

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

Abdul Karim Hassan, Plaintiff-appellant, -v- The State of Montana, and Linda McCulloch, Defendants-appellees.	Case #: 12-35402 <u>APPELLANT’S RESPONSE</u> (Order to Show Cause)
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**APPELLANT’S RESPONSE TO ORDER TO SHOW CAUSE AS TO
SUMMARY AFFIRMANCE**

Abdul K. Hassan, Esq.
Plaintiff, Pro Se
215-28 Hillside Avenue,
Queens Village, NY 11427
Tel: 718-740-1000

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ATTACHMENTS

Partial Transcript of Second Circuit Oral Arguments in

Hassan v. USA, June 3, 2011 ----- Attachment 1

Plaintiff's Brief in Hassan v. New Hampshire (DNH) ----- Attachment 2

Plaintiff's Brief in Hassan v. Iowa (SDIA) ----- Attachment 2

I. PRELIMINARY STATEMENT

Plaintiff-appellant Abdul K. Hassan, Esq., respectfully submits the instant response to the Court's order to show cause dated May 22, 2012. By way of background, plaintiff is an employment and civil rights attorney by profession who is also a candidate for the Presidency of the United States. A detailed treatment of the facts and legal issues can be found in the accompanying briefs from related cases brought by plaintiff. However, while plaintiff should prevail on the merits in this action, the question on the Court's instant motion is not whether plaintiff will prevail on the merits but whether the issues presented are insubstantial. In essence, an issue is insubstantial if it is clearly decided by existing precedent from the Supreme Court. Because this case presents significant constitutional issues of first impression, there is not existing precedent from the Supreme Court or even this Court which has settled or clearly settled the issues presented herein for appellate review. In fact, the closest Supreme Court precedents favor appellant's position and the arguments avoided by the lower courts also favor appellant's position.

II. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Whether Montana's invidious national origin discrimination (statute and denial of ballot access) 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 Amendment is irreconcilable with and trumps, abrogates and repeals 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. ARGUMENT

1. THE ISSUES ON APPEAL ARE NOT INSUBSTANTIAL AND THE COURT SHOULD THEREFORE NOT SUMMARILY AFFIRM THE DISTRICT COURT

In re Thomas 508 F.3d 1225, 1226 -1227 (9th Cir., 2007), the Ninth Circuit explained the standard governing summary affirmances and stated in relevant part as follows:

Because our decisions pursuant to a pre-filing review order are rarely published, we have not yet clarified the standard for determining whether an appeal or petition has sufficient merit to proceed. We take the opportunity to do so now. In addressing this issue, we are guided by prior decisions setting standards for disposing of cases on a summary basis.

In *United States v. Hooton*, we permitted summary affirmance of a final judgment*1227 in a nonemergency situation only where “it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.” 693 F.2d 857, 858 (9th Cir.1982) (citations omitted). Such summary affirmances “should be confined to appeals obviously controlled by precedent and

cases in which the insubstantiality [of the appeal] is manifest from the face of appellant's brief.” *Id.*

The question of whether an issue is insubstantial arises in the appellate context and in the context of whether certain issues should be heard by a three-judge district court. In Wolf v. Boyd, 287 F.2d 520, 522 (C.A.9 1961), the Ninth Circuit, based on Supreme Court precedent, explained the relevant standard as follows:

The issue upon this appeal is not whether appellant is correct in her construction of her constitutional rights, but whether her contentions raise a substantial constitutional question. In the words of the Supreme Court, a question is to be regarded as insubstantial if ‘its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.’ Hannis Distilling Company v. Mayor and City Council of Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482.

... The issues presented by these circumstances have not clearly been settled by existing precedent and the constitutional question which they present is not, in our view, an insubstantial one.

Moreover, the Ninth Circuit seems to agree that the subject precedents must be from the Supreme Court itself. See Lopez v. Butz, 535 F.2d 1170, 1172, fn 1 (9th Cir. 1976) (‘A determination to convene or not to convene a three-judge court must be made on the basis of the Supreme Court's “previous decisions.”’). Regardless of whether the subject precedents must be from the Supreme Court or the Court of Appeals, a conclusion that the issues herein on appeal are not

insubstantial can be made easily and quickly in appellant's favor. This is so because the issues presented herein are significant constitutional issues of first impression that have never "clearly been settled by existing precedent," from either the Supreme Court or the Ninth. In fact, this is the first time in history that the issues herein are being presented to courts. Notably, the court in its order to show cause, did not identify the appellate issues that may be summarily affirmed and did not identify the existing precedents which clearly decide these issues of first impression in this Court. If the Court or defendants know of such precedents, plaintiff respectfully request that he be provided with adequate notice and opportunity to respond to them.

Not only are there no precedents clearly resolving the issues presented, there are Supreme Court precedents strongly supporting the position of plaintiff. See Dred Scott v. Sandford, 60 U.S. 393 (1857) (supportive and material because the modern judiciary and society have rejected as erroneous, the holding in Dred Scott which affirmed citizenship discrimination in the Constitution and rejected as erroneous the reasoning of Justice Taney that a constitutional amendment was needed to avoid the result in Dred Scott). 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.). 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*.”).

The position that the issues on appeal are not insubstantial is further reinforced by the attached briefs in Hassan v. New Hampshire (Attachment 1) and Hassan v. Iowa (Attachment 2). Appellant is including these two cases because the district court in this case incorporated the opinions in these two cases instead of doing its own analysis – the briefs further address the many errors committed below and which require the full attention of this Court.

2. SUMMARY AFFIRMANCE IS ESPECIALLY IMPROPER WHEN DEALING WITH SIGNIFICANT CONSTITUTIONAL ISSUES OF FIRST IMPRESSION

“Parties should avoid requesting summary disposition of issues of first impression for the Court.” *See, e.g.*, D.C. Circuit Handbook at 36. This position is consistent with the rule that summary disposition is only possible if the issue is

clearly decided by existing precedent. Here, this case involves significant constitutional issues of first impression for this Court. In Hassan v. USA¹, a case relied on by defendants and the district court, the court underscored the first impression nature of the implicit repeal issue and stated in relevant part as follows:

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

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

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

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

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

While the defendants in Hassan v. Iowa did recognize that “the case of Fitzpatrick v. Bitzer presents an example of implicit abrogation. 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976),” – a case which favors appellant, they were correct in highlighting the scarcity of authority on the subject and the need for guiding standards and tests. Legal tests/standards as well as binding authority and precedent are created by appellate courts – not by district courts. Summary

¹ See Montana District Court Docket at: Case #: 11-cv-72 (DWM) – Document 7-1

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

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

affirmance has never been used to establish precedent on an issue of first impression. When faced with an issue of first impression, appellate courts are called upon to extrapolate from other precedents and principles of law, to consider history and social impact as well as public policy – such a process requires full briefing – the process may also be aided by amicus curiae briefs and even guidance from the Supreme Court pursuant to 28 USC 1254.

3. THE PROCEEDINGS BEFORE THE SECOND CIRCUIT JUSTIFY THE NEED FOR FULL BRIEFING AND CONSIDERATION IN THIS CASE

The proceedings before the Second Circuit in Hassan v. USA, 441 Fed.Appx. 10 (2d Cir. 2011), demonstrate that the issues raised herein are not insubstantial and warrant full briefing and consideration in this case. In Hassan v. USA, the issue was the same as one of the two issues in this case – whether the discrimination in the natural born clause was irreconcilable with and trumped by the Fifth/Fourteenth Amendments. In Hassan v. USA, the Second Circuit permitted the parties to brief the issues on appeal extensively and the Second Circuit held oral arguments. In fact, the three-judge panel allowed plaintiff here to argue for more than twice the allotted time because of the important issues in the case. During oral arguments the Second Circuit framed the merit issue and stated as follows (See Ex. 1, pg 1):

JUDGE NEWMAN: And on the merits, I think you

7 better focus on the argument that when there are two
8 clauses of the Constitution in alleged conflict, the more
9 precise governs.

The answer to this question is laid out in the attached brief and will be addressed further during briefing in this case. Significantly, however, it is difficult to argue that the Second Circuit panel took the time to frame an insubstantial issue. During oral arguments on the merits, central focus was placed on Dred Scott – the last case before plaintiff’s challenge, to address invidious citizenship discrimination in the Constitution itself. As the transcript in Exhibit 1 shows, the Second Circuit did not challenge plaintiff’s argument that there is no presumption against implicit repeal of laws that discriminate on the basis of race or national origin discrimination. Once plaintiff answered Judge Newman’s question and explained that laws that discriminate based on age in this context are subject to rational basis review and are not presumed to be invalid but that laws that discriminate based on national origin are subject to strict scrutiny and are presumed invalid, the Second Circuit went from being a very “hot bench” to one that did not challenge plaintiff for the remainder of his oral arguments on the merits. (See Exhibit 1). It seems obvious from being in the room the day of oral arguments that the Second Circuit seemed to think that plaintiff was right on the merits. The Second Circuit invalidated the erroneous merit rulings by the district court in Hassan v. USA by finding an absence of jurisdiction – the Court suggested

during oral arguments that plaintiff should sue the state officials like Defendants who control ballot access instead of suing the United States first. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."). The Second Circuit panel after careful consideration, full briefing, and the benefit of oral arguments from the parties, seemed very uncomfortable with a lower court decision that upheld invidious national origin discrimination and the fact that this was the first time since the infamous Dred Scott case that a Court was upholding citizenship discrimination in the Constitution.

**4. THE ISSUES PRESENTED HEREIN ARE SO
SUBSTANTIAL, THEY ARE EVEN WORTHY OF
SUPREME COURT REVIEW**

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

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.

The FEC chairperson after studying and deliberating the issue, was correct to state that the issue was worthy of review by the Supreme Court – only the most important and extraordinary issues are worthy of Supreme Court review. The

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

sentiments of the Chairperson were echoed by several other members of the FEC during their deliberation on September 1, 2011 over whether plaintiff is covered by and prevented by the Federal Election Campaign Act (“FECA”) from running for President – the FEC ruled that plaintiff was not prevented from running for President as a naturalized citizen under FECA. The FEC carried out its duty under law and this Court should do the same by allowing full briefing, deliberating the issues and issue a well-reasoned ruling that addresses the relevant points and authorities.

**5. SEVERAL DISTRICT COURTS HAVE RULED ON THE
ISSUES HEREIN BUT NONE HAVE FOUND THEM TO BE
INSUBSTANTIAL**

In addition to this case, plaintiff has brought cases tied to the discrimination in the natural born clause in several jurisdictions in which he has faced discrimination. Because presidential elections are national and we do not have national trial courts, it is not uncommon for candidates to bring ballot access cases in several jurisdictions. In Anderson v. Celebrezze, 460 U.S. 780 (1983), for example, third party presidential candidate John Anderson, like plaintiff here, was denied ballot access in several states. He brought lawsuits in several locations and one of the cases eventually reached the Supreme Court because of a split in the circuit courts. The Supreme Court eventually overturned the denial of ballot access.

It is very significant that district courts in the other jurisdictions in which appellant brought cases, have issued rulings after full briefing on the issues presented herein, but none have found them to be insubstantial. See Hassan v. New Hampshire, Case. #: 11-cv-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), Hassan v. Iowa, Case #: 11-CV-00574 (SDIA, April 26, 2012) and Hassan v. Colorado, 2012 WL 1560449 (DCO, May 3, 2012). While all these district court cases were decided against plaintiff on motions to dismiss - such dismissals were not because the issues presented were addressed by existing precedent or because they were easy. To the contrary, all of those decisions were based on the absence of precedent directly addressing the issues and an avoidance of some very sensitive issues such as the Dred Scott ruling – each of these courts struggle to discern the correct law and outcome. The absence of direct precedent which was the bases for the lower court decisions is exactly why this court should not grant summary affirmance. Unlike a district court, the job of the Court of Appeals is to create precedent and decide issues of first impression by extrapolating from other precedents and making the judgments necessary to fill the void. For example, on the question of whether the presumption against implicit repeal goes away when we are dealing with a suspect classification such as race or national origin, all of the district courts held that they cannot make such a finding because there is no case which directly holds as such even though there is no case holding otherwise

and even though it is settled law that race and national origin discrimination is presumed to be invalid. . See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (“The general rule gives way, however, when a statute classifies by race, alienage, or national origin.”). However, a court of appeals is authorize to reason that because laws discriminating based on a suspect classification are presumed to be invalid, there is no presumption against repeal of a law that is presumed to be invalid.

Summary affirmance is even more improper in this action because the district court in this action adopted the decisions in Hassan v. New Hampshire and Hassan v. Iowa even though there were differences in the reasoning in these decisions that should have been addressed. Moreover, the decision in Hassan v. Iowa, which the district court in this case adopted, declined to view Fitzpatrick v. Bitzer, 427 U.S. 445 456 (1976), as an example of implicit repeal because it held that⁵, “a majority of federal courts have declined to view *Fitzpatrick* as holding that the Fourteenth Amendment effected an *implicit repeal* of the Eleventh Amendment.” The Supreme Court’s abrogation ruling in Fitzpatrick can be the basis for a ruling in plaintiff’s favor in this case. We know of no case where this Court has granted summary affirmance when the outcome of the case hinged on a split in authority among with courts of appeals – the split shows that the issue is

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

not clearly settled by existing precedent. In fact, the Iowa court even relied on the proposition that⁶ it is, “unlikely that a majority of the present Supreme Court would sustain a holding that the fourteenth amendment, of its own force, represents a pro tanto repeal of the eleventh amendment.” Once again, we know of no case where this Court has granted summary affirmance of a decision which hinged on a projection of how the Supreme Court would rule or that the Supreme Court would change an existing ruling. Such projections require careful analysis and full and complete consideration of the issues by the Court of Appeals. In addition, all the lower district courts avoided the arguments based on Dred Scott – arguments which are so substantial and sensitive the lower courts were unable to address them. Plaintiff can find no case where this Court summarily affirmed a decision that failed to address arguments that were material to the outcome of the case. There is another significant issue that the district courts missed or sidestepped – whether the state defendants’ national origin discrimination against appellant is invalid even if the discrimination in the natural born clause is still valid. In this regard, the district court in Hassan v. USA (EDNY Case #: 08-cv-938 – docket #: 28), summarized the federal government’s related position on this point and stated in relevant part as follows:

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

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

Here, we have a significant conflict between the federal government and the states. Unlike defendants, the federal government has taken the position that the natural born clause does not prevent plaintiff from running for the presidency of the federal government. The federal government is correct on this point because the proper avenue for challenging the constitutional qualifications for President is the electoral college pursuant to the Twelfth Amendment and 3 USC 15.

Importantly however, Supreme Court and the Ninth Circuit has never permitted a state to discriminate on the basis of race or national origin because of a law that does not require such discrimination and where the state could not even remotely satisfy the strict-scrutiny standard. Not surprisingly, we know of no case where this Court summarily affirmed a decision involving a material conflict between the federal and state governments. Likewise, we know of no case where this Court summarily affirmed a state's discrimination based on a suspect classification where such discrimination was not required by the Constitution and where the state did not even attempt to carry its very high burden under the strict-scrutiny standard.

Plaintiff also relied on the Supreme Court's seminal decision in Afroyim v. Rusk, 387 U.S. 253, 262 (1967), which held 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.”). In response, the district court in Hassan v. Iowa stated that⁷, “The fact the Office of the Presidency was omitted from this language was at best an oversight.” We know of no case where this Court summarily affirmed a decision premised on the belief that the Supreme Court made a mistake or oversight. No lower Court is authorized to classify a Supreme Court holding as an oversight or mistake.

There are other examples but these should suffice to prove the point that summary affirmance is improper in this case. It is worth remembering that appellant does not have the burden of showing that summary affirmance is improper.

**6. INVIDIOUS DISCRIMINATION AGAINST MORE THAN
15 MILLION AMERICAN CITIZENS IS NOT
INSUBSTANTIAL AND DESERVES THE FULL
ATTENTION OF THIS COURT**

This case involves invidious discrimination against over 15 million naturalized American citizens based on a suspect classification – national origin. Discrimination based on national origin and race are both subject to strict scrutiny – the highest level of judicial scrutiny. United States v. Virginia, 518 U.S. 515, 532 n. 6, (1996) (noting that “[t]he Court has thus far reserved most stringent judicial

⁷ See District Court Docket - SDIA - Case #: 11-cv-574 (REL)(RAW) - Document 16, page 10, fn 7

scrutiny for classifications based on race or *national origin*.”). Moreover, national origin discrimination is such an evil that the Supreme Court has described it as being “odious to a free people whose institutions are founded upon the doctrine of equality.” See Adarand v. Peña, 515 U.S. 200, 213 (1995). No law discriminating on the basis of national origin has survived in the Supreme Court since the internment of Japanese Americans during World War II because of their national origin – Congress apologized to Japanese Americans in the 1980s. As a result, this Court has never summarily affirmed any decision which upheld race or national origin discrimination. Likewise, this Court has never summarily affirmed any decision which upheld invidious discrimination against more than 15 million American citizens.

In Dred Scott, the Supreme Court was faced with invidious Citizenship discrimination contained in the Constitution itself. Like Dred Scott, this case also involves invidious citizenship discrimination in the Constitution itself. In upholding this citizenship discrimination in Dred Scott v. Sandford, 60 U.S. 393, 426 (1857), Justice Taney wrote for the Supreme Court and stated in relevant part as follows:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal

called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

Like Justice Taney in the above excerpt, defendants and the district court are taking the extremely unfortunate and erroneous view that we are bound by original intent on issues of invidious discrimination and that the only way to escape the bondage of the last remaining form of invidious discrimination in our Constitution is through formal amendment.

Justices of the United States Supreme Court have described the Supreme Court's decision in Dred Scott v. Sandford, 60 U.S. 393 (1857), as a great "self-inflicted wound⁸." 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."). Summarily affirming the citizenship discrimination in this case would be to resurrect the apparition of the citizenship ruling in Dred Scott.

⁸ 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.'

While we will address the Dred Scott decision in more detail in the briefs, of greater relevance to this response is the attention given to the citizenship discrimination in Dred Scott even though it was contained in the Constitution itself and even though the Supreme Court upheld the discrimination. Even the Dred Scott court understood that even if we believe injustice and invidious citizenship discrimination is required by the Constitution, we should not uphold such discrimination very lightly and we must give the arguments against it full and complete attention and consideration. In Dred Scott, the Supreme Court entertained full briefing and held six days of oral arguments and issued a decision of over 100 pages explaining why the invidious discrimination including the citizenship discrimination in the Constitution should be upheld. Summary affirmance in this case would mean that this Court would be giving less attention to invidious citizenship discrimination in the Constitution than the Dred Scott court. Obviously, no court should do worse than the Dred Scott court – the Dred Scott decision has been condemned by the modern judiciary and society as being the worst and most erroneous decision in Supreme Court history.

Even if this Court chooses to uphold invidious discrimination against more than 15 million American citizens, it has no higher duty than to carefully consider and address all arguments and explain to the millions of victims of such invidious discrimination why such discrimination should continue. Because there is no good

justification for upholding such discrimination, this Court should end the long national nightmare and embarrassment created by the invidious discrimination in the natural born clause.

7. SUMMARY AFFIRMANCE IS IMPROPER BECAUSE OF CERTAIN CIRCUMSTANCES IN THE DISTRICT COURT

Summary affirmance is improper in this case because of certain circumstances in the district court. The problems began when the district court engaged in ex-parte communications with defense counsel and based upon these communications, the Magistrate recommended dismissal of the case on the non-existent and strange basis that plaintiff had consented to the dismissal of the case⁹. After plaintiff strongly objected in writing to the ex-parte communications and the incorrect statement that he had consented to the dismissal of his case, the district judge set-aside the Magistrate's findings and recommendation but sent the matter back to the same Magistrate for new findings and recommendation¹⁰. The Magistrate responded by issuing a recommendation that did not contain much analysis of the issues. Instead, the Court adopted the decision of the New Hampshire court even though there were differences in the arguments in the two cases and even though that decision was on appeal and not final. After plaintiff

⁹ See Montana District Court Docket at: Case #: 11-cv-72 (DWM) – Document 8

¹⁰ See Montana District Court Docket at: Case #: 11-cv-72 (DWM) – Document 12

filed objections, the district judge adopted the recommendation without much analysis of the issues and objections raised.

In addition, the district court's Chief Judge, Richard Cebull, sent an e-mail from his courthouse address on February 20, 2012 which stated as follows¹¹:

A Mom's Memory

A little boy said to his mother, 'Mommy, how come I'm black and you're white?' His mother replied, 'Don't even go there Barack! From what I can remember about that party, you're lucky you don't bark!'

More than 150 years after Chief Justice Taney's bigoted opinion in Dred Scott, it is shocking that a Chief Judge of a U.S. district court would express such bigotry about the President. Here, we are dealing with a civil rights case involving invidious discrimination, bigotry and the Presidency. Plaintiff is not arguing that the ex-parte communications, the lack of analysis, and the bigoted email and what it represents should result in a ruling in his favor on the merits. However, under these circumstances it would be highly improper and unwise to summarily affirm in this case, especially given that the Ninth Circuit is still reviewing the Judge Cebull matter and its scope, and especially given the other points made herein. This Court would also be doing itself and the public a disservice if it does not allow full briefing and if it does not fully consider all the issues independent of the circumstances in the district court.

¹¹ <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202544149076&slreturn=1>

8. SUMMARY AFFIRMANCE IN THIS CASE WOULD VIOLATE DUE PROCESS

It is settled that appellant in this case has a right to appeal the district court's decision. In denying summary affirmance in U.S. v. Harris, 846 F.2d 50, 50 -51 (9th Cir., 1988), the Ninth Circuit emphatically stated that, "we must protect the appellant's right to present his challenge to the district court's ruling." The role of an appellate court is not to rubberstamp lower court decisions. The role of an appellate court is to determine whether the district court was right or wrong and such a determination cannot be made in this case without full briefing and serious consideration of the arguments made. In light of the above points, summary affirmance would constitute a major due process violation.

IV. CONCLUSION

While appellant should prevail on the merits in this action, it is important to remember that the question on this motion by the Court is not whether plaintiff would prevail on the merits but whether the issues are insubstantial – whether the court should allow full briefing and consideration of the issues. Plaintiff respectfully requests that this Honorable Court: 1) conclude that the issues raised on this appeal are not insubstantial; 2) allow full briefing, and fully and completely consider the arguments and issues raised on this appeal; and 5) grant plaintiff such other, further and different relief as the Court deems just and proper.

Dated: Queens Village, New York
June 16, 2012

Respectfully submitted,

/s/ Abdul Hassan
Abdul Karim Hassan, Esq. (AH6510)
215-28 Hillside Avenue
Queens Village, New York 11427
Tel: 718-740-1000
Fax: 718-468-3894
Email: abdul@abdulhassan.com

CERTIFICATE OF SERVICE

I, Abdul K. Hassan, plaintiff pro se in the above-entitled action, hereby certify that a copy of plaintiff's response to the Court's May 22, 2012 order to show cause, was delivered on June 16, 2012 to counsel of record for Defendants, Mr. Stuart Segrest, of the Montana Attorney General's office, via the Court's ECF system.

Dated: Queens Village, New York
June 16, 2012

/s/ Abdul Hassan
Abdul K. Hassan, Esq.