

ORAL ARGUMENT NOT REQUESTED

12-1190

IN THE
United States Court of Appeals
FOR THE TENTH CIRCUIT

ABDUL KARIM HASSAN,

Plaintiff-Appellant,

v.

THE STATE OF COLORADO; SCOTT GESSLER, in his official capacity as
Secretary of State of the State of Colorado,

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Colorado, No. 1:11-cv-03116-MJW
Honorable Michael J. Watanabe*

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

I. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over plaintiff's declaratory and injunctive relief 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 4, 2012 from the Judgment entered in the United States District Court, District of Colorado, on May 4, 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 Colorado'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 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. 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, (“plaintiff” or “appellant” or “Hassan”) is a naturalized American citizen and a candidate for the Presidency of the United States. Plaintiff brought the instant action against the State of Colorado and its Secretary of State after they denied him access to the Colorado presidential ballot solely because of his national origin – invidious 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 trumps, abrogates and implicitly repeals the invidious national origin discrimination in the Constitution’s natural born clause.

This action was commenced on November 30, 2011 by the filing of a complaint in the United States District Court for the District of Colorado. Defendants were duly served and prior to answering the complaint, defendants, on January 6, 2012, made a motion to dismiss the complaint for a failure to state a claim, which, upon stipulation of the parties, was converted into a motion for summary judgment. After briefing was completed, the district court, by decision

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.

dated May 3, 2012, granted defendants motion for summary judgment. A judgment dismissing the case was entered on May 4, 2012.

Plaintiff timely filed a notice of appeal on May 4, 2012. Plaintiff seeks a reversal of the district court and the issuance of the declarations he seeks. 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. (Dk. 1:2:9² - complaint). Petitioner's race is East Indian. (Dk. 1:2:10). 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. (Dk. 1:3:11). Hassan satisfies all of the constitutional requirements for holding the Office of President of the United States except the requirement of natural born status. (Dk. 1:3:12). 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>. (Dk. 1:3:13). 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. (Dk. 1:3:14). Since the announcement of his

² The citation (Dk. 1:2:9) refers to paragraph 9 on page 2 of docket entry 1. The docket entries are taken from the district court's docket – Case #:11-cv-3116-MJW

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. (Dk. 1:3:15). Hassan has also been communicating this message to the American public through Youtube.com. (Dk. 1:3:16). 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. (Dk. 1:4:17). In addition, Hassan has done interviews with and has been covered by both print and broadcast media. (Dk. 1:4:18). Hassan's presidential candidacy and campaign have also been covered widely on the internet as a quick online search will reveal. (Dk. 1:4:19). 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. (Dk. 1:4:20). Hassan will continue to build on this initial success and continue to promote his candidacy and ideas to more and more voters in Colorado and across the country. (Dk. 1:4:21).

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. (Dk. 1:5:23). (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 Colorado presidential ballot. (Dk. 1:5:24). By letter dated August 12, 2011, Defendants responded to Plaintiff's request and ruled that, "Any individual who submits a candidate statement of intent for President and fails to check the boxes affirming his or her eligibility, or who affirmatively discloses that he or she does not meet the constitutional qualifications for the office, will not be placed on the ballot in Colorado." (Dk. 1:5:25). The first legally required step to gain access to the Colorado presidential ballot is to file a Candidate Statement of Intent under penalty of perjury. (Dk. 1:5:26). Defendant Gessler has invoked the Colorado statute at C.R.S. § 1-4-303, in declaring that he will not accept a filing of a Candidate Statement of Intent from Plaintiff because Plaintiff is not a natural born citizen. (Dk. 1:6:27). Because Plaintiff is not a natural born citizen, he cannot sign the required statement of intent under oath as required by Defendants because to do so would constitute a crime and would be false. (Dk. 1:6:28). Because of Defendants' use of C.R.S. § 1-4-303 and their refusal to accept a filing of a Candidate

Statement of Intent for President from Plaintiff because he is a naturalized citizen, Plaintiff has been prevented from filing his Candidate Statement of Intent for President, and as a result, has been denied any chance of getting on the presidential ballot in the State of Colorado unless Plaintiff prevails in this lawsuit. (Dk. 1:6:29). Plaintiff has the filing fee ready and if he wins this case, he will immediately execute and file the Candidate Statement of Intent for President with the Colorado Secretary of State office along with the filing fee. (Dk. 1:6:30).

The parties also stipulated to several facts for the purposes of summary judgment and those stipulated facts are laid out in the district court's decision.

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 when 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 Colorado presidential ballot on the grounds that plaintiff is a naturalized citizen and not a natural born citizen. Defendants require plaintiff to sign a statement of intent under penalty of perjury stating that he is a natural born citizen. Because plaintiff cannot sign this statement 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 violates the equal protection clause and, 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 discriminate by the natural born provision. Second, plaintiff demonstrates under standard implicit repeal analysis that the invidious national origin discrimination in the natural born

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.

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 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 Colorado. 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. (Dk. 1:1). The national origin discrimination as laid out in the complaint is defendants' requirement and practice as reflected in its statute (C.R.S. § 1-4-303) and Statement of Intent (R. 16-17⁴), that plaintiff cannot be placed on the Colorado presidential ballot, solely because of his 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. (Dk. 1:1). Defendants do not dispute that their national origin discrimination violates the Fourteenth Amendment - defendants instead argue that they are merely replicating the discrimination in the natural born clause. The district court stated in relevant part that (Add. 15)⁵:

because the natural born clause has not been implicitly repealed, nor is it invalid under the Absurdity Doctrine, Colorado state laws requiring all presidential candidates to affirm that they are natural born citizens are constitutional.

⁴ The citation R. 16-17 refers to pages 16-17 of the record here in the Court of Appeals that was transmitted received from the district court – Appellate Docket #: 4.

⁵ The citation (Add. 15) refers to page 15 of the addendum to this brief which contains the district court's decision.

The district court is incorrect and did not seem to address this point directly – 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 its decision, the district court in Hassan v. USA (R. 38, fn 1), 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 violate 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 trusted⁶. In Schneider v. Rusk, 377 U.S. 163, 168 (1964), the Supreme Court emphatically held that this type of distrust rationale and

⁶ http://www.legistorm.com/score_crs/show/id/82388.html. See also Add. 15.

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 Statement of Intent do. 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* 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. Pena, 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 Statement of Intent 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 Colorado. 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**

Unlike the implicit repeal doctrine, the absurdity doctrine does not require a showing of any legislative intent to abrogate or any irreconcilability. 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. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (“interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”). 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, morally shocking, bigoted, and senseless. On the other hand, we have the equal protection guarantee of the Fourteenth Amendment which prohibits states like Colorado 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.”). It is hard to imagine a federal judge

stating that discriminating against American citizens solely because of their national origin is not an absurd result.

In the instant case, the district court did not disagree with the plaintiff that that invidious national origin discrimination is an absurd result and the district court did not disagree that the equal protection guarantee of the Fourteenth and Fifth Amendments is an alternative interpretation consistent with the purpose liberty and justice purpose of the Constitution. In other words, the district court did not deny that that the two conditions that satisfy the absurdity doctrine have been met in this case. Instead, the district court reasoned that that the absurdity doctrine does not apply, on the sole basis, that while the invidious discrimination in the natural born clause may be absurd as a matter of fact, it is not absurd as a matter of law because the drafters of the natural born clause intended such absurdity. In this regard, the district court stated in relevant parts follows (Add. 14):

Plaintiff argues that the natural born provision is invalid under the Absurdity Doctrine in light of current public policy and Supreme Court precedent. The Absurdity Doctrine is a rule of statutory construction which states 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). The doctrine is applicable “only when it would have been unthinkable for Congress to have intended the result commanded by the words of the statute - that is, when the result would be ‘so bizarre that Congress could not have intended it.’” *Robbins v. Chronister*, 435 F.3d 1238, 1241(10th Cir. 2006) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1992)). It is not enough to show that the result is contrary to congressional desire. *Id.*

In making this argument, the district court is joining hands with Justice Taney in Dred Scott v. Sandford, 60 U.S. 393, 426 (1857), who stated in relevant part as follows:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

Like Justice Taney in the above excerpt, defendants and the district court are taking the extremely unfortunate and erroneous view that we are bound by original intent on issues of invidious discrimination and that the only way to escape the bondage of the last remaining form of invidious discrimination in our Constitution is through formal amendment. In other words, defendants argue that because the drafters of the constitution did not view invidious national origin discrimination as absurd we cannot view such invidious discrimination as absurd using the legal standards and beliefs of today. Fortunately, our society and judiciary have soundly rejected the “original intent” reasoning of Justice Taney in Dred Scott and of defendants and the district court in this case. For example, the drafters of the Constitution did not intend for the Fifth Amendment to protect against discrimination based on national origin and race especially given that slavery was

enshrined in the Constitution. Today, however, the Supreme Court has concluded that race and national origin discrimination are so absurd and unthinkable that such discrimination would be subject to strict judicial scrutiny. (See first argument above.).

Similarly, in Bolling v. Sharpe, 347 U.S. 497, 500 (1954), the Supreme Court ruled that it would be “unthinkable” or absurd for the Constitution to allow the federal government to discriminate and interpreted the Fifth Amendment as prohibiting such discrimination even though, the Founding Fathers never viewed such discrimination as absurd and even though the Fifth Amendment was never intended to prohibit such discrimination. As Justice Marshall once famously declared, if he were to adhere to original intent, he would still be sitting at the back of the bus. Many centuries ago, it was commonly believed that the earth was flat. By today’s standards however, it would be absurd to believe the earth was flat. “Absurdity” is a judgment call in the context of the current time, by people in the current time.

However, as to legislative intent and purpose, the district court erred in equating the natural born clause with a statute – in the context of the absurdity doctrine the whole Constitution should be equated with a statute. Like a statute, the Constitution has many parts such as the natural born clause. Like a statute, the Constitution states its purpose in the preamble. When a statute is amended, the

amendments are part of the statute – when the Constitution is amended, the amendments such as the Fourteenth Amendment are part of the Constitution – each amendment does not become a separate Constitution. As such, the proper legislative purpose for purposes of applying the absurdity doctrine in this case, is the purpose set out in the Constitution’s preamble and not the purpose of the natural born provision alone.

Plaintiff’s view that the entire Constitution is more akin to a statute for purposes of the absurdity doctrine is reinforced by Bolling v. Sharpe, 347 U.S. 497, 500 (1954), in which the Supreme Court stated in relevant part 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.” In rejecting the unthinkable or absurd result of discrimination in favor of equality, the Supreme Court in Bolling referred to the result the “same Constitution would impose” instead of isolating the Fifth and Fourteenth Amendments from the rest of the Constitution like the district court does here with regard to the natural born clause.

The best example of the need for the absurdity doctrine in the constitutional context is the Dred Scott case. Justices of the United States Supreme Court have described the Supreme Court’s decision in Dred Scott v. Sandford, 60 U.S. 393

(1857), as a great “self-inflicted wound⁷.” See South Carolina v. Regan, 465 U.S. 367, 412 (1984). See also Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir., 2007) (“Dred Scott is as infamous as it was erroneous in holding that African-Americans are not citizens.”). Image Carrier Corp. v. Beame, 567 F.2d 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 Dred Scott wrongly decided? The Supreme Court in Dred Scott 60 U. S. at 451, stated in relevant part that:

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.

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

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.

Dred Scott was wrongly decided because we now universally agree that the invidious discrimination based on race/ancestry that destroyed Dred 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. Dred 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 Dred 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 Dred 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 Dred Scott because of his race, it is also incorrect and absurd for the Constitution to deny plaintiff full citizenship because of his national origin.

Almost a hundred years after Dred 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 Dred 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.

The preceding analysis demonstrates that the district court's reliance on Robbins v. Chronister, 435 F.3d 1238, 1241 (10th Cir. 2006) is misplaced. At the outset, unlike the invidious national origin discrimination in this case, the fee award in Robbins was not absurd because, as the Court in Robbins pointed out, in the majority of cases, the losing party does not pay the fees of the winning party. As a result, the plaintiff in Robbins was getting \$1.50 more than he would have gotten in the usual case. The plaintiff in Robbins could have received more fees if he had won his entire case and more damages – linking results to fees is anything but absurd. On the contrary however, when a law discriminates on the basis of race or national origin, the presumption of validity goes away and the law is presumed to be invalid or absurd. . 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.”). Significantly, as pointed out by the Tenth Circuit in Robbins, 435 F.3d 1238, 1242, under the Supreme Court's view of the absurdity doctrine legal presumptions and canons of interpretation play an important role. Here, not only is national origin discrimination presumed to be invalid – the Supreme Court has concluded that the distrust rationale upon which the natural born clause is based as “impossible for us to make.” Schneider, 377

U.S. 163, 168. As such, the discriminatory result in this case is worse than absurd – it is impossible. Also, Robbins did not address the situation presented in this case where the absurdity was created over time. The Dred Scott and Plessy decisions were based on the assumption that black persons were inferior. In the 1950s however, the Supreme Court concluded that based upon the knowledge and beliefs of the day, such discrimination was absurd (see Bolling and Brown) and as a result, it held that race discrimination was subject to strict scrutiny. Likewise, the natural born clause was based on the assumption that naturalized citizens are less trustworthy. However, in the last several decades, the supreme court has rejected this rationale as impossible – worse than absurd. Like race, national origin is considered a suspect classification that is subject to strict scrutiny.

In the final analysis, we have a situation in this case where the Constitution through the Fifth and Fourteenth Amendments prohibit national origin discrimination while the natural born clause purports to allow such national origin discrimination. At a minimum, this is an ambiguity or conflict in the Constitution and invidious national origin discrimination is obviously an absurd result. As between the equality mandate of the Fifth and Fourteenth Amendments and the invidious discrimination in the natural born clause, the equality mandate is consistent with the Constitution's stated purpose of liberty and justice and must be chosen over the absurd national origin discrimination in the natural born clause.

**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. The district court addressed this argument and stated in relevant part as follows (Add 11-12):

Plaintiff suggests that the applicability of the principles of implied repeal depends on the content of the allegedly repealed statute. There is simply no authority supporting plaintiff’s contention

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 slavery provision 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. 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 IRRECONCILABLE
WITH AND IS THEREFORE TRUMPED, ABROGATED
AND IMPLICITLY REPEALED BY THE EQUAL
PROTECTION GUARANTEE OF THE FOURTEENTH
AMENDMENT**

Notably, the district court did not disagree with plaintiff's argument that the equal protection clause of the Fourteenth Amendment and the equal protection guarantee of the Fifth Amendment are in irreconcilable conflict with the national origin discrimination in natural born clause. Instead, the district court held that plaintiff failed to establish implicit repeal because he did not show a "clear and manifest" intent to repeal. The district court stated as follows:

To overcome the presumption against repeal, it must be shown that the legislature had a “clear and manifest” intent to repeal the earlier statute. *Yellowfish v. City of Stillwater*, 691 F.2d 926, 928 (10th Cir. 1982).

The district court was legally incorrect because where an irreconcilable conflict exists, a “clear and manifest” intent need not be shown in order to trigger implicit repeal and the Yellowfish case cited by the district court does not hold otherwise.

In Branch v. Smith, 538 U.S. 254, 285 (2003), the established standard for implicit repeal was stated in relevant part as follows:

The question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute. When Congress clearly expresses its intent to repeal or to pre-empt, we must respect that expression. When it fails to do so expressly, the presumption against implied repeals, like the presumption against pre-emption, can be overcome in two situations: (1) if there is an irreconcilable conflict between the provisions in the two Acts; or (2) if the later Act was clearly intended to “cove[r] the whole subject of the earlier one.” *Posadas v. National City Bank*, 296 U.S. 497, 503

In direct contradiction of the district court, the decision in Branch clearly explains that the presumption against implicit repeal is overcome in “two situations,” - not just where there is an intent to repeal. Moreover, the Supreme Court in Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007), 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.

The district court’s reliance on Yellowfish v. City of Stillwater, 691 F.2d 926, 930 (10th Cir. 1982) is misplaced. At the outset, the Tenth Circuit in Yellowfish, 691 F.2d at 930, found that “the two statutes are not in irreconcilable conflict.” As such, Yellowfish does not stand for the proposition that intent to repeal is required even if an irreconcilable conflict exists. The Court in Yellowfish, 691 F.2d at 928, recognized that, “There are two well accepted categories of repeal by implication,” and found that “the intent of Congress to partially repeal section

357 by implication is not “clear and manifest,” and that the two statutes are not in irreconcilable conflict.’ Yellowfish, 691 F.2d at 930. Unlike the district court in this case, the Tenth Circuit in Yellowfish only found the absence of implicit repeal after finding that neither intent to repeal nor irreconcilable conflict existed - because either one would have been sufficient to trigger implicit repeal.

Plaintiff’s view that where “irreconcilability” is present, as it is here, implicit repeal occurs, without any showing of intent to repeal, 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. In addition, the district court’s view is undermined by the fact that 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.

In this case, the district court did not dispute the existence of an irreconcilable conflict, because such a conflict clearly exists. 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 an obvious 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 especially under the strict scrutiny standard (see first argument 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. See the Fitzpatrick argument below which addresses the second category of implicit repeal – intent to repeal.

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

There is no indication that the district court specifically addressed plaintiff’s argument based on the citizenship clause. With respect to the Citizenship Clause argument, both grounds/categories of 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, Statement of Intent and denial (R. 16-17) 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.

**6. 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 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. 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. 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 as interpreted by the Supreme Court 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.

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

The district court in this case, cited Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) as an example of implicit repeal/abrogation in the constitutional context and stated that (Add 11):

the Supreme Court has recognized implicit modifications to the Constitution absent express amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding the Fourteenth Amendment partially abrogated Eleventh Amendment sovereign immunity).”

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 (see first argument), 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 absurd, bigoted, 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.” Under Fitzpatrick and its progeny, implicit repeal has occurred in this case.

8. THE DISTRICT COURT'S RELIANCE ON PURPORTED ATTEMPTS TO FORMALLY REPEAL IS MISPLACED

The Court's invocation of the attempts to repeal the natural born clause through amendment is also misplaced. (Add. 13, 15). At the outset, the views of a few members of Congress do not represent the views of the majority of Congress. In any event, 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 and was not irreconcilable with the Fourteenth and Fifth Amendments – 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 1940s, an amendment would have been the only way to remedy the discrimination in the natural born clause because prior to the Supreme Court decisions through the 1970s, plaintiff would not have been able to make the arguments he now makes in this case that the discrimination in the natural born clause is legally absurd and irreconcilable with the equal protection guarantees of the Fourteenth and Fifth Amendments. As for the attempts to repeal the natural born clause through amendment in more recent times, these attempts can be construed as a recognition of the irreconcilable conflict and absurdity that plaintiff argues exists – else why would they try to get rid of it. In any event, while an amendment is a more explicit confirmation of constitutional law, attempts by

some to amend does not mean that the same result cannot be achieved through interpretation – almost every major change in constitutional law through interpretation could have also been achieved through amendment and vice versa. 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.

**9. DEFENDANTS MISPERCIEVE THE EFFECT OF 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 judiciary’s legal interpretation of constitutional discrimination has always changed when the Supreme Court rejects the underlying factual basis for the discrimination. The decisions in Plessy 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. (See also Add. 15). 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 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 that⁸:

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:

⁸ http://www.legistorm.com/score_crs/show/id/82388.html

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 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. When the Supreme Court in Schneider v. Rusk, 377 U.S. 163, 168 (1964), rejected the rationale that naturalized citizens are less trustworthy than natural born citizens, the natural born clause lost its foundation and has collapsed for all practical purposes. Such a rejection was a universal fact of which every court can thereafter take judicial notice and was logically not confined to the Schneider case. While the "rejected rationale" argument is an independent basis to rule in plaintiff's favor, this argument also buttresses the arguments based on the absurdity and implicit repeal doctrine. This is so because it would be highly illogical to argue that there is a presumption in favor of a law that is based on a rationale that has already been rejected by the Supreme Court.

10. 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. (See first argument above). 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.

11. THE DISTRICT COURT AND DEFENDANTS FAIL THE DREDD 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 and implicitly repealed by the Fifth and Fourteenth Amendments; 4) declare that defendants’ national origin discrimination and its Statement of Intent containing such discrimination, violate the Fourteenth Amendment; and 5) grant plaintiff such other, further and different relief as the Court deems just and proper.

VIII. ORAL ARGUMENT STATEMENT

This case presents significant constitutional issues of first impression which usually are accompanied by oral argument. However, while plaintiff is not requesting oral argument, he is ready and willing to present oral arguments if

requested by this Court. It may also be helpful if the Court invites parties on all sides of the issues to submit amicus curiae briefs or even to seek guidance from the Supreme Court pursuant to 28 USC § 1254.

Dated: Queens Village, New York
June 20, 2012

Respectfully submitted,

/s/ Abdul Hassan

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Date: June 20, 2012

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
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Date: June 20, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2012, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Matthew D. Grove, matthew.grove@state.co.us

I hereby certify that on June 20, 2012, I have mailed or served 1 copy of the foregoing appellant brief by Express Mail, postage pre-paid to the following:

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Date: June 20, 2012

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Add

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-03116-MJW

ABDUL KARIM HASSAN,

Plaintiff,

v.

THE STATE OF COLORADO and
SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado

Defendants.

**ORDER ON
MOTION TO DISMISS (DOCKET NO. 8) FILED BY DEFENDANTS STATE OF
COLORADO AND SCOTT GESSLER
CONVERTED TO A MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 26)**

MICHAEL J. WATANABE
United States Magistrate Judge

Initially, this case was before this court pursuant to an Order Referring Case (Docket No. 2) issued by Judge William J. Martinez on December 2, 2011. On May 1, 2012, the parties filed a joint motion consenting to the disposition of this matter by this court (Docket No. 31). Pursuant to 28 U.S.C § 636(c), Judge Martinez entered an order granting the parties' motion and assigning the case for all purposes to this court (Docket No. 32). The case was reassigned on May 1, 2012 (Docket No. 33).

PLAINTIFF'S ALLEGATIONS

Plaintiff Abdul Hassan alleges the following in his Complaint for Declaratory and Injunctive Relief (Docket No. 1). Plaintiff is a naturalized American citizen seeking candidacy for the Presidency of the United States. Plaintiff's candidacy was announced

in March 2008 through his website www.abdulahassanforpresident.com. Subsequent to his announcement, plaintiff posted one or more Youtube videos regarding his candidacy and purchased nationwide advertising through Google linking to his presidential website.

In July 2011, plaintiff asked defendants the State of Colorado and Scott Gessler to rule on his eligibility for inclusion on the Colorado presidential ballot, in view of plaintiff's status as a naturalized American citizen. In a letter dated August 12, 2011, defendants responded to plaintiff's inquiry. Defendants stated that pursuant to Section 1-4-303 of the Colorado Revised Statutes, any individual seeking access to the presidential ballot is required to submit a notarized statement of intent and therein affirm that they meet "the constitutional qualifications for the office of the President as outlined in Article II, Sec. 1, Clause 5 of the U.S. Constitution: 1) 35 years or older, 2) at least a 14-year resident of the United States, and 3) a natural-born citizen of the United States." Defendants further stated that any individual who fails to check the three boxes affirming their eligibility, or who affirmatively discloses that they do not meet the requirements, will not be placed on the Colorado presidential ballot. Due to plaintiff's status as a naturalized American citizen, plaintiff cannot sign the statement of intent under oath, and therefore cannot access the Colorado presidential ballot.

Plaintiff's single claim asserts violations of plaintiff's rights under the Equal Protection Clause, the Citizenship Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment. Plaintiff claims that the natural born provision of the U.S. Constitution is "irreconcilable with and is trumped, abrogated and implicitly repealed" by the aforementioned clauses of the Fourteenth Amendment as well as the Equal

Protection guarantee of the Fifth Amendment. Plaintiff also argues that the natural born provision is invalid under the Absurdity Doctrine in light of current public policy concerns. Plaintiff asks the court to: (1) declare § 1-4-303, C.R.S. unconstitutional under the Fourteenth amendment due to the natural born requirement; (2) declare that the natural born provision of the U.S. Constitution has been trumped, abrogated, and implicitly repealed by the Fifth and Fourteenth Amendments; (3) declare that defendants' refusal to accept plaintiff's filing of his declaration of candidacy because of plaintiff's national origin violates the Fourteenth Amendment; and (4) enjoin defendants from discriminating against plaintiff due to his national origin and/or status as a naturalized American citizen with respect to the presidential election ballot in Colorado.

PENDING MOTION

Now before the court is defendants' Motion to Dismiss (Docket No. 8). At the April 23, 2012 status conference, the parties agreed to convert defendants' Motion to Dismiss to a Motion for Summary Judgment, and the court so ordered. On April 27, 2012, the parties filed a Stipulated Motion for Leave to Incorporate List of Stipulated Facts into Motion for Summary Judgment (Docket No. 28). The court entered an order granting the parties' motion and deeming the facts admitted for the purposes of the Motion for Summary Judgment (Docket No. 30) on April 30, 2012.

The stipulated facts are as follows: 1) Plaintiff is a 2012 candidate for the Presidency of the United States; 2) Plaintiff is over the age of 35 years; 3) Plaintiff is a naturalized American citizen; 4) Plaintiff has been a resident of the United States for more than fourteen years; 5) Plaintiff is not a natural-born citizen of the United States; 6) With the exception of the "natural-born citizen" requirement, Plaintiff satisfies all of the

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constitutional requirements for holding the Office of the President of the United States; 7) Colorado Secretary of State Scott Gessler ("the Secretary") is the chief elections officer for the State of Colorado; 8) The Secretary is responsible for ensuring the qualifications of candidates for statewide and federal elections; 9) Plaintiff contacted the Secretary to inquire about Plaintiff's eligibility for the presidential ballot in Colorado; 10) The Secretary responded in the letter attached to the Complaint (Doc. 1) as Exhibit 1; 11) In pertinent part, the letter stated that access to the Presidential ballot in Colorado requires a prospective candidate to file a candidate statement of intent; 12) The letter also stated that any individual "who affirmatively discloses that he or she does not meet the constitutional qualifications for the office, will not be placed on the ballot in Colorado."; 13) Among other things, the Candidate Statement of Intent requires the prospective candidate to affirm his eligibility for office under penalty of perjury; 14) The Secretary will not place a prospective candidate on the presidential ballot unless that prospective candidate submits the Candidate Statement of Intent; 15) Plaintiff has not submitted a Candidate Statement of Intent to the Secretary because he is unable to affirm that he meets the natural-born citizen requirement of Article II, Section 5; and 16) Plaintiff has not identified presidential electors for the 2012 general election.

Defendants argue plaintiff's claim is not yet ripe for review. In addition, defendants argue that the natural born provision has not been implicitly repealed by the Fifth or Fourteenth Amendments because the U.S. Constitution cannot be repealed by implication, and even if it could, plaintiff has failed to demonstrate that implicit repeal has occurred.

The court has carefully considered the Complaint (Docket No. 1), the subject

motion (Docket No. 8), the response (Docket No. 16), and the reply (Docket No. 21). In addition, the court has taken judicial notice of the court's file, and has considered the applicable Federal Rules of Civil Procedure and case law. The court now being fully informed finds and orders as follows.

Rule 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial." Robertson v. Board of County Comm'rs of the County of Morgan, 78 F. Supp. 2d 1142, 1146 (D. Colo. 1999) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Mares v. ConAgra Poultry Co., 971 F.2d 492, 494 (10th Cir. 1992)). "Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. . . . These facts may be shown 'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings by themselves.'" Southway v. Central Bank of Nigeria, 149 F. Supp. 2d 1268, 1273 (D. Colo. 2001), aff'd, 328 F.3d 1267 (10th Cir. 2003). However, "[i]n order to survive summary judgment, the content of the evidence that the nonmoving party points to must be *admissible*." Adams v. American Guarantee & Liability Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000). "The nonmoving party does not have to produce evidence in a form that would be admissible at trial, but 'the content or

substance of the evidence must be admissible.” Id. “Hearsay testimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment because ‘a third party’s description of a witness’ supposed testimony is ‘not suitable grist for the summary judgment mill.’” Id.

“Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence presented in the motion and response.” Southway, 149 F. Supp. 2d at 1273. “The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . . Unsupported allegations without ‘any significant probative evidence tending to support the complaint’ are insufficient . . . as are conclusory assertions that factual disputes exist.” Id.;

Robertson, 78 F. Supp.2d at 1146 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); quoting White v. York Int’l Corp., 45 F.3d 357, 360 (10th Cir. 1995)).

“Evidence presented must be based on more than ‘mere speculation, conjecture, or surmise’ to defeat a motion for summary judgment.” Southway, 149 F. Supp.2d at 1274. “Summary judgment should not enter if, viewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in that party’s favor, a reasonable jury could return a verdict for that party.” Id. at 1273.

JUSTICIABILITY

“Ripeness is a justiciability doctrine ‘drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.’” U.S. v. Vaquera-Juanes, 638 F.3d 734, 736 (10th Cir. 2011) (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)). The ripeness doctrine exists to prevent

courts “from entangling themselves in abstract disagreements” by avoiding “premature adjudication.” Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967). Defendants argue that plaintiff’s claim is not prudentially ripe; defendants do not address constitutional ripeness. The court finds that constitutional ripeness is not an issue in this matter and therefore will proceed only with the prudential ripeness analysis.

Generally, two factors are utilized to determine if an issue is prudentially ripe: the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration. Kan. Judicial Review v. Stout, 519 F.3d 1107, 1116 (10th Cir. 2008). First, to determine the fitness of the issue, the court must “focus[] on whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed.” Id. at 1118. Second, hardship exists if “the challenged action creates a direct and immediate dilemma for the parties.” New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995).

Defendants argue that plaintiff’s claim is not fit because plaintiff’s complaint fails to allege that he has completed all of the requirements under § 1-4-303, C.R.S. Specifically, the statute requires plaintiff to submit “the names of registered electors who are thus nominated as presidential electors” along with an indication from each elector as to their acceptance of the nomination. Plaintiff’s complaint makes no mention of nominated electors. In addition, Defendants argue that there is no direct and immediate dilemma because plaintiff has failed to allege that he is willing and able to satisfy the electors requirement. In other words, defendants argue that “there is no certainty that [plaintiff] would meet the minimum qualifications” set forth in the Colorado statute. For support, defendants cite Gonzales and note that ripeness may depend on “whether the

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case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” 64 F.3d at 1499.

The Tenth Circuit Court’s decision in Roe No. 2 v. Ogden, 253 F.3d 1225 (10th Cir. 2001), is instructive on this issue. In Ogden, the plaintiff law school students challenged the constitutionality of a bar admission rule which authorized questions on the bar application regarding, among other things, the applicant’s history of drug and alcohol dependency. The defendants argued the students’ claims were not prudentially ripe because none of the students had graduated or passed the bar. Ogden, 253 F.3d at 1231. However, in holding that the claims were ripe, the court stated that “while there is always the chance that the Students will not graduate or fail the exam, that contingency, in and of itself, is not sufficient to defeat ripeness.” Id. at 1232 (internal quotes omitted). The court noted that the students had already taken substantial steps towards the disputed question by spending the time and resources required to attend three years of law school. Id. Further, a determination of the merits did not require the further development of facts; the court did not need to know whether the students would graduate and pass the bar in order to make a determination. Id.

Here, plaintiff is in a similar position to the students in Ogden. It is undisputed that plaintiff cannot sign the statement of intent, affirming he meets the natural born requirement, without committing perjury. Plaintiff’s claim is directed specifically at the natural born requirement; plaintiff is not challenging the other requirements found in the Colorado statute such as the electors requirement. While it is true that plaintiff failed to allege that he could meet the electors requirement, the merits of plaintiff’s claim turn strictly on a legal issue (i.e., the implicit repeal of the natural born provision) and does

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not require the development of additional facts for its determination. In addition, there is clearly a direct and immediate dilemma for the parties. The natural born provision directly prevents plaintiff from appearing on the Colorado presidential ballot. In order to appear on the 2012 ballot, plaintiff must submit his statement of intent 155 days prior to the general election. This is a sufficiently immediate deadline. Certainly it is possible that plaintiff will be unable to meet the electors requirement. However, in view of the steps plaintiff has taken towards his goal, such as the creation of his presidential website, the contingent or uncertain nature of plaintiff's ability to meet electors requirement is not enough to defeat ripeness. A determination can be made by this court without knowing whether plaintiff can meet the requirement. Accordingly, the court finds that plaintiff's claim is ripe for review.

IMPLICIT REPEAL

Plaintiff argues that a constitutional provision may be repealed through implication by a subsequent constitutional amendment. Repeal by implication is a rule of statutory construction. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976). Accordingly, the court must first determine if rules of statutory construction apply to constitutional interpretation.

The parties do not cite to, and the court cannot find, any cases directly addressing the applicability of the rules of statutory construction to the Constitution. Several commentators have suggested, in the context of the larger topic of the various theories of constitutional interpretation, that the rules of statutory construction are applicable. See Robert G. Natelson, The Founders' Hermeneutic: The Real Original Understanding of Original Intent, 68 Ohio St. L.J. 1239, 1246-49 (2007) (noting that

“[d]ebaters in the First Congress explicitly applied Anglo-American rules of construction to the Constitution”); Louis J. Sirico, Jr., Original Intent in the First Congress, 71 Mo. L. Rev. 687, 689-90 (2006) (finding “no suggestion that the rules of construction should be any different for a constitution than for a statute”). But see Kevin M. Stack, The Divergence of Constitutional and Statutory Interpretation, 75 U. Colo. L. Rev. 1, 3 (2004); Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 556 (2003) (noting that “members of the founding generation expressed a variety of different views” as to what rules of interpretation applied to the Constitution).

In addition, several commentators have noted Chief Justice Marshall’s use of the common law rules of statutory construction in interpreting the Constitution. Larry D. Kramer, The Supreme Court 2000 Term Forward: We the Court, 115 Harv. L. Rev. 4, 99 (2001); Bernard H. Siegan, Separation of Powers & Economic Liberties, 70 Notre Dame L. Rev. 415, 452 (1995); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 948 (1985).

The parties do not address this threshold issue concerning the applicability of the rules of statutory construction to constitutional interpretation. Accordingly, the court will make no findings on this issue. Nevertheless, the court will assume the rules of statutory construction, and thus implied repeal, are applicable to the Constitution for the purposes of this order.

The court notes that Article V of the Constitution provides an express method to amend the Constitution. Even assuming the rules of statutory construction are applicable, it could be argued that the Framers did not intend the Constitution to be modified through means other than amendment, such as implied repeal. However, as

plaintiff points out, the Supreme Court has recognized implicit modifications to the Constitution absent express amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding the Fourteenth Amendment partially abrogated Eleventh Amendment sovereign immunity).

It is "a cardinal principle of statutory construction that repeals by implication are not favored." United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976). Accordingly, implicit repeal will not be found absent clearly expressed congressional intent. Branch v. Smith, 538 U.S. 254, 273 (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.'" Id. (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

Plaintiff argues that because the natural born clause facially discriminates on the basis of national origin, it must be presumed invalid and the burden must shift to the state to withstand the strict scrutiny test. Further, plaintiff reasons that this presumption of invalidity necessarily destroys the presumption against repeal, and therefore congressional intent need not be shown. Plaintiff cites City of Cleburne, Tex v. Cleburne Living Center, 473 U.S. 432 (1985), for the proposition that the principles of implied repeal are inapplicable when the earlier statute is discriminatory on its face.

The court finds no support for plaintiff's argument in Cleburne. The portion of Cleburne cited by plaintiff explains the applicability of the strict scrutiny test to statutes challenged under the Equal Protection Clause; Cleburne does not involve implicit repeal. Plaintiff suggests that the applicability of the principles of implied repeal depends on the content of the allegedly repealed statute. There is simply no authority

supporting plaintiff's contention that implied repeal and strict scrutiny interact in this manner. As plaintiff notes in his response to defendants' motion, plaintiff is not arguing that the natural born provision itself is unconstitutional. Accordingly, whether or not the natural born provision discriminates on its face, a strict scrutiny analysis is not relevant to plaintiff's challenge. See Black's Law Dictionary 244 (8th ed. 2004) (defining "facial challenge" as a "claim that a statute is unconstitutional on its face"). Plaintiff's challenge is fully couched in his theory of implicit repeal. Therefore, the court finds that the presumption against repeal remains in effect.

To overcome the presumption against repeal, it must be shown that the legislature had a "clear and manifest" intent to repeal the earlier statute. Yellowfish v. City of Stillwater, 691 F.2d 926, 928 (10th Cir. 1982). "Moreover, silence in the legislative history is insufficient to support repeal by implication." United States v. Hahn, 359 F.3d 1315, 1322 (10th Cir. 2004).

Plaintiff argues that the Equal Protection Clause of the Fifth Amendment and various clauses of the Fourteenth Amendment implicitly repealed the natural born provision. The court's analysis will make no distinction between plaintiff's Fifth Amendment and Fourteenth Amendment equal protection arguments. See Adarant Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995) (stating that the Court's approach to equal protection claims under the Fifth Amendment is precisely the same as the approach under the Fourteenth Amendment). Plaintiff does not provide any *specific* arguments demonstrating congressional intent to repeal the natural born provision. Plaintiff only cites to cases which discuss the Equal Protection Clause in more general terms. This absence of any showing of intent alone is likely enough for the court to hold

that plaintiff has failed to overcome the presumption against implicit repeal. However, a quick discussion of congressional action (and inaction) regarding the natural born provision is enlightening on the issue of intent.

As noted in several articles, Congress considered and rejected several proposals to amend or repeal the natural born provision prior to, and shortly following, the ratification of the Fourteenth Amendment. See Sarah Helene Duggin & Mary Beth Collins, “Natural Born” in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It, 85 B.U. L. Rev. 53, 148 (2005) (citing H.R.J. Res. 269, 40th Cong. (1868) and H.R.J. Res. 52, 42d Cong. (2d Sess. 1871)); Malinda L. Seymore, The Presidency and the Meaning of Citizenship, 2005 B.Y.U. L. Rev. 927, 947 (2005) (citing H.R.J. Res. 166-169, 42nd Cong. (3d Sess. 1872) and S.R. 284, 41st Cong. (3d Sess. 1871)). In addition, there is no mention of repeal of the natural born provision in the congressional debates on the Civil Rights Act or the Fourteenth Amendment. See Seymore supra, at 986 (further noting that “there are only a few mentions of the Presidential Eligibility Clause during the debate on the Fourteenth Amendment, and they appear to be incidental”). This is strong evidence that the ratification of the Fourteenth Amendment was not intended to repeal the natural born provision.

Plaintiff also argues, in general terms, that the Supreme Court’s interpretation of the Fourteenth Amendment has evolved since its ratification. Plaintiff argues that the current view of the Fourteenth Amendment supports implied repeal of the natural born provision. However, the continued consideration and rejection of proposals to amend or repeal the natural born provision contradicts plaintiff’s position. See H.R.J. Res. 59,

108th Cong. (2003); Duggin & Collins supra, at 149 (citing H.R.J. Res. 795, 90th Cong. (1967)); Seymore supra, at 947 (citing S.J. Res. 161, 92d Cong (1971)). More importantly, these proposals are further evidence against an intent for the Fourteenth Amendment to repeal the natural born clause. See Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (stating that subsequent congressional actions should not be “rejected out of hand as a source that a court may consider in the search for legislative intent,” but warning that they “must be weighed with extreme care”).

Based on the above, the court finds that plaintiff has failed to show a clear and manifest intent for the Fourteenth Amendment to repeal the natural born provision. Accordingly, the court finds that the natural born provision has not been implicitly repealed.

THE ABSURDITY DOCTRINE

Plaintiff argues that the natural born provision is invalid under the Absurdity Doctrine in light of current public policy and Supreme Court precedent.

The Absurdity Doctrine is a rule of statutory construction which states 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). The doctrine is applicable “only when it would have been unthinkable for Congress to have intended the result commanded by the words of the statute - that is, when the result would be ‘so bizarre that Congress could not have intended it.’” Robbins v. Chronister, 435 F.3d 1238, 1241 (10th Cir. 2006) (quoting Demarest v. Manspeaker, 498 U.S. 184, 190-91 (1992)). It is not enough to show that the result is contrary to congressional desire. Id.

Assuming, as the court does above, that the rules of statutory construction apply to constitutional interpretation, the court cannot find that the Absurdity Doctrine acts to invalidate the natural born provision. Certainly the result of the provision is not so bizarre that Congress could not have intended it; there is ample evidence that the natural born provision was intended, at least in part, to prevent naturalized citizens such as plaintiff from qualifying for the Office of the President. See Seymore supra, at 933-41 (tracing the origins of the natural born clause and stating it was “motivated by fear that foreign-born, naturalized citizens’ loyalty could not be assured”); Lawrence Friedman, An Idea Whose Time has Come - The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency, 52 St. Louis U. L.J. 137, 141-43 (2007) (stating that naturalized citizens were not intended to be eligible under the natural born provision). Indeed, the very fact that Congress has consistently rejected proposals to amend or repeal the natural born provision argues against any suggestion that the result of the provision is absurd. In addition, even assuming subsequent actions by Congress, such as the ratification of the Fourteenth Amendment, demonstrate a desire for a different result, this is not enough to invalidate the natural born provision under the Absurdity Doctrine.

Accordingly, because the natural born clause has not been implicitly repealed, nor is it invalid under the Absurdity Doctrine, Colorado state laws requiring all presidential candidates to affirm that they are natural born citizens are constitutional.

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WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is **granted**.

Pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCiv.R. 54.1 defendants are entitled to costs. A bill of costs must be filed on the appropriate form within 14 days of the date of this order.

Date: May 3, 2012
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge