



NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

Gordon J. MacDonald
T 603-628-4068
gmacdonald@nixonpeabody.com

Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101-2031
603-628-4000

November 23, 2015

VIA HAND DELIVERY

Ballot Law Commission
State of New Hampshire
c/o Secretary of State
Room 204
State House
Concord, NH 03301

ATT: Karen Ladd

Re: Complaint of Robert C. Laity

Dear Ms. Ladd:

Enclosed please find an original and five copies of:

1. An appearance on behalf of U.S. Senator Marco Rubio; and
2. Reply of U.S. Senator Marco Rubio to "Official Notice Of Dispute As To The Non Bona Fides Of Four Republican Candidates For President".

If you have any questions regarding this please contact me. Thank you for your assistance.

Sincerely,



Gordon J. MacDonald

GJM:cln

Enclosures

cc: Robert C. Laity
(by electronic and first class mail and by hand on 11/24/15)
Bryan K. Gould, Esq.
(by electronic and first class mail)
James T. Boffetti, Esq.
(by electronic and first class mail)

STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Complaint of Robert C. Laity


NOTICE OF APPEARANCE

Please enter my Appearance as counsel for:

**U.S. Senator Marco Rubio
P.O. Box 558701
Miami, FL 33255-8701**

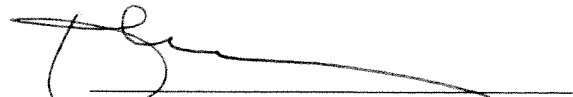
NIXON PEABODY LLP

Dated: November 23, 2015

By: 
Gordon J. MacDonald, Esq.
(Bar. No. 11011)
900 Elm Street, 14th Floor
Manchester, NH 03101
Telephone: 603-628-4068
Fax: 603-628-4040
gmacdonald@nixonpeabody.com

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Notice of Appearance* has been provided to Robert C. Laity by first class and electronic mail on November 23, 2015, and by hand delivery at the hearing on November 24, 2015; to Bryan K. Gould, Esq., by first class and electronic mail on November 23, 2015; and to James T. Boffetti, Esq., by first class and electronic mail on November 23, 2015.


Gordon J. MacDonald, Esq.

STATE OF NEW HAMPSHIRE

BALLOT LAW COMMISSION

Complaint of Robert C. Laity

**REPLY OF U.S. SENATOR MARCO RUBIO TO
“OFFICIAL NOTICE OF DISPUTE AS TO THE NON BONA
FIDES OF FOUR REPUBLICAN CANDIDATES FOR PRESIDENT”**

U.S. Senator Marco Rubio, through counsel, respectfully replies to the “notice of dispute” filed by Robert C. Laity as follows: first, the Ballot Law Commission lacks authority to hear this dispute; second, Mr. Laity lacks standing; and, third, the dispute lacks any legal basis. The Commission should dismiss this matter. In further support, Senator Rubio states as follows:

RELEVANT BACKGROUND

1. On November 5, 2015, Senator Rubio appeared at the State House and, pursuant to RSA 655:47, filed a declaration of candidacy for the Republican nomination for the office of president. The declaration of candidacy was in the form prescribed by that statute, and was signed under penalties of perjury. Senator Rubio tendered a check in the amount of \$1,000, as required by RSA 655:48. Senator Rubio’s declaration was accepted by the Secretary of State.

2. This dispute was filed on November 13, 2015. Although the complaint correctly states that Senator Rubio was born in the United States, it nonetheless argues that he is somehow not a “natural born citizen” within the meaning of Article II, Section I, Clause 4 of the United States Constitution.

ARGUMENT

A. The Commission Lacks Authority To Hear This Dispute.

3. A tribunal lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction. *See, e.g., Bartlett v. City of Manchester*, 164 N.H. 634 (2013). As with any other legislatively created body, the Ballot Law Commission's authority comes "solely and directly from the statutes" that create it or give it authority. *See, e.g., Frost v. Commissioner, N.H. Department of Banking*, 163 N.H. 365, 372 (quotation omitted); *see also Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 247 (2011) (noting that "agencies are granted only limited and special subject matter jurisdiction" and it is depending "entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself]"). Applying these principles, the Commission does not have jurisdiction over this dispute.

4. A careful reading of the relevant statutory provisions establishes that the Legislature has carefully assigned to this Commission important but narrow jurisdiction generally focused on election recounts, *see* RSA 665:8, and certain disputes arising from enforcement of New Hampshire's election laws, *see, e.g.,* RSA 665:6, 9.

5. The statutory provision authorizing the Commission's jurisdiction over "filing disputes" is particularly narrow. RSA 665:7 simply provides, in relevant part, that the Commission shall "hear and determine disputes arising over whether . . . declarations of candidacy filed with the secretary of state conform with the law." (emphasis added).

6. Thus, as this Commission has previously concluded, absent some manifest defect in a filing for office, its jurisdiction is "limited to a review of the sufficiency of the filing of a candidate." *Complaint of Dr. Orly Taitz, Esq.*, BLC-2011-4, p. 3 (Nov. 20, 2011). There is no

claim that the declaration of candidacy filed by Senator Rubio with the Secretary of State fails to conform to the form prescribed by RSA 655:47, I, or that he otherwise failed to meet the filing requirements for the New Hampshire presidential primary. That should end the matter.

7. This dispute invites a vastly different inquiry. It asks this Commission to interpret and enforce the contours of Article II, Section 1, Clause 4 of the United States Constitution and, specifically, its reference to “natural born citizen.” That is well beyond anything the Legislature authorized this Commission to hear and determine.

8. RSA 665:7’s narrow, carefully circumscribed focus certainly does not support jurisdiction to hear this dispute. Nothing in the Commission’s other statutory grants of authority extends to adjudicating qualifications for the office of president of the United States.

9. Observing and honoring Constitutional requirements is plainly fundamental. However, as this Commission has suggested, *see Complaint of Dr. Taitz*, at p. 3, there are other forums to raise issues beyond its jurisdiction. The Legislature has not authorized the New Hampshire Ballot Law Commission to hear and determine this claim. On that basis, it should be dismissed.

10. In the alternative, there is another limitation on the Commission’s authority to hear this dispute. RSA 655:47, III, provides “The decision of the secretary of state as to the regularity of declarations of candidacy filed under this section shall be final.” (emphasis added). Thus, with respect to declarations of candidacy of the New Hampshire presidential primary, the Secretary of State’s decision to accept the filing is not subject to further review.

11. This interpretation is consistent with New Hampshire’s overall statutory scheme. No such limiting language appears with respect to declarations for other federal and state offices. *See, e.g.*, RSA 655:17-17-b. Indeed, RSA 655:14-b expressly provides that, with respect to all

other non-presidential primary declarations, “[i]f the appropriate official with whom the declaration of candidacy . . . [is] filed does not accept them and returns them to the candidate because in the opinion of the official they do not conform to the provisions of this section, the candidate may appeal to the ballot law commission as provided in RSA 665:9.”

12. As discussed above, the Legislature did grant this Commission authority to hear disputes over “whether . . . declarations of candidacy filed with the secretary of state conform with the law.” RSA 665:7. However, that general allocation of authority does not overcome RSA 655:47, III’s specific direction that the Secretary’s determination is final. *See, e.g., EnergNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012) (“When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. To the extent two statutes conflict, the more specific statute controls over the general statute.”) (quotation and citation omitted). For this alternative reason, the Commission lacks subject matter jurisdiction.

B. Mr. Laity Lacks Standing.

13. Mr. Laity lacks standing to bring this matter. Standing is akin to subject matter jurisdiction, *see, e.g., Libertarian Party of N.H. v. Secretary of State*, 158 N.H. 194 (2008) (standing is a question of subject matter jurisdiction), and this Commission must determine whether Mr. Laity has sufficiently demonstrated his right to claim relief, *see, e.g., Sunapee Difference, LLC v. State*, 164 N.H. 778 (2013).

14. The statute does not prescribe who is entitled to bring dispute filings made pursuant to RSA 655:47. The Supreme Court has made clear, however, that “a party has

standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected.” *Appeal of Richards*, 134 N.H. 148, 154 (1991).

15. This dispute is premised solely on a constitutional issue, but Mr. Laity makes no attempt to set forth any factual or legal basis as to how he would be directly and specifically affected in order to support standing.

16. He appears to reside in Tonawanda, New York, and there is no indication that he is registered to vote in this state. Even if he were to vote in the New Hampshire presidential primary, he would still not be directly and specifically affected. *See Hollander v. McCain*, 566 F. Supp. 2d 63, 69 (D.N.H. 2008) (complaints about allegedly ineligible candidates “does not impede the voters from supporting of their choice,” and therefore does not “cause the legally cognizable harm necessary for standing”) (quotations omitted).

17. At most, the present case rests on a generalized claim about an alleged Constitutional violation. It is well established that is insufficient to support standing. *See, e.g., id.* at 68. In the absence of a direct and specific concrete injury, Mr. Laity lacks standing and, therefore, this Commission lacks subject matter jurisdiction. On that basis, the Commission should dismiss this dispute.

C. The Dispute Lacks Any Legal Basis.

18. For the foregoing reasons, the Commission lacks authority to hear the merits of this dispute. Accordingly, it should dismiss this dispute without reaching the merits. However, if the Commission does reach the merits, the matter should nonetheless be dismissed because, as explained below, it lacks any legal basis.

19. Article II, Section 1, Clause 4 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.” In his erudite distilling of the Constitution, Joseph Story elucidated the purpose of this clause stating that it was intended to prevent ambitious foreigners from vying for the office of the President as well as preventing foreign governments from interfering with U.S presidential elections. Commentary by Neal Katyal & Paul Clement *On the Meaning of “Natural Born Citizen,”* March 11, 2015 128 Harv. L. Rev. F. 161 (citing 3 Joseph Story, Commentaries on the Constitution of the United States § 1473, at 333 (1833)).

20. The language of the Constitution is properly interpreted by reference to the common law of England at the time of the Constitution’s adoption. *See Ex parte Grossman*, 267 U.S. 87, 108-09 (1925). During America’s colonial period, the common law of England understood natural born citizens to be those persons born in England, even if that person’s parents were foreigners. *See United States v. Wong Kim Ark*, 169 U.S. 649, 658 (1898). The only exceptions to this rule at common law were if the parents were ambassadors of a foreign government or if the person is born “[i]n a part of the British dominions, which at the time of such person's birth is in hostile occupation.” *Id.* at 657-58. This view prevailed through the founding and into the drafting and adoption of the Constitution. *Id.* at 658 (citing *The Charming Betsy*, 2 Cranch, 64, 119 (Marshall, J.)).

21. This view was further crystalized in the Fourteenth Amendment that all persons born in the United States, even to foreign parents, are natural born citizens of the United States. *Id.* at 674-75. In fact and most noteworthy here, the Supreme Court very clearly stated that:

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

Id. at 694; *see also Hollander*, 566 F. Supp. 2d at 66 (“Those born ‘in the United States, and subject to jurisdiction thereof,’ have been considered citizens under American law in effect since the time of the founding, and thus eligible for the presidency.”) (quoting U.S. Const. amend. XIV and citing, *inter alia*, *Wong Kim Ark*) (other citations omitted).

22. Senator Rubio was born in the United States to parents who immigrated from Cuba to live a life of liberty in the pursuit of happiness here in the United States. The language of the Natural Born Citizen clause does not limit citizenship of those born in the United States to only those whose parents are citizens.

23. Rather, the language only speaks of “natural born citizens.” The common law of England at the time of the Constitution’s adoption and early nineteenth century American jurisprudence demonstrates that natural born citizenship includes those citizens who were born in the United States. The fact that when Senator Rubio was born in the United States his parents were not U.S. citizens is therefore irrelevant. Nor is the citizenship of Senator Rubio’s parents unique in the lexicon of American presidents. President Andrew Jackson, for example, was born to Irish immigrants. *See* Harry J. Lambeth, *Lawyers Who Became President*, American Bar Association Journal 1578, 1580 (Nov. 1977).

24. The Natural Born Citizen clause of the United States Constitution therefore presents no bar to Senator Rubio becoming President of the United States or appearing on the ballot for the New Hampshire presidential primary.

CONCLUSION

In sum, this Commission lacks the authority to hear this dispute and Mr. Laity lacks standing. In any event, the dispute lacks any legal basis. Based on the foregoing, the

Commission should dismiss the dispute filed by Robert C. Laity challenging Senator Rubio's declaration of candidacy in the New Hampshire presidential primary.

Respectfully submitted,

U.S. SENATOR MARCO RUBIO

By his attorneys,

NIXON PEABODY LLP

Dated: November 23, 2015

By: 

Gordon J. MacDonald, Esq.

(Bar. No. 11011)

900 Elm Street, 14th Floor

Manchester, NH 03101


Telephone: 603-628-4000

Fax: 603-628-4040

gmacdonald@nixonpeabody.com

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Reply of U.S. Senator Marco Rubio to "Official Notice Of Dispute As To The Non Bona Fides Of Four Republican Candidates For President"* has been provided to Robert C. Laity by first class and electronic mail on November 23, 2015, and by hand delivery at the hearing on November 24, 2015; to Bryan K. Gould, Esq., by first class and electronic mail on November 23, 2015; and to James T. Boffetti, Esq., by first class and electronic mail on November 23, 2015.


Gordon J. MacDonald, Esq.