

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Abdul Karim Hassan, Plaintiff-appellant, -v- The State of New Hampshire, and William M. Gardner, Defendants-appellees.	Case #: 12-1280 <u>APPELLANT HASSAN'S MOTION FOR A PUBLISHED OPINION</u> Panel Judges: Lynch, Lipez, and Thompson
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I. PRELIMINARY STATEMENT

Plaintiff-appellant Abdul K. Hassan, Esq., respectfully requests, pursuant to First Circuit Local Rule (“LR”) 36, including LR 36(b)(2)(D), that this Honorable Court issue a published opinion in this case regardless of which side wins on the merits. This is a case where the reasoning and analysis is just as important as the result, or even more so. If this Court concludes it needs oral arguments before it can publish its opinion, plaintiff is ready, willing and able to argue orally – even though plaintiff is pro se in this action, plaintiff is an attorney who litigates regularly in the federal courts and has argued cases before the Second Circuit Court of Appeals. The purpose of this motion is not to litigate the merits – it is address the need for a published opinion.

II. ARGUMENT

1. A PUBLISHED OPINION IS WARRANTED BECAUSE THIS APPEAL INVOLVES SIGNIFICANT CONSTITUTIONAL ISSUES OF FIRST IMPRESSION

A published opinion is warranted because this case involves significant constitutional issues of first impression for this Court that require well-reasoned guidance that address all relevant issues raised. In Hassan v. USA¹, a case relied on by defendants (A. 34-40), the court underscored the first impression nature of the implicit repeal issue and stated in relevant part as follows:

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

The district court in this case stated in relevant part as follows²:

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

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

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

While the defendants in Hassan v. Iowa did recognize that "the case of Fitzpatrick v. Bitzer presents an example of implicit abrogation. 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)," – a case which favors appellant, they were

¹ See Appendix pages 34-40

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

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

correct in highlighting the scarcity of authority on the subject and the need for guiding standards and tests. Legal tests/standards as well as binding authority and precedent are created by appellate courts – not by district courts. When faced with an issue of first impression, appellate courts are called upon to extrapolate from other precedents and principles of law and logic, and to consider history and social impact as well as public policy – such a process requires the type of attention, research and reasoning that accompanies a published opinion – the process may also be aided by amicus curiae briefs and even guidance from the Supreme Court pursuant to 28 USC 1254.

2. A PUBLISHED OPINION IS WARRANTED BECAUSE THE ISSUES IN THIS CASE ARE EXTRAORDINARY

In discussing the issues presented herein, the Chairperson of the Federal Election Commission stated as follows⁴:

Whether the Fourteenth Amendment trumps the -- that provision [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 after studying and deliberating the issue, was correct to state that the issue was worthy of review by the Supreme Court – only the most important and extraordinary issues are worthy of Supreme Court review. The sentiments of the Chairperson were echoed by several other members of the FEC

⁴ <http://www.fec.gov/audio/2011/2011090102.mp3>.

during their deliberation on September 1, 2011 over whether plaintiff is covered by and prevented by the Federal Election Campaign Act (“FECA”) from running for President – the FEC ruled that plaintiff was not prevented from running for President as a naturalized citizen under FECA. Issues that are sufficiently important or extraordinary to warrant Supreme Court review should be addressed in a well-reasoned and researched published opinion.

3. A PUBLISHED OPINION IS WARRANTED TO PROVIDE GUIDANCE TO THE OTHER COURTS CURRENTLY FACED WITH THE ISSUES IN THIS CASE

In addition to this case, plaintiff has brought cases tied to the discrimination in the natural born clause in several jurisdictions in which he has faced discrimination. See Hassan v. Iowa, Case #: 11-CV-00574 (SDIA, April 26, 2012); Hassan v. Colorado, 2012 WL 1560449 (DCO, May 3, 2012); and Hassan v. Montana, Case #: 11-cv-72 (DMT, May 3, 2012). These cases are now on appeal. Because presidential elections are national and we do not have national trial courts, it is not uncommon for candidates to bring ballot access cases in several jurisdictions. In Anderson v. Celebrezze, 460 U.S. 780 (1983), for example, third party presidential candidate John Anderson, like plaintiff here, was denied ballot access in several states. He brought lawsuits in several locations and one of the cases eventually reached the Supreme Court because of a split in the circuit courts. The Supreme Court eventually overturned the denial of ballot access.

While all the district court cases mentioned above were decided against plaintiff on motions to dismiss - such dismissals were not because the issues presented were addressed by existing precedent or because they were easy. To the contrary, all of those decisions were based on the absence of precedent directly addressing the issues and an avoidance of some very sensitive issues such as the Dred Scott ruling – each of these courts struggled to discern the correct law and outcome. The absence of direct precedent which was the bases for the decisions in the several district courts is exactly why this court should issue a published opinion. Unlike a district court, the job of the Court of Appeals is to create precedent and decide issues of first impression by extrapolating from other precedents and making the judgments necessary to fill the void. For example, on the question of whether the presumption against implicit repeal goes away when we are dealing with a suspect classification such as race or national origin, all of the district courts held that they cannot make such a finding because there is no case which directly holds as such even though there is no case holding otherwise and even though it is settled law that race and national origin discrimination is presumed to be invalid. . See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (“The general rule gives way, however, when a statute classifies by race, alienage, or national origin.”). However, a court of appeals is authorized to reason that because laws discriminating based on a suspect

classification are presumed to be invalid, there is no presumption against repeal of a law that is presumed to be invalid.

This Court should also provide guidance to the other courts in the form of a published opinion because the other district courts relied explicitly or implicitly on the district court's decision in this case but the reasoning in the other cases was not identical. Moreover, the decision in Hassan v. Iowa, which incorporated the decision of the New Hampshire Court, declined to view Fitzpatrick v. Bitzer, 427 U.S. 445 456 (1976), as an example of implicit repeal because it held that⁵, “a majority of federal courts have declined to view *Fitzpatrick* as holding that the Fourteenth Amendment effected an *implicit repeal* of the Eleventh Amendment.” The Supreme Court's abrogation ruling in Fitzpatrick can be the basis for a ruling in plaintiff's favor in this case. A published opinion would be the best form of disposition where the outcome of the case hinges on a split in authority among the courts of appeals – the split shows that the issue is not clearly settled by existing precedent. In fact, the Iowa court even relied on the proposition that⁶ it is, “unlikely that a majority of the present Supreme Court would sustain a holding that the fourteenth amendment, of its own force, represents a pro tanto repeal of the eleventh amendment.” Once again, a published opinion, and the care, attention, research and reasoning that comes with a published opinion is the best form of

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

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

disposition where a decision may hinge on a projection of how the Supreme Court would rule or that the Supreme Court would change an existing ruling. Such projections require careful analysis and full and complete consideration of the issues by the Court of Appeals. In addition, all the lower district courts avoided the arguments based on Dred Scott – arguments which are so substantial and sensitive the lower courts were unable to even address them. A published opinion by this Court is the best way to address material issues that the lower courts found too sensitive or difficult to address. There is another significant issue that the district courts missed or sidestepped – whether the state defendants’ national origin discrimination against appellant is invalid even if the discrimination in the natural born clause is still valid. In this regard, the district court in Hassan v. USA (A. 34-40), summarized the federal government’s related position on this point and stated in relevant part as follows:

The government argues that Hassan is technically not prevented from *running* for office; he is merely prevented from taking office if elected in [2012]. It notes, as an example, that Roger Calero, a non-citizen, ran for President as a representative of the Socialist Workers Party, even though he could not have taken office had he won.

Here, we have a significant conflict between the federal government and the states. Unlike defendants, the federal government has taken the position that the natural born clause does not prevent plaintiff from running for the presidency of the federal government. The federal government is correct on this point because

the proper avenue for challenging the constitutional qualifications for President is the electoral college pursuant to the Twelfth Amendment and 3 USC 15.

Importantly however, Supreme Court and the First Circuit have never permitted a state to discriminate on the basis of race or national origin because of a law that does not require such discrimination and where the state could not even remotely satisfy the strict-scrutiny standard. Not surprisingly, we know of no case where this Court affirmed a decision involving a material conflict between the federal and state governments without issuing a published opinion. Likewise, we know of no case where this Court affirmed a state's discrimination based on a suspect classification where such discrimination was not required by the Constitution and where the state did not even attempt to carry its very high burden under the strict-scrutiny standard as required by the Fourteenth Amendment.

There are other examples but these should suffice to prove the point that a published opinion is warranted in this case.

**4. INVIDIOUS DISCRIMINATION AGAINST MORE THAN
15 MILLION AMERICAN CITIZENS DESERVES THE
FULL ATTENTION OF THIS COURT AND WARRANTS A
PUBLISHED OPINION**

The discrimination in the natural born provision is premised on the impossible assumption that law-abiding, loyal American citizens cannot be trusted simply because their mothers gave birth to them outside the borders of the United States. This case involves invidious discrimination against over 15 million

naturalized American citizens based on a suspect classification – national origin. Discrimination based on national origin and race are both subject to strict scrutiny – the highest level of judicial scrutiny. United States v. Virginia, 518 U.S. 515, 532 n. 6, (1996) (noting that “[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or *national origin*.”). Moreover, national origin discrimination is such an evil that the Supreme Court has described it as being “odious to a free people whose institutions are founded upon the doctrine of equality.” See Adarand v. Peña, 515 U.S. 200, 213 (1995). No law discriminating on the basis of national origin has survived in the Supreme Court since the internment of Japanese Americans during World War II because of their national origin – Congress apologized to Japanese Americans in the 1980s. As a result, we know of no case where this Court affirmed or reversed any decision which upheld race or national origin discrimination without a published opinion. Likewise, we know of no case in which this Court this Court has affirmed any decision which upheld invidious discrimination against more than 15 million American citizens without a published opinion.

In Dred Scott, the Supreme Court was faced with invidious Citizenship discrimination contained in the Constitution itself. Like Dred Scott, this case also involves invidious citizenship discrimination in the Constitution itself. In upholding this citizenship discrimination in Dred Scott v. Sandford, 60 U.S. 393,

426 (1857), Justice Taney wrote for the Supreme Court and 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.

Justices of the United States Supreme Court have described the Supreme Court's decision in Dred Scott v. Sandford, 60 U.S. 393 (1857), as a great "self-inflicted wound⁷." See South Carolina v. Regan, 465 U.S. 367, 412 (1984). See also Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir., 2007) ("Dred Scott is as infamous as it was erroneous in holding that African-Americans are not citizens."). Image Carrier Corp. v. Beame, 567 F.2d 1197, 1199 (2d Cir. 1977)

⁷ See http://www.supremecourt.gov/publicinfo/speeches/sp_03-21-03.html - In reference to the Dredd Scott decision, then Chief Justice Rehnquist said in a 2003 speech that 'It was rightly referred to by a later Chief Justice as a "self-inflicted wound" from which it took the Court at least a generation to recover.'

(“Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857) (the Dred Scott case), remains the most discredited of Supreme Court decisions. We reject the attempt to resurrect this apparition of the past.”).

While the Dred Scott decision is addressed in more detail in the briefs, of greater relevance to this motion is the attention given to the citizenship discrimination in Dred Scott even though it was contained in the Constitution itself and even though the Supreme Court upheld the discrimination. Even the Dred Scott court understood that even if we believe injustice and invidious citizenship discrimination is required by the Constitution, we should not uphold such injustice and discrimination very lightly and we must give the arguments against it full, careful and complete attention and consideration – the Court should also explore every legal means of remedying or nullifying the discrimination. In Dred Scott, the Supreme Court entertained full briefing and held six days of oral arguments and issued a decision of over 100 pages explaining why the invidious discrimination including the citizenship discrimination in the Constitution should be upheld.

Even if this Court chooses to uphold invidious discrimination against more than 15 million American citizens, it should do so in a published opinion and should carefully consider and address all issues and arguments and explain to the millions of victims of such invidious discrimination and the nation as a whole why such discrimination should continue and why such invidious discrimination is not

trumped by the equality provisions in the Constitution. This Court should keep in mind that if it upholds the citizenship discrimination in this case it would become the first federal appellate court to uphold invidious citizenship discrimination in the Constitution since the Dred Scott Court in 1857 – this Court should not accept such a status without careful thought, reflection, consideration, research and analysis – in the form of a published opinion.

5. A PUBLISHED OPINION IS WARRANTED TO PROVIDE GUIDANCE TO THE PUBLIC AND IN LIGHT OF NEW HAMPSHIRE’S FIRST-IN-THE NATION ROLE IN PRESIDENTIAL POLITICS

The issues surrounding the natural born clause have garnered tremendous public interest especially in the last several years. In the 2008 presidential elections there were lawsuits challenging Republican nominee John McCain who was born in the Panama Canal Zone. After the 2008 elections there have been numerous legal actions by the so-called “birther” movement challenging Democratic President Barack Obama. Somewhat related to the “birther” movement, there have been efforts in many state legislatures including New Hampshire, to enact “birther” legislation. In fact, the New Hampshire ballot laws and requirements challenged herein are the product of this recent movement. In light of this background, a published opinion should be issued to ensure that this Court’s decision is well-founded and reasoned and to avoid misunderstanding, misuse and misapplication of this Court’s decision. In this regard, it should be noted that

people in the “birther” movement have already invoked the district court’s decision in this case to argue that President Obama must affirmatively prove that he is a natural born citizen before he can be placed on the ballot in New Jersey⁸. Similar challenges are being made across the country. 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.

Unlike the Court in Markham, the district court in this case took a different view and held that presidential eligibility issues should not be left to the electoral college. This type of conflict and uncertainty requires the type of guidance and analysis that comes with a published opinion.

⁸ See page 6 at <http://www.scribd.com/doc/98923880/Purpura-Moran-Petition-for-Certification-FILED-7-2-12>

The need for a published opinion is even greater in light of New Hampshire's first-in-the-nation role in presidential elections. Because New Hampshire holds the first presidential primary in the nation, it is the place where candidates and issues are thoroughly vetted – a process that sets the tone for the entire nation. By extension, this Court's opinion about New Hampshire's laws and requirements will set the tone for the rest of the nation and as such, this Court's opinion should be published. A published opinion will not only provide guidance to the voting public and candidates, but also to election authorities in every state in the union who are faced with the same issues.

III. CONCLUSION

Based on the foregoing, appellant Hassan, kindly and respectfully requests that this Honorable Court issue a published opinion in this case.

Dated: Queens Village, New York
July 12, 2012

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Abdul Hassan", is written over a horizontal line.

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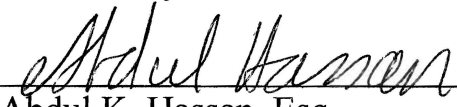
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CERTIFICATE OF SERVICE

I, Abdul K. Hassan, plaintiff pro se in the above-entitled action, hereby certify that a copy of plaintiff's within motion for a published opinion, was served on July 12, 2012 on Counsel of record for defendants, Mr. Matthew Mavrogeorge, (NH Dep't of Justice), 33 Capitol Street, Concord, NH 03301. Service was made by depositing a true and accurate copy of the within motion in an envelope, properly wrapped, sealed and paid for, into the custody of the United States Postal Service for delivery by first class mail.

Dated: Queens Village, New York
July 12, 2012


Abdul K. Hassan, Esq.