

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

Abdul Karim Hassan, Plaintiff, -v- Federal Election Commission, Defendant.	Civil Action #: 11-cv-2189 (EGS) <u>REPLY MEMORANDUM</u>
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**PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF HIS MOTION FOR A THREE-JUDGE COURT**

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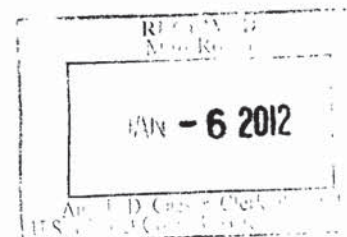


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I. PRELIMINARY STATEMENT

Plaintiff respectfully submits the instant reply memorandum of law in further support of his motion for a three-judge court. The facts as alleged in the complaint must be taken as true and are incorporated herein. In essence however, plaintiff is a civil rights and employment attorney by profession who is a candidate for the Presidency of the United States in 2012 and if not successful, plaintiff intends to continue his campaign without interruption until the 2016 Presidential elections. Plaintiff intends to seek the nomination of the Democratic Party in 2012 and in 2016. The Presidential Election Campaign Fund Act (“Fund Act”), 26 U.S.C. §§ 9001-9013, provides tens of millions of dollars in public funding to the nominee of major parties, which typically consists of the Democratic and Republican parties. However, the Federal Election Commission (“FEC”) ruled on September 2, 2011¹ that because plaintiff is a naturalized citizen and not a natural born citizen, he is not eligible to receive public funding. Because of the FEC’s reasoning and interpretation, plaintiff commenced the instant action to: 1) declare that the Fund Act’s discrimination against plaintiff because of his national origin and status as a natural born citizen, violates the equal protection guarantee of the Fifth Amendment and the Citizenship Clause of the Fourteenth Amendment; and 2) declare that the Fifth and Fourteenth Amendments trump, abrogate and implicitly repeal the invidious national origin discrimination in the natural born provision of the Constitution (See Article II, Section 1, Clause 5) – the discrimination in the Fund Act is purportedly premised on the natural born provision as per the FEC’s interpretation. The instant action was brought pursuant to 26 USC § 9011(b) which requires that claims like this one to construe or implement the Fund Act to be heard by a three-judge court.

¹ http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

After plaintiff requested a three-judge court with the filing of the complaint, defendant opposed the request on two grounds. First, defendant claims that plaintiff does not put forth a substantial question. Second, defendant claims that the case is not justiciable because plaintiff has allegedly not suffered the requisite “injury in fact” etc., under Article III. Defendant improperly seeks to transform this motion into a motion to dismiss by a one-judge court as opposed to a three-judge court as specifically required by statute. However, it is easy to conclude that the claims herein are substantial and justiciable. The cases cited by defendant equate the question of whether a claim is substantial with the question of whether a claim is frivolous. The issue of whether the national origin discrimination in the natural born provision has been trumped is so substantial and meritorious, the Chairperson of the FEC herself has said that², “it might be decided by the Supreme Court and ultimately not by lower courts.” This is not surprising because under the doctrine of implicit repeal, irreconcilability triggers implicit repeal and here, the national origin discrimination in the natural born provision is irreconcilable with the equal protection guarantee of the Fifth Amendment which prohibits national origin discrimination under the strict scrutiny standard developed by the Supreme Court. Because the national origin discrimination in the Fund Act, standing independently, will violate the equal protection guarantee of the Fifth Amendment, such discrimination will fall if the national origin discrimination in the natural born provision also falls under the Absurdity Doctrine and the doctrine of implicit repeal. Also, the Citizenship Clause which was adopted to repeal citizenship discrimination in the Constitution, as interpreted, protects naturalized citizenship from the type of discrimination, destruction and diminution, caused by the Fund Act and the natural born provision. As to whether plaintiff suffered the requisite “injury in fact” under Article III, the central question is whether the national origin discrimination in the Fund Act forces plaintiff to compete on an unequal footing with other Presidential candidates who are

² <http://www.fec.gov/audio/2011/2011090102.mp3>

natural born citizens. The answer is obvious – plaintiff is being forced to compete on an unequal footing because he is forced to compete without the right to receive tens of millions in public financing if nominated. The absence of this right to public funding is extremely harmful and dooms plaintiff's chances of being nominated because as the old saying goes, "money is the mother's milk of politics," – logically, voters will be a lot less likely to nominate a candidate with the huge disadvantage that comes with not having the right to public funding.

Plaintiff, kindly and respectfully request, that this Honorable Court grant plaintiff's request for a three-judge court and expedite this action on its docket as required by statute.

II. ARGUMENT

Defendant claims that despite the statutory command in 26 U.S.C. § 9011(b) that this case be heard by a three-judge court, a single-judge should hear and determine if the claims are "substantial" and "justiciable," and presumably if they are not, to dispose of the case without any involvement of two other judges. The cases cited by defendant are inconsistent and contradictory and do not seem to account for the drastic reduction in the use of three-judge courts by Congress beginning in the mid 1970s. With that ambiguity in jurisprudence noted, it is plaintiff's position that the relevant statute at 26 USC § 9011(b) and the governing Local Civil Rule 9.1, both contemplate a procedure where the single-judge court determines if the statute in question provides for a three-judge court and not for the single-judge court to make the kind of "substantial question" and "justiciability" determinations defendant urges. For example, if a person filing an FLSA case requests a three-judge court, the role of the single judge initially assigned would be to look at the FLSA, determine that it does not provide for a three-judge court and deny the request. In the instant case by contrast, the role of the single-judge court would be to confirm that 26 USC § 9011(b)

provides for a three-judge court for actions brought to construe and implement the Fund Act and after confirming that this is such a case, certify the case as warranting a three-judge court.

Defendant cites Wertheimer v. FEC, 268 F.3d 1070, 1072 (D.C. Cir. 2001). In Wertheimer, however, after noting that the district court may have confused subject-matter jurisdiction with failure to state a cause of action, the DC Circuit Court of appeals stated that, "The district judge, however, lacked authority, by herself, to dismiss on cause of action grounds." This would seem to leave no role for a single-court judge on the merits. Even if the question as to whether the issues are "substantial" is part of the justiciability inquiry, which seem like a stretch, if the Court finds justiciability, are the other two judges bound by that finding? If they are not, how then can a single judge make a finding of non-justiciability that is binding without violating due process? - we don't have courts in America where the judge can only make binding rulings against the plaintiff but not in his favor? The cases cited by defendant equate the question of a "substantial" issue with the question of whether the claim is frivolous. Can a finding of frivolity be made without following the procedures and safeguards in FRCP Rule 11? The motion for a three-judge court is not a motion to dismiss, can the single-judge court dismiss own its own motion without notice and opportunity to be heard as to the contemplated grounds for dismissal? Also, as to all these questions, we obviously recognize that two other judges may have a different answer that would produce a different result than that reached by a single-judge court. Given these landmines, it would seem that plaintiff's view is not only correct, but is also logical and most efficient. With these objections noted, plaintiff will nonetheless show that the issues herein are substantial and justiciable.

1. PLAINTIFF PRESENTS SUBSTANTIAL QUESTIONS

Defendant cited to Judd v. FCC, 723 F. Supp. 2d 221, 223 (D.D.C. 2010), so for ease of analysis, we will use the definition in Judd, which states that (citations omitted):

A claim is insubstantial if it is obviously without merit or clearly determined by previous case law

We can quickly dispose of the second condition because the issues presented herein have never been “clearly determined by previous case law.” This is the first time in history that a naturalized citizen running for President has asserted these abrogation/implicit repeal claims and has challenged the Fund Act on grounds that it unconstitutionally discriminates against naturalized citizens. We can also dispose of the first condition (whether issues are obviously without merit) on several bases. First, in addressing the merit issues in the context of the Supreme Court, the Chairperson of the FEC stated in relevant part as follows during the FEC’s September 1, 2011 deliberations as to plaintiff’s arguments³:

Whether the Fourteenth Amendment
trumps the -- that [natural born] provision in the Constitution, is
something that I guess if I -- I envision that if it were
to be decided by a court, it might be decided by the
Supreme Court and ultimately not by lower courts.

The FEC Chairperson was correct to state that the merit issues herein are Supreme Court material. Defendant’s own Chairperson, after studying the issue and deliberating it intensely with her fellow commissioners for half-hour on September 1, 2011, echoed the sentiments of her fellow commissioners and concluded that the abrogation/implicit repeal issues herein are not just substantial, they are so substantial they should be heard by the highest court in the land. In making this statement, the Chairperson, like her fellow commissioners, were acting in a quasi-judicial

³ <http://www.fec.gov/audio/2011/2011090102.mp3>

capacity and had a duty to be objective and credible. By contrast, the defense lawyers in this case have a different role. Issues that are substantial enough to merit Supreme Court review – like the issues herein, would obviously also merit review by a three-judge district court.

Second, in the Supreme Court’s seminal Citizenship Clause decision in Afroyim v. Rusk 387 U.S. 253, 262 (1967), the Court stated in relevant part that:

“(The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native”

This statement is clear and sweeping and contains no exception as to presidential eligibility and we need not go further to show that the natural born provision is now moot. Nonetheless, we will provide more. Before that however, it should be pointed out that despite being the seminal case on the Fourteenth Amendment’s Citizenship Clause and despite the fact that the Afroyim case was cited in the complaint, it is not addressed or even mentioned at all in defendant’s opposition. A party cannot simply ignore controlling Supreme Court precedent simply because it is contrary to the party’s arguments. Defendant’s failure to distinguish or even address Afroyim, is an implicit concession that its arguments are without merit.

Defendant references the case of Hassan v. United States and relies (Opp. Memo 5) in almost wholesale fashion, on the arguments of defendant United States in that case, and it may be most convenient to use the Hassan case to further illustrate the merits of the instant case and address the arguments of defendant herein. It should be noted however, that defendant USA has retreated considerably in that case as the understanding of the issues by all sides has increased and as it has been forced to address the applicable case law. By way of background, just after plaintiff declared his candidacy for the Presidency in 2008, he filed a declaratory judgment action against the United

States seeking a declaration that under modern Constitutional civil rights jurisprudence, the invidious national origin discrimination in the natural born provision is trumped, abrogated and implicitly repealed by the equal protection guarantee of the Fifth Amendment and the Citizenship Clause of the Fourteenth Amendment. Plaintiff's case then and now is based on the Absurdity Doctrine and the doctrine of implicit repeal. The United States moved to dismiss for failure to state a claim. Defendant USA, plaintiff and the Court agreed that the doctrine of implicit repeal in the statutory context applies as well in the Constitutional context. In Branch v. Smith, 538 U.S. 254, 285 (2003), the established standard for implicit repeal was stated in relevant part as follows:

The question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute. When Congress clearly expresses its intent to repeal or to pre-empt, we must respect that expression. When it fails to do so expressly, the presumption against implied repeals, like the presumption against pre-emption, can be overcome in two situations: (1) if there is an irreconcilable conflict between the provisions in the two Acts; or (2) if the later Act was clearly intended to "cove[r] the whole subject of the earlier one."

The district court in Hassan correctly found that plaintiff had standing to bring the case but made several errors on the merits – somewhat to be expected, given that this was a significant constitutional case of first impression and there are almost always mistakes the first time around. First, the district Court in Hassan, like defendant here, hinged its decision on the principle that there is a presumption against implicit repeal and that such a presumption is greater in the constitutional context. This was a gigantic legal error because laws which discriminate on the basis of race or national origin are not presumed to be valid and there is no presumption against their implicit repeal. . In City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985), the Supreme Court stated in relevant part as follows:

When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, United States Railroad Retirement Board v. Fritz, supra, 449 U.S., at 174, 101 S.Ct., at 459; New Orleans v. Dukes, supra, 427 U.S., at 303, 96

S.Ct., at 2516, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. [4] [5] The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

As the Supreme Court reiterated in *City of Cleburne*, the presumption of validity goes away when the law classifies and discriminates on the basis of national origin like the natural born provision does and like the Fund Act in this case does. Furthermore, as explained in the above excerpt, one of the main reasons for this presumption of invalidity of laws that discriminate on the basis of race or national origin, is the fact that obtaining a remedy or repeal through the legislative process would be difficult. Because it is even more difficult to achieve change and amendment/repeal in the Constitutional context through legislative means, the presumption of invalidity is stronger in the Constitutional context. It is not surprising that all of the significant changes in Constitutional law and civil rights were implicit, in the form of judicial opinions and do not expressly appear in the text of the constitution.

Second, the district court in *Hassan v. USA* did not have the benefit of the Supreme Court's decision in *McDonald v. City of Chicago, Ill.* 130 S.Ct. 3020, 3059 -3060 (U.S., 2010), which was handed down a few weeks after the district court's decision and which stated that slavery and the measures designed to protect it like the citizenship discrimination in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), based on ancestry, were “irreconcilable” with the “principles of equality” in the Constitution. While simple common sense should tell us that invidious citizenship discrimination is irreconcilable with Constitutional equality, the *McDonald* decision removed any doubt. Because

defendant USA and the district court in Hassan agree that irreconcilability would trigger implicit repeal, implicit repeal should have been declared in Hassan v. USA and should be declared in this action. There is a very easy technique to determine irreconcilability which the district court in Hassan failed to apply. To determine irreconcilability, we simply assume that the natural born provision is a statute and determine whether it would violate the equal protection guarantee – because it discriminates on the basis of national origin, it will be subject to strict scrutiny and will quickly fail – no law which discriminates on the basis of race or national origin has survived in the Supreme Court in the last sixty years.

Third, the district court in Hassan did not address the argument based on the Citizenship Clause – apparently confusing the Citizenship Clause with the Equal Protection Clause of the Fourteenth Amendment – the Court should have known that the Equal Protection Clause of the Fourteenth Amendment applies only to the states and not to the federal government.

Fourth, the district court in Hassan v. USA did not address the seminal Citizenship Clause case of Afroyim and did not address the powerful Dredd Scott case. Plaintiff relied on Dredd Scott because it was the last Supreme Court case that dealt with invidious citizenship discrimination in the Constitution itself and because of the Supreme Court's current view that its decision in Dredd Scott was a great "self inflicted wound." Both these cases, as used by plaintiff, would have required a different result in Hassan v. USA and would require a declaration in plaintiff's favor here.

Fifth, the district court itself in Hassan v. USA, identified Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) as an example of implicit repeal/abrogation in the Constitutional context but had the court applied Fitzpatrick, it would have had to issue a declaration in plaintiff's favor. Based on

Fitzpatrick, and its progeny, a finding of abrogation/implicit repeal is even more warranted in this case for several reasons. First, in Fitzpatrick, the Supreme Court hinged its abrogation finding on the general purpose of the Fourteenth Amendment to limit the power of the states. Here, the intent to limit is more specific – the Fifth Amendment as interpreted, specifically limits the power of the states to discriminate and to discriminate on the basis of national origin – the very type of discrimination in the natural born provision. Similarly, the Fifth Amendment, as interpreted, limits the power of the federal government to discriminate and to discriminate on the basis of national origin. Second, national origin is subject to a higher level of judicial scrutiny (strict scrutiny) than the sex/gender discrimination in Fitzpatrick. Third, the Citizenship Clause is even more specific because it deals specifically with naturalized and natural born citizens and because it has been interpreted to “completely control the status of citizenship.” See Afroyim, 387 U.S. at 262. Fourth, the Citizenship Clause was specifically adopted to repeal invidious citizenship discrimination in the Constitution following the Dredd Scott decision. Fifth, unlike the Eleventh Amendment which does not mention discrimination, the natural born provision, on its face, invidiously discriminates against plaintiff because of national origin. Sixth, laws like the natural born provision, which discriminate on the basis of national origin, are presumed to be invalid under the logic of “strict scrutiny.”

On appeal, the Second Circuit invalidated the erroneous merit rulings by the district court in Hassan v. USA by erroneously finding an absence of jurisdiction. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (“Without jurisdiction the court cannot proceed at all in any cause.”). A more detailed treatment of the Hassan v. USA case and the issues and arguments therein can be found at www.abdulhassanforpresident.com/second_circuit. Despite the many errors in the Hassan case, we believe that case was very helpful in setting the foundation for addressing this issue of first impression. The instant case builds on that foundation and is a lot more compelling on the issue of jurisdiction as well as on the merits.

Defendant, towards the end of its “substantial issue” analysis, in referring to the natural born provision, states that, “Cases decided after the ratification of the Fourteenth Amendment have acknowledged this constitutional distinction among citizens.” (Opp. Memo. 6-7). What defendant neglects to tell this Court is that the most recent in this line of cases, and the seminal case on the Citizenship Clause is Afroyim, in which the Supreme Court stated without exception as to Presidential eligibility that, the Court stated in relevant part that, “(The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.” See Afroyim v. Rusk 387 U.S. 253, 262 (1967). Moreover, defendant’s misplaced reliance on dicta in these cases fails to account for the gigantic change in civil rights and constitutional jurisprudence in the last several decades. For example, the most recent of these cases cited by defendant is Knauer v. United States, 328 U.S. 654, 658 (1946). However, at the time of Knauer in 1946, Plessy v. Ferguson, 163 U.S. 537 (1896), which upheld racial segregation, was the leading equal protection case and still the law of the land at the time. In fact, it was only in 2010 that the Supreme Court explicitly stated in McDonald that the invidious citizenship discrimination in the constitution is “irreconcilable” with Constitutional equality. It should be noted however, that the distinction observed in Knauer and related cases is not inconsistent with plaintiff’s argument herein. It is obvious that the natural born provision on its face makes such a distinction. However, this case goes one step further by asking this Court to decide whether this distinction and discrimination are irreconcilable with and trumped by the Equal Protection Clause, and the Citizenship Clause of the Fourteenth Amendment. In fact, it is only in the last few decades that equal protection and civil rights jurisprudence has strengthened enough to permit the types of compelling arguments that plaintiff makes herein. Importantly, invidious discrimination was not always viewed as an absurd result under the Constitution and for this reason, citing cases from the days of segregation and slavery before that, on issues of discrimination and

civil rights is a mistake. Moreover, given that none of the cases cited by defendant involved the issue of presidential eligibility and because the arguments herein were never presented or addressed in those cases, the implicit repeal/abrogation issues herein were never before decided by the Supreme Court in those cases and any statement in those cases about the natural born provision is merely dicta. While presidential eligibility was also not at issue in Afroyim, the statement in Afroyim about equal rights for naturalized and natural born citizens without any exception for presidential eligibility is not dicta because it was necessary to justify the ultimate holding that the Fourteenth Amendment was intended to “completely control” the status of citizenship and that it created “a citizenship” – singular not plural. This view is further supported by the context of the Afroyim case. The Supreme Court specifically granted certiorari in Afroyim to determine whether to overrule its 1957 decision in Perez v. Brownell, 356 U.S. 44 (1957). See Afroyim v. Rusk, 387 U.S. 253, 256 (U.S.N.Y. 1967) (“These cases, as well as many commentators, have cast great doubt upon the soundness of Perez. Under these circumstances, we granted certiorari to reconsider it”). As such, Afroyim is rightly considered to be the seminal case on the Citizenship Clause and supersedes all prior cases on the subject, including the cases cited by defendant from the dark days of segregation.

No court or agency has ever classified plaintiff’s arguments as frivolous or insubstantial because they are powerful and compelling. So much so, that one got the clear sense that the district court and the Second Circuit in Hassan felt that the issue should be decided by the Supreme Court and not by them – especially given that these issues are socially and politically very sensitive. This view about the role of the Supreme Court was specifically expressed by the Chairperson of the FEC, when she echoed her fellow commissioners and stated:

Whether the Fourteenth Amendment
trumps the -- that [natural born] provision in the Constitution, is

something that I guess if I -- I envision that if it were to be decided by a court, it might be decided by the Supreme Court and ultimately not by lower courts.

This Court should swiftly reject defendant's arguments and certify this case as one warranting a three-judge court.

2. PLAINTIFF'S CLAIMS ARE JUSTICIABLE

Defendant cites Federal Election Com'n v. National Conservative Political Action Committee, 470 U.S. 480 (1985), ("NCPAC"), along with several other cases to argue that this Court lacks subject matter jurisdiction. Defendant almost universally misrepresents and misapplies the cases cited by it. However, because NCPAC is a Supreme Court case which like the instant case, deals with a declaratory judgment action and a three-judge court under 26 U.S.C. § 9011, and specifically with the issue of subject matter jurisdiction, it suffices to establish justiciability in the present context.

In NCPAC, the Supreme Court found in relevant part that the FEC had statutory and Article III standing to bring a declaratory judgment action like this one to determine the constitutionality of the Fund Act. The Supreme Court began its analysis with 26 USC § 9011(b) which specifically grants the FEC the same right as an individual voter like plaintiff to bring an action to construe or implement the Fund Act. The Supreme Court specifically stated that, "an individual voter could sue the FEC under 26 U.S.C. § 9011(b) to implement or construe the Act." This is precisely what plaintiff herein has done – an action that is especially warranted in light of the FEC's ruling that the public funding law for primaries, and by extension the Fund Act, excludes naturalized citizens. Nonetheless, defendant put forth the following incomplete quotation from NCPAC (Opp. Memo. 4):

The Supreme Court has explained that it is “highly dubious that Congress intended every one of the millions of eligible voters in this country to have the power to invoke expedited review by a three-judge district court with direct appeal to this Court” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 487-488 (1985).

However, defendants omitted the remainder of the quotation which reads, “in actions brought by them against other private parties.” This omission by defendant is extremely material because the instant case is not a case by plaintiff against another private party and defendant’s attempt to use the above inaccurate quotation to create the impression that the Supreme Court disapproved of suits by eligible voters against the FEC is misleading. In fact, the Supreme Court in NCPAC specifically approved of suits by individuals like plaintiff against the FEC, especially where as here, the FEC has issued an interpretation that plaintiff cannot receive public financing as to his presidential campaign because of his status as a naturalized citizen. Defendant here does not dispute that it still interprets the Fund Act as excluding naturalized citizens like plaintiff. The analysis is made more compelling by the fact that plaintiff is not just an eligible voter - he is also a Presidential candidate whom the FEC has ruled must comply with the obligations of the campaign finance laws like any other Presidential candidate.

In terms of the Article III requirements, the Supreme Court in NCPAC found that the FEC satisfied them and that the requisite “injury-in-fact” existed and that the suit was ripe even though the FEC had not yet even taken any action directed at NCPAC – like an eligible voter, the FEC must also satisfy the statutory and Article III requirements. Here, plaintiff’s injury-in-fact is much more profound here than the injury-in-fact that the Supreme Court in NCPAC found was sufficient under Article III – standing and ripeness are much more present here than in NCPAC.

Jurisdiction, including standing and ripeness also exist in this case under the Supreme Court's decision in FEC v. Akins et al, 524 U.S. 11, 22 (1998). In Akins, the FEC argued as it does here, that injury-in-fact, along with causation and redressibility did not exist. The FEC's arguments were rejected by the Supreme Court which found that, 'The "injury in fact" that respondents have suffered consists of their inability to obtain information.' See FEC v. Akins et al, 524 U.S. 11, 22 (1998). Here, plaintiff's "injury in fact" includes his inability and the denial of the right to obtain tens of millions in public funding, if nominated, because of the FEC's interpretation that plaintiff cannot receive public funding as a naturalized citizen. Because of this, and the various other forms of injury outlined below, plaintiff's case here is a lot more compelling than that of the plaintiffs in Akins which the Supreme Court found was sufficient to satisfy Article III requirements. Furthermore, unlike the plaintiffs in Akins, plaintiff is also a Presidential candidate whom the FEC has opined must satisfy the obligations of the campaign finance laws, in the same manner as the other Presidential candidates who are natural born.

When Congress grants a plaintiff standing to sue under a statute like in the context of the present case, it abrogates the requirement of prudential standing although it cannot abrogate the requirements of Article III standing. See Akins et al, 524 U.S. at 19-20. Bennett v. Spear, 520 U.S. 154, 165 (1997). However, the decision of Congress in granting statutory standing should be given great weight. In granting an eligible voter like plaintiff the right to sue under 26 USC § 9011(b) to construe or implement the Fund Act, Congress is making an informed judgment that uncertainty over the Fund Act creates "injury in fact" and that such injury should be remedied by a declaratory judgment action like this one sooner rather than later in the Presidential campaign process. The courts recognize that Congress created these campaign finance laws to remedy harms in the area of elections and campaign finance and is uniquely positioned to judge what constitutes an injury, when

and how such injury can be remedied by judicial action, and by whom. Not surprisingly, in almost every case like this one where statutory standing is established, Article III standing is also present as it easily is in this case.

Moreover, in enacting the “testing the waters” provisions⁴ of the federal campaign law, Congress through statute, and the FEC, through regulation, wanted candidates to “test the waters” and identify and overcome obstacles at an early stage before making the significant, commitment, effort and expense of running for President. Resolving such obstacles early, especially major obstacles like the discrimination and denial challenged by plaintiff herein, is not only in the interest of plaintiff, it is also in the interest of the voting public as well as the FEC. Whether a candidate can receive tens of millions in public funding is a significant factor that would influence whether a voter would vote for plaintiff as the candidate of the Democratic Party and the answer to the question should come before the voters vote so that their vote is not wasted or diminished – it is therefore not surprising that Congress provided an expedited procedure with direct appeal to the Supreme Court – Presidential elections cover the whole country and the Supreme Court is the only national court. Likewise, an early and expedited answer to this question will also help the FEC plan and administer the public funding programs – especially since the FEC informed plaintiff in writing that “the Commission cannot make any determination as to whether you can, as a naturalized citizen, serve as President⁵,” – even though such a determination was key to the FEC’s decision to deny plaintiff the right to receive public funding and even though plaintiff has a legal right to obtain the FEC’s opinion on his entitlement to public funding. This type of confusion and inconsistency is itself

⁴ See 11 CFR § 100.72 and 11 CFR § 100.131. See also the Federal Election Commission bulletin (http://www.fec.gov/pages/brochures/testing_waters.pdf), summarizing the relevant FECA provisions. See also Federal Election Campaign Act (“FECA”), 2 USC § 431 et Seq also contained at <http://www.fec.gov/law/feca/feca.pdf>.

⁵ http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

sufficient to establish “injury in fact” warranting an action like this one to construe the Fund Act and clear the confusion.

The presence of statutory and Article III standing and ripeness in this case can be further demonstrated based on Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 211-212 (1995). In the area of standing jurisprudence it is important to pick the right case. Standing is very fact and context specific and the stage of the proceedings is important as well. One can quickly observe that a lot of the leading cases on standing are environmental cases which are not analogous to equal protection cases, and because they generally involve associational standing – the plaintiffs in those cases usually have a more difficult burden than in cases involving individual standing where the harm is direct – like this one. Because this is an equal protection case based on a discriminatory classification – national origin, Adarand is a more relevant precedent than any case cited by defendant. In Adarand, 515 U.S. at 211-212, the U.S. Supreme Court stated in relevant part as follows (internal cites omitted):

We note that, contrary to respondents’ suggestion, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a “discriminatory classification prevent[s] the plaintiff from competing on an equal footing.” The aggrieved party “need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”

Therefore, contrary to defendant’s position herein, to establish “injury in fact” plaintiff here does not have to show he would become the Presidential nominee of a major party and otherwise qualify for public financing. Plaintiff is only required to show that the discrimination against naturalized citizens in the Fund Act has or will place him on an unequal footing with natural born candidates in competing for the Presidency. Plaintiff can easily make this showing in several ways. First, plaintiff has been injured because he is being forced to comply with the obligations of the

federal campaign finance laws while being denied the benefits of these laws such as the right to receive Presidential matching funds – this denial is solely because plaintiff is a naturalized citizen. In a September 2, 2011 decision⁶, the defendant in this case ruled that plaintiff as a person running for President is covered by the federal campaign finance laws like every other declared Presidential candidate and must comply with the obligations of those laws, even though he is a naturalized citizen. Under the campaign finance laws, the act of making a declaration of candidacy for the Presidency signals the start of the presidential campaign in the eyes of the law and triggers a series of significant obligations⁷, as the FEC confirmed in its ruling about plaintiff's Presidential campaign. Here, plaintiff has not only declared his candidacy, he has actively campaigned, and has been promoting his candidacy through nationwide advertising. (See Complaint, ¶ 14, 15, 17, 22). However, because plaintiff is a naturalized citizen, he is being denied the right to receive public funding. Under penalty of law, plaintiff has been expending effort and money and has adjusted to satisfy the many other restrictions of the campaign finance laws. (See Complaint, ¶ 15). While paying the same types of costs of compliance as the other Presidential candidates, as forced upon him by the law and the FEC's ruling, plaintiff is being given less rights in return solely because he is a naturalized and not a natural born citizen – denial of the right to receive public funding. The FEC has taken the inconsistent position that as to the obligations imposed by the campaign finance laws, the national origin of the candidate does not matter but as to the benefits, national origin does matter. This inconsistency by itself is sufficient "injury in fact" in addition to the other types outlined herein.

⁶ http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

⁷ See 11 CFR § 100.72 and 11 CFR § 100.131. See also the Federal Election Commission bulletin (http://www.fec.gov/pages/brochures/testing_waters.pdf), summarizing the relevant FECA provisions. See also Federal Election Campaign Act ("FECA"), 2 USC § 431 et Seq also contained at <http://www.fec.gov/law/feca/feca.pdf>.

Second, while “injury in fact” is more obvious where the law imposes costs on plaintiff and where plaintiff has no choice in the matter, “injury in fact” is also compelling present in connection with plaintiff’s other expenditures - plaintiff has been spending money on his presidential website as well as separate national advertising as part of his presidential campaign. (See Complaint, ¶ 14, 15, 17, 22). While making these expenditures as part of his presidential campaign, plaintiff is being placed on an unequal footing with candidates who are natural born citizens because the Fund Act denies plaintiff the right to receive public funding because of his national origin.

Third, and very significantly, denial of funds significantly hurts plaintiff’s electoral chances. Obviously, having a candidate who is ineligible for tens of millions of dollars in public funding will seriously hurt the political party and the party’s members and because of this, voters will not logically vote or are significantly less likely to vote to nominate plaintiff as the party’s Presidential candidate. Being elected President is already a difficult task and to compete for nomination and the Presidency with a major handicap such as the denial of the right to receive public funding, places plaintiff on a hugely unequal footing solely with natural born candidates because of the national origin discrimination in the Fund Act. This is even more harmful in light of the fact that no candidate outside the two major political parties has even been elected President and the importance of money in Presidential campaigns – as the old saying goes, “money is the mother’s milk of politics.”

Fourth, the stigma of distrust has and will continue to hurt plaintiff’s campaign. The discrimination against naturalized citizens in the Fund Act has its origins in the natural born provision of the Constitution (Article II, Section 1, Clause 5) and the natural born provision was based on the legally impermissible assumption that foreign-born citizens bear less allegiance to the

country and are less loyal than natural born citizens. In this regard, the Congressional Research Service has stated in relevant part that⁸:

The use of the [natural born] phrase in the Constitution may have derived from a suggestion in a letter from John Jay to George Washington during the Convention expressing concern about having the office of Commander-in-Chief devolve on, any but a natural born Citizen, as there were fears at that time about wealthy European aristocracy or royalty coming to America, gaining citizenship, and then buying and scheming their way to the presidency without long-standing loyalty to the nation.

The job of President, more than any other, requires trust and loyalty. As such, for the Fund Act to exclude plaintiff, in essence, on the assumption that he bears less allegiance, trust and loyalty to this country is a stigma that is extremely harmful. This stigma took on a more direct and personal effect when the FEC specifically denied plaintiff the right to receive primary matching funds, and by extension, the right to receive funding under the Fund Act (Complaint, 23-25), solely because plaintiff is a foreign-born citizen. As an example, plaintiff recently did a radio interview on a popular NYC radio station⁹ in which the host focused on the distrust rationale on which the natural born provision is based and in so doing, echoed the sentiments of many who use the perceived legitimacy of the laws and the FEC to promote unjustified stigma and hatred. See also National Journal Article¹⁰. As the Supreme Court recognized in Brown v. Board of Education, 347 U.S. 483 (1954), among many other cases, separate or unequal treatment because of immutable characteristics such as race or national origin, is inherently harmful and can be remedied in the courts.

⁸ http://www.legistorm.com/score_crs/show/id/82388.html

⁹ <http://www.youtube.com/watch?v=sQmzIG6PvWw>

¹⁰ <http://www.nationaljournal.com/hotline/campaign-law-watch/fec-no-u-s-birth-certificate-no-presidential-matching-funds-20110903>

Defendant also mentions the case of Hassan v. USA, on the issue of standing. (Opp. Memo. 8). In Hassan v. USA, the district court correctly applied binding precedent in finding that plaintiff had standing to challenge the natural born provision and that the claims were ripe for review. It was so obvious that the petitioner suffered the requisite “injury in fact,” the government on appeal did not challenge the district court’s ruling that petitioner suffered the requisite “injury in fact.” As such, neither party before the Second Circuit addressed “injury in fact” in their briefs and the Second Circuit disagreed with the district court on standing solely based on the alleged absence of “injury in fact” – the one issue the parties did not contest and did not brief. The numerous errors in the Second Circuit’s standing decision were due to the fact that unlike the district court, the Second Circuit did not have the benefit of briefing¹¹. Instead of denying the unopposed petition for rehearing with a one-word denial as it usual does, likely realizing the merit of the standing/ripeness arguments the Second Circuit felt the need to explain that, “Appellant had ample opportunity to brief all relevant issues, including the issue of standing, before the district court and this Court and an opportunity to further advance his positions at oral argument.” Notably, the Second Circuit did not take issue with the compelling merits of the standing arguments - instead, it said the arguments should have been raised earlier. Unlike the Second Circuit, this Court is being presented with the relevant arguments. Moreover, petitioner has been injured even more since the Second Circuit ruling including when the FEC issued its ruling that petitioner cannot obtain public funding because of his naturalized citizen status. In any event, under the rules of the Second Circuit, its summary order in Hassan has no precedential value especially because, “abbreviated explanations in summary orders might result in distortions of case law.” (See 2d Cir. LCR 32).

¹¹ See http://www.abdulhassanforpresident.com/second_circuit/rehearing_petition.shtml.

Defendant seems to argue that injury-in-fact does not exist on the sole claim that, “Because he does not allege that he intends to be a candidate of a political party, he has alleged no imminent or concrete injury-in-fact that is caused by the Fund Act or that could be redressed by a favorable ruling.” (Opp. Memo. 7). Defendant is wrong on a number of grounds. First, in drafting his complaint, plaintiff is not required to allege each fact that would be provided on an application for funds from the Fund Act or on a motion for summary judgment. Second, defendant’s argument is more equivalent to an argument that plaintiff failed to state a claim – a determination that cannot be made at this stage and on this motion and also because the claim is well stated. However, in paragraph 26 of the complaint, plaintiff clearly states in relevant part that:

Because PECFA denies funds to Plaintiff, Plaintiffs chances of becoming the nominee of a major political party is destroyed and the same can be said of Plaintiff’s chances of winning the Presidency given that only candidates of the major political parties have won the Presidency throughout the history of the Country.

Plaintiff also states in paragraph 14 of the complaint that he is running in the 2012 presidential cycle and if not successful will continue running uninterrupted until the 2016 presidential elections. It is therefore clear, based on the complaint that plaintiff is running to be the “nominee of a major political party.” In fact, plaintiff is running for the nomination of the Democratic Party in the 2012 election and if not successful, in the 2016 elections. It is important to remember the applicable standards at the pleadings stage. In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court stated in relevant part that:

“[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’

Furthermore, when standing and jurisdiction are challenged on the basis of the pleadings, the Court must, “accept as true all material allegations of the complaint, and ... construe the complaint

in favor of the complaining party,” Warth v. Seldin, 422 U.S. 490, 501 (1975). It should be pointed out however, that defendant seems to misunderstand the type of injury required – likely because it relied on cases that did not involve a discriminatory classification. As pointed out above, plaintiff has been forced to compete on an unequal footing because of the discrimination in the Fund Act against naturalized citizens – he has in essence been forced to compete without the right to receive tens of millions of dollars in public funding - and as such has been clearly injured in several distinct ways as laid out above.

With injury-in-fact established, the causation and redressibility arguments can be quickly disposed of in this context. In essence, the harm is that because of the discrimination in the Fund Act plaintiff is forced to compete without the right to receive public funding, so causation is easily established. Likewise, if the discrimination in the Fund Act is struck down, plaintiff will not be denied the right to receive public funding because of his naturalized status and as such, it is obvious that a favorable ruling will redress the harm alleged. By way of clarification, plaintiff is only required to show that the injury caused by the Fund Act will be redressed by a favorable ruling – he is not required to show that a favorable ruling would remedy some other harm to plaintiff such as bigotry against Muslims.

A few other principles of standing jurisprudence are worth reiterating. First, plaintiff is not required to engage in futile conduct in order to establish standing and ripeness. See National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953 (D.C. Cir. 1980). In this regard, even if plaintiff satisfies every real or imagined requirement for public funding that defendant puts forth, plaintiff still cannot receive public funding because plaintiff can never change his national origin – the fact he was born in another country. Second, standing

jurisprudence does not require plaintiff to act unreasonably.. As such, even though plaintiff is enduring the costs of seeking the Democratic Party nomination, it would be perfectly reasonable and logical if he first seeks a declaration invalidating the discrimination against him in the Fund Act, before seeking the nomination. In addition, the already strong standing argument is made even stronger by the fact that courts have traditionally applied a “broad and accommodating concept of standing in civil rights cases.” La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469 (9th Cir. 1973). One of the reasons for this relaxed standard is the fact that invidious discrimination not only injures the petitioner but the whole society as well. As Justice O'Connor reiterated in Adarand v. Peña, 515 U.S. 200, 213 (1995), “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Where as here, our government discriminates against plaintiff and more than fifteen (15) million of its other naturalized citizens because of their national origin/ancestry – a strict scrutiny characteristic, this Court has no higher duty than to inform petitioner and the millions of other victims of such invidious discrimination across the nation whether they are required to endure such discrimination any longer and why.

3. SERVICE WAS PROPERLY EFFECTED BY PLAINTFF BUT NOT BY DEFENDANT

Defendant claims that service was not properly effected because it claims the D.C. U.S. Attorney and the U.S. Attorney General were not served. (Opp. Memo. 1, n1). Plaintiff has 120 days under the FRCP to effect service and he has done so. The D.C. U.S. Attorney and the US Attorney General were served in-person on January 3, 2012 and Defendant was served in-person on December 21, 2011 and by certified mail on December 29, 2011 – defendant obtained and posted the complaint and motion for three-judge court on its website soon after it was filed. The proofs of

service are being sent along with this reply memorandum to the clerk's office for filing. While complaining about improper service, defendant failed to properly serve its opposition papers by conventional means – defendant's certificate of service states that it served plaintiff via ECF but plaintiff is not registered for ECF in this Court and in this case.

III. CONCLUSION

Based on the foregoing, plaintiff kindly and respectfully request that this Honorable Court grant his motion for a Three-Judge Court and expedite this matter on the calendar, consistent with statute, together with such other, further and different relief, that the Court deems just and proper.

Dated: Queens Village, New York
January 5, 2012

Respectfully submitted,



Abdul Karim Hassan, Esq.

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**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

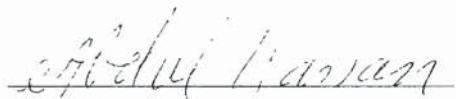
Abdul Karim Hassan, Plaintiff, -v- Federal Election Commission, Defendant.	Civil Action #: 11-cv-2189 (EGS) <u>PROOF OF SERVICE</u> (Reply Memorandum)
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ABDUL KARIM HASSAN, an attorney and a member of the Bar of the State of New York, states the following under penalty of perjury:

1. I am the Petitioner, pro se, in the above-captioned action and over 18 years old;
2. That on the 5th day of January 2012, I served plaintiff's reply memorandum of law in further support of his motion for a three-judge court, in the above-entitled action, by enclosing a true copy thereof in an envelope, properly addressed, sealed and paid for, and deposited into the exclusive custody and control of the U.S. Postal Service within the state of New York, for delivery by first class mail to: Federal Election Commission, Office of General Counsel, 999 E Street, N.W., Washington, D.C. 20463.

Dated: Queens Village, New York

January 5, 2012



Abdul K. Hassan

215-28 Hillside Avenue, Queens Village, NY 11427