THE STATE OF NEW HAMPSHIRE
BALLOT LAW COMMISSION

In re: Petition of Elliott, Petition of Booth,
and Petition of Laity

RESPONSE OF SENATOR TED CRUZ TO PETITIONS

United States Senator Ted Cruz submits this Response to the Petitions filed challenging his inclusion on the presidential primary ballot in the State of New Hampshire and seeks dismissal of the Petitions for lack of jurisdiction.

I. INTRODUCTION

RSA 655:47 provides that, once a declaration of candidacy for the office of President of the United States has been accepted as "regular[ ]" by the Secretary of State, the Secretary's determination is "final," and the candidate's name "shall be printed on the ballots." The New Hampshire Legislature thus chose not to confer jurisdiction on this Commission to entertain challenges to a presidential candidate's declaration, once it has been accepted as regular by the Secretary of State.

In so doing, the Legislature acted not only with prudence and proper regard for the first-in-the-nation role that New Hampshire plays in the presidential primaries, but also with due respect for the federal Constitution. As the Legislature recognized, subjecting the Secretary's acceptance of a declaration of candidacy in the presidential primary to third-party petitions would open the door to the sort of abusive, frivolous, and ideologically driven filings that would degrade New Hampshire's preeminent role in the critical process by which the nation's political parties select their candidates for the presidency. By divesting this Commission of any jurisdiction to pass on the question of whether a candidate meets the constitutional requirements

for the office of President, the Legislature respected the constitutionally prescribed roles of the Electoral College and the Congress in passing judgment on that question.

Furthermore, under bedrock jurisdictional principles of New Hampshire and federal law, the Petitioners lack standing to raise the challenges they seek to assert, because they have suffered no legally cognizable injury. Two of the Petitioners are not even residents of New Hampshire, and are therefore ineligible to participate in the New Hampshire primary. The remaining Petitioner asserts only an undifferentiated and abstract interest in keeping a candidate off the ballot—an interest that is, as a matter of law, inadequate to establish the legally cognizable "dispute[]" upon which this Commission's jurisdiction under RSA 665:7 ultimately rests.

These jurisdictional defects foreclose the Commission from even reaching the substance of the allegations in these Petitions. Reaching those allegations, moreover, would undermine the very purpose of the finality provisions of RSA 655:47, III. Because the Commission lacks jurisdiction to entertain these Petitions, the Petitions should accordingly be dismissed, and the determination of the Secretary respected as "final" pursuant to RSA 655:47, III.

In any event, there is no doubt that Petitioners' challenge to Senator Cruz's constitutional eligibility to hold the office of President is baseless: Senator Cruz is unquestionably a "natural born Citizen." Every single reliable authority has confirmed that a "natural born Citizen" is a person who was a citizen at birth—that is, a person who does not need to go through naturalization proceedings to become a citizen. Here, Senator Cruz was undoubtedly a U.S. citizen at the moment of his birth, because his mother was a U.S. citizen—regardless of the fact that his mother happened to be outside of the United States when Senator Cruz was born. Thus, he is a "natural born Citizen" eligible to serve as President of the United States.

II. STATEMENT OF FACTS

There are no relevant, disputed facts at issue in this case. It is undisputed that Senator Cruz was born to a U.S. citizen who happened to be in Canada at the time she gave birth to Senator Cruz. It is undisputed that Senator Cruz's mother was physically present in the United States for more than ten years, including at least five years after attaining the age of fourteen, prior to giving birth to Senator Cruz. It is also undisputed that at least two of the Petitioners—Carmon Elliot and Robert C. Laity—are not residents of New Hampshire.

III. LEGAL BASIS FOR THE REQUESTED RELIEF

A. The Commission Lacks Statutory Jurisdiction to Entertain Petitioners' Challenge.

Respondent respectfully submits that these Petitions should be dismissed immediately on jurisdictional grounds. First, the Commission lacks authority under RSA 665:7 to review the Secretary of State's acceptance of a presidential candidate's filing. Second, Petitioners lack standing to seek relief from this Commission. The Petitions should accordingly be dismissed and the determination of the Secretary respected as "final" pursuant to RSA 655:47, III.

1. The Decision of the Secretary of State Is Final under New Hampshire Law.

The Secretary of State's determination that a declaration of candidacy for the office of President meets the legal requirements for regularity is "final" and not subject to further review.

Any person who is seeking to be placed on the New Hampshire presidential primary ballot must file a sworn declaration of candidacy with the Secretary of State stating, "under penalties of perjury that I am qualified to be a candidate for president of the United States pursuant to article II, section 1, clause 4 of the United States Constitution . . ." RSA 655:47, I. Once a candidate has filed this declaration and the Secretary has accepted the filing as regular, the law commands that the candidate's name "shall be printed on the ballots." *Id.* The law is clear that "[t]he decision of the secretary of state as to the regularity of declarations of candidacy

filed under this section shall be final." RSA 655:47, III. By making the Secretary's decision final, RSA 655:47, III precludes the Commission from reviewing the merits of that decision.

As the Commission itself has explained, "the jurisdiction of the New Hampshire Ballot Law Commission is limited to that afforded it by the legislature in its enabling legislation." BLC-2011-4, Complaint of Dr. Orly Taitz, Esq. against Barack Obama, Decision and Order (Nov. 30, 2011) at 3 ("Obama Decision and Order"). The Legislature has given the Commission jurisdiction to "hear and determine disputes arising over whether nomination papers or declarations of candidacy filed with the secretary of state conform with the law," RSA 665:7, but this jurisdiction does not extend to reviewing the merits of a declaration made by a person who is seeking to be placed on the *presidential* primary ballot. Rather, it is "limited to a review of the sufficiency of the filing of a candidate." Obama Decision & Order at 3.[1] In the specific case of a presidential candidate, the express finality provision of RSA 655:47, III bars any further review under RSA 665:7. Moreover, this reading of the statute is consistent with the statutory scheme, which evinces throughout a clear legislative intent to treat candidates for the *presidency* differently than candidates for all other offices by restricting the role that state agencies play in resolving what would be *federal constitutional* questions of national import.

As discussed more fully below, the Legislature made this decision in conformity with the prescriptions of the federal Constitution, which vests the power to review a presidential candidate's qualifications exclusively in the hands of the Electoral College and the United States

[1] Under RSA 665:7, the Commission undeniably has the authority to review a petition challenging a candidate's compliance with specific New Hampshire filing requirements pertaining to, for example, the candidate's compliance with state laws governing the adequacy of a candidate's petitions, *see, e.g.*, BLC, Order, *Ovide Lamontagne v. Bill Zeliff*, No. 96-1 (July 5, 1996), or state laws pertaining to the proper manner in which a candidate must pay the required filing fee, *see, e.g.*, BLC, Decision, *Petition of Joseph S. Haas, Jr.*, No. 99-2 (Dec. 21, 1999). It is to the declaration of candidacy, and the declaration of candidacy specifically for the federal presidency, over which this Commission has not been given jurisdiction.

Congress. This is to avoid the risk that state authorities might reach conflicting decisions about the qualifications of a presidential candidate.

New Hampshire law properly reflects this commitment to the Electoral College and the U.S. Congress of the question that Petitioners here seek to raise. That is why these Petitions must be dismissed.

a. RSA 655:47 Provides That the Secretary of State's Determination That a Filing of Candidacy for the Presidency is "Regular" Shall Be the "Final" Word on the Matter.

There are two statutory provisions that confer authority to review the filing of a candidate for inclusion on the New Hampshire ballot: RSA 655:47, III, which provides that the Secretary of State's determination that a presidential candidate's declaration of candidacy is regular "shall be final"; and RSA 665:7, which provides that this Commission is authorized to "hear and determine disputes" about declarations of candidacy. The apparent conflict between these two provisions—which read together appear to authorize the Commission to review even a "final" determination of the Secretary—is easily resolved by applying familiar canons of statutory construction that have been adopted by the New Hampshire courts: The language of RSA 655:47, III dealing with the specific subject of presidential candidacies must be read as an exception to the general provision of RSA 665:7.

As the New Hampshire Supreme Court has explained: "[i]n construing a statute, we ascribe the plain and ordinary meaning to words used, considering the statute as a whole and interpreting it consistent with its purpose." *In re Boucher*, 148 N.H. 458, 460 (2002) (quotation marks omitted). "It is well established that where several statutes deal with the same subject matter, as is the case here, they should be construed, so far as reasonably possible, not to contradict each other." *State v. Woodman*, 114 N.H. 497, 500 (1974). Finally, "where one statute deals with a subject in general terms, and another deals with a part of the same subject in

a more detailed way, the latter will be regarded as an exception to the general enactment where the two conflict." *State v. Bell*, 125 N.H. 425, 432 (1984). The New Hampshire courts "interpret statutes not in isolation, but in the context of the overall statutory scheme." *In re Mooney*, 160 N.H. 607, 609 (2010).

Applying these canons, it is clear that the New Hampshire Legislature intended that the declarations of candidates for the office of President are to be subjected to a far more limited administrative review than those filings of candidates for all other offices, both state and federal. In the case of a candidate's declaration seeking the office of President, review is limited to whether the sworn statement is regular under New Hampshire law. That determination, moreover, is made exclusively by the Secretary of State, whose determination is the final word on the matter.

This interpretation of the statute is confirmed by an examination of the treatment afforded to the qualifications for all other offices, both state and federal, under New Hampshire law. In the case of all other offices, the qualifications are made a part of the statute. Chapter 655 specifically provides, for example, that "[t]o hold the office of United States senator, a person must be qualified as provided in Article 1, section 3 of the federal constitution." RSA 655:3. Similar provisions govern the qualifications "[t]o hold the office of United States representative," RSA 655:4; "[t]o hold the office of governor," RSA 655:5; "[t]o hold the office of councilor," RSA 655:6; "[t]o hold the office of state senator," RSA 655:7; and "[t]o hold the office of state representative," RSA 655:8. In keeping with the statute's unique treatment of presidential candidacies, the Secretary's acceptance of a candidate's declaration is "final" only in the case of the presidential ballot. A declaration of candidacy for any other office is not final, but rather remains subject to review by the Commission.

The statute does not, however, enumerate the qualifications to hold the office of the President. Instead, RSA 655.47 requires only that a candidate seeking to be placed on the ballot in the presidential primary "swear under penalties of perjury that I am qualified to be a candidate for president of the United States pursuant to article II, section 1, clause 4 of the United States Constitution." RSA 655:47, I. Likewise, RSA 655:17-b requires a candidate filing a declaration of intent to be placed on the ballot as a presidential candidate to "swear under penalties of perjury that I am qualified to be a candidate for president of the United States pursuant to article II, section 1, clause 4 of the United States Constitution." RSA 655.17-b. No candidate for any other office is required to *swear under penalties of perjury* that they are qualified to serve in that office. The legislature added this requirement in 2010 in direct response to the controversies that had arisen during the 2008 election regarding the candidates' qualifications to serve as President. 2010 N.H. Laws 10-2043, ch. 50:1-2.

The law could not be clearer. The Legislature has decided that New Hampshire will do no more than require candidates to swear under penalties of perjury that they are eligible for the office of the President. Once the candidate has provided this sworn statement to the Secretary, the candidate's name "shall be printed on the ballots." RSA 655:47, I. It is for the candidate to determine and to swear that he or she possesses the qualifications set forth in the Constitution, not for the Secretary to conduct an independent inquiry into the matter, beyond determining that the declaration is "regular" and has been executed in conformity with the formal requirements of law. New Hampshire has chosen, specifically in the case of candidates for the office of the President, not to conduct any further inquiry. After this sworn declaration has been accepted, it remains solely for the voters, for the Electoral College, and for the Congress to pass judgment on the qualifications, constitutional and otherwise, of the candidate.

Moreover, the structure of Chapter 655 ("Nominations") as a whole also supports this interpretation of the Legislature's intent. The chapter is organized with subheadings for discrete sets of statutes addressing specific aspects of the nominating process. Thus, for example, candidate qualifications (RSA 655:1-:10-a), nominations by primary (RSA 655:11-:29), and removal and withdrawal of candidates (RSA 655:30, :31, and :46) are addressed separately from the provisions on presidential nominations (RSA 655:47-:54). And the statute's unique treatment of presidential primary candidacies—in keeping with New Hampshire's unique first-in-the-nation presidential primary status—compel the conclusion that the Legislature intended that there be no review by the Commission of the Secretary's determination that a presidential candidate's declaration complies with New Hampshire law.

To begin with, the provision in RSA 655:47, III, that the Secretary's determination of the "regularity" of a presidential candidate's declaration is "final" has no counterpart in connection with declarations for any other office. To the contrary, the sections of the statute prescribing the form of declaration for candidates for offices other than President contain no provision for review of the general sufficiency of the declaration. RSA 655:17, :17-a. In fact, the only specified ground on which a candidate's name can be removed from the ballot involuntarily[2] is if the form of the candidate's name does not comply with statutory standards. RSA 655:14-b, IV. Under that section, however, *there is an explicit right to appeal that decision to the Commission. Id.* (if declaration is rejected as nonconforming, the "candidate may appeal to the ballot law commission as provided in RSA 665:9"). By contrast, there is no right of appeal to this

[2] A candidate can also be removed from the primary ballot voluntarily by filing a sworn statement of disability. RSA 655:38.

Commission within the section of the chapter governing declarations by presidential primary candidates.

When construing a statute, "'[n]ormally the expression of one thing in a statute implies the exclusion of another.'" *St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996) (citations omitted); *see also In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 251 (2011); *State v. Mayo*, 167 N.H. 443, 452 (2015) (same). A corollary of this principle is that the Legislature's failure to include a provision in part of a statute is presumed to be intentional where that provision was used elsewhere in the statute. *See, e.g., Dep't. of Homeland Security v. MacLean*, 135 S. Ct. 913, 919-20 (2015).

Hence, the Legislature's inclusion of a right to appeal from a decision to remove a candidate's name from the ballot for non-compliance with the standards of RSA 655:14-b implies that the absence of any such right of appeal under RSA 655:47 was intentional. Combined with the Legislature's express intent that "[t]he decision of the secretary of state as to the regularity of declarations of candidacy filed *under this section* shall be *final*," RSA 655:47 (emphasis added), the statutory scheme plainly deprives the Commission of jurisdiction over these Petitions.

b. The Distinction That the Legislature Has Drawn Properly Reflects the Unique Status of the Presidential Office in the Federal Government.

Make no mistake: the Legislature had a sound and rational basis for drawing a distinction between the presidency and other elected offices.

It did so not simply because the qualifications for the office of the President are created by the U.S. Constitution. After all, the U.S. Constitution creates the qualifications for the office of U.S. Senator and U.S. Representative as well, yet New Hampshire election law still enumerates the qualifications "[t]o hold" those offices. *See* RSA 655:3, 655:4. Rather, the

distinction is between elections in which New Hampshire voters are deciding who will represent the people of New Hampshire alone, compared to an election in which all American voters are electing the President for the country as a whole. New Hampshire has properly chosen not to resolve at the state level a question of decidedly national import.

Indeed, the Legislature has gone out of its way to ensure that New Hampshire will honor the role assigned to the States in our federal system of government—and *not* usurp the role that is assigned to the Electoral College and to the U.S. Congress. New Hampshire has long led the nation in voting in the presidential primaries. But while New Hampshire is the first to speak, it has neither the last nor the only word. The State's election laws reflect that there are some determinations that require national uniformity and that therefore can be made only at the national level—and the question of whether a candidate for the presidency meets the qualifications of Article II, Section 1, Clause 4 is one such question.

In the case of candidates who will be elected solely by New Hampshire voters—including, it should be noted, candidates for the U.S. Senate and the U.S. House of Representatives—the New Hampshire Ballot Law Commission has the authority to determine whether these candidates possess the requisite qualifications to hold their offices. This is reflected by the fact that, in the case of none of these other offices—not the Governor, not an executive councilor, not a U.S. Senator, not a U.S. Representative—does New Hampshire law provide that the Secretary's acceptance of a declaration of candidacy shall be "final."

But the *presidential* primary is different. Again, RSA 655:47, III provides that a determination of "regularity" made by the Secretary with respect to a declaration of candidacy

for the presidency shall be "final."[3] By limiting the review of a presidential candidate's declaration of candidacy to the Secretary of State's determination that it is regular, the statute recognizes that—while New Hampshire voters exercise the profound responsibility of passing the first judgment on the qualities of the candidates—it would be a profound abuse of the trust that political parties and the Nation have placed in New Hampshire if the State were to use its first-in-the-nation status to usurp the role of passing judgment on a candidates' constitutional qualifications to hold the office of the President. This is a role that the Electoral College will exercise in the first instance and Congress will ultimately perform as a matter of law.

Indeed, the Constitution ensures that the fifty states will not reach conflicting decisions regarding whether a candidate meets the requirements of Article II by expressly providing that this question will be decided at the national level.

The Constitution assigns the question of a presidential candidate's eligibility for President, in the first instance, to the Electoral College. U.S. Const. art. II, § 1, cl.2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct," electors for the President and Vice President); *id.* amend. XXIII, § 1. The Constitution's commitment to the Electoral College of the responsibility to select the President includes the authority to decide whether a presidential candidate is qualified for office, because the examination of a candidate's qualifications is an integral component of the electors' decision-making process. If a State were to sit in judgment of a candidate's qualifications before the Nation has voted, and before the Electoral College has cast its votes, such a judgment could inappropriately interfere with the

[3] It was, perhaps, not accidental that, by making only a *denial* of regularity reviewable, the Legislature created a statutory scheme that prevents the filing of any ideologically-driven, frivolous challenges that seek to manipulate the political process and thereby tarnish New Hampshire's role in the presidential primaries.

Electoral College's constitutional authority to elect the President and to evaluate the qualifications of the candidates seeking that office.

The Constitution also provides that, after the Electoral College has voted, further review of a presidential candidate's eligibility for office rests with the U.S. Congress. Should a candidate elected by the Electoral College be deemed not to satisfy the Constitution's eligibility requirements, the Twentieth Amendment explicitly grants Congress the responsibility for selecting a President. *See id.* amend. XX, § 3 ("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"). Additionally, should no candidate receive a majority of the electoral votes, the Constitution commits to the U.S. House of Representatives the authority to select the President—and, in so doing, to evaluate the candidates' qualifications. *See id.* amend. XII. Indeed, both the House and the Senate have standing committees with jurisdiction to decide questions relating to presidential elections. *See* S. R. 25.1(n)(1)(5) (Senate Committee on Rules and Administration has jurisdiction over "proposed legislation, messages, petitions, memorials, and other matters relating to . . . Federal elections generally, including the election of the President, Vice President, and Members of the Congress"); H. R. 10.1(k)(12) (House Committee on House Administration has jurisdiction over "Election of the President, Vice President, . . . ; credentials and qualifications; and Federal elections generally").

It is unsurprising, then, that several federal courts have recognized the Constitution's commitment of the question of whether a candidate meets Article II's requirements to the voters, the electors, and ultimately the Congress. For example, in declining to reach the merits of a

challenge to Senator John McCain's eligibility for the office of President, the Court in *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008), ruled:

> It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance.

Similarly, in *Grinols v. Electoral College*, No. 2:12-cv-02997, 2013 WL 2294885 (E.D. Cal. May 23, 2013), a challenge to President Obama's eligibility for the office of President, the Court concluded:

> These various articles and amendments of the Constitution make clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. 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. Accordingly, this Court, like numerous other district courts that have dealt with this issue to date, declines to reach the merits of Plaintiffs' allegations because doing so would ignore the Constitutional limits imposed on the federal courts.

2013 WL 2294885, at *6.

Because the Constitution commits the question of whether a candidate meets the qualifications of the Natural Born Citizen Clause to the U.S. Congress, federal and state courts—along with all other federal and state authorities—are barred from deciding the question. To put it another way, until the Electoral College has voted to elect the next President, the question of an individual's qualifications for the office remains unripe.

* * *

All of this makes clear that the New Hampshire Legislature, through RSA 655:47, sought to act consistently with the U.S. Constitution by denying the Ballot Law Commission the authority to review the qualifications of a candidate to hold the office of the President. As a result, these Petitions must be dismissed.

2. The Petitioners Lack Standing Because They Have Not Been "Directly Affected" by the Secretary of State's Determination.

Under New Hampshire law, a petitioner seeking to challenge an administrative action by a New Hampshire agency must have standing to assert the claim. *In re Richards*, 134 N.H. 148, 154 (1991). Absent standing, there is no "actual controversy" to adjudicate. *Asmussen v. Comm'r, NH Dep't of Safety*, 145 N.H. 578, 588 (2000). And without an actual controversy, the adjudicative body has no subject matter jurisdiction, and the proceeding must be dismissed. *See Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195-96 (2008) (standing necessary to invoke constitutional authority of judiciary); *Asmussen*, 145 N.H. at 588 (lack of standing defeats subject matter jurisdiction).

Indeed, the federal Constitution imposes an essentially similar limitation on the power of the federal courts, restricting their jurisdiction to "Cases" and "Controversies." U.S. CONST. Art III, §2.[4] And the New Hampshire Legislature similarly limited the jurisdiction of this Commission to actual "disputes." RSA 665:7.

In order to have standing before this Commission, then, the petitioner "must demonstrate that his rights 'may be directly affected' by the decision, *see* RSA 541:3 and :6, or in other words, that he has suffered or will suffer an 'injury in fact.'" *Richards*, 134 N.H. at 154. *See*

[4] To have standing to sue in federal court, a party must have suffered a cognizable injury: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; that was caused by, or is "fairly traceable to," the challenged action; and that a favorable decision must be likely to redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

also Blanchard v. Boston & M. R.R., 86 N.H. 263, 264-66 (1933) (no standing to appeal an administrative agency's decision absent a showing of direct injury). A mere interest, shared by members of the public at large, in a legal issue is not a basis for standing. *See, e.g.*, *Richards*, 134 N.H. at 156 (*citing Sierra Club v. Morton,* 405 U.S. 727, 739 (1972)); *Caspersen v. Town of Lyme*, 139 N.H. 637, 640-41 (1995) ("general interest in a diverse community" is insufficient to create standing; rather, the challenged ordinance must actually affect individual's property).

Thus, a petitioner "has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected." *Richards*, 134 N.H. at 154 (citing 59 Am. Jur. 2d *Parties* § 33 (1987)). An injury suffered equally by all is insufficient to confer standing on a single individual, for such questions are properly resolved through the democratic process. *See, e.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[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.").

Petitioners before the Commission lack standing to challenge the determination of the Secretary of State because they have not alleged that they have suffered a concrete and particularized injury that would give rise to a cognizable "dispute" under RSA 665:7.

As an initial matter, Petitioner Carmon Elliot affirms that he is a resident of the Commonwealth of Pennsylvania, while Petitioner Robert C. Laity affirms that he is a resident of the State of New York. Neither Petitioner, therefore, would even be eligible to vote in the New Hampshire primary and therefore lacks even a hypothetical interest in that election. Indeed, Mr.

Elliot alleges only that he is a "citizen who has concerned himself with the issue of Constitutional presidential eligibility out of a love for our Constitution." The U.S. Supreme Court "has repeatedly held," however, "that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). Indeed, it is "axiomatic that standing cannot rest on a plaintiff's alleged interest in having the law enforced, because such an injury is too generalized and ideological." *Citizens for Responsibility and Ethics in Wash. v. F.E.C.*, 401 F. Supp. 2d 115, 122 (D. D.C. 2005) (internal citations omitted). These jurisdictional principles apply no less to the Commission under New Hampshire law.

Although Petitioner Christopher Booth appears to be a New Hampshire resident, he has alleged no injury distinct from that which every voter in New Hampshire would be able to allege. Indeed, the fact that Mr. Booth's challenge is a verbatim copy of Mr. Elliott's underscores the fungible nature of their alleged interests. A generalized and undifferentiated interest shared by all New Hampshire voters is insufficient to support a petitioner's standing to challenge the Secretary's determination that a presidential candidate's declaration is regular and, therefore, acceptable. *See, e.g.*, *Ex Parte Levitt*, 302 U.S. 633, 633 (1937) ("a citizen and a member of the Bar of this Court" did not have standing to challenge appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, article I, § 6, cl. 2, because he "has merely a general interest common to all members of the public").

Indeed, the courts have uniformly held that the mere allegation that permitting a candidate's name to appear on the ballot "will harm them by infringing their right to cast a meaningful vote also fails to satisfy the Article III [case or controversy] requirement of a 'distinct and palpable injury.'" *Jones v. Bush*, 122 F. Supp. 2d 713, 717 (N.D. Tex. 2000)

(voters lacked standing to seek injunctive relief to prevent Texas members of the Electoral College from casting votes for both George W. Bush and Dick Cheney) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See also Froelich v. F.E.C.*, 855 F. Supp. 868, 870 (E.D. Va. 1994) (plaintiffs alleging that interstate campaign contributions deprived them of a meaningful vote lacked standing, because their allegedinjury was too abstract and hypothetical to constitute injury in fact).

Additionally, while the New Hampshire state courts have never addressed the question of whether a voter has standing to challenge a presidential candidate's qualifications under the Natural Born Citizen Clause—a fact that is unsurprising, given the inherently federal nature of the question—every federal court that has addressed the issue has held that the party seeking to bring suit failed to allege the concrete and particularized injury required to establish standing. *See, e.g.*, *Hollander v. McCain*, 566 F. Supp. 2d 63, 67-71 (D. N.H. 2008) (plaintiff lacked standing to challenge candidate's qualification under the Natural Born Citizen Clause because harm alleged was too generalized); *Berg v. Obama*, 574 F. Supp. 2d 509, 520 (2008) ("[A] candidate's ineligibility under the Natural Born Citizen Clause does not result in an injury in fact to voters."); *Grinols*, 2013 WL 2294885, at *7-10 (the question was not only committed to Congress, but plaintiff lacked standing to challenge qualification of President to hold office).

Because Petitioners have failed to allege any concrete injury, the Commission therefore lacks subject matter jurisdiction to entertain the Petitions and the Petitions should accordingly be dismissed.

* * *

The Commission's inquiry should end here, without any need to delve into the merits of the Petitions. The Commission does not have jurisdiction to rule on these allegations, nor do the

Petitioners have any standing to make them. *Great Falls Mfg. Co. v. Worster*, 23 N.H. 462, 463 (1851) ("A question of jurisdiction should be settled before the merits are discussed."); *In re Soucy*, 139 N.H. 110, 115 (1994) ("We first address the petitioner's threshold questions concerning the commission's jurisdiction to decide the issues before it and its authority to vacate the election.").

But make no mistake: the merits are equally meritless.

B. Senator Cruz Is a "Natural Born Citizen" Eligible to Serve as President of the United States.

Article II of the U.S. Constitution states that "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." U.S. Const. art. II, § 2, cl. 4.

The Constitution does not explicitly define the phrase "natural born Citizen." But its meaning is not difficult to determine, evidenced by the fact that every single reliable authority is in agreement on what it means: a "natural born Citizen" is anyone who was a citizen at the moment they were "born"—as opposed to becoming a citizen later, through the naturalization process at some point after their birth. *See, e.g.*, Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen"*, 128 Harv. L. Rev. F. 161, 161 (2015) ("All the sources routinely used to interpret the Constitution confirm that the phrase 'natural born Citizen' has a specific meaning: namely, someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time."); Laurence H. Tribe & Theodore B. Olson, *Presidents and Citizenship* (March 19, 2008), *reprinted in* 2 J. L (2 Pub. L. Misc.) 509, 509 (2012) ("The U.S. Supreme Court gives meaning to terms that are not expressly defined in the Constitution by looking to the context in which those terms are used; to statutes enacted by the First Congress; and to the common law at the time of the Founding. These sources all confirm

that the phrase 'natural born' includes . . . birth abroad to parents who were citizens.") (citations omitted).

Senator Cruz was a U.S. citizen at birth because his mother was a U.S. citizen. This is true regardless of where his U.S. citizen mother happened to be at the moment she gave birth to him. So he is a "natural born Citizen," eligible to serve as President of the United States.

1. Every Reliable Source From the Time of the Writing of the U.S. Constitution Confirms That A Person Who Was a U.S. Citizen at Birth—Like Senator Cruz—Is A "Natural Born Citizen" Eligible To Serve As President.

Enactments of the first United States Congress—convened just three years after the drafting of the Constitution—provide crucial context for construing our Constitution. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 789-91 (1983). After all, those enactments are strong indicators of what particular terms meant to the Framers at the time they wrote the Constitution. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (the views of the First Congress provide "contemporaneous and weighty evidence of the Constitution's meaning").

For similar reasons, British law at the time of the Founding of the United States also provides essential context for determining the meaning of terms used by the Framers of the Constitution. They were, after all, raised in the British legal tradition. *See, e.g.*, *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Ex parte William Wells*, 18 How. (59 U.S.) 307, 311 (1855) ("We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution.")

With respect to the phrase "natural born Citizen," the First Congress and British law at the time of the Founding are in agreement—a person who is a citizen at birth due to the citizenship of a parent is a "natural born Citizen." In 1790, the First Congress enacted legislation

explicitly providing that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as *natural born citizens*." Naturalization Act of 1790, ch. 3, 1 Stat. 104, 104 (emphasis added). Similarly, British law dating back to the 1350s, and in force at the time of Founding, made clear that children born outside the British Empire to a subject of the Crown were themselves subjects of the Crown, stating that those children were "*natural-born Subjects* . . . to all Intents, Constructions, and Purposes whatsoever." British Nationality Act, 1730, 4 Geo. 2, c. 21 (emphasis added).

Moreover, this original understanding of "natural born Citizen"—anyone who was a citizen of the United States at the moment of their birth—also comports with the Framers' purpose in adopting this requirement in the Constitution.

The Framers included the Natural Born Citizen Clause in response to a 1787 letter from John Jay to George Washington, in which Jay suggested that the Constitution prohibit "Foreigners" from attaining the position of Commander in Chief. *See* Letter from John Jay to George Washington (July 25, 1787), *in* 3 *The Records of the Federal Convention of 1787* 61 (Max Farrand ed., 1911) ("[W]hether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the [A]merican army shall not be given to, nor devolve on, any but a natural *born* citizen.").[5]

So it is inconceivable that the Framers intended to exclude a U.S. citizen at birth from holding the office of President, simply because of where he or she happened to be born. After all, that individual is not a "foreigner"—but rather, a U.S. citizen from the very day he or she

[5] Among many notable accomplishments, Jay served as President of the Continental Congress and as the first Chief Justice of the United States, and was one of the authors of *The Federalist Papers*.

was born. Indeed, it is particularly inconceivable that Jay himself would have held such a view, considering both that, at the time of his letter to Washington, he was serving abroad as the Secretary of Foreign Affairs, and that he had fathered three of his children abroad. Surely Jay would not have believed that people like his own children were "foreigners" who should be constitutionally ineligible to hold the office of President.

2. Historical Precedents Also Confirm That A Person Who Was A U.S. Citizen at Birth—Like Senator Cruz—Is A "Natural Born Citizen."

This original understanding of the term "natural born Citizen" has been borne out by subsequent American history and practice, and is best evidenced by previous candidates for President who were U.S. citizens at birth, despite being born outside the United States.

In 2008, for example, it was widely understood that Senator and presidential-candidate John McCain was a natural born citizen due to his birth to a U.S. citizen parent—and regardless of the fact that he was born in the Panama Canal Zone.

Indeed, the U.S. Senate unanimously passed a resolution confirming that Senator McCain is a natural born citizen, due to his birth to a U.S. citizen parent. *See* S. Res. 511, 110th Cong. (2008) ("previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President," consistent with "the purpose and intent of the 'natural born Citizen' clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term 'natural born Citizen'").

Several courts also concluded that Senator McCain was eligible to serve as President on account of his birth to a U.S. citizen parent. *See, e.g.*, *Robinson*, 567 F. Supp. at 1146 (finding it "highly probable . . . that Senator McCain is a natural born citizen" due to his birth to at least one U.S. citizen parent, before dismissing case for lack of standing); *Hollander*, 566 F. Supp. at 66 & n.3 (noting that "the weight of the commentary falls heavily on the side of eligibility" for persons

born outside the U.S. to at least one U.S. citizen parent, before dismissing case for lack of standing); *Ankeny v. Governor of State of Indiana*, 916 N.E.2d 678, 685 n.10 (Ind. Ct. App. 2009) ("Plaintiffs do not cite any authority or develop any cogent legal argument for the proposition that a person must actually be born within one of the fifty States in order to qualify as a natural born citizen.").

Nor is Senator McCain the only example. Governor George Romney, born in Mexico, was understood to be a natural born citizen when he ran for President in 1968. *See, e.g.*, Clement & Katyal, *supra* at 164; *see also* S. Res. 511, 110th Cong. (2008) ("previous presidential candidates were born outside the United States of America and were understood to be eligible to be President"); Eustace Seligman, *A Brief for Governor Romney's Eligibility for President*, 113 Cong. Rec. 35019, 35020 (1967) ("It is well settled that the term 'natural born' citizen (or subject) included not only all those born within the territorial limits of England or of the Colonies but likewise all those who were citizens at birth, wherever their birthplaces might be."); *id.* at 35021 ("It follows from the preceding that Governor Romney, who was a citizen of the United States from his birth by virtue of his parentage, is a natural-born citizen and therefore is eligible under the constitution to be elected to the office of President of the United States.").

It is no surprise, then, that the Congressional Research Service—an objective, non-partisan agency within the Library of Congress that provides legal and policy analysis to members of Congress—has also come to the same conclusion. In 2011, it issued a report concluding that the "weight of legal and historical authority indicates that the term 'natural born' citizen would mean a person who is entitled to U.S. citizenship 'by birth' or 'at birth,'" including "by being born abroad to U.S. citizen-parent." Jack Maskell, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement* (Congressional Research Service, Report

No. 7-5700, Nov. 14, 2011), *available at* http://www.fas.org/sgp/crs/misc/R42097.pdf; *id.* at 50 ("The weight of more recent federal cases, as well as the majority of scholarship on the subject, also indicates that the term 'natural born citizen' would most likely include, as well as native born citizens, those born abroad to U.S. citizen-parents, at least one of whom had previously resided in the United States, or those born abroad to one U.S. citizen parent who, prior to the birth, had met the requirements of federal law for physical presence in the country.").

* * *

Founding-era sources, Congressional statements, historical precedent, and case law all command the same conclusion: a "natural born Citizen" is a person who was a U.S. citizen at birth, without the need for later naturalization.

And there is no dispute that Senator Cruz meets that definition. The very first Congress recognized that a child born to a U.S. citizen parent is a U.S. citizen, no matter where the birth happens to occur. *See* 1 Stat. at 104. And at the time of Senator Cruz's birth, that principle was codified at 8 U.S.C. § 1401(a)(7): "The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years."[6]

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[6] Today, the relevant law is codified at 8 U.S.C. § 1401(g) (2012): "The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years."

Senator Cruz satisfies this provision. He was born outside the United States, and his mother was a U.S. citizen who was physically present in the United States for more than ten years, including at least five after attaining the age of fourteen. So he was a U.S. citizen at the moment of his birth—and thus a "natural born Citizen" eligible to serve as President of the United States.

IV. CONCLUSION

Based on the foregoing, the Commission should dismiss the Petitions filed challenging Senator Cruz's inclusion on the presidential primary ballot in the State of New Hampshire.

Respectfully submitted,

SENATOR TED CRUZ,

By His Attorneys,

Date: 11-20-15

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Certificate of Service

I hereby certify that a copy of the foregoing document was this day mailed, postage prepaid, to Carmon Elliott, 105 Elmont Street, Pittsburgh, PA 15205; to Christopher Booth, 171 Loudon Road #1, Concord, NH 03301; and to Robert Laity, Society for the Preservation of Our American Republic, 43 Mosher Drive, Tonawanda, NY 14150.

Date: 11-20-15

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