

12-35402

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ABDUL KARIM HASSAN,

Plaintiff-Appellant,

v.

STATE OF MONTANA; LINDA MCCULLOCH,

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Montana (Helena)
Case No. 6:11-cv-00072-DWM, Judge Donald W. Molloy*

BRIEF FOR PLAINTIFF-APPELLANT PRO SE

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I. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over plaintiff's declaratory judgment claims under 28 USC §§ 2201 and 2202 and pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed his Notice of Appeal on May 17, 2012 from the Judgment entered in the United States District Court, District of New Montana, on May 3, 2012. Plaintiff's appeal is from a final order or judgment that dismissed all of his claims.

II. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Whether Montana's invidious national origin discrimination against plaintiff violates the equal protection clause and citizenship clause of the Fourteenth Amendment especially under strict scrutiny review? Standard of Review ("SOR"): De novo.

Afroyim v. Rusk, 387 U.S. 253 (1967) (invalidating statute which discriminated against plaintiff because he was a naturalized citizen and not a natural born citizen.).

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*.").

ISSUE 2: Whether the Fourteenth and Fifth Amendments are irreconcilable with and trump, abrogate and repeal the invidious

national origin discrimination in the natural born clause of the Constitution under the absurdity doctrine and/or the doctrine of implicit repeal? Standard of Review (“SOR”): De novo.

Dred Scott v. Sandford, 60 U.S. 393 (1857) (apposite because the modern judiciary and society have rejected as erroneous, the holding in Dred Scott which affirmed citizenship discrimination in the Constitution)

Afroyim v. Rusk, 387 U.S. 253, 262 (1967) (holding that, “(The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.”).

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (finding that the 14th Amendment *impliedly* abrogated the 11th Amendment – where the subject, like here, was discrimination).

McDonald v. City of Chicago, Ill. 130 S.Ct. 3020, 3059 -3060 (U.S., 2010), (explaining that Constitutional slavery/citizenship discrimination and Constitutional equality are “irreconcilable” – a condition that triggers *implicit* repeal.).

III. STATEMENT OF CASE

Based on the 2010 national census, there were more than 15 million naturalized Americans. As such, this is one of the largest cases of invidious discrimination in the history of the United States because its outcome will have implications for every naturalized citizen. Plaintiff-Appellant Abdul Karim

Hassan, is a naturalized American citizen and a candidate for the Presidency of the United States (“plaintiff” or “appellant”). Plaintiff brought the instant action against the State of Montana and its Secretary of State because of their national origin discrimination in the form of their discriminatory denial of presidential ballot access (ER. 12-13), discriminatory declaration (ER. 15), and statute (MCA § 13-10-201 - ER. 16) – invidious national origin discrimination solely because he was an American citizen who was born in another country before settling in America. Plaintiff sought a declaration that defendants’ national origin discrimination against him violated the equal protection clause and the citizenship clause of the Fourteenth Amendment. Plaintiff also sought a declaration that the Fifth¹ and Fourteenth Amendments are in irreconcilable conflict with and therefore trump, abrogate and implicitly repeal the invidious national origin discrimination in the Constitution’s natural born clause.

This action was commenced on December 8, 2011 by the filing of a complaint in the United States District Court for the District of Montana. Defendants were duly served and prior to answering the complaint, defendants, on January 5, 2012, made a motion to dismiss the complaint for a failure to state a claim. After briefing was completed, the district court, by decision dated May 3, 2012, adopted the Magistrate’s March 21, 2012 Findings and Recommendation

¹ The equal protection analysis under the Fifth and Fourteenth Amendments is the same. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995) ([t]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.

and granted defendants' motion to dismiss. A judgment dismissing the case was entered on May 3, 2012.

Plaintiff timely filed a notice of appeal on May 17, 2012. Plaintiff seeks a reversal of the district court and the issuance of the declarations he seeks in the complaint. The filing of the instant brief constitutes the perfection of this appeal.

IV. STATEMENT OF FACTS

Plaintiff-Appellant Abdul Karim Hassan was born in 1974 in the country of Guyana. (ER. 2:9² - complaint). Petitioner's race is East Indian. (ER. 2:10). Hassan is a naturalized American citizen who was naturalized within the United States and took the oath of citizenship at a United States District Court in New York City. (ER. 3:11). Hassan satisfies all of the constitutional requirements for holding the Office of President of the United States except the requirement of natural born status. (ER. 3:12). See U.S. Constitution, Article II, Section 1, Clause 5 ("Natural Born Clause"). In March 2008, Hassan announced his candidacy for the Presidency of the United States through his presidential website at <http://www.abdulhassanforpresident.com>. (ER. 3:13). Hassan is currently focused on the 2012 presidential elections but if he is not successful in 2012, Hassan intends to continue his current campaign without interruption until the next presidential elections in 2016. (ER. 3:14). Since the announcement of his

² The citation (ER. 2:9) refers to paragraph 9 on page 2 of the Excerpts of Record ("ER").

candidacy in March 2008, Hassan has used and will continue to use without interruption, his presidential website in much the same way as the leading presidential candidates – to promote and communicate his candidacy, issue positions and campaign to voters and the public. (ER. 3:15). Hassan has also been communicating this message to the American public through Youtube.com. (ER. 3:16). In order to compliment and improve the use of the website, petitioner has purchased and paid for a national presidential advertising campaign through Google - this advertisement has been running and will continue to run and it links to petitioner's presidential website. (ER. 4:17). In addition, Hassan has done interviews with and has been covered by both print and broadcast media. (ER. 4:18). Hassan's presidential candidacy and campaign have also been covered widely on the internet as a quick online search will reveal. (ER. 4:19). This growth in Hassan's presidential campaign and candidacy has resulted in thousands of hits each month to petitioner's presidential website from all across the country and the growth continues. (ER. 4:20). Hassan will continue to build on this initial success and continue to promote his candidacy and ideas to more and more voters in New Hampshire and across the country. (ER. 4:21).

On September 2, 2011, the Federal Election Commission ruled that Hassan as a naturalized American citizen running for President of the United States is covered by the Federal Election Campaign Act ("FECA") and related laws and that

plaintiff is required to comply with the record-keeping, expenditure and other requirements of the federal election laws and plaintiff has been and will continue to spend money, time and effort to comply with these requirements. (ER. 5:23). (See FEC ruling at <http://www.abdulahassanforpresident.com/fec/ruling.pdf>). In July 2011, plaintiff sought a ruling from Defendants as to whether his status as a naturalized American citizen will prevent him from being placed on the Montana presidential ballot. (ER. 5:24). In response, Defendants rule that they will not place plaintiff on their presidential ballot because of his national origin. (ER. 5:25; ER. 12-16). As a condition to getting on the Presidential ballot in Montana, Defendants invoke MCA § 13-10-201 and require plaintiff Hassan (and other presidential candidates) to sign a Declaration for Nomination and Oath of Candidacy for President under oath stating in effect that plaintiff is a natural born citizen. (ER. 5:26; ER. 12-16). Because plaintiff is a naturalized citizen and not a natural born citizen, he cannot sign the required Declaration without committing perjury and as such, plaintiff has been denied any chance of getting on the presidential primary ballot and/or the presidential general elections ballot in the State of Montana unless plaintiff prevails in this lawsuit. (ER. 6:27-28). Hassan has the filing fee ready and if he wins this case, he will immediately execute and file the modified Declaration with the Montana Secretary of State office along with the filing fee. (ER. 6:29).

V. SUMMARY OF ARGUMENTS

At the outset, we should note that plaintiff is not arguing that the natural born clause is “unconstitutional,” and plaintiff is not asking this Court to amend the Constitution – people usually accuse the Supreme Court of amending the Constitution when they don’t like the interpretation. Plaintiff is simply asking the Court to interpret the Constitution and resolve the conflict between different parts of the Constitution. To the extent that there is implicit repeal, it is created by the irreconcilable conflict and not by the Court – the Court merely identifies the irreconcilable conflict that triggers implicit repeal. Implicit repeal is not a voluntary undertaking by the Court, it is a necessary result where one part of the Constitution allows certain discrimination (as argued by defendants concerning the natural born clause) and a later part of the Constitution prohibits the very type of discrimination – both cannot operate at the same time and one must necessarily give way. It is also not accurate to characterize plaintiff’s position as being that the natural born provision is unconstitutional – it is plaintiff’s position that the natural born provision is irreconcilable with another part of the Constitution. The term “unconstitutional” is better used to describe a situation where a lower level authority such as a statute, is irreconcilable with or violates a Constitutional provision. When a statute is irreconcilable with a part of the Constitution, it is deemed unconstitutional under principles of supremacy because the Constitution is higher in authority than a statute. When one part of the Constitution is in

irreconcilable conflict with an earlier part of the Constitution, the earlier part is deemed trumped/abrogated/implicitly repealed under principles of implicit repeal – not supremacy, because both are at the same level – both are contained in the Constitution.

The facts as alleged in the complaint must be taken as true and are incorporated herein. In essence however, plaintiff has been prevented by defendants from accessing the Montana presidential ballot on the grounds that plaintiff is a naturalized citizen and not a natural born citizen. Defendants require plaintiff to sign a Declaration under penalty of perjury stating that he is a natural born citizen. Because plaintiff cannot sign this Declaration without committing perjury, and because of defendant's unlawful national origin discrimination against plaintiff, the instant case was filed. In addition to related injunctive relief, plaintiff in general seeks a declaration: 1) that defendants' national origin discrimination against him in the form of is discriminatory denial (ER. 12-13), discriminatory declaration (ER. 15) and statute (MCA § 13-10-201 - ER. 16), violates the equal protection clause and the citizenship clause of the Fourteenth Amendment; and 2) that the national origin discrimination in the Constitution's natural born provision is trumped, abrogated and implicitly repealed by the Fourteenth and Fifth Amendments – presumably defendants' national origin discrimination is based on

the natural born provision. Article II, Section 1, Clause 5³. First, under settled law, defendants' national origin discrimination is subject to strict scrutiny review under the Fourteenth Amendment and defendants have not even attempted to meet their stringent burden under this standard because it is impossible for them to do so in this case. Defendants do not deny that their discrimination, standing alone, would violate the Fourteenth Amendment, but instead, argue that they are allowed to invidiously discriminate by the natural born provision. Second, plaintiff demonstrates under standard implicit repeal analysis that the invidious national origin discrimination in the natural born provision is irreconcilable with the equal protection guarantee of the Fourteenth Amendment – a condition that triggers abrogation/implicit repeal. In addition, plaintiff demonstrates that the Fourteenth Amendment was intended to limit the power of government to discriminate, especially regarding naturalized and natural born citizenship – another condition that triggers implicit repeal/abrogation. The equal protection guarantee of the Fifth Amendment also limits the power of the federal government to discriminate based on national origin and status as a naturalized citizen. While the conditions under

³ The 12th Amendment which took effect in 1804, repealed Clause 3 of Section 1. While the repeal did occur, it does not follow that any renumbering occurred. For reference purposes, it is common to use the numbering before repeal but note the fact of repeal. For example, when the 21st Amendment repealed the 18th Amendment, the 19th Amendment did not become the 18th and the 20th Amendment did not become the 19th etc. Nonetheless, when defendants refer to Clause 4 and plaintiff refers Clause 5, we are both referring to the natural born provision in Article II, Section 1.

standard repeal analysis such as irreconcilability are satisfied in this case, because we are dealing with strict-scrutiny type discrimination based on a suspect classification, there is no presumption against implicit repeal because laws which discriminate based on characteristics such as race or national origin are presumed to be invalid. This presumption of invalidity is even greater in the constitutional context because it is harder to change the Constitution than it is to change a statute.

Importantly, because the natural born clause only deals with the Presidency and does not deal with ballot access, it does not require defendants to deny plaintiff ballot access. By contrast, the Fourteenth Amendment prohibits defendants from denying plaintiff ballot access because of his national origin. As such, defendants' discrimination against plaintiff would be invalid and unconstitutional even if the natural born clause is still valid – which it is not.

When plaintiff uses terms such as trump, abrogate and implicit repeal, in the complaint, these are intended to encompass the range of situations which would lead to an interpretation of the Constitution that plaintiff is not prevented from being President because of his status as a naturalized citizen. Plaintiff also argues that under the well-established Absurdity Doctrine, that the absurd result of invidious national origin discrimination that the natural born provision produces, should be avoided in favor of the result of equality that Fourteenth Amendment produces especially in light of the liberty and justice goals of the Constitution, and

the current anti-discrimination public policy of the United States and the State of Montana. Because absurd results in the constitutional context are harder to remedy through the legislature than absurd results in the statutory context, the Absurdity Doctrine applies with greater force in the constitutional context as explained further below. It is no accident that no type of strict scrutiny discrimination has survived in the Supreme Court in the last sixty years – the Court has always adopted an interpretation of the Constitution that placed equality above discrimination. History and the law require such an anti-discrimination interpretation in this case. Defendants’ motion should be denied in its entirety and a declaration issued in plaintiff’s favor as requested.

VI. ARGUMENTS

1. EVEN IF THE NATURAL BORN CLAUSE IS VALID, DEFENDANTS’ NATIONAL ORIGIN DISCRIMINATION IS INVALID

In his complaint, Hassan seeks a declaration that defendants’ national origin discrimination violates the Fourteenth Amendment and is therefore invalid. (ER. 1:1). The national origin discrimination as laid out in the complaint is defendants’ discriminatory denial (ER. 12-13), discriminatory declaration (ER. 15) and statute (MCA § 13-10-201 - ER. 16), which prevent plaintiff Hassan from being placed on the Montana presidential ballot, solely because of Hassan’s national origin, even though Hassan is an American citizen. Plaintiff also seeks a declaration that the

Fourteenth Amendment implicitly repealed the invidious discrimination in the natural born clause. (ER. 1:1). Defendants do not dispute that their national origin discrimination violates the Fourteenth Amendment - defendants instead argue that they are merely replicating the invidious national origin discrimination in the natural born clause.

While defendants' discrimination against plaintiff is unconstitutional if the natural born provision is invalid, defendants' national origin discrimination against Hassan is unconstitutional and invalid even if the natural born clause is still valid. In Hassan v. USA (EDNY Case #: 08-cv-938 – docket #: 28), a case defendants and the district court relied on heavily, the court 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.

There are more examples. Barry Goldwater was a candidate in every presidential primary and caucus on his way to becoming the Republican nominee for President in 1964, even though Mr. Goldwater was born in the Arizona territories in 1909 before Arizona became a state in 1912. In 1968, Governor George Romney was on the presidential primary/caucus ballot in several states even though he was born in Mexico. More recently in 2008, Senator John McCain

was a candidate in every presidential primary and caucus on his way to becoming the Republican nominee for President even though he was born in Panama – the Panama Canal Zone was always a part of Panama and was never a part of the United States.

The district court in Hassan v. USA, did agree with the United States government that the natural born clause only prevents Hassan from taking office and did not prevent him from running for office and being elected – though it held that Hassan was still injured by not being able to take office and could challenge the natural born clause as a result. Because the natural born clause does not require defendants to engage in national origin discrimination, and because the Fourteenth Amendment prohibits defendants’ national origin discrimination especially under strict-scrutiny analysis, defendants’ national origin discrimination against Hassan violates the Fourteenth Amendment.

It is easy to conclude that defendants’ national origin discrimination violates the Fourteenth Amendment. See Afroyim v. Rusk 387 U.S. 253, 262 (1967)(invalidating statute that discriminated against citizens because they were naturalized and not natural born). Both race and national origin are subject to strict scrutiny analysis. See 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”). See Clark v. Jeter, 486 U.S. 456,

461 (1988) (reiterating that discrimination based on race or national origin is subject to strict scrutiny). City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (reiterating that discrimination based on race, national origin, and alienage is subject to strict scrutiny.). Graham v. Richardson, 403 U.S. 354, 371-72 (1971) (reiterating that discrimination based on race, national origin, and alienage is subject to strict scrutiny). Jana-Rock Const., Inc. v. New York State Dept. of Economic Development, 438 F.3d 195, 200 (2d Cir. 2006) (“The classifications that are the subject of this appeal are based on national origin rather than race. It is undisputed, however, that principles of analysis applicable to race-based affirmative action programs are the same as those applicable to national-origin-based affirmative action programs. We therefore use the terms interchangeably.”).

In Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 19 (1st Cir. 1998), the First Circuit stated in relevant part as follows:

The formula for strict scrutiny is familiar: the government must demonstrate that its action served a “compelling state interest,” Croson, 488 U.S. at 505, 109 S.Ct. 706, and was “narrowly tailored” to advance that interest, *id.* at 507–08, 109 S.Ct. 706.

Not surprisingly, defendants have not even attempted to carry their burden because they cannot even remotely satisfy the strict scrutiny standard. Defendants’ national origin discrimination is taken from the natural born clause which is based on the assumption that foreign-born citizens are less loyal than natural born

citizens and cannot be trusted⁴. In Schneider v. Rusk, 377 U.S. 163, 168 (1964), the Supreme Court emphatically held that this type of distrust rationale and assumption are legally impermissible and have no value when it stated in relevant part that:

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U. S. 497, 499.

Significantly, the Supreme Court in Schneider v. Rusk, 377 U.S. 163, 165 (1964), rejected the argument that, "it is not invidious discrimination for Congress to treat such naturalized citizens differently from the manner in which it treats native-born citizens" - the very thing defendants' national origin discrimination and Declaration for affidavit of candidacy. Likewise, in Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court found that treating naturalized citizens differently than natural born citizens also violated constitutional equal protection and struck down the statute in that case. The instant case is a lot of more compelling than Schneider and Afroyim. First, unlike the Fifth Amendment, the Fourteenth Amendment does contain an equal protection clause and does not rely solely on its due process clause. Second, the statutes in Schneider and Afroyim

⁴ http://www.legistorm.com/score_crs/show/id/82388.html

sought to discriminate based on conduct such as residing overseas and voting in foreign elections respectively. Here however, defendants are discriminating against Hassan solely because of his birth status and national origin, and not because he engaged in any given conduct. See also Bolling v. Sharpe, 347 U. S. 497 (1954) (denial of admission based solely on race violates constitutional equal protection). Moreover, as Justice O'Connor reiterated in Adarand v. Peña, 515 U.S. 200, 213 (1995), about earlier national origin discrimination against Japanese Americans, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." It is so difficult for the government to satisfy strict scrutiny, no law discriminating on the basis of race or national origin has survived in the Supreme Court in the last sixty years under strict scrutiny review. It is therefore easy to conclude that defendants' national origin discrimination and Affidavit of Candidacy violate the equal protection guarantee of the Fourteenth Amendment. The constitutional qualifications for President can be properly challenged through the electoral college pursuant to the Twelfth Amendment and 3 U.S.C. 15.

Therefore, while the natural born clause prohibits the plaintiff from being President, it does not prohibit plaintiff from being placed on the Presidential ballot in Montana. Here, defendants do not and cannot claim that their national origin discrimination is valid under the Fourteenth Amendment – defendants instead

argue that they are allowed to invidiously discriminate by the natural born clause but as explained herein, the natural born clause deals with taking office and does not deal with ballot access and does not require defendants to deny plaintiff ballot access. Notably, most states do not have laws which deny naturalized citizens access to their presidential ballot and many of those that do, have adopted such laws only in recent years in response to the “birther” movement that has challenged President Obama and Presidential candidate John McCain by claiming they were not born in the United States. This is a very important point in this case because this court can enforce plaintiff’s equal protection rights under the Fourteenth Amendment by declaring defendant’s national origin discrimination and affidavit of candidacy to be unconstitutional, regardless of whether the natural born clause is valid – which it is not.

A common question asked when the natural born issue is discussed is whether a 21-year old, for example, can challenge the Constitution’s minimum age requirement that the President be at least thirty-five years old. The answer would be no, because unlike national origin discrimination which is subject to strict scrutiny review, age in this context would be subject to “rational basis” review under the Fourteenth or Fifth Amendments (see Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) and requiring an older age and greater life experience for such an important job is likely to survive the rather low bar of rational basis

review. Similarly, the very section in the Constitution that contains the natural born provision also uses the pronoun “he” in terms of the Presidency and many argue that it was intended to limit the Presidency to men – which is not surprising because at the time the Constitution was adopted women were considered to be the property of men and did not even have the right to vote. If this is ever challenged on the grounds of gender/sex discrimination, under the Fourteenth or Fifth Amendment such discrimination would be subject to intermediate scrutiny (see Craig v. Boren, 429 U.S. 190 (1976)– lower than the strict scrutiny standard that race and national origin discrimination are subjected to.

**2. THE NATURAL BORN PROVISION IS INVALID
UNDER THE ABSURDITY DOCTRINE AND IN LIGHT
OF THE CONSTITUTION’S LIBERTY AND JUSTICE
GOALS AND THE CURRENT PUBLIC POLICY OF THE
NATION**

The district court did not address the arguments based on the absurdity doctrine but since the district court adopted the reasoning in Hassan v. New Hampshire, Case. #: 11-cv-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), we will use said reasoning to discuss this point. In rejecting plaintiff’s argument based on the absurdity doctrine, the district court in Hassan v. New Hampshire stated in relevant part as follows (2012 WL 405620, * 4, fn 5):

The Absurdity Doctrine provides that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). As

discussed, Hassan has not demonstrated that the legislative purpose behind the Fifth or Fourteenth Amendments was to abrogate the Natural Born Citizen Clause. Similarly, Hassan's contention that the original rationale for the Natural Born Citizen Clause is no longer relevant does not provide the basis for ignoring the plain language of the Constitution.

At the outset, the district court in Hassan v. New Hampshire did not disagree with plaintiff's arguments that the absurdity doctrine applies in the constitutional context – plaintiff examined several instances of the absurdity doctrine at work in the constitutional context. However, the two bases upon which the district court rejected the absurdity doctrine, are without merit. First, while the conditions for implicit repeal exist in this case, unlike the implicit repeal doctrine, the absurdity doctrine does not require a showing of any legislative intent to abrogate or any irreconcilability. As the district court itself noted in the above excerpt, the conditions that satisfy the absurdity doctrine are as follows: 1) an absurd result; 2) an alternative interpretation that is consistent with the legislative purpose. In terms of legislative purpose, the Constitution in its preamble states that its purpose is to “form a more perfect Union ... establish justice ...and secure the Blessings of liberty.” With this purpose in mind, we turn to the competing interpretations. On the one hand, we have the natural born provision which inflicts invidious national origin discrimination on American citizens - the district court does not seem to disagree with plaintiff that discriminating against American citizens solely because of their national origin is absurd, irrational, bigoted, and senseless. On the other

hand, we have the equal protection guarantee of the Fourteenth Amendment which prohibits states like Montana from discriminating on the basis of national origin especially under the standard of strict scrutiny as explained above. We now must decide which result – discrimination or equality – is consistent with the Constitution’s purpose of liberty and justice. The answer is simple – equality as produced by the Fourteenth Amendment. This resort to policy and purpose as a guide in picking one interpretation over another was also utilized by the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, 499 (1954), which relied on “our American ideal of fairness,” in reaching its decision. It was also utilized in Afroyim in deciding whether to keep the interpretation in Perez v. Brownell, 356 U.S. 44 (1957) or the alternative interpretation the Court adopted in Afroyim v. Rusk, 387 U.S. 253, 267 (1967)(“Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than Perez with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee.”).

The district court also argued in the above excerpt that the fact that the natural born clause is no longer “relevant” does not mean it is no longer valid but the district court misses the mark again. Under the absurdity doctrine, the proper inquiry is not whether the interpretation/result is “relevant” – it is whether it is

absurd and the district court does not seem to disagree with plaintiff's view that invidious national origin discrimination is an absurd result. It is hard to imagine a federal judge stating that discriminating against American citizens and classifying them as disloyal solely because of the location of their birth is not an absurd result.

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 wound⁵." 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) ("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.").

The Dredd Scott decision was handed down before the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted, and at a time when slavery was still protected by the Constitution in explicit terms, so why was it wrongly decided? The Supreme Court in Dredd Scott 60 U. S. at 451, stated in relevant part that:

⁵ 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.'

the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words -- too plain to be misunderstood.

On the question of whether persons of African ancestry were citizens under the Constitution the Supreme Court in Dred Scott v. Sandford, 60 U.S. 393, 404-405 (1857), stated in relevant part that:

We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Dredd Scott was wrongly decided because we now universally agree that the invidious discrimination based on race/ancestry that destroyed Dredd Scott's right to citizenship was irreconcilable with constitutional equality and was absurd and that this absurd result should have been avoided by choosing an alternative interpretation that was consistent with the Constitution's liberty and justice, goals which are today embodied in the Fifth and Fourteenth Amendment's equal protection guarantee and which at the time should have also been found in the Fifth Amendment's liberty and due process clauses. Dredd Scott's right to citizenship

was destroyed because of his ancestry and here, Hassan's right to full citizenship is being destroyed because of his national origin – like *Dredd Scott*, Hassan is being relegated to second class status. See *Schneider*, 377 U.S. at 169 (discriminating against citizens because of their naturalized status “creates indeed a second-class citizenship”). *Plyler v. Doe*, 457 U.S. 202, 233-234 (1982) (BLACKMUN, J., concurring) (“a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.”). Here, denying more than 15 million naturalized citizens the right to participate as candidates in the most important political process in the nation – the presidential election process, is to condemn plaintiff and this class of naturalized citizens to permanent second-class status.

It should be noted that although *Dredd Scott* dealt with citizenship and race discrimination, as a matter of constitutional law, race and national origin discrimination are viewed as equally bad as evidenced by the fact that they are both subject to strict scrutiny. See for example *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”). Simply put, because it is now universally accepted that it was incorrect and absurd for the Constitution to deny citizenship to *Dredd Scott* because of his race, it is also

incorrect and absurd for the Constitution to deny plaintiff full citizenship because of his national origin. In this day and age, good and decent American citizens should not be stigmatized as disloyal solely because of the location of their birth.

Almost a hundred years after Dredd Scott, the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), was faced with a situation in which the U.S. Constitution prohibited the states from engaging in invidious discrimination but did not prohibit the federal government from doing the same - the federal government was subjecting African Americans to invidious discrimination but the Fifth Amendment contained no equal protection clause and was never intended by the Founding Fathers to protect African Americans from discrimination. In order to avoid another great self-inflicted wound like the one caused by its Dredd Scott decision, the Supreme Court characterized this situation as “unthinkable” or absurd and stated that, “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” Bolling, 347 U.S. at 500. Likewise, in light of the Supreme Court’s interpretation that the Fifth and Fourteenth Amendments prohibit national origin discrimination by the federal and state governments respectively, it would be unthinkable that the same Constitution nonetheless allows them to engage in national origin discrimination. The lesson from the unanimous decision in Bolling is that invidious

discrimination is an absurdity and that the Constitution should not be interpreted in a manner that permits invidious discrimination. In Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009), the Supreme Court noted that it recognized an implied right of action because in essence, it would be illogical or absurd to have a right without a remedy in the equal protection context. Thanks to Bolling and its progeny, the jurisprudential framework is already in place for this Court to rule in plaintiff's favor and it should do so without hesitation.

3. CONTRARY TO THE DISTRICT COURT'S HOLDING, THERE IS NO PRESUMPTION IN FAVOR OF INVIDIOUS NATIONAL ORIGIN DISCRIMINATION

A central part of plaintiff's implicit repeal arguments is that there is no presumption against implicit repeal of a law that discriminates on the basis of a "suspect" classification because such discrimination is presumed to be invalid. If the usual presumption against implicit repeal goes away, there is no need to show irreconcilability or intent to repeal in order to trigger implicit repeal or nullification, even though both of these conditions exist in this case. The district court was legally wrong to hold otherwise.

While there is no known case directly addressing this precise issue, there is also no case which contradicts Hassan's position on this issue and there is a lot of legal authority which lend support to Hassan's position on this issue. We begin with the Dred Scott case which is universally condemned today because Chief

Justice Taney in that case did not adjust his analysis for the fact that he was dealing with laws which enslaved human beings and denied them citizenship because of ancestry/race. Assuming the “content” of the Constitution’s slavery provisions was different and stated that one can import and hold cattle (instead of black people) as slave property - a decision upholding and protecting such a right to import and hold cattle as property would not have led to a civil war and would not have been condemned as the worst decision in Supreme Court history. In fact such a decision would be unremarkable and a logical application of legal principles. As such, for the district court to say that content of the law does not matter - that in effect, it does not matter whether we are holding people as slave property or cattle as property, is astonishing and plain wrong. The district court, in holding that content does not matter is agreeing with Chief Justice Taney in Dred Scott who held that the legal analysis does not change whether we are dealing with property in the form of a human being or property in the form of an article of merchandise (Dred Scott, 60 U. S. at 451) – rather than lump the district court with Justice Taney, one will generously conclude that the district court seriously erred because it did not think through its ruling carefully. However, such generosity cannot last forever and judges cannot rule like Justice Taney and then expect not to face the same judgment that history has visited on Justice Taney – we should all profit from the mistakes of the past.

We next turn to Andrus v. Glover Const. Co., 446 U.S. 608, 618-619 (1980) in which the supreme court held that there is a stronger presumption in favor of “remedial” laws in the context of implicit repeal – a holding that contradicts the district court’s view that the content of the law does not matter - the equal protection clause is the most remedial of all laws. Also in Branch v. Smith, 538 U.S. 254, 285 (2003), the Supreme Court equated the doctrine of implicit repeal with the doctrine of preemption and noted that both these doctrines carry a presumption against them. It is well established that the preemption doctrine is based on supremacy principles which hold that a higher level law will trump a lower level law – a federal statute will trump state law and the Constitution will trump a federal statute or state law. One example of preemption is where a state law that discriminates on the basis of race or national origin is trumped or preempted by the equal protection clause of the Fourteenth Amendment. However, because laws which discriminate on the basis of race or national origin are presumed to be invalid, there is no presumption against their preemption or implicit repeal. 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.”). Not surprisingly, the district court has not cited a single case in which a law that discriminated on the basis of race or national origin was presumed valid or which carried a presumption against implicit repeal –

defendants have also not cited any such case. Furthermore, as explained in Cleburne, 473 U.S. at 439, one of the main reasons for this presumption of invalidity of laws that discriminate on the basis of race or national origin, is the fact that obtaining a remedy or repeal through the legislative process would be difficult. Because it is even more difficult to achieve change and amendment/repeal in the Constitutional context through legislative means, the presumption of invalidity and in favor of implicit repeal is even stronger in the constitutional context. It is not surprising that all of the significant changes in Constitutional law and civil rights were implicit, in the form of judicial opinions and do not expressly appear in the text of the Constitution. See Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (explaining that the Supreme Court recognized an *implied* Constitutional “Bivens” cause of action in discrimination cases like this one but not in other types of cases.). Bolling v. Sharpe, 347 U.S. 497 (1954) (recognizing an *implied* equal protection guarantee in the Fifth Amendment – where the subject, like here, was discrimination). Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (finding that the 14th Amendment *impliedly* abrogated the 11th Amendment – where the subject, like here, was discrimination). McDonald v. City of Chicago, Ill. 130 S.Ct. 3020, 3059 -3060 (U.S., 2010), (explaining that Constitutional slavery/citizenship discrimination and Constitutional equality are “irreconcilable” – a condition that triggers *implicit* repeal.). The government

cannot carry the very high burden under the logic of strict scrutiny to justify this irrational and senseless national origin discrimination. Finally, for the district court to hold that the content does not matter, is to say that if the slavery provision was the subject of an implicit repeal argument the district court here would hold that there is a presumption against repeal of the slavery provision – such a holding would be astonishing and obviously wrong and it is clear that the district court did not carefully think through its analysis. As such, the natural born clause is trumped, abrogated and implicitly repealed by the equal protection guarantee of the Fifth and Fourteenth Amendments because there is no presumption against implicit repeal of laws which discriminate on the basis of national origin and because: 1) defendants can show that the subject national origin discrimination in the natural born clause is necessary to achieve any compelling governmental interest etc.; 2) the equal protection clause in the Fourteenth Amendment was adopted after the natural born clause; 3) national origin discrimination is against the public policy of the United States; and 4) discriminating against American citizens solely because of their national origin is absurd, irrational and senseless.

**4. THE INVIDIOUS NATIONAL ORIGIN DISCRIMINATION
IN THE NATURAL BORN CLAUSE IS TRUMPED,
ABROGATED AND IMPLICITLY REPEALED BY THE
EQUAL PROTECTION CLAUSE OF THE FOURTEENTH
AMENDMENT**

In addressing plaintiff's argument that the equal protection clause of the Fourteenth Amendment is irreconcilable with the national origin discrimination in natural born clause, the district court here incorporated the finding in the related case of Hassan v. New Hampshire, Civ. No. 11-cv-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), which stated in relevant part as follows (2012 WL 405620, * 2):

For there to be an irreconcilable conflict, “[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation....” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976). Instead, the “intent to repeal must be manifest in the ‘positive repugnancy between the provisions.’” *United States v. Batchelder*, 442 U.S. 114, 122, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (quoting *United States v. Borden Co.*, 308 U.S. 188, 199, 60 S.Ct. 182, 84 L.Ed. 181 (1939)); see also *Ga. v. Penn. R. Co.*, 324 U.S. 439, 457, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) (“[o]nly a clear repugnancy between the old law and the new results in the former giving way”).

Significantly, the cases relied on by the New Hampshire court in reaching its conclusion about “positive repugnancy” do not support the court’s conclusion and actually support plaintiff’s irreconcilability arguments. For example, in U. S. v. Batchelder, 442 U.S. 114, 122 (1979), cited by the New Hampshire court, the defendant’s conduct violated two laws – one law carried a two-year sentence and the other carried a five-year sentence. Here, by contrast, denying plaintiff the Presidency because of his national origin, would be required under the natural born clause but would be prohibited by the equal protection guarantee of the Fifth and

Fourteenth Amendments. In other words, the conduct in Batchelder violated both laws but here, the conduct or action violates one law but is permitted and required by the other law – a classic example of irreconcilable conflict. In Radzanower v. Touche Ross & co., 426 U.S. 148, 156 (1976), cited in the above excerpt, the court was faced with two laws regulating venue for lawsuits involving securities and banks. The court noted that there was a conflict but was able to reconcile the conflicting provisions because the small population affected by the conflict were still able to bring their lawsuits even if not in the venue they preferred. Here by contrast, the 15 million victims of the natural born clause are not able under any scenario to invoke the equal protection guarantee against national origin discrimination and become President. In Radzanower, the conflict was a mere inconvenience but here, the conflict completely prevents plaintiff and more than 15 million naturalized American citizens from becoming President.

In the recent case of McDonald v. City of Chicago, Ill. 130 S.Ct. 3020, 3059-3060 (U.S., 2010), the Supreme Court stated that slavery and the measures designed to protect it like the citizenship discrimination in Dred Scott v. Sandford, 60 U.S. 393 (1857), based on ancestry, were “irreconcilable” with the “principles of equality” in the Constitution. With such a finding that invidious discrimination is irreconcilable with constitutional equality, the implicit repeal analysis can end at this point in plaintiff’s favor. Significantly, there is a very easy technique which

will establish whether the invidious discrimination in the natural born clause is irreconcilable with the equal protection clause of the Fourteenth Amendment – we simply assume the natural born clause was a statute and then determine if it would violate the equal protection clause. To say that a statute violates the equal protection clause is the same as saying the statute is irreconcilable with the equal protection clause. The answer is easily yes as explained above and as such, the natural born clause as a part of the Constitution would be irreconcilable with and implicitly repealed, trumped, abrogated and nullified by the equal protection guarantee of the Fifth and Fourteenth Amendment.

**5. UNDER THE IMPLICIT REPEAL DOCTRINE PLAINTIFF
NEED NOT SHOW INTENT TO REPEAL WHERE AN
IRRECONCILABLE CONFLICT EXISTS**

The district court in this case as well as in Hassan v. New Hampshire and Hasan v. Iowa, seem to correctly hold that plaintiff need only show that one of the two categories of implicit repeal exists. However, in referring to the two categories of implicit repeal, the district court in Hassan v. Iowa Case #: 11-cv-574, Doc # 16 - pg 9, (Southern District of Iowa, Judge Longstaff):

In either context, a repeal will not be presumed “unless the intention of the legislature to repeal [is] clear and manifest.” *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007).

The district court erred to the extent it held that plaintiff needed to show a clear and manifest intent to repeal even where an irreconcilable conflict exists. At

the outset, the case of Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007), which the district court cited for this proposition, does not say any such thing. The Supreme Court in Homebuilders, 551 U.S. at 663 stated in relevant part as follows:

see also *Branch v. Smith*, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (“An implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute’ ”); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936) (“[T]he intention of the legislature to repeal must be clear and manifest”).

As the above excerpt reveals, the Supreme Court in Homebuilders never stated that intent to repeal was required “in either context.” The Supreme Court in Homebuilders as well as in Branch v. Smith, 538 U.S. 254, 273 (2003), interpreted Posadas v. National City Bank, 296 U.S. 497 (1936), and the implicit repeal standard therein, and in both cases, the Supreme Court did not state or hold that intent is required for implicit repeal where an irreconcilable conflict exists. The “clear and manifest” language in Homebuilders and other cases refers to the intent required to trigger the second category of implied repeal – not the first category which is triggered by an irreconcilable conflict. Plaintiff’s view that where “irreconcilability” is present, as it is here, implicit repeal occurs, without any showing of intent, is also supported by good logic. If the Constitution says turn left and turn right at the same time, this irreconcilability will trigger implicit repeal of

the instruction that came earlier in time because one cannot possibly turn left and right at the same time regardless of intent of legislative intent.

Very significantly, an irreconcilable conflict may emerge long after a law has been enacted. Moreover, the conflict may exist precisely because the legislature did not think of it at the time of passing the law. In fact, while the Supreme Court in Radzanower was able to reconcile the conflict in that case, the Court found that at the time congress adopted the venue provisions which eventually conflicted, the legislature did not contemplate that banks would be involved in securities and no conflict had existed at the time the venue provisions were adopted though the conflict developed later. In the current case, the irreconcilable conflict only emerged in the last several decades when the Supreme Court began interpreting the Fourteenth and Fifth Amendments as prohibiting national origin discrimination.

6. THE DISTRICT COURT MISAPPLIED THE RULE REGARDING SPECIFIC V. GENERAL SUBJECT MATTER

The district court (ER. 28-29) as well as the New Hampshire court focused on specific versus general subject matter. The New Hampshire Court cited Homebuilders, 551 U.S. at 663, for the proposition that, ‘the more generalized Fourteenth Amendment could not be viewed as “covering the whole subject” of the earlier provision.’ (2012 WL 405620, *2). The district court misread Homebuilders. In Homebuilders, 551 U.S. at 663, after describing the two

categories of implicit repeal, the Supreme Court noted that “outside these limited circumstances” a specific provision will not be submerged by a more general provision. In other words, this rule as to specific versus general subject matter only applies where neither of the two categories for implicit repeal is triggered. This is consistent with the rule that the presumption against implicit repeal goes away when irreconcilability or intent is shown. See Branch, 538 U.S. at 285.

The district court also seem to miss the fact that while the language of the Fourteenth Amendment does not specifically address discrimination based on race or national origin, etc., the Supreme Court has specifically ruled that the Amendment addresses such discrimination and these interpretations are part of the Amendment as if they were written into the text. Moreover, rather than enumerate specific types of discrimination, the Fourteenth Amendment is sweeping as opposed to general, and covers all acts of discrimination which the Supreme Court has ruled, will be subject to one of several levels of scrutiny ranging from strict scrutiny to rational basis review.

However, as explained above, the Supreme Court in Home Builders made it clear that the issue of general versus precise subject matter is only relevant “outside these limited circumstances” of irreconcilability or intent – conditions that trigger implicit repeal. Therefore, when the Supreme Court makes a finding that discrimination is irreconcilable with constitutional equality, we need not dwell on

whether the discrimination is specific or general. In fact, when the Supreme Court in McDonald found that the slavery and discrimination in Dred Scott was irreconcilable with the principles of equality in the Constitution, it obviously knew that the slavery provision as well as the citizenship discrimination in Dred Scott were very specific but such specificity did not prevent it from making a finding of irreconcilability. We can also easily determine the district court is wrong because under the district court's view of the law, the specific slavery provision in Dred Scott would not be deemed to be irreconcilable with the equality provision in the Constitution and in the Fifth and Fourteenth Amendments.

**7. THE FOURTEENTH AMENDMENT'S CITIZENSHIP
CLAUSE TRUMPS, ABROGATES AND IMPLICITLY
REPEALS THE NATURAL BORN CITIZEN CLAUSE**

There is no indication that the district court or the New Hampshire court specifically addressed plaintiff's argument based on the citizenship clause. It seems however, that the district court and the New Hampshire court rejected all of the Fourteenth Amendment arguments on the grounds that the intent at the time of the Amendment was not to abrogate the natural born clause and that the Fourteenth Amendment cases cited by plaintiff merely discuss generalized equal rights of citizens. In so doing, the courts incorrectly discount Supreme Court caselaw interpreting the Fourteenth Amendment. With respect to the Citizenship Clause argument, both grounds for implicit repeal exist herein and implicit repeal can

occur based on either of them. In the landmark case of Brown v. Board of Education, 347 U.S. 483, 489 (1954), the Supreme Court held oral arguments in that case and focused heavily on the purpose and intent of the Fourteenth Amendment - after careful examination, and its “own investigation” the Supreme Court concluded that the legislative history of the Fourteenth Amendment was inconclusive. However, while reaching this conclusion, the Supreme Court in Brown noted that “avid proponents” of the Fourteenth Amendment intended it, “to remove all legal distinctions among ‘all persons born or naturalized in the United States.’” Brown, 347 U.S. at 489. It is clearly evident from the language of the Citizenship Clause that this “intent” prevailed and that it makes no legal distinction among citizens. The Citizenship Clause grants a single citizenship to persons born or naturalized within the United States – it does not grant naturalized citizenship to some and natural born citizenship to others – birth and naturalization are means of acquiring the same citizenship. In Afroyim v. Rusk 387 U.S. 253, 262 (1967), the Supreme Court adopted this view and made it abundantly clear, that the language of the Fourteenth Amendment, which was enacted about eighty years after the natural born requirement, was, “calculated completely to control the status of citizenship.” Simply put, the only way the Fourteenth Amendment can “completely control the status of citizenship” as the Supreme Court found, is if the natural born provision lost the control or power to relegate naturalized citizens to second-class

status as it did prior to the Fourteenth Amendment. Further powerful support for this conclusion emerges when the “complete control” finding is analyzed in the context of the following statement in Afroyim v. Rusk 387 U.S. 253, 262 (1967):

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

This statement is clear and sweeping and contains no exception as to presidential eligibility and we need not go further to show that the natural born provision is now moot. Nonetheless, the Afroyim Court’s statement that the Citizenship Clause should be interpreted to comport with the Fourteenth Amendment’s purpose of “equal justice to all that the entire Fourteenth Amendment was adopted to guarantee” (Afroyim, 387 U.S. at 267), the Supreme Court further reinforces the fact that the Citizenship Clause “remove[s] all legal distinctions among ‘all persons born or naturalized in the United States.’” This mandate of “equal justice” for naturalized and natural born citizens in the Citizenship Clause is irreconcilable with the discrimination in the natural born provision and results in the abrogation/implicit repeal of the natural born provision. Likewise, the natural born provision is also abrogated/implicitly repealed because, as explained above, the Citizenship Clause was intended to “completely control the status of citizenship.” Similarly, defendants’ statute, Declaration and denial which invidiously discriminate against naturalized citizens, are irreconcilable with and

violate the Citizenship Clause. Moreover, as the Supreme Court pointed out in Afroyim, Fourteenth Amendment citizenship which plaintiff possesses, cannot be shifted, cannot be diluted, is not fleeting, and cannot be destroyed by governmental power. Afroyim, 387 U.S. at 262. Given these emphatic statements by the Supreme Court, the discrimination in the natural born requirement cannot operate and can no longer stand because it “creates indeed a second-class citizenship,” (Schneider, 377 U.S. at 169), and as such, dilutes, and partially but significantly destroys the citizenship of plaintiff – the very result prohibited by the Fourteenth Amendment. As such, even though we only need “irreconcilability” or “intent” to trigger implicit repeal, we have both here especially when coupled with the “Fitzpatrick” argument below.

**8. THE IMPLICIT REPEAL BY THE CITIZENSHIP
CLAUSE OF CITIZENSHIP DISCRIMINATION BASED
ON ANCESTRY FURTHER ESTABLISHES THAT THE
CITIZENSHIP CLAUSE TRUMPED, ABROGATED AND
IMPLICATED REPEALED THE CITIZENSHIP
DISCRIMINATION BASED ON NATIONAL ORIGIN**

In its decision, the New Hampshire court, 2012 WL 405620, * 1, stated that, “Hassan does not contend that the Constitution contains any language expressly repealing the Natural Born Citizen Clause.” The court was making the point that in the absence of “language expressly repealing,” any repeal has to be implicit. It is universally accepted that the citizenship clause repealed the Constitution’s exclusion of blacks from citizenship following the Dredd Scott decision. See Bell

v. State of Md., 378 U.S. 226, 301 (1964) ("The first sentence of s 1 of the Fourteenth Amendment, the spirit of which pervades all of the Civil War Amendments, was obviously designed to overrule Dred Scott v. Sandford."). Given that the Fourteenth Amendment does not contain "any language expressly repealing" this exclusion of blacks from citizenship, that repeal was implicit and not explicit. Because the repeal was implicit, the conditions for implicit repeal had to exist – irreconcilability or intent. However, it must be noted that if the district court is correct in holding that a specific law cannot be repealed by a more general law, then the Constitution's exclusion of blacks (a specific group) from citizenship was not repealed by the more "general" citizenship clause which granted citizenship to "all person born or naturalized." This is yet more proof that the district court was very wrong.

The district court's erroneous holding that the citizenship discrimination against foreign-born citizens is not implicitly repealed like the citizenship discrimination against blacks was implicit repealed by the citizenship clause, is primarily due to the common misunderstanding that the citizenship clause was only intended to address the issue of black citizenship and nothing else. While the Constitution's exclusion of blacks from citizenship was one of the motivating factors and sparks that led to the adoption of the citizenship clause, the express language of the citizenship clause includes the words "all persons" and is not

limited to any particular group. This was confirmed in United States v. Wong Kim Ark, 169 U.S. 649 (1898), when the Supreme Court confirmed that the citizenship clause protected more than just black persons and protected the plaintiff in that case who was Chinese.

The district court also reasoned that plaintiff cannot show that the Fourteenth Amendment was originally intended to abrogate the Natural Born Citizen Clause. (Add. 9). At the outset, where an irreconcilable conflict is present, implicit repeal occurs without any showing of intent, and the absurdity doctrine does not require any showing of intent to abrogate or repeal. In any event, the district court's statement highlights a fundamental error in its logic. This error centers on the role of the Supreme Court in telling us what the purpose and intent of the Constitution are. In an interview at Hastings College of Law, Justice Scalia said the Fourteenth Amendment was never originally intended to prohibit gender discrimination along with other types of discrimination but because he believes in stare decisis, he accepts that the Fourteenth Amendment prohibits these types of discrimination given decisions in the past holding as such. Justice Ginsberg, in interview at the Constitutional Law Center in Philadelphia, also agreed that the Fourteenth Amendment was not originally intended to protect against gender discrimination – she observed that it was more than 50 years after the Fourteenth Amendment that women got the right to vote through Constitutional amendment. She stated

however, that under current Supreme Court precedent, one of the purposes of the Fourteenth Amendment is to protect against gender discrimination. This example demonstrates that despite what a district court may view as original intent, the district court must follow current Supreme Court case law as to what the intent and purpose of the Fourteenth Amendment is and as pointed out above, the Fourteenth Amendment now prohibits the type of national origin discrimination found in the natural born clause and the Supreme Court in Afroyim found that the Fourteenth Amendment was intended to completely control the status of citizenship – was intended to remove any control over citizenship held by other parts of the Constitution such as the natural born clause. There is even more support for this view. In holding that the Fourteenth Amendment trumped the Necessary and Proper Clause and the Naturalization Clause, the Supreme Court in Afroyim, 387 U.S. at 263 stated that:

Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy.

The Fourteenth Amendment’s control of citizenship is so obviously complete and sweeping - the Fourteenth Amendment as reinforced by the above excerpt, trumps and abrogates constitutional provisions that the drafters of the Fourteenth Amendment were not even “particularly concerned with.” This is more

than is needed to further conclude that the Fourteenth Amendment trumps, abrogates and implicitly repeals the natural born provision.

**9. THE NATURAL BORN PROVISION IS TRUMPED,
ABROGATED AND IMPLICITLY REPEAL UNDER
FITZPATRICK V. BITZER AND ITS PROGENY**

The district court in Hassan v. New Hampshire, cited Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) as an example of implicit repeal/abrogation in the constitutional context and stated that, “the Supreme Court has held that the Fourteenth Amendment limits Eleventh Amendment sovereign immunity, even though the text of the Fourteenth Amendment does not explicitly require that result.” 2012 WL 405620, * 2. Building on Fitzpatrick, the Supreme Court in Kimel v. Florida Board of Regents, 528 U.S. 62, 82 (2000), clarified that the Fourteenth Amendment will trump and abrogate the Eleventh Amendment if the discrimination engaged in by the state violates the Fourteenth Amendment. As outlined above, the national origin discrimination by defendants easily and clearly violates the Fourteenth Amendment, especially under strict scrutiny review. See Schneider and Afroyim. In fact, discriminating against plaintiff solely because of his national origin and nothing else and assuming that plaintiff cannot be trusted because he is foreign-born is completely irrational and senseless. Based on Fitzpatrick, and its progeny, a finding of abrogation/implicit repeal is even more warranted in this case for several reasons. First, in Fitzpatrick, the Supreme Court

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

10. THE DISTRICT COURT’S RELIANCE ON CASES BEFORE AFROYIM V. RUSK IS MISPLACED

The district court in Hassan v. New Hampshire also tried to discount the seminal Supreme Court decision in Afroyim v. Rusk 387 U.S. 253, 262 (1967),

while relying to some extent on dicta in Schneider v. Rusk, 377 U.S. 163, 168 (1964), and prior cases which mentioned the natural born provision. See 2012 WL 405620, * 3. Afroyim v. Rusk 387 U.S. 253, 262 (1967), was the last and seminal case in the Schneider line of cases in which the Supreme Court stated without exception as to presidential eligibility that a naturalized citizen, “becomes a member of the society, possessing all of the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.” Significantly, as the Supreme Court explained in Afroyim, 387 U.S. at 256, it granted certiorari in Afroyim specifically to overrule its decision in Perez v. Brownell, 356 U.S. 44 (1957), which it did. As such, the line of cases before Afroyim were decided under a different state of the law that did not exist after Afroyim – since the seminal decision in Afroyim, no case has even mentioned the different treatment of citizens under the natural born clause. Very importantly however, the issues and arguments in this case were never present in the Schneider line of cases and constitutional civil rights jurisprudence, public policy and societal norms have evolved considerably in plaintiff’s favor in the last several decades. Moreover, the arguments here are not inconsistent with the subject dicta cited by district court. Said dicta observed the different treatment of citizens in the natural born provision and this is actually a central aspect of plaintiff’s arguments herein though in the instant case, after observing the difference, plaintiff goes one step further and is

asking this Court to resolve this irreconcilable conflict – something that the prior courts were never asked to do and something they did not do.

**11. THE NATURAL BORN PROVISION IS MOOT
BECAUSE THE SUPREME COURT HAS ALREADY
REJECTED THE “DISTRUST” RATIONALE UPON
WHICH IT IS BASED**

History has shown that the Courts’ legal interpretation of constitutional discrimination has always changed when the Supreme Court rejected the underlying factual basis for the discrimination. The decisions in Plessy v. Ferguson, 163 U.S. 537 (1896) and Dred Scott for example, were premised on the Court’s belief that blacks were inferior and sub-human. When the Supreme Court began rejecting this rationale in the 1940s (see Brown and Bolling for example), the entire body of law based on this rejected rationale began collapsing. As explained below, the natural born clause was premised on the belief that naturalized citizens were less loyal than natural born citizens. The Supreme Court has now rejected this rationale and classified it as “impossible to make.” A formal rejection of the invidious discrimination in the natural born clause must now follow.

It is commonly accepted that that the source of the natural born provision is a July 25, 1787 letter from John Jay (who was then serving as the Continental Congress’s Minister of Foreign Affairs) to George Washington (who was presiding

over the Constitutional Convention in Philadelphia). In this regard, the Congressional Research Service has stated in relevant part that⁶:

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

On a lighter note, plaintiff can confirm that he has never been accused of being part of “wealthy European aristocracy or royalty.” However, plaintiff agrees that the assumption and rationale behind the natural born requirement was the distrust of foreigners and the belief at the time that naturalized citizens were less loyal than native born citizens. Very significantly, while the Supreme Court in Schneider, 377 U.S. at 168, did not address the legal question about Presidential eligibility, it specifically and directly rejected its “distrust” rationale and basis as a factual matter when it stated in relevant part that:

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make.

Given the Supreme Court’s outright rejection of the non-allegiance and distrust rationales, the natural born requirement is without any factual foundation

⁶ http://www.legistorm.com/score_crs/show/id/82388.html

or value and can no longer stand when confronted by the guarantees of equal protection in the Fourteenth and Fifth Amendments under the implicit repeal/abrogation and the Absurdity Doctrine. Unlike the natural born provision which is premised on an impossibility and has no value whatsoever, the equal protection of the law is the pillar on which our nation stands and blossoms in the eyes of the world. It is difficult to argue that there is a presumption against the implicit repeal of a law that has no value or negative value. A ruling that upholds invidious discrimination based on an impossible assumption is more than absurd and must be avoided under the Absurdity Doctrine in favor of the equality alternatives.

12. THE NATIONAL ORIGIN DISCRIMINATION IN THIS CASE SHOULD BE TREATED THE SAME AS RACE DISCRIMINATION

While gender discrimination is subject to a level of scrutiny lower than strict scrutiny - as explained above, national origin discrimination which is at issue in this case, is subject to the same level of scrutiny as is race discrimination – strict scrutiny. Let us assume that the natural born clause prevented black people or white people from being President instead of foreign born citizens, would defendants replicate such race discrimination at the state level and would defendants and the courts argue in favor of such race discrimination? Obviously not. However, because race and national origin discrimination are viewed as evil

and are both subject to strict-scrutiny by the courts as a result, the same disdain we hold for race discrimination should also lead us to oppose the national origin discrimination in this case and invalidate it under law.

13. THE DISTRICT COURT AND DEFENDANTS FAIL THE DRED SCOTT TEST

One of the most compelling arguments on this appeal is that the district court's ruling fails the Dredd Scott test. Despite being over 150 years old, Dredd Scott is the most recent Supreme Court case to deal with invidious citizenship discrimination in the Constitution itself. The best indication that the district court's application of the implicit repeal and absurdity doctrines is incorrect is the fact that under its reasoning, the notorious Dred Scott decision would be deemed to be a correct decision even though the Supreme Court now views said decision as a great "self-inflicted" wound – the post-civil war amendments did not exist at the time of Dredd Scott. In Dredd Scott, the Supreme Court held that the Constitution prohibited persons of African race and ancestry from being citizens despite the due process (equality) and liberty guarantees of the Fifth Amendment. The district court as well as defendants in this case did not address the Dred Scott case even though Dred Scott is the most recent Supreme Court decision that deals with invidious citizenship discrimination in the Constitution itself – this avoidance is recognition that the current view of Dredd Scott supports plaintiff's arguments herein. It was so obvious that the government's arguments and the district court's

decision in Hassan v. USA, upon which defendants here rely, were an endorsement of Dredd Scott, the government included the following remarkable disclaimer, when forced to address the Dred Scott case on appeal before the Second Circuit (See USA Br. at 21, fn 10 - 2010 WL 6190666):

In discussing Dred Scott, the United States by no means implies that this case was correctly decided. Nor should defendant's discussion of Dred Scott be construed as tacit agreement with Chief Justice Taney's reasoning therein.

The district court adopted a legal position that if applied to the Dred Scott case, would lead to the same result reached by Justice Roger Taney even though the U.S. Supreme Court now views that result as grossly erroneous and shameful. This is conclusive proof that defendants' legal position is wrong. Using an even clearer example, assume this Court was sitting in 1856 when slavery was still part of the Constitution. Assume that a slave from a slave state sued for his freedom by arguing that the slavery provision in the Constitution was irreconcilable with and therefore implicitly repealed by the due process/equality and liberty guarantees in the Fifth Amendment. Using the implicit repeal analysis of the district court, this Court would have to rule against the slave because: 1) the slavery provision was very specific and the Fifth Amendment was more "general"; 2) there is a strong presumption against implicit repeal – despite the slave's argument that such a presumption goes away when the subject is invidious discrimination; 3) the Fifth Amendment was never intended to repeal the slavery provision because when the

Fifth Amendment was adopted, slavery was the only part of the Constitution specifically protected from repeal for 20 years; and 4) the Founding Fathers did not see any conflict or irreconcilability between the slavery provision and the Fifth Amendment because of the preceding point and because many of them owned slaves before and after the Fifth Amendment was adopted. Thankfully, under plaintiff's analysis, the slave would win his freedom. The slavery and invidious citizenship discrimination in Dred Scott and the invidious citizenship discrimination in this case are chilling reminders that the Absurdity Doctrine and the doctrine of implicit repeal are vital and necessary parts of Constitutional jurisprudence.

Unlike the district court and the defendants in this case, this Court must be careful not to adopt legal reasoning which may, "impl[y] that [Dredd Scott] was correctly decided" or may be "construed as tacit agreement with Chief Justice Taney's reasoning therein?" There is no way of avoiding the mistake of Dred Scott, unless this Court grants plaintiff the declaration he seeks and recognizes that there is no presumption against implicit repeal when dealing with invidious "strict-scrutiny" type discrimination such as race or national origin.

VII. 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 by the Fifth and Fourteenth Amendments under the doctrines of implicit repeal and/or absurdity; 4) declare that defendants' national origin discrimination in the form of their discriminatory denial of presidential ballot access (ER. 12-13), discriminatory declaration (ER. 15) and statute (MCA § 13-10-201 - ER. 16), violate the Fourteenth Amendment; and 5) grant plaintiff such other, further and different relief as the Court deems just and proper.

VIII. STATEMENT OF RELATED CASES

No related cases in this Court.

Dated: Queens Village, New York
August 27, 2012

Respectfully submitted,

/s/ Abdul Hassan

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Date August 27, 2012

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