United States). The Electoral College electors have already delivered their sealed votes to the President of the Senate. *See* 3 U.S.C. §§ 9, 10, 11 (directing the electors to send their sealed votes to the President of the Senate one day after their meeting on December 17, 2012).

Congress has already counted the electoral votes at a joint session of Congress held on January 4, 2013. *See* Pub. L. No. 112-228, 126 Stat. 1610 (2012). Barack Obama was declared the winner of the Presidential Election with 332 electoral votes to Mitt Romney's 206 electoral votes. *See* 159 Cong. Rec. H49-04 (daily ed. Jan. 4, 2013). Finally, the President was inaugurated and began his second term as President of the United States on January 20, 2013. *See* U.S. Const. amend. XX, § 1; Megan Slack, *President Obama and Vice President Biden Take the Oath of Office*, The White House Blog (Jan. 20, 2013, at 1:00 p.m.), http://www.whitehouse.gov/blog/2013/01/20/president-obama-and-vice-president-biden-take-oath-office.

In light of the fact that all of the events leading up to, and including, the President's inauguration to a second term as President have already occurred, plaintiffs' claim that Barack Obama is not eligible to run for the Presidency is moot.[3] *See Sibley v. Alexander*, No. 12-cv-1984 (JDB), 2013 WL 76286, at *1 (D.D.C. Jan. 8, 2013) (dismissing as moot an action challenging President Obama's eligibility to hold office on the ground that plaintiff "sought to enjoin the electors from casting their ballots, which has already occurred"); *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (dismissing as moot plaintiffs' declaratory and injunctive relief claims challenging the 2009 presidential inaugural ceremony because the ceremony had already occurred), *cert. denied*, 131 S. Ct. 2441 (2012). The fact that plaintiffs seek a declaratory judgment does not alter the mootness determination "because the jurisdictional prerequisite of a 'case or controversy' applies with equal force to actions seeking declaratory relief." *Newdow v. Bush*, 391 F. Supp. 2d 95, 107-08 (D.D.C. 2005) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)) (the Declaratory Judgment Act "is operative only in respect

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[3] To the extent plaintiffs seek to amend their Amended Complaint either explicitly or *sub silencio* to obtain relief other than that explicitly requested in their Amended Complaint, the United States opposes such amendment. As has previously been explained to plaintiffs' counsel, with President Obama's January 20, 2013 inauguration to a second term as President of the United States, any conceivable declaratory or injunctive relief that plaintiffs could now seek would run "not merely against [Barack] Obama as a political candidate but against President Obama, this country's sitting president . . . [and] the Court would need to wade deep into the waters of the President's official duties [and] declare that the President could no longer perform *any* official duties." *Barnett v. Obama*, No. 8:09-cv-00082-DOCAN, 2009 WL 3861788, at *11, *13 (C.D. Cal. Oct. 29, 2009), *aff'd sub. nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2748 (2012).

to controversies which are such in the constitutional sense"); *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (stating that in order to obtain declaratory relief, plaintiff must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment").

Although an exception to the mootness doctrines exists for allegedly illegal government actions that are capable of repetition, yet evading review, the exception is a narrow one and applies only in "exceptional situations." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). This exception cannot be applied to this case because the actions challenged by plaintiffs cannot be repeated. President Obama has been elected to a second term as President of the United States and the Twenty-Second Amendment prohibits persons from being elected to the office of President more than twice. *See* U.S. Const. amend XXII, § 1. Moreover, plaintiffs have provided no explanation for why they waited until December 13, 2012, to file their Petition (five weeks after the General Election took place on November 6, 2012), and until February 11, 2013 to file their Amended Complaint, and failed to pursue the available legal remedies to preserve the status quo, as is required to invoke the "capable of repetition yet evading review" exception to the mootness doctrine. *See Koppers Indus., Inc. v. U.S. Envtl. Prot. Agency*, 902 F.2d 756, 759 (9th Cir. 1990) (stating that the "capable of repetition, yet evading review" exception does not apply when a party fails to take all steps necessary to preserve the status quo, such as through seeking a stay and taking an appeal, before the case becomes moot).

**B. Plaintiffs Lack Standing**

The Court should also dismiss this action for lack of subject matter jurisdiction because plaintiffs lack standing to sue under Article III of the United States Constitution.

"To establish Article III standing, a plaintiff must show: (1) 'an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical'; (2) 'a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court,' and (3) 'it must be likely, as

opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Drake v. Obama*, 664 F.3d 774, 779 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), *cert. denied*, 132 S. Ct. 2748 (2012).

"Moreover, a litigant's interest cannot be based on the 'generalized interest of all citizens in constitutional governance.'" *Drake*, 664 F.3d at 774 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)). "[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. "[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." *Warth v. Seldin*, 422 U.S. 490, 499 (1975)

The Supreme Court has consistently refused to entertain suits based on generalized claims of constitutional ineligibility for public office. *See*, *e.g. Ex parte Levitt*, 302 U.S. 633, 637 (1937) (per curiam) (holding that a citizen lacked standing to challenge the appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, art. I, § 6, cl. 2); *Reservists Comm. to Stop the War*, 418 U.S. at 220-21 (holding that an anti-war group did not have standing to invoke the Incompatibility Clause, art. II, § 6, cl. 2, to have members of Congress stricken from the Armed Forces Reserve List).

Lower courts, likewise, have uniformly dismissed for lack of standing challenges to the qualifications of a candidate for President of the United States. *See, e.g., Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 (D.N.J. 2009) (dismissing for lack of standing a challenge to the President's eligibility for office because "the injury, if any, suffered by Plaintiffs is one that would be shared by all the American people" and "this generalized harm is not sufficient to establish standing under Article III"), *aff'd*, 612 F 3d 204 (3d Cir. 2010) (dismissing appeal as frivolous), *cert. denied,* 131 S. Ct. 663; *Berg v. Obama*, 574 F. Supp. 2d 509, 518 (E.D. Pa. 2008) (dismissing for lack of standing an action challenging the President's eligibility for office because "[t]he alleged harm to voters stemming from a

presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing"), *aff'd*, 586 F.3d 234, 239 (3d Cir. 2009); *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (dismissing for lack of standing a claim that Senator John McCain was not eligible to be President because the alleged ineligibility, even if true, "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury"); *Cohen v. Obama,* No. 08-2150, 2008 WL 5191864, *1 (D.D.C. Dec. 11, 2008) (dismissing for lack of standing an action seeking to enjoin President Obama from taking the oath of office in 2008 because the claim presented only a generalized grievance); *Jones v. Bush*, 122 F. Supp. 2d 713, 717 (N.D. Tex. 2000) (dismissing for lack of standing a challenge to the eligibility of George W. Bush and Richard Cheney for President and Vice-President because "plaintiffs conspicuously fail to demonstrate how they, as opposed to the general voting population, will feel its effects"), *aff'd without opinion*, 244 F.3d 134 (5th Cir. 2000).

The Ninth Circuit has recognized the notion of "competitive standing," which the court described as follows: "a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Drake*, 664 F.3d at 782-83 (quoting *Hollander*, 566 F. Supp. 2d at 68). However, the notion of competitive standing cannot reasonably be applied in this case. Three of the plaintiffs – Edward Noonan, Thomas MacLeran, and Keith Judd – are alleged to be "candidates for U.S. President." However, although Edward Noonan alleges that he was the winner of the American Independent Party primary, an individual by the name of Thomas Hoefling was actually nominated as the American Independent Party's candidate for President, not Mr. Noonan. *See* http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf at 7. The Amended Complaint contains no allegations whatsoever regarding which political party Thomas Gregory MacLeran was affiliated with, nor does it provide any other details regarding his candidacy for President. Although the Amended Complaint alleges that Keith Judd received forty percent of the vote in the West Virginia Democratic Party Primary, Judd is currently serving a prison sentence at the Federal Correctional Institution in Texarkana, Texas, and is not scheduled for release until June 24, 2013.

*See* http://www.bop.gov/iloc2/LocateInmate.jsp. None of these plaintiffs alleges that he was on the ballot in enough states in the 2012 Presidential election to even hope he could gain the requisite 270 electoral votes to win the Presidency. None of these plaintiffs can plausibly argue that he would have been elected President if Barack Obama had not participated in the election process. As the United States Court of Appeals for the District of Columbia recently held in affirming the dismissal of a similar challenge to the qualifications of the President brought by a write-in candidate for President:

> As the district court said, "self declaration as a write-in candidate" is insufficient, *Sibley v. Obama*, 866 F. Supp. 2d 17, 20 (D.D.C. 2012),—both because if it were sufficient any citizen could obtain standing (in violation of Article III of the U.S. Constitution) by merely "self declaring," and because the writ is only available for someone who would obtain the office if the incumbent were ousted, *see Newman*, 238 U.S. at 544, 547, 550–51.

*Sibley v. Obama*, 2012 WL 6603088, at *1 (D.C. Cir. Dec. 6, 2012); *see also Sibley v. Alexander*, No. 12-cv-1984 (JDB), 2013 WL 76286, at *2 (D.D.C. Jan. 8, 2013) ("Sibley's status as a write-in candidate is insufficient to confer standing because there is no evidence, nor authority, that Sibley points to which would indicate that the electors would otherwise have cast their votes for him").

Moreover, the fact that two of the plaintiffs – James Grinols and Robert Odden – are allegedly Presidential Electors does not transform their generalized grievance into an Article III injury. The harm that they allege is not only speculative but also simply derivative of their favored candidates (which are not even identified in the Petition). As the Northern District of California held in an action brought by an elector challenging the eligibility of John McCain to be President:

> [P]laintiff has no standing to challenge Senator McCain's qualifications. Plaintiff is a mere candidate hoping to become a California elector pledged to an obscure third-party candidate whose presidential prospects are theoretical at best. Plaintiff has, therefore, no greater stake in the matter than a taxpayer or voter. *Hollander v. McCain*, 2008 WL 2853250 (D.N.H. 2008). Neither plaintiff nor general election voters favoring the same candidate as plaintiff have in any way been prevented from supporting their preferred candidate. If plaintiff alleges that his prospects of becoming an elector would be enhanced absent Senator McCain's candidacy, any such claim would be wholly speculative. Moreover, plaintiff himself is not a candidate in competition with John McCain – the harm plaintiff alleges is not only speculative but also merely derivative of the prospects of his favored obscure candidate. *Gottlieb v. Federal Election Commission*, 143 F.3d 618, 622 (D.C. Cir. 1998). His claimed injury is neither particularized nor actual and imminent. Plaintiff lacks standing to bring this lawsuit.

*Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008).

In addition, any competitive interest that any of the plaintiffs may have had in running against a qualified candidate was extinguished by the time the Amended Complaint was filed. As the Ninth Circuit explained in *Drake*:

> Once the 2008 election was over and the President sworn in, Keyes, Drake, and Lightfoot were no longer "candidates" for the 2008 general election. Moreover, they have not alleged any interest in running against President Obama in the future. Therefore, none of the plaintiffs could claim that they would be injured by the "potential loss of an election." *Owen*, 640 F.2d at 1132. Plaintiffs' competitive interest in running against a qualified candidate had lapsed. Similarly, Robinson's interest as an elector – derived from the competitive interest of his preferred candidates – was extinguished by the time the complaint was filed.

*Drake*, 664 F.3d at 784.

To the extent that any of the plaintiffs are claiming that they have standing based on their status as voters, this same argument has been flatly rejected by the Ninth Circuit in *Drake*. *See Drake*, 664 F.3d at 782 (stating that, as a voter, plaintiff "has no greater stake in the lawsuit than any other United States citizen" and "[t]he harm he alleges is therefore too generalized to confer standing.").

Plaintiffs lack standing for the additional reason that their claims are not redressable by this suit. As this Court stated in its Order denying plaintiffs' motion for a temporary restraining order:

> In order for Plaintiffs' alleged injury to be fully addressed, Plaintiffs would have the Court intervene, upheave the results of a national election, declare the President illegitimate, shut down the functioning of the government of the United States, and leave this country defenseless. . . . [Further,] redressing the injury of competing in an unfair election would require that the Court order a new national presidential election. Instead of impeachment, which would allow succession by the Vice President and continuation of the order of a functioning government, Plaintiffs seek to shut down the government through an injunction and install a replacement government through a new election. In other words, if the political candidates' harm is based on their inability to compete against constitutionally qualified candidates, in order to redress that harm the Court would not only have to remove the President, it would have to order a new national election.

Docket No. 52 at 12 (quoting *Barnett*, 2009 WL 3861788, at *11); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion) ("in general, 'this court has no jurisdiction of a bill to enjoin the President in performance of his official duties'") (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)); *Mississippi*, 71 U.S. at 500 ("Neither [the Congress nor the President] can be restrained in its action by the judicial department; though the acts of both, when performed, are, in

proper cases, subject to its cognizance"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief") (citations omitted); *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936) (stating that "the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference").

Because plaintiffs' allegations "amount to little more than attempts 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government,'" *Valley Forge Christian College v. Americans United for Separtion of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)), plaintiffs lack standing under Article III of the Constitution to bring this action.

**C. Plaintiffs' Claims Are Barred By The Political Question Doctrine**

The Court should also dismiss the action for lack of subject matter jurisdiction because plaintiffs' claims are barred by the political question doctrine. As this Court ruled in its Order denying plaintiffs' motion for a temporary restraining order:

> These various articles and amendments of the Constitution make it clear that the Constitution assigns Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case – whether President Obama may legitimately run for office and serve as President – is a political question that the Court may not answer. If the Court were to answer that question the Court would "[interfere] in a political matter that is principally within the dominion of another branch of government." *See Banner*, 303 F. Supp. 2d at 9. This Court, or any other federal court, cannot reach the decision on the merits of a political question because doing so would ignore the Constitutional limits imposed on the courts. Accordingly, Plaintiffs ask the Court to answer a question the Constitution bars the Court from answering.

Docket No. 53 at 8.

**D. The Speech or Debate Clause Bars This Suit**

The Court should also dismiss the action for lack of subject matter jurisdiction because plaintiffs' claims against Congress are barred by the Speech or Debate Clause of the Constitution.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Supreme Court has read the Speech or Debate Clause "broadly to effectuate its purposes," which is "to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975). The Clause, where it applies, affords an absolute immunity from all forms of relief, whether for injunction, damages, or declaration. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732 & n.10 (1980). Because the Speech or Debate Clause immunizes members of Congress from both liability and the burdens of litigation, it should be resolved at the outset of litigation. *See Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979).

When the Speech or Debate privilege is raised in defense to a suit, the only question is whether the claims presented "fall within the 'sphere of legitimate legislative activity.'" *Eastland*, 421 U.S. at 506. Legitimate legislative activity protected by the Clause encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)). The Clause accordingly precludes inquiry into "the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*" *Gravel v. United States*, 408 U.S. 606, 625 (1972) (emphasis added). "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503.

The constitutionally-prescribed counting of the electoral votes is unquestionably a "matter[] which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. The Twelfth Amendment provides that, after States transmit their certified electoral votes to the seat of government of the United States, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. Const., amend. XII; *see also* 3 U.S.C. § 15. The Constitution explicitly contemplates that the bare counting of

electoral votes does not necessarily end the selection process, for in the event no candidate for President receives a majority of the votes, responsibility for choosing the President passes to the House of Representatives, *id.*, while if no candidate for Vice President receives a majority of the votes, responsibility for choosing the Vice President transfers to the Senate. *Id.* In short, Congress's role in counting electoral votes is undoubtedly "part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration . . . of . . . matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625; *see also id.* at 624 (acts of voting by Members protected); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (per curiam) (voting is "clearly legislative in nature.").[4]

Because plaintiffs' questioning of the counting of electoral votes by Congress is nothing more than an attempt to interfere with the legislative process committed by the Constitution to that branch of government, the Speech or Debate Clause bars the relief plaintiffs request. Under the Speech or Debate Clause, the acts of Congress, therefore, cannot be questioned, or enjoined, in this Court or, as the Constitution commands, "in any other Place."[5]

**E. Plaintiffs' Claims Lack Merit**

Even if this Court were to address the substance of plaintiffs' claims, they are frivolous and have been consistently rejected by every state and federal court that has considered them to date. *See, e.g., Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2748 (2012); *Sibley v. Obama*, 866 F. Supp. 2d 17, *aff'd*, 2012 WL 6603088 (D.C. Cir. Dec. 6, 2012) (per curiam); *Taitz v. Obama*, 707 F. Supp. 2d 1 (D.D.C. 2010); *Kercher v. Obama*, 669 F. Supp. 2d 477 (D.N.J. 2009), *aff'd*,

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[4] Allegations that legislative conduct violates the Constitution or other laws do not evade the Speech or Debate bar. *See Bogan v. Scott-Harris,* 523 U.S. 44, 54-55 (1998) (legislative immunity barred suit against local legislator for "act[] of voting" for what jury found was unconstitutional ordinance).

[5] Plaintiffs' suit against the Congress is also precluded by sovereign immunity. *See Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (holding that Congress "is protected from suit by sovereign immunity" in suit for alleged failure to take legislative action); *Rockefeller v. Bingaman*, 234 F. App'x 852, 856 (10th Cir. 2007) ("Sovereign immunity forecloses [plaintiff's] claims against the House of Representatives and Senate as institutions.").

612 F.3d 204 (3rd Cir. 2010); *Holister v. Soetoro*, 601 F. Supp. 2d 179 (D.D.C. 2009); *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3rd Cir. 2009).

Plaintiffs claim, for example, that the President has not provided any valid documentary evidence of his natural born status, which is required for one to be a candidate for the U.S. Presidency according to Article 2, section 1 of the U.S. Constitution. *See* Amended Complaint at 7-8. The Constitution, however, does not require a Presidential candidate to provide documentary evidence of his or her natural born status. Article II, section 1 simply provides in relevant part that "[n]o person except a natural born citizen . . . shall be eligible to the office of President." Plaintiffs have not cited any authority to support their assertion that a candidate must show them (or the Court) "identification papers" that are satisfactory to them. Whether or not the President is in possession of a valid social security card, selective service registration or any particular type of birth certificate is simply irrelevant to his eligibility for the Presidency as far as Article II, section 1 of the Constitution is concerned.

Moreover, the President released his long-form birth certificate on April 27, 2011, and posted a copy on the White House website. *See* http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate. The certificate confirms the President's birth in Honolulu, Hawaii. *See id.*; *Taitz v. Ruemmler*, 2011 WL 4916936, at *1 n.2 (D.D.C. Oct. 17, 2011). The Director of the Hawaii Health Department has attested to the authenticity of the certified copies of the original Certificate of Live Birth that were provided to the President. *See* http://hawaii.gov/health/vital-records/News_Release_Birth-Certificate_042711.pdf ("I have seen the original records filed at the Department of Health and attest to the authenticity of the certified copies the department provided to the President that further prove the fact that he was born in Hawaii."); http://hawaii.gov/health/about/pr/2009/09-063.pdf ("I, Dr. Chiyome Fukino, Director of the Hawaii State Department of Health, have seen the original vital records maintained on file by the Hawaii State Department of Health verifying Barack Hussein Obama was born in Hawaii and is a natural-born American citizen."). To the extent that any of the affidavits submitted by plaintiffs in this action can be read as averring that the President's birth certificate or any other documents are forged, none of those affidavits is based on personal knowledge and none of the affidavits set forth any basis for qualifying

the affiants as experts. Moreover, Plaintiffs have not claimed, much less provided any evidence, that President Obama was born anywhere but in the United States, and it is well settled that those born in the United States are considered natural born citizens. *See United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898); Jack Maskell, Cong. Research Serv., R42097, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement* 11-14 (2011).

Although plaintiffs allege that, under 5 U.S.C. § 3328, the President is not "eligible to work in the executive branch of the U.S. government" based on his alleged forged selective service application, *see* Amended Complaint at 11, Section 3328 provides simply that individuals who have not registered for Selective Service are "ineligible for appointment to a position in an Executive agency." The President has obviously not been "appointed" to a position in "an Executive agency." Moreover, although plaintiffs contend that "the most egregious crime in the history of the United States" has been committed, *see* Amended Complaint at 18, it is well established that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

Although plaintiffs appear to allege a violation of their rights under the Fifth and Fourteenth Amendments in connection with the submission and acceptance of invalid voter registrations in California, this claim appears to be directed to the State of California defendants. *See* Amended Complaint at 15-18. In any event, plaintiffs have made no effort to state a cognizable and comprehensible equal protection claim under either the Fifth or Fourteenth Amendment against any defendant based on invalid voter registrations.

Finally, although plaintiffs appear to bring their claims as a class action, *see* Amended Complaint at 2, they have not filed a motion to certify any of the classes they mention in their Amended Complaint pursuant to Fed. R. Civ. P. 23(c)(1)(A). They have also failed to make any legitimate attempt to satisfy Federal Rule of Civil Procedure 23's requirements, such as explaining how questions of law or fact common to class members predominate and why a class action is superior to individual litigation in more fairly and efficiently resolving the litigation.

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**F. Subpoenas**

Plaintiffs have recently attempted to serve two subpoenas – one on Senator Barbara Mikulski and one on President Obama, both of which seek evidence purportedly related to the merits of plaintiffs' claim. See Docket Nos. 57, 61, and 66.[6] The undersigned has sent plaintiffs' attorney three letters with objections to these subpoenas pursuant to Fed. R. Civ. P. 45(c)(2)(B). Because this action is precluded for various threshold, jurisdictional reasons grounded in the separation of powers, including the application of Speech or Debate and sovereign immunity, defendants respectfully ask the Court to direct that no discovery, including the issuance of subpoenas, occur until after the Court disposes of defendants' motion to dismiss this action for lack of subject matter jurisdiction. *See Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (holding that because "discovery could not have affected" the application of official and qualified immunity defenses, "[t]he trial court did not abuse its discretion by staying discovery until the immunity issue was decided," which "furthers the goal of efficiency for the court and litigants"); *America West Airlines, Inc. v. GPA Group. Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (holding that trial court appropriately exercises its discretion not to allow discovery pending a dismissal motion where, as here, discovery "would not demonstrate facts sufficient to constitute a basis for jurisdiction").

## VI. CONCLUSION

For the foregoing reasons, plaintiffs' action should be dismissed without leave to amend for lack of subject matter jurisdiction, or for failure to state a claim, and discovery should be sayed pending the resolution of defendants' dismissal motion.

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[6] Plaintiffs originally attempted to serve a number of other subpoenas. *See* Docket Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, and 46. However, after receiving letters from the undersigned with objections to the subpoenas, and following the Court's January 18, 2013 Order directing plaintiffs to modify their subpoenas in order to comply with Fed. R. Civ. P. 45, plaintiffs have limited their subpoenas to Docket Nos. 57 and 66. Docket No. 66 is an amended version of a subpoena directed to Senator Mikulski found at Docket No. 61.

Respectfully submitted,

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United States Attorney

Date: February 15, 2013

By */s/ Edward A. Olsen*
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