

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

ABDUL KARIM HASSAN,

Plaintiff-Appellant,

v.

STATE OF IOWA, MATT SCHULTZ, SECRETARY OF STATE,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Southern District of Iowa (Des Moines)*

**REPLY BRIEF FOR PLAINTIFF-APPELLANT
ABDUL KARIM HASSAN**

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES -----	ii
I. PRELIMINARY STATEMENT -----	1
II. ARGUMENT-----	1
1. DEFENDANTS DO NOT GENUINELY DISPUTE THE EXISTENCE OF AN IRRECONCILABLE CONFLICT BETWEEN THE FOURTEENTH/FIFTH AMENDMENTS AND NATURAL BORN CLAUSE-----	1
2. THE FAILURE OF THE DISTRICT COURT AND DEFENDANTS TO OPPOSE OR EVEN ADDRESS THE <u>DRED SCOTT</u> ARGUMENTS MANDATES A REVERSAL OF THE DISTRICT COURT-----	5
3. DEFENDANTS’ RESPONSE TO FITZPATRICK V. BITZER FURTHER DEMONSTRATES THAT PLAINTIFF IS CORRECT ON THE MERITS---	7
4. DEFENDANTS FAIL TO UNDERMINE PLAINTIFF’S ARGUMENTS BASED ON THE ABSURDITY DOCTRINE-----	10
5. DEFENDANTS’ DISCRIMINATION IS INVALID EVEN IF THE NATURAL BORN PROVISION IS VALID-----	14
6. DEFENDANTS’ OTHER ARGUMENTS ARE WITHOUT MERIT-----	17
7. DEFENDANTS MISPERCIEVE THE EFFECT OF REJECTED RATIONALES-----	23
8. DEFENDANTS’ USE OF MINOR V. HAPPERSTAT HIGHLIGHTS A MAJOR WEAKNESS IN THEIR CASE-----	24
9. THE EIGHT CIRCUIT SHOULD AVOID THE JUDICIAL MISTAKES OF THE PAST-----	25
III. CONCLUSION-----	27

TABLE OF AUTHORITIES
CASES

<u>Afroyim v. Rusk,</u> 387 U.S. 253 (1967) -----	17, 21
<u>Bolling v. Sharpe,</u> 347 U. S. 497 (1954) -----	12
<u>Brown v. Board of Education,</u> 347 U.S. 483, 489 (1954) -----	26
<u>Dred Scott v. Sandford,</u> 60 U.S. 393 (1857) -----	5, 6, 11, 17, 19, 20, 24, 25, 26, 27
<u>Fitzpatrick v. Bitzer,</u> 427 U.S. 445 (1976) -----	4, 7, 8, 9, 10, 17, 19
<u>Gill v. Office of Personnel Management,</u> 2012 WL 1948017, 4 (1st Cir. 2012)-----	14
<u>Hirabayashi v. United States,</u> 320 U. S. 81, 100 (1943)-----	26, 27
<u>Korematsu v. United States,</u> 323 U. S. 214, 216 (1944)-----	26
<u>Markham v. Robinson,</u> No. C 08-03836 (WHA – Northern District of California)-----	16
<u>Minor v. Happerstat,</u> 88 U.S. 162, 171 (1874)-----	24
<u>Oyama v. California,</u> 332 U. S. 633, 644-646 (1948)-----	26
<u>Plessy v. Ferguson,</u> 163 U.S. 537 (1896) -----	22, 24, 26, 27

<u>Reed v. Reed,</u> 404 U.S. 71 (1971)-----	20, 25
---	--------

<u>Schneider v. Rusk,</u> 377 U.S. 163, 168 (1964)-----	24
--	----

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. II, Sec. 1, Cl. 5 (“Natural Born Provision”) -----	passim
U.S. Const. Amend. 5 -----	passim
U.S. Const. Amend. 11-----	passim
U.S. Const. Amend. 12-----	16
U.S. Const. Amend. 14-----	passim
U.S. Const. Amend. 19 -----	25

STATUTES

28 U.S.C § 1254-----	7
2 U.S.C § 15 -----	16

I. PRELIMINARY STATEMENT

Plaintiff-appellant Abdul K. Hassan, respectfully submits the instant reply brief in response to the opposing brief submitted by defendants-appellees, and in further support of his appeal. The purpose of a reply is to address arguments raised in the opposing brief. Most of the arguments raised in defendants' opposing brief are based on the district court's decision and have already been addressed in plaintiff's opening brief. As such, rather than repeat the arguments in the opening brief, plaintiff will focus on those points that can benefit from additional attention and refers the Court to plaintiff's opening brief for a more detailed treatment of the issues and arguments. There is one correction that is in order – in plaintiff's opening brief, the language on page one which reads, "Judgment entered in the United States District Court, District of New Hampshire," should read, "Judgment entered in the United States District Court, Southern District of Iowa."

Plaintiff kindly and respectfully requests that this Honorable Court reverse the district court and grant the relief that plaintiff seeks in this case as laid out in the complaint.

II. ARGUMENT

1. DEFENDANTS DO NOT GENUINELY DISPUTE THE EXISTENCE OF AN IRRECONCILABLE CONFLICT BETWEEN THE FOURTEENTH/FIFTH AMENDMENTS AND NATURAL BORN CLAUSE

At the outset, while defendants in conclusory fashion argue that implicit repeal has not occurred in this case, defendants admit that irreconcilable conflict alone, is a condition which by itself is sufficient to trigger implicit repeal. (See Def. Br. 22, “Neither condition necessary to make such a determination (irreconcilable conflict or a clear intended substitution) entail here.”). (See also Def. Br. 13). The irreconcilable conflict between the equal protection clause and the natural born clause can be established using defendants’ own words. In this regard, defendants state in relevant part that (Def. Br. 20):

The Equal Protection clause demands that individuals be treated equally by the federal and state governments, regardless of national origin.

By contrast, the natural born provision invoked by defendants, demands that individuals be treated unequally by the federal and state governments because of national origin – the total opposite of what the Fourteenth and Fifth Amendments demand. In fact, defendants do not dispute that their discrimination against Hassan, because of his national origin, would violate the Fourteenth Amendment, but they claim that they can nonetheless discriminate because the natural born provision allows or requires such national origin discrimination. This is a textbook example of irreconcilable conflict which triggers implicit repeal and the analysis can end at this point with a reversal of the district court.

But there is more. In addressing the irreconcilable conflict between the equal protection clause of the Fourteenth/Fifth Amendments and the natural born clause, defendants admit that, “the *concepts* espoused in the two clauses appear to be at odds with one another.” (Def. Br. 22). However, defendants make the strange argument that this irreconcilable conflict is not really an actual or irreconcilable conflict because “The Constitution is not the Government.” (Def. Br. 21). Defendants explain further that (Def. Br. 21):

Thus the Equal Protection Clause, even when applied through the Fifth Amendment, does not apply to the Constitution itself.

Obviously realizing that this is a quibbling point, defendants preemptively state, “this is not a quibbling point.” (Def. Br. 21). This point is not only quibbling - it is a very strange one – made by defendants likely because no legitimate argument exists to erase the existence of the irreconcilable conflict. It is very easy to correct defendants on this point because nowhere is plaintiff arguing that the equal protection clause applies to the Constitution – assuming we can even understand what this means. What plaintiff is arguing is that the equal protection clause applies to state and federal governments – a point that defendants themselves make. (See Def. Br. 21 – “the Clause is directed at *the government*.”). Simply put, the Fourteenth and Fifth Amendments instruct the government not to discriminate on the basis of national origin, while the natural born clause instructs the government to discriminate on the basis of national origin. The government

cannot follow both of these irreconcilably conflicting instructions and the natural born clause must give way, because, among other reasons, it came earlier in time. Because defendants' attempt to avoid an irreconcilable conflict is premised on the erroneous belief that plaintiff was relying on the equal protection clause applying to the Constitution, once this error is corrected, as it has been, the irreconcilable conflict stands and implicit repeal is triggered.

Defendants' "quibbling point" that the "Constitution is not the government" is also destroyed by defendants very own arguments. In addressing the case of Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), defendants argue that Fitzpatrick (Def. Br. 10), "involved a direct conflict between two Constitutional provisions," - the Fourteenth Amendment and the Eleventh Amendment. If as defendants argue that the Fourteenth Amendment in this case cannot be in conflict with another part of the Constitution because the Fourteenth Amendment "does not apply to the Constitution itself," then there could not have been a conflict between the Fourteenth and Eleventh Amendments in Fitzpatrick – a conflict defendants admit was present. It is difficult, or even impossible, for anyone with a good understanding of equal protection jurisprudence to argue that an irreconcilable conflict does not exist in this case between the Fourteenth/Fifth Amendments and the natural born clause. As such, this Court should reverse the district court and make a finding of implicit repeal.

2. THE FAILURE OF THE DISTRICT COURT AND DEFENDANTS TO OPPOSE OR EVEN ADDRESS THE DRED SCOTT ARGUMENTS MANDATES A REVERSAL OF THE DISTRICT COURT

Despite being over 150 years old, Dredd Scott v. Sandford, 60 U.S. 393 (1857), is the most recent Supreme Court case to deal with invidious citizenship discrimination that is contained in the Constitution itself – the very thing we face in this case where plaintiff challenges invidious citizenship discrimination that is contained in the Constitution’s natural born provision. Plaintiff relies on Dredd Scott not because of the holding in this 1857 case but because the Supreme Court today views its decision in Dredd Scott as a great self-inflicted wound. (See Pl. Br. 23). Importantly, Dred Scott is central because it dealt with citizenship discrimination in the Constitution itself – if the natural born clause was a statute, and not in the Constitution itself, we would all agree that it would violate the Fourteenth and Fifth Amendments and we would have no need for this case. Because Dred Scott is the most recent and relevant precedent on the issue of citizenship discrimination in the Constitution itself, plaintiff relied on Dred Scott probably more than any other case. In this regard, plaintiff argued that the repudiation of the Dred Scott citizenship ruling, standing alone, is sufficient to warrant a ruling in his favor. In addition, plaintiff argues that the conclusion that the Dred Scott Court was very wrong in upholding citizenship discrimination in the Constitution, demonstrates that the implicit repeal and absurdity doctrine analysis

employed by the district court and defendants is very wrong. The parties and the Court have an obligation to address relevant precedent and dispositive arguments. As such, when the district court and the defendants fail to address the most recent and relevant Supreme Court precedent on the issue, a red flag goes up and it should grab this Court's attention – such a failure amounts to a concession that plaintiff is right. It seems clear that defendants and the district court ignored the Dred Scott arguments because under the logic and reasoning of defendants and the district court in this case, the Dred Scott ruling would be viewed as correct even though the Supreme Court and the current judiciary now views the Dred Scott citizenship ruling as erroneous. (See Pl. Br. 23). However, a court and a party cannot ignore precedent and arguments simply because they contradict their desired outcome. If the Court is unable to distinguish Dred Scott and the arguments based on it, the Court would be required to change its ruling. It is now the duty of the Court of Appeals to change the ruling of the district court and reject the logic and reasoning in Dred Scott. Action speaks louder than words – we cannot condemn Justice Taney and when faced with similar citizenship discrimination in the Constitution, do the very thing he did and affirm the invidious discrimination.

The avoidance of the discrimination label and of the Dred Scott case can also be construed as a message from the district court and defendants that the legal, social and political issues implicated in this case are too extraordinary and

sensitive for them to handle and that they should be addressed by the Court of Appeals or the Supreme Court. In fact, in discussing the issues presented herein, the chairperson of the Federal Election Commission stated as follows¹:

Whether the Fourteenth Amendment trumps the -- that 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.

In the event this Court believes that the issues herein should be decided by the Supreme Court, it should certify the questions presented herein to the Supreme Court. Pursuant to 28 USC § 1254, “certification at any time by a court of appeals of any question of law,” is a way of obtaining guidance from the U.S. Supreme.

3. DEFENDANTS’ RESPONSE TO FITZPATRICK V. BITZER FURTHER DEMONSTRATES THAT PLAINTIFF IS CORRECT ON THE MERITS

In their opposition, defendants concede that, “It could be argued that the case of Fitzpatrick v. Bitzer presents an example of implicit abrogation.” (Def. Br. 9). Defendants further concede that Fitzpatrick, (Def. Br. 10), “involved a direct conflict between two Constitutional provisions,” – irreconcilable conflict triggers implicit repeal. If as defendants concede, the Fourteenth and Eleventh Amendments were in irreconcilable conflict in Fitzpatrick, there is an even bigger irreconcilable conflict between the Fourteenth Amendment and the natural born

¹ <http://www.fec.gov/audio/2011/2011090102.mp3>.

clause in this case. In this regard, it should first be noted that under the Fourteenth Amendment, national origin discrimination that is at issue in this case, like race discrimination, is subject to a higher level of scrutiny (strict scrutiny) than the gender discrimination in Fitzpatrick. As such, the national origin discrimination in this case is more violative of the Fourteenth Amendment than the gender discrimination in Fitzpatrick, and therefore creates a greater conflict between the Fourteenth Amendment and the natural born clause than the conflict between the Fourteenth Amendment and the Eleventh Amendment. Second, unlike Fitzpatrick where there were alternative means of effecting the Fourteenth Amendment's protections against gender discrimination in the absence of implicit abrogation of the Eleventh Amendment, there are no alternative means of granting plaintiff the Fourteenth Amendment's protections against national origin discrimination in his presidential run unless the natural born clause is implicitly abrogated/repealed. Third, while the Eleventh Amendment has a legitimate purpose of protecting state finances, the natural born clause is based on an "impermissible rationale" that foreign born citizens cannot be trusted solely because their mothers gave birth to them outside the United States – "an assumption that is impossible for us to make." (Pl. Br. 48-49).

Defendants are caught in a conundrum. On the one hand, they are forced to concede that Fitzpatrick is an example of implicit abrogation/repeal and on the

other hand, Fitzpatrick does not fit into the implicit repeal standard put forth by defendants – compelling proof that the analysis of defendants and the district court is wrong. For example, defendants argue that a more general law will not implicitly repeal a more specific law. However, this argument is trampled by defendants’ concession that the more general Fourteenth Amendment implicitly abrogated the more specific Eleventh Amendment. Defendants’ admission of the irreconcilable conflict in Fitzpatrick also confirms that such a conflict overcomes the presumption against implicit repeal, even if there is a presumption against implicit repeal of a law that invidiously discriminates. Defendant next argues that implicit repeal will not occur unless it is necessary for the later law to have any meaning at all. Defendants try to fit Fitzpatrick into this framework and states that, “A “carving out” of state powers *necessarily* followed (if section 5 of the Fourteenth Amendment was to have any meaning),” (Def. Br. 10). The problem for defendants is that the Supreme Court found implicit repeal in Fitzpatrick, as defendants concede, even though the Fourteenth Amendment would have a lot of meaning and effectiveness even without an implicit abrogation/repeal finding. This is because Congress can still enforce the Fourteenth Amendment even without money suits by citizens against states – the subject of the Eleventh Amendment – the Eleventh Amendment does not prohibit suits by the federal government through the Justice Department or the EEOC against the states and it does not prohibit suits by citizens

against the states for injunctive relief and for monetary damages incidental to such injunctive relief. In fact, for most of the Fourteenth Amendment's existence, Congress enforced it without the use of money suits by citizens against the states. By contrast, the alternatives that were available in Fitzpatrick are not available here – in this case, if the natural born clause is given effect, there is no alternative use of the Fourteenth Amendment that could combat the national origin discrimination in the natural born clause and permit plaintiff to become President free of national origin discrimination – something the Fifth and Fourteenth Amendments would clearly and undoubtedly allow in the absence of the natural born clause.

Defendants also point out that while the Fourteenth Amendment abrogates the Eleventh Amendment, the Commerce Clause does not abrogate the Eleventh Amendment. (Def. Br. 10). This is because the Fourteenth Amendment came after the Eleventh but the Commerce Clause did not. This is also because the implicit repeal analysis, as plaintiff argues, changes when the subject is invidious discrimination – it is not a coincidence that as far as is known, all cases in which the Fourteenth Amendment abrogated the eleventh, the subject was discrimination. In the last sixty years, the Supreme Court has always adopted an interpretation of the Constitution that resulted in the invalidation or eradication of discrimination based on suspect classifications such as race or national origin.

4. DEFENDANTS FAIL TO UNDERMINE PLAINTIFF'S ARGUMENTS BASED ON THE ABSURDITY DOCTRINE

Defendants argue that while the invidious discrimination in the natural born clause may be absurd as a matter of fact, it is not absurd as a matter of law because the drafters of the Constitution intended such absurdity. (Def. Br. 24-26). In making this argument, defendants are joining hands with Justice Taney in Dred Scott v. Sandford, 60 U.S. 393, 426 (1857), who stated in relevant part as follows:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

Like Justice Taney in the above excerpt, defendants and the district court are taking the extremely unfortunate and erroneous view that we are bound by original intent on issues of invidious discrimination and that the only way to escape the bondage of the last remaining form of invidious discrimination in our Constitution is through formal amendment. In other words, defendants argue that because the drafters of the constitution did not view invidious national origin discrimination as absurd we cannot view such invidious discrimination as absurd using the legal standards and beliefs of today. Fortunately, our society and judiciary have soundly rejected the “original intent” reasoning of Justice Taney in Dred Scott and of

defendants and the district court in this case. (Pl. Br. 23). For example, the drafters of the Constitution did not intend for the Fifth Amendment to protect against discrimination based on national origin and race especially given that slavery was enshrined in the Constitution. Today, however, the Supreme Court has concluded that race and national origin discrimination are so absurd and irrational that such discrimination would be subject to strict judicial scrutiny. (Pl. Br. 13-15).

Similarly, in Bolling v. Sharpe, 347 U.S. 497, 500 (1954), the Supreme Court ruled that it would be “unthinkable” or absurd for the Constitution to allow the federal government to discriminate and interpreted the Fifth Amendment as prohibiting such discrimination even though, as defendants would argue, the Founding Fathers never viewed such discrimination as absurd and even though the Fifth Amendment was never intended to prohibit such discrimination. As Justice Marshall once famously declared, if he were to adhere to original intent, he would still be sitting at the back of the bus. Many centuries ago, it was commonly believed that the earth was flat. By today’s standards however, it would be absurd to believe the earth is flat. “Absurdity” is a judgment call in the context of the current time, by people in the current time.

Defendants also argue that the alternative interpretation put forth by plaintiff is a rehashing of the implicit repeal arguments. Defendants are very wrong. We can quickly dispose of this argument by focusing on the requirements of the absurdity

doctrine which are: 1) an absurd result; and 2) an alternative explanation consistent with the legislative purpose. As such, for the absurdity doctrine to apply in this case, plaintiff does not have to show that the Fifth and Fourteenth Amendments were intended to abrogate or are in irreconcilable conflict with the natural born clause. Likewise, because the application of the absurdity doctrine does not require a showing of intent to abrogate or irreconcilability, the alternative interpretation put forth by plaintiff in the form of constitutional equality in the Fourteenth and Fifth Amendments, is not a rehashing of the implicit repeal arguments. Defendants try to improperly conflate the two doctrines. Moreover, defendants and the district court committed a serious error in the area of constitutional jurisprudence - in discerning the purpose of the Fourteenth Amendment it is erroneous not to accept the modern Supreme Court's view of what the purpose is. Under modern constitutional jurisprudence, the purpose of the Fourteenth and Fifth Amendments is to control and regulate all acts of governmental discrimination. In order to effectuate this purpose, the Supreme Court has divided the many types of discrimination into three categories depending on the severity of the discrimination, and depending on the category the courts apply various tests, ranging from rational basis to strict scrutiny, in order to determine if the discrimination can survive. (Pl. Br. 13-18). Because this type of categorization is only a few decades old and did not exist at the time the Fourteenth and Fifth

Amendments were adopted, defendants and the district court seriously err by focusing on what they think the Amendments meant at the time of adoption as opposed to what the Supreme Court today has said these Amendments mean.

**5. DEFENDANTS’ DISCRIMINATION IS INVALID
EVEN IF THE NATURAL BORN PROVISION IS VALID**

Plaintiff argues that even if the natural born provision is still valid, defendants’ invidious national origin discrimination against him is still invalid. (Pl. Br. 12-18). At the outset, defendants do not disagree that the natural born clause does not require defendants to deny ballot access to plaintiff. Instead, defendants argue that states are allowed to regulate who gets on the ballot and pursuant to this general authority, defendants can choose to deny plaintiff ballot access because of his national origin. However, while a state has some role in federal presidential elections, defendants do not deny that the actions of the state in regulating ballot access are still subject to the equal protection mandate of the Fourteenth Amendment. When the government discriminates on the basis of national origin – a “suspect” classification, such discrimination is subject to strict scrutiny. In this regard, the First Circuit in Gill v. Office of Personnel Management, 2012 WL 1948017, 4 (1st Cir. 2012) stated in relevant part that:

Certain suspect classifications--race, alienage and national origin--require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227

Defendants have not cited any case in which the government was allowed to deny ballot access based on a suspect classification such as race or national origin - it is defendants that have the very high burden of proving the justifications for their discrimination, especially because the natural born clause does not require any denial of ballot access. In any event, defendants have no legitimate interest whatsoever in discriminating against plaintiff because of his national origin - such bigotry is absurd, irrational and senseless. While defendants have mentioned the prevention of voter confusion and dilution as justifications, these justifications were never raised in the district court and are being raised for the first time on appeal. Even if we were to consider these justifications, defendants have failed to put forth any evidence to support these justifications and defendants' national origin discrimination will still violate the Fourteenth Amendment.

Importantly, the presidency is a federal government job and defendants did not address the position of the federal government that the natural born clause does not prevent plaintiff from appearing on the ballot and being elected. (Pl. Br. 12). This failure to address this position of the federal government is an implicit concession that plaintiff is not prevented by the natural born clause from appearing on the presidential ballot. Not surprisingly, defendants could not cite any case where the Supreme Court allowed a state to engage in race or national origin

discrimination based on a law which did not require such discrimination – the natural born provision deals with taking office not with ballot access.

Significantly, defendants did not address plaintiff's argument that any objections to the constitutional qualifications of presidential candidates should be raised by the Electoral College through the Twelfth Amendment as well as 3 U.S.C. 15. In Markham v. Robinson, No. C 08-03836 (WHA – Northern District of California), Judge William Alsup rejected a pre-election challenge to Senator McCain's qualifications under the natural born clause and stated in relevant part as follows:

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

Defendants' denial of ballot access in this case, unnecessarily and unlawfully conflicts with the statutory and constitutional role of the Electoral College. Such a conflict is unnecessary because the natural born clause, even if it is still valid, does not require defendants to deny ballot access to plaintiff – it deals

only with taking office. Moreover, given the constitutional role of the electorate and the Electoral College, the judicial branch is like to give some deference to the will of the people and any decision by the Electoral College to choose constitutional equality in the Fifth and Fourteenth Amendments over the invidious national origin discrimination in the natural born clause. This approach is especially proper where, as here, the objection is the evil of invidious national origin discrimination that is “odious to a free people.” Simply put, we cannot have a government “of the people, by the people and for the people” if more than fifteen million naturalized citizens, through no fault or their own, are excluded from heading the government, because of the impermissible assumption that they cannot be trusted.

6. DEFENDANTS’ OTHER ARGUMENTS ARE WITHOUT MERIT

As laid out in his opening brief and above, plaintiff can prevail in this case in light of the irreconcilable conflict, or based on the repudiation of the Dred Scott ruling, or based on the Fitzpatrick decision, or based on the absurdity doctrine, or based on the Afroyim decision, among others. However, plaintiff will address a few additional points raised by defendants even though they are not dispositive, to show that defendants’ entire opposition is built on shaky ground. First, defendants seem to argue that because there is a process for amending the Constitution, the doctrine of implicit repeal and the absurdity doctrine do not apply in the

constitutional context. In making this argument, defendants confuse several things. First, defendants confuse interpretation with amendment – implicit repeal and the absurdity doctrine are interpretive tools and using them is not the same as amending the Constitution. While it is very common for Supreme Court interpretation to dramatically change the meaning of the Constitution, the courts have never been prevented from making such interpretations by the existence of the amendment process. In fact, because implicit repeal and absurdity are doctrines of necessity and because formally amending the Constitution is more difficult than amending a statute, these doctrines are more available in the constitutional context than in the statutory context.

Second, if it is true, as defendants argue, that the existence of a formal amendment process precludes application of the doctrine of implicit repeal and absurdity, then the doctrine of implicit repeal will not exist in the statutory context where defendants agree it does apply, because there is a formal process for amending every statute – a simple majority vote of the legislature.

Third, defendants' arguments fail on a logical level because defendants do not seem to understand that implicit repeal and absurdity are doctrines of necessity. On the other hand, amending the Constitution through the amendment process is a matter of choice. The difference between this necessity and choice is underscored by the fact that except where intent is present, an irreconcilable conflict is required

to trigger implicit repeal and an absurd result is required to trigger the absurdity doctrine. An irreconcilable conflict by definition is a situation where it is impossible to follow two provisions of the Constitution at the same time and as such, the court must pick the later provision over the earlier provision – the Constitution cannot make possible what is impossible. Not surprisingly, defendants have cited no Supreme Court case holding that implicit repeal cannot be applied in the constitutional context. By contrast, plaintiff cites examples of implicit repeal in his opening brief and defendant itself cited the Supreme Court’s decision in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), as an example of implicit repeal/abrogation in the constitutional context. Furthermore, cases such as Dred Scott, are chilling reminders why doctrines such as implicit repeal and the absurdity doctrine are vital and necessary tools in constitutional interpretation.

Plaintiff argued that context is important in applying the doctrine of implicit repeal. Specifically, plaintiff argues that because laws which discriminate on the basis of national origin or race are presumed to be invalid, there is no presumption against the implicit repeal of such laws and implicit repeal of such laws can occur without any showing of intent to repeal or irreconcilability, even though both conditions exist in this case – only one of these conditions is required to trigger implicit repeal. Not surprisingly, defendants have not cited any case where there was a presumption against implicit repeal of a law which discriminated on the

basis of race or national origin. Also, defendants have not explained why there would be a presumption against implicit repeal of discrimination that is presumed to be invalid – race and national origin discrimination for example, are presumed to be invalid. Under defendants’ logic, as between the Fifth Amendment and the slavery provision in the Constitution, there would be a presumption against implicit repeal of the slavery provision and defendants would argue that the slavery provision is not irreconcilable with the due process, equal protection and liberty guarantees of the Fifth Amendment. Obviously, this cannot be and highlights why defendants and the district court are so very wrong. This helps explain why defendants did not oppose the Dred Scott arguments made by plaintiff – arguments that are central and material to this case.

Defendants also argue that there is no irreconcilable conflict because the subject parts of the Constitution have coexisted without incident since 1868. Defendants are wrong once again. It is only in the last several decades that the Supreme Court interpreted the equal protection guarantee of the Fifth and Fourteenth Amendments as prohibiting national origin discrimination so no conflict would have existed before such interpretation and hence, no challenge could have been brought. This point is underscored by defendants’ argument that there was a conflict between the Fourteenth and Eleventh Amendments in Fitzpatrick. It was only in 1971 that the Supreme Court in Reed v. Reed, 404 U.S.

71 (1971), interpreted the Fourteenth Amendment as prohibiting gender discrimination so the conflict that existed in Fitzpatrick would not have existed before 1971. Additionally, as best as one can discern, plaintiff is the first naturalized citizen who was denied ballot access by defendants – without a denial there would be no incident or court action like this one. Notably, there were questions about the natural born status of presidential candidates John McCain (born in Panama Canal Zone), George Romney (born in Mexico) and Barry Goldwater (born in Arizona before it was a state) but defendants never denied any of these candidates ballot access.

Another of defendants' arguments is that the Fourteenth Amendment was not intended to implicitly repeal the natural born clause – this point is addressed at length in plaintiff's opening brief. (Pl. Br. 37-46). Even though intent to repeal need not be shown where an irreconcilable conflict exists, defendants' already questionable opposition is totally destroyed by Afroyim v. Rusk, 387 U.S. 253 (1967) as discussed in the opening brief. (Pl. Br. 37-46). Afroyim established that the purpose of the Fourteenth Amendment was to take complete control of the status of citizenship and to remove all distinctions among citizens regardless of whether citizenship was acquired by birth or naturalization. Defendants cannot ignore the leading Supreme Court case on an issue simply because the case is contrary to defendants' arguments.

In any event, defendants and the district court commit several other errors in trying to ascertain the purpose and intent of the Fourteenth Amendment. Defendants invoke the statements of Representative Henry Raymond as well as the attempts in Congress to repeal the natural born provision. The reliance of Representative Raymond's statement is potentially misleading. The cited statements of Representative Raymond were made during the debates of the Civil Rights Act of 1866 and not in connection with the Citizenship Clause of the Fourteenth Amendment. This fact is significant because there is a material difference between the Civil Rights Act ("CRA") and the Citizenship Clause of the Fourteenth Amendment – the CRA granted citizenship only to persons *born* in the United States, but the Fourteenth Amendment granted citizenship to persons *born or naturalized* in the United States. It is therefore misleading to use statements about a statute that did not deal with naturalized citizenship to show the intent behind a constitutional provision that did grant naturalized citizenship. Likewise, defendants' invocation of the attempts to repeal the natural born clause through amendment is also misplaced. Prior to the 1940s, the Supreme Court did not interpret the Fourteenth Amendment as prohibiting national origin discrimination and before this time, invidious discrimination was not viewed as an absurd result – Plessy v. Ferguson, 163 U.S. 537 (1896), was still the law of the land until 1954 and there was a period of evolution in equal protection jurisprudence since then

that in many ways continues today. As such, prior to the 1970s, an amendment would have been the only way to remedy the discrimination in the natural born clause because prior to the Supreme Court decisions through the 1970s, plaintiff would not have been able to make the arguments he now makes in this case that the discrimination in the natural born clause is legally absurd and irreconcilable with the equal protection guarantees of the Fourteenth and Fifth Amendments. As for the attempts to repeal the natural born clause through amendment in more recent times, these attempts can be construed as a recognition of the irreconcilable conflict and absurdity that plaintiff argues exists – else why would they try to get rid of it. In any event, while an amendment is a more explicit confirmation of constitutional law, attempts by some to amend does not mean that the same result cannot be achieved through interpretation – almost every major change in constitutional law through interpretation could have also been achieved through amendment and vice versa. Notably, since plaintiff began his challenge to the natural born clause, there have been no attempts to repeal the natural born clause through amendment and there has been considerable support for plaintiff’s challenge to the natural born clause.

7. DEFENDANTS MISPERCIEVE THE EFFECT OF REJECTED RATIONALES

Defendant argues that the fact that the Supreme Court has rejected the rationale behind the natural born clause (Pl. Br. 47-49) does not mean the clause is

invalid. (Def. Br. 26). Defendants misperceive the role that rejected rationales have played in constitutional cases involving discrimination. For example, decisions such as Dred Scott and Plessy were based on the rationale that blacks were inferior and sub-human. When the Supreme Court began rejecting this rationale in the 1950s, the body of constitutional law based on this rejected rationale also collapsed and the modern era of equal protection jurisprudence was born. When the Supreme Court in Schneider v. Rusk, 377 U.S. 163, 168 (1964), rejected the rationale that naturalized citizens are less trustworthy than natural born citizens, the natural born clause lost its foundation and has collapsed for all practical purposes. Such a rejection was a universal fact of which every court can thereafter take judicial notice and was logically not confined to the Schneider case. While the “rejected rationale” argument is an independent basis to rule in plaintiff’s favor, this argument also buttresses the arguments based on the absurdity and implicit repeal doctrine. This is so because it would be highly illogical to argue that there is a presumption against implicit repeal of a law that is based on a rationale that has already been rejected by the Supreme Court.

8. DEFENDANTS’ USE OF MINOR V. HAPPERSTAT HIGHLIGHTS A MAJOR WEAKNESS IN THEIR CASE

A major weakness in defendants’ opposition and the district court’s decision can be highlighted by defendants’ use of Minor v. Happerstat, 88 U.S. 162, 171 (1874). Defendant relies on Minor to argue that even after the adoption of the

Fourteenth Amendment, female citizens were still without the right to vote (Def. Br. 18) and defendants further argue that it took the 19th Amendment to give women the right to vote. (Def. Br. 18, Fn 10). In other words, defendants argue that the Fourteenth Amendment was not intended to protect women from discrimination and that an amendment was the only way to give women this protection. The weakness in defendant's logic is that defendants fail to recognize the role of judicial interpretation. Even without the Nineteenth Amendment women would be protected against discrimination and discrimination in voting under the current interpretation of the Fourteenth Amendment. See Reed v. Reed, 404 U.S. 71 (1971). This reality reinforces the point that the Supreme Court's rulings as to the purpose and intent of the Fourteenth Amendment are final and binding regardless of what some may speculate is the intent of those who voted for the Fourteenth Amendment. This example also reinforces plaintiff's point that we do not need a constitutional amendment in order to produce a change or clarification in constitutional law. Likewise, the position of Justice Taney in Dred Scott and of defendants and district court in this case that injustice and invidious discrimination in the Constitution can only be remedied through formal amendment is without merit.

9. THE EIGHT CIRCUIT SHOULD AVOID THE JUDICIAL MISTAKES OF THE PAST

As a citizen who cares about this country and the Courts, and as a practitioner in the courts, plaintiff pleads with this Court not to repeat the judicial mistakes of the past. Discrimination cases have posed the greatest test to the American judicial system and the record of the courts in the most significant of these cases is one of much regret. In the most significant discrimination cases, the Court has almost always made the wrong decision the first time around. In Dred Scott the Court upheld racial discrimination in the Constitution. It took a civil war and several constitutional amendments to try to fix this horrendous judicial mistake. Justices of the Supreme Court have subsequently described the Dredd Scott decision as a great self-inflicted wound from which it will take the Court generations to recover. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court gave constitutional protection to “separate but equal” race discrimination. It took the Supreme Court almost sixty years to fix this huge mistake when it overruled Plessy in Brown v. Board of Education, 347 U.S. 483 (1954). In Oyama v. California, 332 U. S. 633, 644-646 (1948), Korematsu v. United States, 323 U. S. 214, 216 (1944) and Hirabayashi v. United States, 320 U. S. 81, 100 (1943), the Supreme Court upheld as constitutional, the internment of Japanese Americans because of their national origin. It took several decades, a congressional apology, millions in compensation and a few subsequent court decisions to try to fix this horrendous mistake. In this case, we once again face a significant discrimination

issue of first impression in the form of invidious national origin discrimination against more than 15 million American citizens. It cannot be that our judicial system is condemned to failure each time it faces significant issues of discrimination - it cannot be that we are condemned to deciding issues of discrimination incorrectly the first time we face them. It must be that we are capable of learning from the mistakes of the past and getting it right the first time. I kindly urge this Court to break from the tradition of Dredd Scott, Plessy and Hirabayashi by rejecting the invidious discrimination challenged in this case.

III. CONCLUSION

Plaintiff respectfully requests that this Honorable Court: 1) reverse the district court and the invidious discrimination challenged in this case; 2) deny defendants' motion in its entirety and declare the natural born provision to be trumped, mooted, abrogated and implicitly repealed by the Fifth and Fourteenth Amendments; 4) declare that defendants' Affidavit of Candidacy, and denial of ballot access to Hassan because of his national origin, violate the Fourteenth Amendment; and 5) grant plaintiff such other, further and different relief as the Court deems just and proper.

Dated: Queens Village, New York
August 1, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
VOLUME REQUIREMENTS FOR BRIEF
(Fed. R. App. P. 32 (a)(7)(C))**

I, Abdul Karim Hassan, Plaintiff-Appellant Pro Se, in this appeal. I certify that the preceding brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, because the brief contains no more than 6,611 words as indicated by the word count of the Microsoft Word word processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that on August 1, 2012, I electronically filed the preceding with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which sent notification of that filing to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is both true and correct.

Dated: August 1, 2012

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ANTI-VIRUS CERTIFICATION

See Eighth Circuit Local Rule 28A(h)(2).

CASE NAME: Abdul Karim Hassan v. State of Iowa; Matt Schultz

DOCKET NUMBER: 12-2037

I, Abdul K. Hassan, certify that I have scanned for viruses the PDF version of the attached document using Symantec Endpoint Protection, Version: 11.0.780.1109 that was submitted in this case to the CM/ECF system and that no viruses were detected.

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