**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| NEWTON BORIS SCHWARTZ, SR., | § | |
| | § | |
| *Plaintiff*, | § | |
| | § | |
| v. | § | CIVIL ACTION H-16-106 |
| | § | |
| TED CRUZ, | § | |
| | § | |
| *Defendant*. | § | |

## MEMORANDUM OPINION & ORDER

Pending before the court is defendant Ted Cruz's motion to dismiss plaintiff Newton Boris Schwartz, Sr.'s second amended complaint. Dkt. 14. Having considered the motion, response, reply, the applicable law, and the arguments of counsel at a hearing held on April 13, 2016, the court is of the opinion that the motion should be GRANTED.

## I. BACKGROUND

Pro se plaintiff Newton Boris Schwartz, Sr. filed this lawsuit on January 14, 2016. Dkt. 1. Schwartz amended his complaint once on January 19 (Dkt. 3) and again on February 3 (Dkt. 7). In his second amended complaint, Schwartz asks the court to declare that defendant, United States Senator Ted Cruz, is ineligible to serve as President of the United States. *Id*. Schwartz subsequently filed two memoranda which purport to supplement his second amended complaint. Dkts. 8, 11. Schwartz requests a "Declaratory Judgment adjudicating and deciding whether or not Defendant Cruz is eligible to be elected and certified by the Electoral College vole [sic] and serve as President of the United States per U.S. Constitution Article II, Section I, Clause 5." Dkt. 7 at 11. Article II, section 1 of the Constitution states: "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, § 1, cl. 4 (emphasis added). Schwartz claims that because Cruz was born in Canada, he is not a natural born citizen and therefore cannot serve as President. Dkt. 7 at 6. On February 22, 2016, Cruz filed a motion to dismiss Schwartz's lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 14. On March 14, Schwartz filed a response to the motion (Dkt. 24), to which Cruz filed a reply (Dkt. 25). On April 13, the court held a hearing on Cruz's motion to dismiss.

## II. LEGAL STANDARD

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555.

Plaintiff "must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 56 S. Ct. 780 (1936). "[I]f the plaintiff does not carry his burden 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute,' then dismissal for lack of standing is appropriate." *Hotze v. Burwell*, 784 F.3d 984, 993 (5th Cir. 2015) (quoting *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231, 110 S.Ct. 596 (1990)).

## III. LAW & ANALYSIS

Cruz argues that Schwartz's complaint must be dismissed for the following reasons: (1) Schwartz lacks standing to challenge Cruz's eligibility under Article II; (2) any challenge to Cruz's eligibility is not yet ripe; (3) this court is not the proper forum for challenging a presidential candidate's qualifications; and (4) Schwartz has failed to allege a cause of action. Dkt. 14 at 14. In the event that the court does not dismiss Schwartz's complaint, Cruz requests that the court find that he is a "natural born citizen" and is therefore eligible for the office of President of the United States. *Id*. at 26. Because the court finds that Schwartz's lawsuit must be dismissed based on standing and ripeness, the court does not reach the political question issue or the merits. *See Lance v. Coffman*, 549 U.S. 437, 440, 127 S. Ct. 1194 (2007) (per curiam) ("Federal courts must determine that they have jurisdiction before proceeding to the merits.").

### A. Standing

Standing is a jurisdictional question that concerns "the power of the court to entertain that suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197 (1975). "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting U.S. Const. art. III, § 2). The doctrine of standing is used to determine whether a "case" or "controversy" exists by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)). To establish Article III standing, Schwartz "must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id*. (quoting *Lujan*, 504 U.S. at 560–61). The burden to establish standing lies with the party seeking to invoke the jurisdiction of a federal court. *Id*. at 2342. "An injury sufficient to satisfy Article III

must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id*. at 2341 (citation and internal quotation marks omitted).

> [A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large— does not state an Article III case or controversy.

*Lujan*, 504 U.S. at 573–74.

Schwartz has not and cannot satisfy the injury in fact element of standing that "lies at the core of article III concepts of the limits of the exercise of the federal judicial power." *White v. U.S. Pipe & Foundry Co.*, 646 F.2d 203, 206 (5th Cir. 1981). Indeed, several courts have held that an individual citizen does not have standing to challenge a candidate's eligibility to serve as president. *See, e.g., Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885 at *14 (E.D. Cal. May 23, 2013) ("Plaintiffs lack standing to bring this action."), *aff'd on other grounds*, 622 F. App'x 624 (9th Cir. 2015); *Reade v. Galvin*, No. CIV.A. 12-11492-DJC, 2012 WL 5385683 at *3 (D. Mass. Oct. 30, 2012) ("To the extent that Reade is attempting to bring a claim to remove President Obama's name from the presidential ballot on the ground that he is ineligible for that office, Reade lacks standing."), *aff'd*, No. 12-2406 (1st Cir. June 11, 2013).

To date, four other federal courts have rendered decisions with respect to actions seeking declaratory or injunctive relief in connection with Cruz's alleged ineligibility to run for President. *Fischer v. Cruz,* No. 16-CV-1224(JS)(ARL), 2016 WL 1383493 (E.D.N.Y. Apr. 7, 2016); *Wagner v. Cruz*, No. 2:16-CV-55-JNP, 2016 WL 1089245 (D. Utah Mar. 18, 2016)*; Librace v. Martin,* No. 16-CV-0057 (E.D. Ark. Feb. 29, 2016); *Booth v. Cruz*, No. 15-CV-518-PB, 2016 WL 403153 (D.N.H. Jan. 20, 2016). All four cases were dismissed for lack of standing. In *Wagner*, the court held that the plaintiff did not demonstrate "any particularized harm resulting from Senator Cruz's

campaign" and that the plaintiff's alleged harms of Senator Cruz "potentially skew[ing]" election results and "potentially. . . unlawfully serving as President" were speculative rather than "actual and imminent." 2016 WL 1089245, at *3 (finding that the plaintiff's status as a "a citizen of Utah, registered to vote in Utah, and a long-time resident in Utah" did not confer standing on the plaintiff). In *Librace*, the court held that the plaintiff's claims regarding Cruz's ineligibility were not "concrete and particularized because he shares these injuries with every other voter in Arkansas." *Librace,* at 3. In *Booth*, the court held that the plaintiff lacked standing and rejected the argument that Cruz's presence on the New Hampshire Republican Primary ballot impeded the plaintiff's right to vote. 2016 WL 403153, at *2 (noting that "an individual voter challenging the eligibility of a candidate for President lacks standing to assert a claim based on the general interests of the voting public"). Most recently, in *Fischer*, the court held that the "[p]laintiff's allegation that Senator Cruz's presence on the [New York] ballot will somehow damage his rights as a voter does not constitute a sufficiently particularized injury to establish standing under Article III." 2016 WL 1383493, at *2. Like the other federal courts which have ruled on this question, this court finds that Schwartz lacks standing to bring this lawsuit.

Schwartz does not cite any federal court cases that have held that an individual citizen has standing to challenge a candidate's eligibility to serve as President. Nor has the court been able to locate any such case. The court will, however, briefly address Schwartz's various arguments for standing. In his second amended complaint, Schwartz frames his potential injury as an abstract harm to the political process. For example, Schwartz claims that "it is politically beneficial to both Defendant Cruz as well as the entire United States to do so politically, for this Court to decide whether" Cruz is eligible. Dkt. 7 at 10. However, it is well settled that this type of general harm is not a cognizable interest for purposes of Article III standing. *See Schlesinger v. Reservists Comm.*

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