

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

Abdul Karim Hassan, Plaintiff, -v- Federal Election Commission, Defendant.	Case #: 11-2189 (EGS) <u>PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITIES</u>
--	--

I. PRELIMINARY STATEMENT

Plaintiff Abdul K. Hassan, Esq., respectfully submits the instant notice of supplemental authority as to his motion for a three-judge panel. Briefing on said motion was completed on January 6, 2012. The supplemental authorities presented in this notice were issued after the motion was submitted. These supplemental authorities should allow this court to expeditiously resolve the motion for a three-judge court and convene assign defendant's pending motion to a three-judge court for resolution.

A more detailed treatment of the issues is contained in the motion papers already submitted. As such, the discussion here will be brief and only as needed to demonstrate the relevance and importance of the supplemental authorities.

II. SUPPLEMENTAL AUTHORITIES

**1. THE NINTH CIRCUIT'S FINDING OF SUBSTANTIAL QUESTION
IN HASSAN V. MONTANA**

In opposing plaintiff's motion for a three-judge Court, defendant stated in relevant part that (Def. Opp. Mem. 4):

Section 9011(b) explicitly requires that it be construed in accordance with the three-judge court provision in 28 U.S.C. § 2284. Courts have interpreted section 2284 and its predecessors to grant an application for a three-judge court only if the complaint states a “substantial”

As in this case, the Ninth Circuit Court of Appeals in Hassan v. Montana, Case No. 12-35402, (Exhibit 1) is faced with the question of whether the invidious national origin discrimination in the natural born clause is now moot under the implicit repeal and absurdity doctrines in light of the current interpretation of the equal protection clause of the Fourteenth and Fifth Amendments and the Citizenship Clause of the Fourteenth Amendment. The Ninth Circuit issued an order to show cause as to why it should not summarily affirm the district court’s ruling on these issues – the same issues in this case. In the Ninth Circuit, the question of whether an issue is substantial – the condition for summary affirmance, is the same as whether the issue is substantial for purposes of convening a three-judge court. See In re Thomas 508 F.3d 1225, 1226 -1227 (9th Cir., 2007). Wolf v. Boyd, 287 F.2d 520, 522 (C.A.9 1961).

In response to the Ninth Circuit’s order to show cause, both parties briefed the issues based on the implicit repeal and absurdity doctrines that are the subject of this case as well as the Ninth Circuit case. After reviewing the record and the submission of the parties, the Ninth Circuit found that summary affirmance was inappropriate (that the issues were substantial) and it discharged its order to show cause. (See Exhibit 1). Significantly, in arguing in favor of summary affirmance, the defendants in Hassan v. Montana, in essence, made the same arguments that defendants made in this case in opposition to the motion for a three-judge Court. Moreover, at the time the Ninth Circuit made its finding that the issues were substantial, it had before it, all the arguments and analysis that the parties will be providing in their briefs – the submissions on the order to show cause were extensive.

This Court should follow the lead of the Ninth Circuit, find that the issues herein are substantial and allow the issues in this case to be heard and determined by a three-judge Court.

2. D.C. CIRCUIT HANDBOOK

In researching and preparing the response to the Ninth Circuit's Order to Show cause in Hassan v. Montana, plaintiff came across a certain part of the D.C. Circuit Handbook which states in relevant part that, "Parties should avoid requesting summary disposition of issues of first impression for the Court." *See, e.g.*, D.C. Circuit Handbook at 36. In other words, courts should avoid making a finding that an issue is insubstantial where the Circuit and the Supreme Court have not directly and clearly resolved the issue before. Here, this case involves significant constitutional issues of first impression that have never been addressed or decided by the D.C. Circuit or the Supreme Court. In Hassan v. USA¹, a case relied on by defendants, the court underscored the first impression nature of the implicit repeal issue and stated in relevant part as follows:

Likely because of the rarity of such challenges, the Supreme Court has not established a test for determining whether or when one constitutional provision "trumps," as plaintiff argues, another

Also, the district court in this case stated in relevant part as follows²:

Judges Gershon [New York], DiClerico [New Hampshire], and Longstaff [Iowa] noted that it is unclear whether the principles of implicit statutory repeal apply to the Constitution.

Likewise, the defendants in Hassan v. Iowa, stated in relevant part as follows³:

Neither of these cases address when and how a Constitutional amendment may "abrogate" or "implicitly repeal" other Constitutional provisions. Indeed, it does not appear that any authority exists on this subject.

¹ See See USDC EDNY Docket at: Case #: 08-cv-938 (NG) – Document 28

² See Montana District Court Docket at: Case #: 11-cv-72 (DWM) – Document 22, page 3

³ See District Court Docket - SDIA - Case #: 11-cv-574 (REL)(RAW) - Document 2-1, page 8

While the defendants in Hassan v. Iowa did recognize that in the constitutional context “the case of Fitzpatrick v. Bitzer presents an example of implicit abrogation. 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976),” – a case which favors appellant, they were correct in highlighting the scarcity of authority on the subject and the first impression nature of the issue.

When faced with an issue of first impression, appellate courts are called upon to extrapolate from other precedents and principles of law and logic, and to consider history and social impact as well as public policy. This Court should be guided by D.C. Circuit Handbook and refrain from finding that the significant constitutional issues of first impression in this case are insubstantial.

3. THE SEVERAL DISTRICT COURT DECISIONS

In addition to this case, plaintiff has brought cases tied to the discrimination in the natural born clause in several jurisdictions in which he has faced invidious national origin discrimination. See Hassan v. New Hampshire, Case #: 11-cv-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012); Hassan v. Iowa, Case #: 11-CV-00574 (SDIA, April 26, 2012); Hassan v. Colorado, 2012 WL 1560449 (DCO, May 3, 2012); and Hassan v. Montana, Case #: 11-cv-72 (DMT, May 3, 2012). These cases are now on appeal. While all these district court cases were decided against plaintiff on motions to dismiss - such dismissals were not because the issues presented were addressed by existing precedent or because they were easy. To the contrary, all of these decisions were based on the absence of precedent directly addressing the issues and an avoidance of some very sensitive issues such as those arguments based on the citizenship ruling in Dred Scott and the judiciary’s current view that such a ruling was erroneous and a great self-inflicted wound – each of these courts struggled to discern the correct law and outcome. The

absence of direct precedent which was the bases for the decisions in the several district courts is exactly why this court should convene a three-judge court.

Significantly, while plaintiff should ultimately prevail on the merits, the question of whether plaintiff will ultimately prevail is very different from whether the issues presented are substantial for the purpose of deciding whether to convene a three-judge court. In Wolf v. Boyd, 287 F.2d 520, 522 (C.A.9 1961), the Ninth Circuit, based on Supreme Court precedent, ordered the convening of a three-judge court and explained as follows:

The issue upon this appeal is not whether appellant is correct in her construction of her constitutional rights, but whether her contentions raise a substantial constitutional question. In the words of the Supreme Court, a question is to be regarded as insubstantial if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' Hannis Distilling Company v. Mayor and City Council of Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482.

As explained above, none of the several district courts that have ruled on the merits of the natural born issues herein have found these issues to be insubstantial or frivolous. Moreover, neither the Supreme Court nor the D.C. Circuit have even addressed or ruled on the implicit repeal and absurdity doctrine arguments raised in this case. Gendron v. Saxbe, 501 F.2d 1087 (9th Cir., 1974) ('A determination to convene or not to convene a three-judge court must be made on the basis of the Supreme Court's "previous decisions."'). As such, there is no legal basis whatsoever for finding that the issues raised herein are insubstantial.

Very significantly, the district court in Hassan v. Colorado, 2012 WL 1560449 (DCO, May 3, 2012) felt that the issues were so substantial that it designated its decision for publication. As this Court is aware, the vast majority of judicial opinions are unpublished and courts only designate for publication, decisions on the most substantial legal issues.

Also, the district court in Hassan v. Iowa, in response to Fitzpatrick v. Bitzer, 427 U.S. 445 456 (1976), as an example of implicit repeal in the constitutional context stated that⁴, “a majority of federal courts have declined to view *Fitzpatrick* as holding that the Fourteenth Amendment effected an *implicit repeal* of the Eleventh Amendment.” The Supreme Court’s abrogation ruling in Fitzpatrick can be the basis for a ruling in plaintiff’s favor in this case. An issue cannot be insubstantial where its resolution hinges on resolving a split in authority among the courts of appeals – the split shows that the issue is not clearly settled by existing precedent – a split in the courts of appeals is also one of the grounds for Supreme Court review – hardly an insubstantial matter. In fact, the Iowa court even relied on the proposition that⁵ it is, “unlikely that a majority of the present Supreme Court would sustain a holding that the fourteenth amendment, of its own force, represents a pro tanto repeal of the eleventh amendment.” Once again, an issue cannot be insubstantial where in order for the Court to resolve the issue against plaintiff, it has to engage in a projection of how the Supreme Court would rule today or make a finding that the Supreme Court would change an existing ruling. Such projections require careful analysis and full and complete consideration of the issues by a three-judge court as required by statute.

4. NONE OF THE SEVERAL DISTRICT COURTS FOUND THAT PLAINTIFF HASSAN LACKED STANDING TO CHALLENGE THE NATURAL BORN CLAUSE

In its opposition to the motion for a three-judge court, defendant also argues that the issue of standing should be decided by a single judge instead of a three-judge court. While this position is contrary to the statute requiring a three-judge court, the four cases against state election authorities referenced above further demonstrate that plaintiff has standing to challenge

⁴ See District Court Docket - SDIA - Case #: 11-cv-574 (REL)(RAW) - Document 16, page 8, fn 6

⁵ See District Court Docket - SDIA - Case #: 11-cv-574 (REL)(RAW) - Document 16, page 8, fn 6

the natural born clause. It is so obvious that plaintiff has standing, the defendants in Hassan v. New Hampshire and Hassan v. Montana, did not even bother to challenge Hassan on standing and ripeness grounds. While the defendants in Hassan v. Iowa and Hassan v. Colorado did raise standing and ripeness, those arguments were rejected by the district courts in both cases which found that plaintiff had standing and that his claims were ripe for review. Here, standing and ripeness are even more present because in addition to the usual standing and ripeness factors which are satisfied, the statute in this case allows any “individuals eligible to vote for President” to bring a declaratory judgment case like this one. See 26 USC § 9011(b)(1).

III. CONCLUSION

Based on the original submissions and the supplemental authorities provided herein, plaintiff respectfully requests that this Honorable Court expedite its decision on the motion for a three-judge court and convene a three-judge court to hear this case and defendant’s pending motion to dismiss.

Dated: Queens Village, New York
August 18, 2012

Respectfully submitted,

/s/ Abdul Hassan
Abdul Karim Hassan, Esq. (AH6510)
215-28 Hillside Avenue
Queens Village, New York 11427
Tel: 718-740-1000
Fax: 718-468-3894
Email: abdul@abdulhassan.com

CERTIFICATE OF SERVICE

I, Abdul K. Hassan, plaintiff pro se in the above-entitled action, hereby certify that a copy of plaintiff's Notice of Supplemental Authorities, was served on August 18, 2012 on counsel of record for defendant, Mr. Greg J. Mueller, (FEC's General Counsel's Office), via this court's ECF system.

Dated: Queens Village, New York
August 18, 2012

/s/ Abdul Hassan
Abdul K. Hassan, Esq.

EXHIBIT 1

FILED

UNITED STATES COURT OF APPEALS

JUL 19 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ABDUL KARIM HASSAN,

Plaintiff - Appellant,

v.

STATE OF MONTANA and LINDA
MCCULLOCH,

Defendants - Appellees.

No. 12-35402

D.C. No. 6:11-cv-00072-DWM
District of Montana,
Helena

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellant's motion for an extension of time to file a response to this court's May 22, 2012 order to show cause is granted.

A review of the record and the parties' responses to the order to show cause demonstrates that this appeal does not appear to be appropriate for summary disposition at this time. Accordingly, the May 22, 2012 order to show cause is discharged.

The briefing schedule established on May 17, 2012 shall govern this appeal.