

No. 21-56287

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONSTITUTION ASSOCIATION, INC., A
FOUNDER GEORGE F.X. ROMBACH, AND B.

GREEN, ET AL.,

PLAINTIFFS-APPELLANTS

v.

KAMALA DEVI HARRIS,

VICE PRESIDENT,

UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE

*On Appeal from the United States District Court
for the Southern District of California
20CV2379-TWR-BLM*

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The district court's jurisdiction was contested, and the district court ultimately dismissed the Complaint for lack of Article III standing and under the political question doctrine. The district court *sua sponte* dismissed Plaintiffs' Complaint without prejudice on September 28, 2021, and gave Plaintiffs 30 days to file an amended Complaint.¹ Plaintiffs did not file an amended Complaint and, on November 4, 2021, the district court ordered the Clerk of

¹ Excerpts of Record (ER)-8-9.

the Court to close the case. Plaintiffs filed a timely notice of appeal on November 26, 2021.² This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Plaintiffs have standing to challenge Kamala Harris' eligibility to serve as Vice President.
2. Whether the political question doctrine deprived the district court of jurisdiction because the issue of whether Harris is eligible to serve as Vice President is “a political matter principally within the dominion of another branch of government?”³

STATEMENT OF THE FACTS

Harris was born in Oakland, California on October 20, 1964.⁴ In August 2020, Joseph Biden announced that Harris would be his vice-presidential running mate.⁵ On December 7, 2020, Plaintiffs filed a Complaint in district court in the Southern District of California, seeking a declaration that Harris is not a “natural born citizen” under the Constitution and is thus ineligible to serve as

² ER-12-15; *see* Fed. R. App. P. 4(a)(1)(B) (60-day time limit).

³ ER-5.

⁴ Supplemental Excerpts of Record (SER)-56-57.

⁵ *See* Adam Edelman, Deepa Shivaram and Kristen Welker, *Kamala Harris Named by Joe Biden as His VIP Pick*, NBC NEWS (Aug. 12, 2020), <https://www.nbcnews.com/politics/2020-election/joe-biden-selects-kamala-harris-his-running-mate-n1235771>.

Vice President of the United States.⁶ Plaintiffs attached a copy of Harris’ birth certificate to their Complaint, confirming her birth in Oakland, California.⁷ Plaintiffs nevertheless asserted that Harris is not a “natural born citizen,” because—according to Plaintiffs—neither her mother or father “were citizens of the United States when [she] was born.”⁸ Plaintiffs did not serve Harris with their Complaint.

Harris took the oath of office and became Vice President of the United States on January 20, 2021.⁹

In April 2021, Plaintiffs filed a Request for Entry of Default against Harris.¹⁰ The Clerk of the Court responded by entering default against Harris later that day.¹¹ The following month, the United States filed an *Ex Parte* Application to set aside the default, arguing that the entry was improper because: (1) Plaintiffs had not

⁶ SER-44-45.

⁷ SER-56-57. *See also* SER-12 (stating that “Kamala Devi Harris . . . was born on the 20th day of October, 1964, in Oakland, California.”)

⁸ SER-13.

⁹ *See* Chelsea Janes and Cleve R. Wootson, *Kamala Harris sworn into history with vice-presidential oath*, The Washington Post (January 20, 2021), https://www.washingtonpost.com/politics/kamala-harris-sworn-in/2021/01/20/a184a12e-5aa9-11eb-b8bd-ee36b1cd18bf_story.html

¹⁰ SER-71-76.

¹¹ SER-77.

effected service of their Complaint; and (2) Harris had multiple meritorious defenses to Plaintiffs' Complaint.¹²

The district court issued an order allowing Plaintiffs to respond to the *Ex Parte* Application, and requiring them to show cause why the Complaint should not be dismissed for lack of subject-matter jurisdiction.¹³ Plaintiffs responded to the order to show cause, and the United States filed a reply in support of its application.¹⁴

On September 28, 2021, the district court dismissed the Complaint *sua sponte* and denied the United States' *Ex Parte* Application as moot.¹⁵ The district court explained that the Complaint must be dismissed for lack of subject-matter jurisdiction, both because Plaintiffs failed to allege Article III standing to challenge Harris' eligibility to serve as Vice President and because the Plaintiffs' claims were barred by the political question doctrine.¹⁶ Although the district court noted that "it appear[ed]

¹² SER-78-87.

¹³ SER-88-93.

¹⁴ SER-94-101 and SER-102-109, respectively.

¹⁵ ER-3-9.

¹⁶ ER-5-8. Because the district court concluded that it lacked jurisdiction, it did not assess—nor have the parties yet had occasion to fully brief—whether Plaintiffs have stated a claim on which relief can be granted.

unlikely that the Complaint [might] be saved by amendment,”¹⁷ the nevertheless gave Plaintiffs leave to file an amended complaint.¹⁸ After Plaintiffs did not do so, the district court issued a final order dismissing the case without prejudice and instructing the Clerk of the Court to close the file.¹⁹ Plaintiffs filed their notice of appeal three weeks later.²⁰

SUMMARY OF ARGUMENT

The district court’s dismissal of Plaintiffs’ Complaint should be affirmed for two independent reasons. First, Plaintiffs identify no concrete injury that would be redressed by the relief they seek, and thus lack standing to challenge Harris’ eligibility to serve as Vice President. This Court has already rejected analogous claims to standing in the context of challenges to Barack Obama’s eligibility to serve as President. Second, Congress, rather than the courts, is assigned the task of determining whether an individual should remain Vice President, and the political question doctrine therefore also bars Plaintiffs’ claims.

¹⁷ ER-8

¹⁸ ER-9.

¹⁹ ER-10-11.

²⁰ ER-12-15.

ARGUMENT

I. Standard of Review

A district court's dismissal of a complaint is reviewed de novo.²¹ The Court accepts "all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party."²²

II. Plaintiffs Lack Standing

The district court correctly ruled that Plaintiffs' Complaint "fails adequately to allege Article III standing."²³ That is a sufficient basis to affirm the district court's dismissal of Plaintiffs' Complaint.²⁴

As the district court explained, Plaintiffs' allegations of harm are too generalized to confer standing.²⁵ Plaintiffs allege in their Complaint that they "have had their voting rights disenfranchised

²¹ *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017).

²² *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009).

²³ ER-6 (citing *Drake*, 664 F.3d 744 and *Berg v. Obama*, 586 F.3d 234, 239 (3d. Cir. 2009)).

²⁴ See *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). ("Standing is a threshold matter central to our subject matter jurisdiction."); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) ("[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction under [FRCP] 12(b)(1).") (citations omitted).

²⁵ ER-6.

or diluted when [Defendant] Harris sought the office [of] Vice-President of the United States.”²⁶ But this Court held in *Drake v. Obama*, 664 F. 3d 774 (9th Cir. 2011)—which addressed a claim that President Obama was ineligible for the presidency—that this sort of alleged harm cannot confer standing. *Id.* at 784 (“Even as a voter, [plaintiff] has no greater stake in this lawsuit than any other United States citizen. The harm he alleges is therefore too generalized to confer standing.”); accord *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

In addition, although Plaintiffs cite a number of statutory provisions in their standing argument, they do not explain how any of these provisions confer standing—particularly in the absence of a concrete injury.²⁷ The district court recognized as much, holding that none of the statutes cited by Plaintiffs below support their standing arguments.²⁸

²⁶ ER-6 (quoting Compl. 13).

²⁷ Dkt. #14 (Amended Opening Brief) at 20-21 (citing 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. §§ 1983, 1985).

²⁸ ER-6 (noting that: (1) 18 U.S.C. §§ 241, 242, 245, and 594 do not confer standing because they are “criminal statutes that do not confer a private right of action;” (2) 28 U.S.C. § 1343 does not confer standing because it “does not provide a cause of action;” and (3) 42 U.S.C. § 1985(3) does not confer standing because Petitioners’ Complaint does not “allege ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.’”)

Plaintiffs do not engage with the district court’s standing analysis on appeal, nor do they address this Court’s decision in *Drake v. Obama*.²⁹ Their conclusory standing arguments are insufficient to establish the existence of an Article III case or controversy.

Plaintiffs assert that Plaintiff Constitution Association, Inc. “has separate and distinct damages from the individual citizens which are for resources wasted because of Defendant Harris[] unconstitutional conduct.”³⁰ Plaintiffs provide no citation, and no explanation beyond this conclusory statement as to what these resources might be, much less how this alleged injury would be redressed by a favorable decision. This assertion too is insufficient to support standing.

III. The Political Question Doctrine Bars Plaintiffs’ Suit

Plaintiffs’ claim is jurisdictionally barred for a second, independent reason: the district court correctly concluded that the political question doctrine prevented it from exercising subject-matter jurisdiction over Plaintiffs’ Complaint.

The political question doctrine arises out of the Constitution’s separation of powers, providing that certain questions are political

²⁹ Dkt. #14 (Amended Opening Brief) at 19:1 – 21:2.

³⁰ Dkt. #14 (Amended Opening Brief) at 20-21.

as opposed to legal and, therefore, beyond the courts' jurisdiction.³¹ The doctrine "serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch."³² In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court explained that a non-justiciable political question exists where there is:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

This Court has "characterized the first three factors [of the *Baker* test] as 'constitutional limitations of a court's jurisdiction' and the

³¹ *Corrie v. Caterpillar, Inc.*, 503 F. 3d 974, 980 (9th Cir. 2007) ("Disputes involving political questions lie outside of the Article III jurisdiction of federal courts.")

³² *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992).

³³ *Baker*, 369 U.S. at 217.

other three factors as ‘prudential considerations.’”³⁴ It has also recognized that, of all six factors, “the first two are likely the most important.”³⁵ Nevertheless, this Court has confirmed that the inquiry is highly case specific, that the factors “often collaps[e] into one another[,]” and that any one factor of sufficient weight is enough to render a case unfit for judicial determination.³⁶ Here, there is plainly a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” depriving the district court of jurisdiction.

At the outset, the Electoral College is the constitutionally created body responsible for selecting the President of the United States.³⁷ Where no candidate receives a majority of the electoral votes, the Constitution commits to the House of Representatives the authority to select the President and, in so doing, to evaluate the

³⁴ *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017) (quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007)).

³⁵ *Marshall Islands*, 865 F.3d at 1200 (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005)).

³⁶ *See Marshall Islands*, 865 F.3d at 1200 (first alteration in original) (quoting *Alperin*, 410 F.3d at 544).

³⁷ *See* U.S. Const., art. II, § 1, cl. 2; *Id.*, Amend. XXIII Section 1; *Williams v. Rhodes*, 393 U.S. 23, 43 (1968) (Harlan, J., concurring) (“[T]he [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation . . .”).

candidates' eligibility.³⁸ Similarly, the Twentieth Amendment exclusively grants Congress the responsibility for selecting a President when a candidate elected by the Electoral College does not satisfy the Constitution's eligibility requirements.³⁹ Thus, pursuant to the Constitution, review of Presidential eligibility after the Electoral College has acted rests in Congress.

In addition, Plaintiffs seek, among other things: (1) a determination that "Harris is NOT eligible to serve as Vice-President of the United States, and never will be pursuant to the Constitution"; (2) a declaration that "Harris be permanently ineligible to hold the Offices of Vice-President or of President;" and (3) "injunctive relief against Harris serving as Vice-President . . . or as President and Commander in Chief of the United States."⁴⁰ In other words, Plaintiffs ask the courts to immediately and permanently remove Vice President Harris from office.

But the Constitution establishes that the authority to remove a sitting Vice President lies exclusively with Congress. The

³⁸ See U.S. Const., Amend. XII.

³⁹ See *id.*, Amend. XX, § III (" . . . the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."); see also *id.*, Amend. XII.

⁴⁰ SER-43.

Constitution provides that the “Vice President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors.”⁴¹ The Constitution further provides that “[t]he House of Representatives . . . shall have the sole Power of Impeachment,”⁴² and that “[t]he Senate shall have the sole Power to try all Impeachments.”⁴³ This is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁴⁴ Redress of Plaintiffs’ alleged harms would require the courts to rule on the ability of the Vice President to hold office—in turn, that would require the courts to usurp a responsibility assigned by the Constitution to the legislative branch.⁴⁵ Consistent with this reasoning, district courts faced with analogous challenges to then-President Obama’s citizenship have concluded that such challenges are not justiciable because removal is textually committed to Congress.⁴⁶

⁴¹ U.S. Const. art. II, § 4.

⁴² U.S. Const. art. I, § 2, cl. 5.

⁴³ U.S. Const. art. I, § 3, cl. 6.

⁴⁴ *Baker*, 369 U.S. at 217.

⁴⁵ See *Nixon v. United States*, 506 U.S. 224, 235-36 (1993) (explaining that judicial review of impeachment proceedings would run counter to the textual commitment of the impeachment power to the Legislature).

⁴⁶ See *Grinols v. Electoral College*, No. 2:12-cv-2997, 2013 WL 2294885, at *5-7 (E.D. Cal. May 23, 2013), *aff’d*, 622 F. App’x 624,

CONCLUSION

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

Respectfully submitted,

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March 28, 2022

625 (9th Cir. 2015) (affirming dismissal on mootness grounds); *Barnett v. Obama*, No. SACV 09-0082, 2009 WL 3861788, at *11-16 (C.D. Cal. Oct. 29, 2009), *aff'd sub nom.*, *Drake v. Obama*, 664 F.3d 774, 786 (9th Cir. 2011) (affirming dismissal on standing grounds).

UNITED STATES COURT OF APPEALS
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