

12-1280

IN THE
United States Court of Appeals
FOR THE FIRST CIRCUIT

❧

ABDUL KARIM HASSAN,

Plaintiff-Appellant,

v.

STATE OF NEW HAMPSHIRE;
WILLIAM M. GARDNER, Secretary of State
of the State of New Hampshire,

Defendants-Appellees.

*On Appeal from a Judgment and Order of the United States District Court
for the District of New Hampshire (Concord)*

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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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.

Significantly, the arguments defendants did not make or oppose are very revealing. For example, defendants do not challenge or dispute the fact that the analysis of the district court and defendants in relevant part is almost identical to the reasoning of Justice Taney in Dred Scott v. Sandford, 60 U.S. 393 (1857), and would lead to the same result Justice Taney reached in Dred Scott – upholding the Constitution's citizenship discrimination based on ancestry/race. (Pl. Br. 46-49). The Dred Scott decision is considered by the modern judiciary and society to be the most erroneous decision in Supreme Court history. As such, any analysis such as that employed by defendants and the district court, which would lead to the

same result reached in Dred Scott is also extremely erroneous and must be swiftly rejected.

Not only did defendants and the district court completely avoid the numerous arguments based on the seminal Dred Scott case and the current view of Dred Scott, defendants in their brief, did not mention even once, the Supreme Court decision in Afroyim v. Rusk, 387 U.S. 253 (1967), despite it being the seminal and leading Supreme Court case dealing with the Citizenship Clause and the purpose of the Fourteenth Amendment. The fact that defendants in essence disagree with the Supreme Court in Afroyim necessarily means that defendants are wrong because the Supreme Court has the final say on what the Constitution means.

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

II. ARGUMENT

1. IT IS IMPORTANT TO ACKNOWLEDGE AND ADMIT THE EVIL OF NATIONAL ORIGIN DISCRIMINATION

In this action, plaintiff has observed an attempt by the opposing parties and the court to avoid calling the discrimination in the natural born clause what it actually is - discrimination. There has also been an attempt to avoid acknowledging that national origin discrimination is such an evil that it is subjected to the same

level of judicial scrutiny as race discrimination. The reason for this attempt to evade the fact that we are dealing with invidious discrimination seems obvious. If defendants and the court admit the obvious fact that we are not only dealing with discrimination but with discrimination based on a suspect classification – national origin, it becomes morally and legally very difficult to justify any position or ruling supporting or upholding such invidious discrimination. We are all very much aware that Dred Scott was the last and only time that the Supreme Court upheld invidious citizenship discrimination in the Constitution, and we are even more aware of the condemnation that history, society and the modern judiciary have placed on Justice Taney – the author of the Dred Scott citizenship ruling. However, this case, like every other case, must be litigated and decided on the basis of facts even if the facts are inconvenient and uncomfortable. Not only did the district court and defendants avoid calling discrimination - discrimination, they also completely avoided the arguments based on Dred Scott – recognizing that their logic matched that of Justice Taney in Dred Scott (Pl. Br. 46-49) and to acknowledge this fact would make it very difficult to uphold the invidious citizenship discrimination challenged in this case.

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

district court 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 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. This Court can also stay its decision until appeals to the Supreme Court are exhausted.

2. 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

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

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. Here, defendants have not even attempted to meet the strict scrutiny standard – no attempt to prove a compelling interest and narrow tailoring. In any event, defendants have no legitimate interest whatsoever in discriminating against plaintiff because of his national origin - such bigotry is 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. As such, these purported

justifications are waived. Even if we were to consider these justifications, defendants have failed to put forth any evidence to support these justifications.

In Gill, the First Circuit reiterated that the government has to offer a lot more than conclusory justifications for discrimination and must put forth adequate factual findings in support of those justifications. The burden on the government in this case is a lot higher than in Gill which involved only the rational basis standard – defendants’ national origin discrimination in this case is subjected to strict scrutiny. In Gill, this Court looked at the legislative record to discern the government’s justifications. Here, defendants have said nothing about the legislative record or intent and instead, they try to speculate that the state’s interest in passing the subject statutes (N.H. Rev. Stat. § 655:47 and 655:17-b; A. 21-29) is to avoid voter confusion and dilution. However, there is no evidence put forth by defendants from the legislative record or from anything else to support these purported interests. In fact, it may emerge that the purpose of the law was to create mischief by frustrating the candidacy of President Obama. Notably, candidates such a George Romney and Barry Goldwater did not have to comply with these laws. The justifications put forth by defendants are further undermined by the fact that most states do not have such laws and defendants have only recently mandated the challenged discrimination even though the natural born clause is over two hundred years old. Importantly, presidential elections are for a federal office and in

the case of Hassan v. USA, the federal government took the position that the natural born clause does not prevent plaintiff from being elected. (Pl. Br. 13). Finally, and very significantly, 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. Pena, 515 U.S. 200, 213 (1995). The Supreme Court has never allowed a state to engage in such evil discrimination based on a law that does not require such discrimination. Any objections to the constitutional qualifications of presidential candidates can be raised by the electoral college through the Twelfth Amendment as well as 3 U.S.C. 15. 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.

3. DEFENDANTS FAIL TO UNDERMINE PLAINTIFF’S ARGUMENTS BASED ON THE ABSURDITY DOCTRINE

In opposition to plaintiff’s arguments based on the absurdity doctrine, defendants first argue that the absurdity doctrine does not apply to the Constitution because the Constitution provides a mechanism or process for amendments. (Def. Br. 28-31). Notably, the district court never held that the absurdity doctrine does not apply to the Constitution – not surprising, given the examples contained in

plaintiff's brief. Defendants' argument also fails on another level – if it is true, as defendant argues, that the existence of an amendment mechanism precludes the application of the absurdity doctrine, then the absurdity doctrine would not exist in the statutory context where defendants concede it does apply, because there is a formal process or mechanism for amending every statute – that process is a majority vote of the legislature. Importantly, however, defendants fundamentally err by equating the application of the absurdity doctrine with the formal amendment process. When a court applies the absurdity doctrine, the court is not amending the law – the court is interpreting the law – as such, the amendment provision does not prevent the Court from interpreting the Constitution using the absurdity doctrine. Not surprisingly, defendants have not cited any case which holds that the absurdity doctrine cannot be applied to constitutional interpretation. By contrast, plaintiff in his opening brief has cited examples of the absurdity doctrine at work in the constitutional context. (Pl. Br. 18-25).

Defendants also 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. 30-31). 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. 21-22). 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. 14-15).

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 was flat. “Absurdity” is a judgment call in the context of the current time, by people in the current time.

Defendants reiterate two other arguments made by the district court (Def. Br. 29-30): 1) that the legislative purpose of the Fifth and Fourteenth Amendments was not to abrogate the natural born clause; and 2) that the alternative interpretation put forth by plaintiff is a rehashing of the implicit repeal arguments. Defendants are very wrong on both fronts. We can quickly dispose of both arguments by focusing on the requirements of the absurdity doctrine as put forth by defendants as well as the district court. The requirements for the absurdity doctrine 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 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. Given that defendants do not argue that the invidious discrimination in this case is not, at a minimum, factually absurd, defendants understand that the absurdity doctrine is much easier to apply than the implicit repeal doctrine so 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 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. 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.

4. DEFENDANTS' IMPLICIT REPEAL ARGUMENTS ARE WITHOUT MERIT

On pages 13 -28 of their opposing brief, the defendants argue against plaintiff's claim that the citizenship clause and the equal protection clause of the Fourteenth Amendment equalized naturalized and natural born citizenship and thereby trumped, abrogated and implicitly repealed the discrimination against naturalized citizens that is embodied in the natural born provision. Most of the arguments defendants make are taken from the district court's decision and plaintiff has already addressed those in detail in his opening brief. A few arguments however, will be addressed in this reply. One such argument is that the doctrine of implicit repeal does not apply in the constitutional context – a conclusion that the district court did not reach - very likely because the doctrine does apply in the constitutional context. Defendants' main argument in this regard is that because there is a process for amending the Constitution, the doctrine of implicit repeal cannot apply to the Constitution. In making this argument, defendant confuses several things. First, defendant confuses interpretation with amendment – implicit repeal is an interpretive tool and using it 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 is a doctrine of necessity and because formally amending the Constitution is more difficult than amending a statute, the doctrine of implicit repeal is 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, 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 defendant does not seem to understand that the implicit repeal is a doctrine 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. 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 the district court 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. (ADD. 5-6). 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. (Pl. Br. 14-15). 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 seems to agree that the Fourteenth Amendment would prohibit the government from carrying out the discrimination contained in the natural born clause but claims that there is no irreconcilable conflict between the equal protection clause and the natural born clause because, “the Constitution is not the government.” (Def. Br. 22). This is probably the strangest argument defendants have made. Obviously, the Constitution applies to the federal and state governments and if one part of the Constitution requires the government to discriminate and a later part of the Constitution requires the government not to discriminate, we have an obvious irreconcilable conflict. 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. 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), 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. 34-37). However, defendants’ already questionable opposition is totally destroyed by its failure to address Afroyim v. Rusk, 387 U.S. 253 (1967). Afroyim is the leading and seminal Supreme Court case dealing with the purpose and meaning of the citizenship clause of the Fourteenth Amendment and defendants do not even mention Afroyim once – this is because 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. 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.

4. 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. 44-46) does not mean the clause is

invalid. (Def. Br. 28-29). 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.

5. 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. 25) and defendants further argue that it took the 19th Amendment to give women the right to vote. (Def. Br. Fn 10). In other words, defendants argue that the 14th 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 19th 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 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.

**6. THE FIRST CIRCUIT SHOULD BE GUIDED IN
RELEVANT PART BY ITS DECISION IN GILL v. OFFICE
OF PERSONNEL MANAGEMENT**

On May 31, 2012, the First Circuit in Gill v. Office of Personnel Management, 2012 WL 1948017 (1st Cir. 2012), struck down as unconstitutional, the Defense of Marriage tAct (“DOMA”). While the type of discrimination and the context in Gill are not identical to this case, there are many significant similarities that should guide this Court in resolving the appeal in this case. At the outset, the First Circuit in Gill recognized that it was dealing with a unique case and that some adjustment in traditional analysis was needed to match the uniqueness of the challenge. Likewise, this is an even more unique and extraordinary case. This case presents an issue of first impression and implicates the only form of invidious discrimination that remains in our Constitution after more than 200 years. Moreover, the most recent precedent dealing with invidious citizenship discrimination in the Constitution itself is the Dred Scott case which itself has been repudiated by the Supreme Court which referred to the Dred Scott decision as a great self-inflicted wound. In addition, we have a strange situation where the type of discrimination contained in the natural born clause (national origin discrimination) is prohibited by the Fifth and Fourteenth Amendments, federal law and state law. Even the First Circuit has policies which prohibit national origin discrimination in hiring and other matters. Given the uniqueness of this case, we must adjust the analysis to match the uniqueness – something the district court did not do and something the defendants also have not done.

Second, the First Circuit in Gill reminded us that when faced with an equal protection case involving a discriminatory classification, the Court must apply the appropriate level of scrutiny and perform the required analysis. Specifically, the Court in Gill noted that the government must be held to its burden of proving its justifications with sufficient evidence. In Gill, the court found that the defendant's justifications could not even satisfy the rational basis standard – the lowest standard. Here, the highest standard applies to the national origin discrimination in this case – strict scrutiny.

Third, the First Circuit in Gill acknowledged that the equal protection issues made the case a “difficult” one. Such candor is always helpful and increases public confidence in the judiciary. In Gill, the case was difficult because none of the precedents squarely fit the unique situation and because of the social and political sensitivity of the issues. This case poses some of those same difficult challenges. The response should not be to ignore the difficult issues and arguments.

Fourth, the court in Gill emphasized that courts should hold the state to its burden when it discriminates against minorities because the victims of such discrimination lack the political power necessary to remedy the discrimination through legislation. Courts should take discrimination cases seriously and invest the time and effort to adequately address the issues – even though the caseload is heavy, the Court should not just defer to or rubberstamp the government's

invidious discrimination. Courts should keep in mind that even though equal protection cases may present difficulties for the judges - including personal, social and political difficulties, the difficulties for the victims of the challenged discrimination are even greater. Such difficulties are magnified in this case because the number of victims is extremely high and the type of discrimination is of the worst kind. The invidious discrimination challenged in this case affects more than 15 million naturalized citizens who have been condemned to second-class status by defendants' statutes and the natural born provision. Moreover, as the First Circuit reiterated in Gill, the type of discrimination challenged in this case (national origin) is such as evil that it is subject to the highest level of judicial scrutiny – the same strict scrutiny that race discrimination is subjected to.

Even if this Court chooses to uphold invidious discrimination against more than 15 million American citizens, it has no higher duty than to carefully consider and address all arguments and explain to the millions of victims of such invidious discrimination why such discrimination should continue. Because there is no good justification for upholding such discrimination, this Court should end the long national nightmare and embarrassment created by the invidious discrimination in the natural born clause.

7. THE FIRST 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' statutes (N.H. Rev. Stat. § 655:47 and 655:17-b), Declaration of Candidacy and denial of ballot access to Hassan because of his national origin (See A. 21-29), 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
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Respectfully submitted,

/s/ Abdul Hassan

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,134 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.