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SUMMARY

In an attempt to prevent the Presidential and Vice-Presidential Electors of the State of Texas (the “Texas Electors”) from casting their votes in accordance with the overwhelming majority vote of the residents of the State of Texas, Plaintiffs have requested that this Court enjoin and declare invalid the anticipated vote of the Texas Electors for Governor Bush and Secretary Cheney. Plaintiffs’ legal theory is that Governor Bush and Secretary Cheney both will be “inhabitants” of Texas on December 18, 2000, when the Texas Electors cast their ballots for President and Vice-President of the United States. Therefore, Plaintiffs reason, the Texas Electors will be prohibited by the Twelfth Amendment to the United States Constitution from casting Texas’ electoral votes for both candidates.

Plaintiffs’ theory is factually and legally incorrect. It is undisputed that Secretary Cheney was elected to Congress as a representative from Wyoming for six terms, was raised, educated, and married in Wyoming, has owned a residence in Wyoming for over twenty years, and votes in Wyoming. He clearly intended to establish his inhabitation to Wyoming, and he is clearly an inhabitant of that State. Plaintiffs have no evidence to show the contrary. However, this Court need not reach the factual issue of Secretary Cheney’s inhabitation: Plaintiffs’ Complaint lies outside this Court’s subject matter jurisdiction and, even assuming the allegations of the Complaint to be true, fails to state a claim for which relief may be granted.

Plaintiffs’ Complaint should be dismissed for numerous procedural and substantive reasons, including the following:

1. Plaintiffs lack standing to satisfy the case-or-controversy requirement of Article III of the United States Constitution. Plaintiffs have not alleged, and cannot prove, that they have suffered or will suffer a concrete and particularized injury, fairly traceable to defendants’ conduct, if the Court does not grant their requested relief. They are suing based on an alleged injury to “the national interest” and to “all American citizens.” This type

of generalized public injury is not sufficient to give Plaintiffs standing to bring their claims.

2. Plaintiffs do not present a justiciable case or controversy. Congress has jurisdiction to resolve objections concerning the votes of the Presidential and Vice-Presidential Electors – a process for which Congress has enacted a specific procedure involving both Houses of Congress. *See* 3 U.S.C. §§ 15-18. Judicial resolution of Plaintiffs' Complaint would interfere with decisionmaking constitutionally committed to a coordinate branch of government and impermissibly involve the Court in a "political question."
3. Plaintiffs' Complaint fails to state a claim for which relief can be granted because it is based on two erroneous legal premises: (i) that a candidate for Vice-President cannot satisfy the Twelfth Amendment "inhabitation" requirement by changing his or her state of inhabitation prior to the Electoral College vote, as Secretary Cheney has done, and (ii) that mere speculation that Secretary Cheney will inhabit Texas on December 18, 2000 suffices to obtain the injunctive relief they seek. As a matter of law, both of these premises are wrong.

For these reasons, as discussed in more detail below, Governor Bush and Secretary Cheney request that Plaintiffs' Complaint be dismissed in its entirety.

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(B)(1) AND 12(B)(6) FOR LACK OF STANDING.

A plaintiff seeking to invoke the jurisdiction of a federal court has the burden of establishing that he or she has standing to bring that claim. *See, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). A plaintiff must have standing to meet the case or controversy requirement of Article III, Section 2, of the United States Constitution, *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 64 (1987), and must satisfy the "prudential considerations that are part of judicial self-government," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) Plaintiffs can do neither.

The “irreducible constitutional minimum” for standing requires, among other things, the plaintiff to have suffered an “injury in fact – 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. To have a “particularized” legal interest for Article III standing purposes, “the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.1. Thus, the Supreme Court has consistently held that a plaintiff raising only a generalized 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.” *Id.* at 573-74.

In this case, the essence of Plaintiffs’ allegations is that they are citizens of the United States and that all citizens will be injured if the Twelfth Amendment to the United States Constitution is violated. *See, e.g.*, Complaint ¶ 51 (alleging that the “national interest” will be damaged); *id.* ¶ 55 (“Plaintiff has a right, as do all citizens of the United States, for the election for President and Vice-President in the Electoral College to be held in strict accordance with the Constitution”); *id.* ¶ 58 (alleging that “Plaintiffs and all other American citizens will suffer immediate and irreparable injury”). Plaintiffs’ claim exemplifies the type of generalized grievance which fails to satisfy the standing requirement to bring suit. *See Arizonans for Official English*, 520 U.S. at 64 (“An interest shared generally with the public at large in the proper application of the Constitution and laws will not do”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 226-27 (1974) (“[i]n some fashion, every provision of the

Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a ‘case or controversy’ appropriate for judicial resolution”).¹

Applying the above rules, the Supreme Court has repeatedly held that where, as here, a citizen files suit seeking to redress an alleged injury to the public at large, as opposed to an injury particular to the citizen or a discrete class of citizens, the complaint should be dismissed for lack of standing. For example, in *Schlesinger*, the plaintiffs sought declaratory and injunctive relief to stop the appointment of certain members of Congress as officers in the Armed Forces Reserves on the grounds that such appointments violated the Incompatibility Clause of the United States Constitution. See U.S. CONST. art. I, § 6, cl. 2. The Court dismissed the Complaint. Likewise, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), the plaintiffs sought a declaratory judgment and injunctive relief against the donation of certain government property to a religious organization on the grounds that it violated the Establishment Clause of the First Amendment to the Constitution. See U.S. CONST. amend. I. Rejecting the plaintiffs’ contention

¹ The Supreme Court has repeatedly reaffirmed these principles. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 832 (1997) (“harm to [plaintiffs’] interest in having government abide by the Constitution, . . . would be shared to the same extent by the public at large and thus provide no basis for suit”); *United States v. Hays*, 515 U.S. 737, 743 (1995) (“[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power”); *Allen v. Wright*, 468 U.S. 737, 754 (1984) (“This Court has repeatedly held 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”); *Ex parte Levitt*, 302 U.S. 633 (1937) (no citizen standing to challenge Supreme Court appointment of Justice Hugo Black under Article I, Section 6 of U.S. Constitution); *Fairchild v. Hughes*, 258 U.S. 126 (1922) (Brandeis, J.) (action was “not a case within the meaning of . . . Article III” where plaintiff asserted “only the right, possessed by every citizen, to require that the Government be administered according to law Obviously this general right does not entitle a private citizen to institute in the federal courts a suit”). Cf. *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue CIA under Article I, Section 9 Accounts Clause); *Frothingham v. Mellon*, 262 U.S. 447 (1923) (no taxpayer standing to challenge Federal Maternity Act of 1921 under Tenth Amendment).

that they had standing to sue for this alleged constitutional violation, the Supreme Court reiterated:

The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries. . . . Although Defendants claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge, 454 U.S. at 485-86 (emphasis added; citations omitted). This action, too, was dismissed.

Plaintiffs here have not alleged, and cannot prove, a “concrete and particularized” injury as required by the above authorities. At most, Plaintiffs have alleged “an interest shared generally with the public at large in the proper application of the Constitution and laws,” *Arizonans for Official English*, 520 U.S. at 64. Plaintiffs’ generalized grievance fails to meet Article III’s “irreducible minimum” of standing and places their claim outside of this Court’s subject matter jurisdiction. For that reason, the Complaint should be dismissed. *See Fed. R. Civ. P. 12(b)(1)*.

II. THE PLAINTIFFS’ COMPLAINT FAILS TO PRESENT THE COURT WITH A JUSTICIABLE CASE OR CONTROVERSY AND IMPERMISSIBLY SEEKS TO INVOLVE IT IN A “POLITICAL QUESTION.”

Plaintiffs’ Complaint also fails to present the Court with a justiciable case or controversy and seeks to involve it in a “political question” not appropriate for judicial resolution. “[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Based on this separation of powers principle, the Supreme Court has adopted the so-

called “political question” doctrine, which requires the judicial branch to refrain from deciding an issue if, among other things, there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See generally Nixon v. United States*, 506 U.S. 224, 228-29 (1993).

In this case, there is clearly “a textually demonstrable constitutional commitment of the issue” Plaintiffs seek to raise “to a coordinate political department.” The essence of Plaintiffs’ claim in this case is that if the Texas Electors vote for Governor Bush and Secretary Cheney on December 18, 2000, their votes should not be counted because they would be cast in violation of the Twelfth Amendment. *See* Complaint ¶¶ 48-60. The Twelfth Amendment, however, expressly delegates to Congress the power to count the electoral votes.² In accordance with that power, Congress has enacted a comprehensive statutory framework allowing members of Congress to object to the votes and specifying the procedure by which Congress shall determine whether the votes will be counted.³ Congress – not the courts – possesses the authority to

² Specifically, the Twelfth Amendment states, in pertinent part:

The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates [from the Electors of their votes] and the votes shall then be counted[.]

U.S. CONST. amend. XII.

³ The statutory framework is set forth in 3 U.S.C. § 1 *et. seq.* The specific provision governing objections to the electoral votes is contained in Section 15, which states in part:

Upon such reading of any such certificate or paper [purporting to be the certificate of the electoral votes from the Electors], the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit

consider any objections to electoral votes, *see* 3 U.S.C. § 15, and ultimately to reject challenged votes if the House and Senate “concurrently. . . agree that such vote or votes have not been so regularly given by electors.” *Id.* Section 15 requires the President of the Senate to call for objections to the Electoral College vote and requires Congress to receive and consider “objections so made to any vote . . . from a State.” 3 U.S.C. § 15. Congress clearly has been invested with a “textually demonstrable constitutional commitment” to resolve objections to electoral votes and has provided procedures for the resolution of those objections accordingly. Just as with other constitutionally-committed functions such as impeachment trials, *Nixon*, 506 U.S. 224, and the seating of Members of Congress, *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944 (1969), challenges to the validity of electoral votes are simply nonjusticiable. *See also Roudebush v. Hartke*, 405 U.S. 15, 19 & n.6, (1972) (article I, section 5, clause 1 of the Constitution making the Senate the “Judge . . . of its own Members,” does not preclude state recount in senatorial election, but question of which “candidate is entitled to be seated in the Senate [is] a non-justiciable political question.”).

III. THE PLAINTIFFS’ COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

The Twelfth Amendment to the Constitution of the United States, which amended Article II, § 1, provides for the election of the President and Vice-President as follows:

such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to Section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

3 U.S.C. § 15.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves[.]

U.S. CONST. amend. XII (emphasis added). The core premises underlying the Plaintiffs' Complaint are that: (i) a candidate for Vice-President cannot meet the above "inhabitation" requirement by changing his or her state of inhabitation prior to the Electoral College vote as Secretary Cheney has done; and (ii) speculation that Secretary Cheney will inhabit Texas on December 18, 2000 suffices to obtain the injunctive relief they seek. *See* Complaint ¶ 13. As a matter of law, however, both of those premises are wrong and should be rejected.

Although there is no explicit Supreme Court guidance on the term "inhabitant" as used in the Twelfth Amendment, the term "inhabitant" is used elsewhere in the Constitution, and there is guidance from at least one Court of Appeals as to its requirements. For example, Article I, § 2, of the Constitution sets forth the qualifications for U.S. Congressmen and provides that a Congressional Representative must be "an inhabitant of that State in which he shall be chosen." *See also*, U.S. CONST. art. I § 3 (setting forth similar qualification for the Senate). Interpreting this provision in *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), the Ninth Circuit Court of Appeals treated "inhabitant" as used in Article I as the equivalent of "resident." The Ninth Circuit noted that the delegates to the Constitutional Convention considered the "inhabitant" requirement of Article I to be the equivalent of residency at the time of election, and specifically rejected any call that inhabitation be established by anything more than residence in the state, as defined by the voting statutes, at the time of election (*i.e.*, no prior length of time in the state was required). *Townsend*, 215 F.3d at 1034-38.⁴

⁴ The *Townsend* court noted that the delegates used "inhabitant" rather than "resident" by design in order to avoid a dispute over meaning, as they evidently viewed inhabitant as less ambiguous and "would not exclude persons absent occasionally for a considerable time on public or private business." 215 F.3d at 1036, n. 5 (internal citation omitted).

Under the voting statutes of Wyoming and Texas, as well as under the common law, the location of a person's inhabitation is a function of: (i) the person's place of habitation; and (ii) the person's intent to return to that place of habitation whenever he or she is away. For example, in order to vote in Wyoming, an individual must be a U.S. citizen, at least 18 years of age on election day, not mentally incompetent, not a felon, and "a bona fide resident of Wyoming." WYO. STAT. 22-3-102. "Residence" is defined as "the place of a person's actual habitation" which is "the place where a person has a current habitation and to which, whenever he is absent, he has the intention of returning." *Id.* 22-1-102(a)(xxx).⁵ Likewise, the Texas voting statutes define a person's residence for voting purposes as a "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." TEX. ELEC. CODE § 1.015(a).

The above voting statutes are consistent with the common law, which generally considers a person to be "domiciled" in a state if the person has both: (i) a physical presence in the state; and (ii) an intent to remain there indefinitely or return there whenever he or she is absent. *See, e.g., State of Texas v. State of Florida*, 306 U.S. 398, 424 (1939) ("Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile."); *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (change in domicile requires "only" the concurrence of: (i) a physical presence at the new location and (ii) an intention to remain there indefinitely or the absence of any intention to go elsewhere.); *Holmes v. Sopuch*, 639 F.2d 431, 433 (8th Cir. 1981) (same).

⁵ In their Complaint, the Plaintiffs cite Wyoming Statute 23-1-102-(a)(ix) for the proposition that a person has to be domiciled in Wyoming at least one year in order to be a "resident." *See* Complaint ¶43. On its face, however, this provision only applies to certain statutes that concern hunting and fishing rights, not voting and constitutional rights. *Id.* at 23-1-102-(a).

Significantly, the common law is clear that a person's domicile is changed instantaneously whenever these two elements simultaneously exist, regardless of how long the person is present at the new place of domicile. As explained by the Eighth Circuit:

To acquire a domicil of choice, the law requires the physical presence of a person at the place of the domicil claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous. Intention to live permanently at the claimed domicil is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial.

Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962) (emphasis added and citations omitted); *see also White v. All America Cable & Radio, Inc.*, 642 F. Supp. 69, 72 (D.P.R. 1986) (“Once the elements are met a new domicile is established instantaneously”); *St. Onge v. McNelius Truck and Mfg., Inc.*, 645 F. Supp. 280, 282 (D. Minn. 1986) (“No minimum period of residence is required; when these two facts concur, domicile changes instantaneously”) (citations omitted).

In this case, Plaintiffs do not dispute that Secretary Cheney grew up in Wyoming, owns a house (i.e., a habitation) in Wyoming, regularly goes to Wyoming, and has expressed his intent that Wyoming is his permanent home. *See* Complaint ¶¶ 13(I), 18, 24, 27 and 28. Plaintiffs also do not dispute that Secretary Cheney has acted in a manner consistent with that intent by resigning from his job in Dallas, putting his Dallas house up for sale, surrendering his Texas driver's license, registering to vote in Wyoming, and actually voting in Wyoming. *Id.* As a matter of law, this is sufficient to change his inhabitation and satisfy the requirements of the Twelfth Amendment.

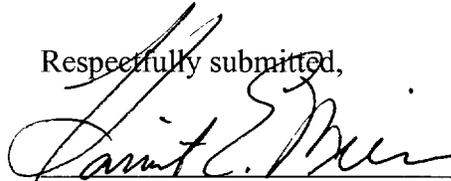
Significantly, notwithstanding the Plaintiffs' numerous allegations about Secretary Cheney's past inhabitation in Texas, the relevant inquiry under the Twelfth Amendment is his inhabitation at the time the Texas Electors vote. *See* U. S. CONST. amend. XII (stating that either the President or Vice-President “shall not be” an inhabitant of the same state as the Electors, not

“shall not have been”) (emphasis added). The sum total of facts in the Complaint looking to Secretary Cheney’s future status consists of speculations insufficient to sustain Plaintiffs’ claim. *See* Complaint ¶ 41 (alleging that Secretary Cheney “may never actually sell” his Dallas house and “might not move” if he is defeated). Because Secretary Cheney is not now, and will not be at the time the Texas Electors vote, an inhabitant of Texas, the Plaintiffs’ Complaint should be dismissed as a matter of law.

WHEREFORE, Governor Bush and Secretary Cheney respectfully request that the Plaintiffs’ Complaint be dismissed, that all costs of court be taxed against the Plaintiffs, and that Governor Bush and Secretary Cheney receive such other and further relief to which they are justly entitled.

Dated: November 27, 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served upon the Plaintiffs' counsel and all other counsel of record via telecopier on this the 27th day of November, 2000.



Harriet E. Miers