

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*

REPLY BRIEF FOR PLAINTIFF-APPELLANT PRO SE

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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.

II. ARGUMENT

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

Defendants point out that the several courts that have heard the issues herein have all ruled against plaintiff on the merits. What defendants did not mention however, is that everyone one of these courts failed to address Hassan's central argument based on the Dred Scott v. Sandford, 60 U.S. 393 (1857) case. (Pl. Br. 49-51, 20-24, 25-26, 31, 35-36, 39-40). Remarkably, not only did the courts ignore the central arguments, the defendants in those cases also ran and hid from the Dred Scott arguments. Why did the courts and defendants evade Hassan's central

argument? The answer can be found in the federal Government's brief in Hassan v. USA (See USA Br. at 21, fn 10 - 2010 WL 6190666) which included the following astonishing disclaimer:

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.

In Hassan v. USA, the government dodged the Dred Scott arguments at the district court level but realizing that Dred Scott is the most recent Supreme Court precedent on the issue of citizenship discrimination in the Constitution (the issue in this case), it could not credibly oppose plaintiff on appeal without addressing Dred Scott. Likewise, defendants' opposition and this Court's ruling in this case cannot have any credibility unless the Dred Scott arguments are carefully examined and addressed. The government in Hassan v. USA, as per the above excerpt, was worried that its position would be confused with that of Justice Taney in Dred Scott because its position was precisely the same as Justice Taney in Dred Scott – holding that the only way to remedy citizenship discrimination in the Constitution is by formal amendment. The way to avoid being seen as agreeing with Dred Scott is to disagree with Dred Scott. While the fear of Dred Scott is understandable, it is not excusable – lawyers and judges are ethically bound to handle issues without fear or favor. If the Court is unable to distinguish Dred Scott and the arguments based on it, the Court would be required to reverse the district court endorsement

of the invidious discrimination in this case. Action speaks louder than words – we cannot condemn Justice Taney and when faced with citizenship discrimination in the Constitution, do the very thing he did and affirm the invidious discrimination in the Constitution.

The avoidance of the discrimination label and of the Dred Scott case can also be construed as a message from the district court and defendants that the legal, social and political issues implicated in this case are too extraordinary and sensitive for them to handle and that they should be addressed by the Court of Appeals or the Supreme Court. In fact, in discussing the issues presented herein, the chairperson of the Federal Election Commission stated as follows¹:

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

While the FEC's Chairperson was right in stating that the issue herein is ideally suited for the Supreme Court, the Ninth Court is probably the best suited of the lower courts to address the significant constitutional issues herein and the social and political consequences that may flow from their resolution. The Ninth Circuit is the largest Court of Appeals and has traditionally been at the forefront of the leading legal issues of the day. If this Court is fearful of social or political

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

consequences that may flow from addressing the Dred Scott arguments, I respectfully urge this court to reflect upon its ethical obligation to decide cases without fear or favor and to think amount the more than 15 million citizens who have been relegated to second-class status because of the invidious national origin in the natural born clause.

**2. DEFENDANTS DO NOT GENUINELY DISPUTE THE
EXISTENCE OF AN IRRECONCILABLE CONFLICT
BETWEEN THE FOURTEENTH/FIFTH AMENDMENTS
AND THE NATURAL BORN CLAUSE – A CONDITION
THAT TRIGGERS IMPLICIT REPEAL**

At the outset, defendants do not seem to deny that irreconcilable conflict alone is a condition which by itself is sufficient to trigger implicit repeal as Hassan explained in his opening brief. (Pl. Br. 29-34)². Defendants also finally admit expressly that they are bound by the equal protection mandate of the Fourteenth Amendment and state in relevant part that (Def. Br. 8):

As explained by the Supreme Court, "[a]s long ago as 1896, this Court declared the principle ' that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the general government, or by the states, against any citizen because of his race.* '" ***Bolling v. Sharpe***, 347 U.S. 497,499 (1954) (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591,16 S. Ct. 904 (1896)) (emphasis added).

It is settled constitutional law that both race and national origin discrimination are prohibited by the Fourteenth and Fifth Amendments. (See Pl.

² Pl. Br. 29-34 refers to pages 29-34 of plaintiff's opening brief.

Br. 13-18). By contrast, the natural born provision invoked by defendants, demands that individuals be treated unequally by the federal and state governments because of national origin – the total opposite of what the Fourteenth and Fifth Amendments demand. In fact, defendants do not dispute that their discrimination against Hassan, because of his national origin, is subject to strict judicial scrutiny and would violate the Fourteenth Amendment, but they claim that they can nonetheless discriminate because the natural born provision allows or requires such national origin discrimination. This is a textbook example of irreconcilable conflict which triggers implicit repeal and the analysis can end at this point with a reversal of the district court and a declaration in plaintiff’s favor.

But there is more. In addressing the irreconcilable conflict between the equal protection clause of the Fourteenth/Fifth Amendments and the natural born clause, defendants admit that, “the *concepts* espoused in the two clauses appear to be at odds with one another.” (Def. Br. 8). However, defendants make the strange argument that this irreconcilable conflict is not really an actual or irreconcilable conflict because “The Constitution is not the Government.” (Def. Br. 8).

Defendants explain further that (Def. Br. 8):

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

This point is not only trivial - it is a very strange one – made by defendants most likely because no legitimate argument exists to erase the existence of the

irreconcilable conflict. It is very easy to correct defendants on this point because no where is plaintiff arguing that the equal protection clause and strict scrutiny apply to the Constitution – assuming we can even understand what this means. What plaintiff is arguing is that the equal protection clause and strict scrutiny apply to state and federal governments – a point that defendants themselves make. (See Def. Br. 8). The defendants in this case are the government of the State of Iowa and its Secretary of State who discriminated against Hassan because of his national origin – the Constitution is not the defendant as can be confirmed by the case caption and the complaint. Simply put, the Fourteenth and Fifth Amendments instruct the government not to discriminate on the basis of national origin, while the natural born clause instructs the government to discriminate on the basis of national origin. The government cannot follow both of these irreconcilably conflicting instructions and the natural born clause must give way, because, among other reasons, it came earlier in time. Because defendants’ attempt to avoid an irreconcilable conflict is premised on the erroneous belief that plaintiff was relying on the equal protection clause applying to the Constitution, once this error is corrected, as it has been, the irreconcilable conflict stands and implicit repeal is triggered.

Importantly, once an irreconcilable conflict is established, the normal presumption against implicit repeal is overcome, even though such a presumption

does not even exist in this case where the subject matter is invidious national original discrimination that is presumed to be invalid. See Branch v. Smith, 538 U.S. 254, 285 (2003) (‘the presumption against implied repeals, like the presumption against pre-emption, can be overcome ... if there is an irreconcilable conflict between the provisions in the two Acts.’). Likewise, the issue of specific versus general laws is subsumed in the finding of irreconcilability and is no longer relevant – even though the equal protection clause is sweeping and not general. In Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 663 (2007), after describing the two categories of implicit repeal, the Supreme Court noted that only “outside these limited circumstances” would specific versus general subject matter be relevant. In other words, this issue as to specific versus general subject matter only applies where neither of the two categories for implicit repeal is present. 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.

This implicit repeal argument has is even more powerful in light of the Supreme Court’s recent implicit repeal ruling in Credit Suisse Securities (USA) LLC v. Billing 551 U.S. 264 (2007). In Credit Suisse, 551 U.S. 254, 275, an almost unanimous Supreme Court, including liberal as well as conservative justices, found implicit repeal using a more relaxed standard where the laws were “incompatible” but not necessarily “irreconcilable.” The comparative value of the

laws also played a role in the Court’s implicit repeal finding. Here, it is clear that the equal protection clause has a lot of value and the natural born clause has no value at all. Moreover, while the invidious national origin discrimination in the natural born clause is irreconcilable with the equal protection clause, at minimum, these clauses are incompatible – a condition which under Credit Suisse is sufficient to trigger implicit repeal.

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

Defendants have failed to put forth any opposition in the body of its brief to plaintiff’s arguments (Pl. Br. 18-25) based on the absurdity doctrine. Plaintiff’s “opposition” consists only of a footnote that does not address the arguments made. (See Def. Br. 4, fn 2). The lack of any substantive opposition from defendants is not surprising and is a concession that plaintiff’s absurdity doctrine arguments should prevail –classifying people as disloyal simply because of their place of birth is obviously absurd and invidious national origin discrimination has been rightly classified as being odious to a free people. Likewise, equality is obviously more consistent with the liberty and justice goals of the constitution than is invidious discrimination.

4. THE ABSURDITY AND IMPLICIT REPEAL DOCTRINES DO APPLY IN THE CONSTITUTIONAL CONTEXT

Likely because the conditions for the implicit repeal and absurdity doctrines are present in this case, defendants argue that these doctrines do not apply in the constitutional context because there is a formal process for amending the Constitution (Def. Br. 5-7). Defendants are wrong on numerous grounds. First, while defendants dance around the case, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), is an obvious example of implicit repeal/abrogation in the Constitutional context. Second, as defendants point out, the Citizenship Clause of the Fourteenth Amendment repealed the citizenship discrimination in the Constitution based on race. (Def. Br. 9). However, because the Citizenship Clause mentions nothing about race discrimination, the repeal was implicit and not explicit. Third, unlike the Twenty-First amendment which contains explicit language repealing the Eighteenth Amendment, the Thirteenth Amendment does not contain any repeal language at all. This means that the Thirteenth Amendment's repeal of the Constitution's slavery provisions was implicit and not explicit. See also Credit Suisse Securities (USA) LLC v. Billing 551 U.S. 264, 270-271 (2007) (explaining the difference between explicit and implicit repeal and stating that, "Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws ... Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws."). Also, the Twentieth Amendment contained no repeal

language and as such, its repeal of the date of meeting for Congress, which was contained in Article I, Section 4, was implicit and not explicit.

The biggest reason for defendants' erroneous argument in this regard is that defendants confuse interpretation with formal amendment – implicit repeal and the absurdity doctrine are interpretive tools and using them is not the same as amending the Constitution. While it is very common for judicial interpretation to dramatically change the meaning of the Constitution through implication, the courts have never been prevented from making such interpretations by the existence of the formal amendment process. In fact, the majority of current constitutional law is implicit in the form of judicial opinions and cannot be expressly found in the text of the Constitution.

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

Defendants' arguments also fail on a logical level because defendants do not seem to understand that implicit repeal and absurdity are doctrines of necessity. On the other hand, amending the Constitution through the amendment process is a matter of choice. The difference between this necessity and choice is underscored

by the fact that except where intent is present, an irreconcilable conflict is required to trigger implicit repeal and an absurd result is required to trigger the absurdity doctrine. An irreconcilable conflict by definition is a situation where it is impossible to follow two provisions of the Constitution at the same time and as such, the court must pick the later provision over the earlier provision – the Constitution cannot make possible what is impossible. Not surprisingly, defendants have cited no Supreme Court case holding that implicit repeal or absurdity doctrines cannot be applied in the constitutional context. By contrast, plaintiff cites examples of implicit repeal and absurdity doctrines in the constitutional context in his opening brief. Furthermore, cases such as Dred Scott, are chilling reminders why the implicit repeal and absurdity doctrines are vital and necessary tools in constitutional interpretation.

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

Plaintiff argues that even if the natural born provision is still valid, defendants' invidious national origin discrimination against him is still invalid. (Pl. Br. 12-18). At the outset, defendants do not disagree that the natural born clause does not require defendants to deny ballot access to plaintiff. Instead, defendants argue that states are allowed to regulate who gets on the ballot and pursuant to this general authority, defendants can choose to deny plaintiff ballot access because of his national origin. However, while a state has some role in federal presidential

elections, defendants do not deny that the actions of the state in regulating ballot access are still subject to the equal protection mandate of the Fourteenth Amendment. When the government discriminates on the basis of national origin – a “suspect” classification, such discrimination is subject to strict scrutiny. In this regard, the First Circuit in Gill v. Office of Personnel Management, 2012 WL 1948017, 4 (1st Cir. 2012) stated in relevant part that:

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

Defendants have not cited any case in which the government was allowed to deny ballot access based on a suspect classification such as race or national origin - it is defendants that have the very high burden of proving the justifications for their discrimination, especially because the natural born clause does not require any denial of ballot access. In any event, defendants have no compelling interest whatsoever in discriminating against plaintiff because of his national origin - such bigotry is absurd, irrational and senseless. While defendants have mentioned the prevention of voter confusion and dilution as justifications, defendants have failed to put forth any evidence to support these justifications, and in any event, the Supreme Court has never allowed a state to engage in the evil of race or national origin discrimination in the name of avoiding alleged voter confusion.

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

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

It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised

as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance.

Defendants' denial of ballot access in this case, unnecessarily and unlawfully conflicts with the statutory and constitutional role of the Electoral College. Such a conflict is unnecessary because the natural born clause, even if it is still valid, does not require defendants to deny ballot access to plaintiff – it deals only with taking office. Moreover, given the constitutional role of the electorate and the Electoral College, the judicial branch is likely to give some deference to the will of the people and any decision by the Electoral College to choose constitutional equality in the Fifth and Fourteenth Amendments over the invidious national origin discrimination in the natural born clause. This approach is especially proper where, as here, the objection is the evil of invidious national origin discrimination that is “odious to a free people.” (Pl. Br. 12-18). Simply put, we cannot have a government “of the people, by the people and for the people” if more than fifteen million naturalized citizens, through no fault or their own, are excluded from heading the government, because of the impermissible assumption that they cannot be trusted.

6. DEFENDANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

As laid out in his opening brief and above, plaintiff can prevail in this case on numerous grounds and defendants' arguments are uniformly without merit. However, plaintiff will address a few additional points raised by defendants to further show that defendants' entire opposition is built on shaky ground.

First, 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 (Pl. Br. 25-29), even though both conditions exist in this case – only one of these conditions is required to trigger implicit repeal. Plaintiff is not trying to change the implicit repeal standard as defendants intimate because there is no case and 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. 12-18). Under defendants' logic, as between the Fifth Amendment and the slavery provision in the Constitution, there would be a presumption against implicit repeal of the slavery provision and defendants would argue that the slavery provision is not

irreconcilable with the due process, equal protection and liberty guarantees of the Fifth Amendment. Obviously, this cannot be and highlights why defendants and the district court are so very wrong. This helps explain why defendants did not oppose the Dred Scott arguments made by plaintiff – arguments that are central and material to this case.

Defendants also argue that there is no irreconcilable conflict because the Fourteenth Amendment and the natural born clause 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. It was only in 1971 that the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971), interpreted the Fourteenth Amendment as prohibiting gender discrimination so the conflict that existed in Fitzpatrick would not have existed before 1971. Additionally, as best as one can discern, plaintiff is the first naturalized citizen who was denied ballot access by defendants – without a denial there would be no incident or court action like this one. Notably, there were questions about the natural born status of presidential candidates John McCain (born in Panama Canal Zone), George Romney (born in Mexico) and Barry

Goldwater (born in Arizona before it was a state) but defendants never denied any of those 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. 36-44). Even though intent to repeal need not be shown where an irreconcilable conflict exists, defendants' already questionable opposition is totally destroyed by Afroyim v. Rusk, 387 U.S. 253 (1967) as discussed in the opening brief. (Pl. Br. 36-44). Afroyim established that the purpose of the Fourteenth Amendment and its Citizenship Clause 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. As laid out in Afroyim, the Citizenship Clause of the Fourteenth Amendment created a single citizenship and birth and naturalization were simply means of acquiring this single citizenship. By contrast, the natural born clause creates two classes of citizenship – one class that can become President and one class that cannot become President. This irreconcilable conflict must be resolved in favor of the Citizenship Clause. Likewise, the intent of the Citizenship Clause as laid out in Afroyim was to create a single citizenship and equalize natural born and naturalized citizens – it was

therefore clearly intended as a substitute for natural born provision which invidiously discriminates and creates inequality among citizens.

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 exist – 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 and – almost every major

change in constitutional law through interpretation such as Brown v. Board of Education, 347 U.S. 483, 489 (1954) and Roe v. Wade, 410 U.S. 113 (1973) could have also been achieved through amendment and vice versa – Reed for example, also prevents the gender discrimination that the Nineteenth Amendment was adopted to address. Notably, since plaintiff began his challenge to the natural born clause, there have been no attempts to repeal the natural born clause through amendment and there has been considerable support for plaintiff’s challenge to the natural born clause.

7. DEFENDANTS’ 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. 9-10) and that it took the 19th Amendment to give women the right to vote. In other words, defendants argue that the Fourteenth Amendment was not intended to protect women from discrimination and that an amendment was the only way to give women this protection. The weakness in defendants’ logic is that defendants fail to recognize the role of judicial interpretation. Even without the Nineteenth Amendment women would be protected against discrimination and discrimination in voting under the current interpretation of the Fourteenth Amendment. See Reed

v. Reed, 404 U.S. 71 (1971). This reality reinforces the point that the Supreme Court's rulings as to the purpose and intent of the Fourteenth Amendment are final and binding regardless of what some may speculate is the intent of those who voted for the Fourteenth Amendment. This example also reinforces plaintiff's point that we do not need a constitutional amendment in order to produce a change or clarification in constitutional law. Likewise, the position of Justice Taney in Dred Scott and of defendants and district court in this case that injustice and invidious discrimination in the Constitution can only be remedied through formal amendment is without merit.

8. THE NINTH 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 invidious 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 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.

Dated: Queens Village, New York
October 8, 2012

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4¹ for Case Number 12-35402

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

- ☒ This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 5262 words, 479 lines of text or 22 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.
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Signature of Attorney or
Unrepresented Litigant

\s\

("s/" plus typed name is acceptable for electronically-filed documents)

Date October 8, 2012

¹ If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

9th Circuit Case Number(s) 12-35402

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Oct 8, 2012 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) \s\ Abdul K. Hassan

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