No. 09-4209

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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CHARLES KERCHNER, JR., et al.,

Plaintiffs-Appellants,

v.

BARACK OBAMA, et al.,

Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs brought suit against President Barack Obama, the United States of America, the United States Congress, Senate, and House of Representatives, the Speaker of the House, and former Vice President Richard Cheney, alleging that defendants had violated various constitutional provisions by failing to adequately investigate and prove Barack Obama's eligibility to serve as President of the United States. Appendix ("App.") 3-7. Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 1346(a)(2), 1361, 1651(a), and 2201-2202. Dkt. #3 (Second Amended Complaint) at 2-3, ¶¶1-6.

The district court dismissed plaintiffs' suit on October 20, 2009 for lack of standing. App. 2-12. Plaintiffs filed a timely notice of appeal on October 27. App. 1. Plaintiffs invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Plaintiffs allege that Barack Obama is ineligible to serve as President of the United States because he is not a "natural born citizen" within the meaning of Article II, Section 1, Clause 5 of the United States Constitution, and that he and others have failed to adequately investigate and prove to the contrary. On this basis, plaintiffs seek (among other things) a court order declaring that Barack Obama is ineligible to serve as President of the United States; that the 2008 Presidential election is "null, void, and of no effect"; and that Obama must be "removed, excluded, and ousted" and "permanently disqualified" from the office to which he was elected.

The question presented in this appeal is whether the district court correctly dismissed plaintiffs' suit for lack of Article III standing.

STATEMENT OF THE CASE

Plaintiffs brought suit seeking declaratory, injunctive, mandamus, and quo warranto relief against Barack Obama, the United States of America, the United States Congress, Senate, and House of Representatives, the Speaker of the House, and the former Vice President, contending that Obama was constitutionally ineligible to serve as President of the United States and that defendants had failed to sufficiently investigate or prove otherwise. The district court dismissed plaintiffs' suit for lack of standing. Plaintiffs appealed.

STATEMENT OF THE FACTS

1. On January 20, 2009, plaintiffs Charles Kerchner, Jr., Lowell Patterson, Darrell LeNormand, and Donald Nelsen, Jr. brought suit against Barack Obama, the United States of America, the United States Congress, Senate, and House of Representatives, and the Speaker of the House and former Vice President. Plaintiffs alleged that Obama was constitutionally ineligible to serve as President of the United States because he was not a "natural born citizen" within the meaning of Article II, Section 1, Clause 5, and asked that the court "[i]mmediately stay the swearing in and oath of defendant Barack Hussein Obama II"; declare the results of the November 2008 Presidential election "null, void, and of no effect"; and declare Obama "removed and excluded" and "permanently disqualified" from holding the office of the President. Dkt. #1 (Complaint) at 30-31, ¶¶1, 9-11.

Plaintiffs' complaint, as amended following the Presidential inauguration,[1] alleged that defendants had committed multiple constitutional violations by failing to adequately investigate and establish Barack Obama's eligibility to serve as President. App. 4-5. Plaintiffs claimed that the Congressional defendants

[1]Plaintiffs filed an amended complaint on January 21, 2009, and a second amended complaint without court leave on February 9. Dkt. ##2,3. The district court determined that plaintiffs lacked standing to sue based even on the latter complaint's allegations; it accordingly declined to resolve whether the complaint had been filed in compliance with Fed. R. Civ. P. 15(a) or contained a short and plain statement of a claim for relief as required by Fed. R. Civ. P. 8(a)(2). App. 4 & n.1.

had violated plaintiffs' First, Fifth, Ninth, Tenth, and Twentieth Amendment rights by not sufficiently investigating and holding hearings on Barack Obama's citizenship, despite acquiescing to similar requests regarding Presidential candidate John McCain. App. 5-6. Plaintiffs further contended that Barack Obama had violated plaintiffs' Fifth, Ninth, and Tenth Amendment rights by holding the office of the President without proving his constitutional qualifications. Id. Plaintiffs sought a range of equitable relief, including that Obama be disqualified from continuing to serve as President. App. 6-7.

2. In October 2009, the district court dismissed plaintiffs' suit. App. 2. The court held that plaintiffs lacked standing to press their claims, as they had not established an injury in fact that was sufficiently concrete and particularized to satisfy the requirements of Article III. App. 8. The court explained that "'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.'" App. 9 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992)). Plaintiffs' allegations of insufficient investigation and proof of President Obama's eligibility for office were harms that, if valid, would "apply equally to all United States residents" and thus were inadequate

to establish standing under Article III. App. 10. Plaintiffs could not remedy this deficiency merely by taking "oaths to protect and defend the Constitution," or by asserting that they possessed above-average concern over the President's qualifications. App. 10-11. Nor was the possibility that plaintiff Kerchner might be recalled to active military duty at some future date sufficiently actual or imminent to constitute a cognizable injury. App. 11. Because plaintiffs lacked "an 'injury in fact' necessary for Article III standing," the court concluded that it was without jurisdiction to entertain plaintiffs' claims and dismissed the suit. App. 11-12.[2]

STATEMENT OF RELATED CASES AND PROCEEDINGS

This suit is "one of a series of cases brought challenging the qualifications of the 2008 presidential candidates from both of the major political parties." Berg v. Obama, 586 F.3d 234, 239 & n.4 (3d Cir. 2009) (citing cases). Many such suits have been dismissed. Id. Pending related cases include Allen v. Soetoro, No. 10-15290 (9th Cir.); Drake v. Obama, Nos. 09-56827, 10-55084 (9th Cir.) (consol.); Rhodes v. MacDonald, No. 09-15418

[2]The court noted that even if plaintiffs had satisfied the requirements of Article III standing, the abstract nature of their grievances would preclude judicial review as a prudential matter. App. 12 n.5. In addition, because "[t]he Constitution commits the selection of the President to the Electoral College" and specifically sets forth procedures for the President-elect's replacement if unqualified, the court concluded that plaintiffs' claims appeared to be "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department." Id. (citing Baker v. Carr, 369 U.S. 186, 216 (1962)).

(11th Cir.); Hollister v. Soetoro, Nos. 09-5080, 09-5161 (D.C. Cir.) (consol.); Berg v. Obama, No. 09-5362 (D.C. Cir.); Keyes v. Bowen, No. C062321 (Cal. 3d App. Dist.); In Re Super American Grand Jury, No. 09-346 (D.D.C.); Strunk v. U.S. Dep't of State, No. 08-2234 (D.D.C.); and Taitz v. Obama, No. 10-151 (D.D.C.).

As explained below, the issue presented in this appeal was squarely addressed by this Court in Berg v. Obama, 586 F.3d 234 (3d Cir. 2009).

SUMMARY OF THE ARGUMENT

The district court correctly held that plaintiffs possess no concrete and particularized injury sufficient to satisfy the standing requirements of Article III. To establish such an injury, plaintiffs must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (citations and quotation marks omitted). Plaintiffs' alleged grievances regarding President Obama's constitutional qualifications reflect a generalized interest in the proper administration of the law "shared by all the American people," App. 10, not a concrete injury particular to plaintiffs. The Supreme Court has repeatedly held that Article III standing may not be predicated on such injury. Plaintiffs' attempts to aggrandize their harms, based on oaths they have taken to support to the Constitution, their heightened interest in constitutional principles, or the possibility of future military service, fail.

This Court, in laying to rest another challenge to President Obama's constitutional qualifications, recently explained that a plaintiff's "stake in the legitimacy of Obama's presidency is shared by . . . all 300 million-plus U.S. citizens" and thus is not an injury adequate to confer standing under Article III. Berg v. Obama, 586 F.3d 234, 240 (3rd Cir. 2009). Plaintiffs' alleged injury is no different. This Court's decision in Berg underscores "the obvious lack of any merit in [plaintiffs'] contentions," id. at 239, and confirms the soundness of the district court's judgment.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the dismissal of a complaint for lack of subject matter jurisdiction de novo, accepting the complaint's allegations as true. Berg, 586 F.3d at 238. The burden to establish standing rests on plaintiffs. Id.

II. PLAINTIFFS CANNOT DEMONSTRATE A CONCRETE AND PARTICULARIZED INJURY, AS ARTICLE III REQUIRES.

"[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947) (footnotes omitted). To invoke the jurisdiction of the federal courts, a plaintiff must accordingly "show that he personally has suffered some actual or threatened injury as a result of the

putatively illegal conduct of the defendant." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quotation marks omitted).

Plaintiffs have made no such showing here. "Plaintiffs allege that they have been injured because Defendants have not adequately established that the President is truly a 'natural born citizen' and because, according to Plaintiffs, President Obama is not a 'natural born citizen' and therefore an illegitimate president." App. 10. Such allegations of unlawful conduct do not state a concrete and particularized injury on the part of plaintiffs. "'[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.'" App. 9 (quoting Lujan, 504 U.S. at 573-74).

As this Court explained recently in holding that another litigant lacked standing to challenge President Obama's constitutional eligibility, a plaintiff's "stake in the legitimacy of Obama's presidency" is one shared equally among all voters, indeed by "all 300 million-plus U.S. citizens, whether voters or not." Berg, 586 F.3d at 240. Private individuals may not assert such generalized constitutional grievances under Article III--whether it be to challenge a Supreme Court Justice's

appointment, Ex Parte Levitt, 302 U.S. 633 (1937) (per curiam), a Congressmember's eligibility to hold a commission in the military reserves, Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974), or a President's eligibility to serve in office. Any injury based on an interest of this kind, shared among all members of the public, is "too general for the purposes of Article III." Berg, 586 F.3d at 240.

The district court's analysis accords with both this Court's decision in Berg and the long line of authority on which Berg relied. As the district court explained, "[t]he Supreme Court has interpreted the requirement that an injury be 'concrete and particularized' to preclude harms that are suffered by many or all of the American people." App. 8-9 (citing Lujan, 504 U.S. at 573-74; United States v. Richardson, 418 U.S. 166, 176-77 (1974); Schlesinger, 418 U.S. at 220-22; Levitt, 302 U.S. at 633). That conclusion flows from the "established principle" under Article III that a plaintiff "must show that he has sustained or is immediately in danger of sustaining a direct injury"; "it is not sufficient that he has merely a general interest common to all members of the public." Levitt, 302 U.S. at 634.

The harms claimed by plaintiffs "apply equally to all United States residents." App. 10. Indeed, "[p]laintiffs' complaint repeatedly acknowledges that the injuries they allege are generally applicable to 'the people.'" Id. As the district court explained, in such circumstances "standing to sue may not

be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." App. 9 (quoting Schlesinger, 418 U.S. at 220).

Plaintiffs offer no rebuttal of that analysis. They acknowledge that established Supreme Court precedent requires them to possess "individual injuries . . . not shared by all members of the public," rather than merely "a general interest in constitutional governance." Pl. Br. 51. See generally Pl. Br. 47-52. Yet plaintiffs point to no concrete injury sufficient to satisfy such a burden. If anything, their brief reinforces that the injury they claim is one common to all members of the public. See, e.g., Br. 35-36 ("Plaintiffs, as citizens of the United States and part of the people thereof, are parties to [the Constitution]. They therefore have standing to enforce the requirements of Article II . . . ."); Br. 37 ("[P]laintiffs are personally and directly affected in a concrete way by everything the President does and does not do.").

Plaintiffs suggest that their injuries are analogous to those of states affected by global warming or individuals injured by government displays of religion. See Pl. Br. 39 (citing cases). But none of plaintiffs' cited cases suggests that a mere interest in the proper application of the law, unaccompanied by more concrete consequences particular to a plaintiff, can serve as the basis of Article III standing. See, e.g., Massachusetts

v. EPA, 549 U.S. 497, 517 (2007) (reinforcing that under Article III "a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent"); Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) ("[A] mere abstract objection to unconstitutional conduct is not sufficient to confer standing.") (cited at Pl. Br. 39).

As plaintiffs note, a harm may suffice to establish standing in some circumstances "even if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975) (quoted at Pl. Br. 46). But an injury remains inadequate "in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature--for example, harm to the 'common concern for obedience to law.'" FEC v. Akins, 524 U.S. 11, 23 (1998) (quoting L. Singer & Sons v. Union Pac. R.R. Co., 311 U.S. 295, 303 (1940)). In such instances, "[t]he abstract nature of the harm--for example, injury to the interest in seeing that the law is obeyed--deprives the case of the concrete specificity" required under Article III. Id. at 24. Litigants may thus "invoke the general public interest in support of their claim" only if they first "allege a distinct and palpable injury to [themselves]." Warth, 422 U.S. at 501.

Plaintiffs have failed to do so here. As this Court explained in Berg, claims against a President's eligibility rest on an "'interest in proper application of the Constitution and

laws'" that is abstract and shared by the general public, and that seeks no particular relief beyond vindication of a legal principle. 586 F.3d at 240 (quoting Lujan, 504 U.S. at 573). Plaintiffs' invocation of their "passion for the Constitution" (Br. 53) and oaths to uphold the same (Br. 54) do not alter that conclusion, but reinforce the abstract nature of their claims. See App. 11 ("Plaintiffs' motivations do not alter the nature of the injury alleged.").

Nor does the possibility that plaintiff Kerchner may be recalled to active duty in the military (Pl. Br. 57) create an actual or imminent harm sufficient to establish standing. As the district court explained, "[t]he hypothetical nature of this future injury, conditioned on the occurrence of 'an extreme national emergency,' is not an 'injury in fact' necessary to establish standing." App. 11 (citing Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 297 (3d Cir. 2003)). Plaintiffs contend (Br. 57) that the harm of Kerchner's recall "is not only a possibility, but rather a certainty or a probability." But plaintiffs allege no present injury to Kerchner other than an "injury emanating from the thought that he may be recalled to duty (even if it never happens)." Pl. Br. 57-58. Article III's requirement of injury in fact cannot be satisfied through such inferential conjecture. See Lujan, 504 U.S. at 560.[3]

[3]As the district court explained, App. 7 n.2, the fact that Kerchner has complained to Congress about President Obama's purported lack of qualifications does not render his injury any

Plaintiffs' alleged injuries are precisely the sort of generalized legal grievance that the Supreme Court has repeatedly held to lie beyond the scope of Article III courts. This Court recently reaffirmed those principles in Berg. Plaintiffs offer no reason to set aside the decision in that case, let alone the established body of Supreme Court precedent that precludes their claims. The district court's judgment should be affirmed.[4]

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more concrete and particularized. Compare Pl. Br. 58, 63. Congress's alleged failure to listen to a plaintiff's views does not establish a concrete injury: it is not a cognizable injury at all. See Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283 (1984) (individuals possess no "constitutional right to force the government to listen to their views . . . . The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.").

[4]As the district court and this Court have both recognized, plaintiffs' claims would be nonjusticiable under the political question doctrine even if plaintiffs possessed standing to press them. See Berg v. Obama, No. 08-4340, Order of Dec. 9, 2008, at 2 (3d Cir.) ("Even if Appellant possessed standing to raise the issue of President-Elect Obama's constitutional eligibility to be President, no justiciable controversy is presented, as Appellant seeks adjudication of a political question."); App. 12 n.5 ("[I]t appears that Plaintiffs have raised claims that are likewise barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department." (citing Baker v. Carr, 369 U.S. 186, 216 (1962))). See also Barnett v. Obama, No. 09-0082, ___ F. Supp. 2d ___, 2009 WL 3861788, at *13-*16 (C.D. Cal. Oct. 29, 2009).

Application of the political question doctrine does not turn, as plaintiffs suggest, on whether Article II "provides a legal standard" to adjudicate (Br. 84), but on whether disputes over the President's qualifications have been "in any measure been committed by the Constitution to another branch of government." Baker, 369 U.S. at 211. The qualification and removal of a President are acts explicitly reserved to Congress under Article I, Sections 2-3 and the Twelfth, Twentieth, and Twenty-Fifth Amendments. See also Nixon v. United States, 506 U.S. 224 (1993). The political question doctrine would accordingly bar plaintiffs' suit even if plaintiffs possessed Article III standing.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in monospaced Courier New font of no more than 10.5 characters per inch. The brief (from the start of its Statement Of Jurisdiction through the end of its Conclusion) contains 3,172 words according to the count of this office's word processing system.

s/Eric Fleisig-Greene
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CERTIFICATE OF BAR MEMBERSHIP, E-BRIEF COMPLIANCE, VIRUS CHECK

Counsel for appellees are federal government attorneys and are not required to be members of the Bar of this Court.

The text of the hard copy of this brief and the text of the brief in electronic .pdf format are identical.

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s/Eric Fleisig-Greene
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CERTIFICATE OF SERVICE

I certify that on March 8, 2010, I filed the foregoing brief with the Court by using the appellate CM/ECF system, and by causing ten paper copies to be sent to the Court by overnight delivery. I further certify that the following counsel are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system:

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