

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*

REPLY BRIEF FOR PLAINTIFF-APPELLANT

ABDUL K. HASSAN, ESQ.
Plaintiff-Appellant Pro Se
215-28 Hillside Avenue
Queens Village, New York 11427
718-740-1000

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I. PRELIMINARY STATEMENT

Plaintiff-appellant Abdul K. Hassan, respectfully submits the instant reply brief in response to the opposing brief submitted by defendants-appellees, and in further support of his appeal. The purpose of a reply is to address arguments raised in the opposing brief. Most of the arguments raised in defendants' opposing brief are based on the district court's decision and have already been addressed in plaintiff's opening brief. As such, rather than repeat the arguments in the opening brief, plaintiff will focus on those points that can benefit from additional attention and refers the Court to plaintiff's opening brief for a more detailed treatment of the issues and arguments.

II. ARGUMENT

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

At the outset, defendants do not seem to deny that irreconcilable conflict alone is a condition which by itself is sufficient to trigger implicit repeal as Hassan explained in his opening brief. (Pl. Br. 35-37)¹. Significantly, the district court did not dispute that there was an irreconcilable conflict in this case – the district court focused solely on intent. Defendants also finally admit expressly that they are

¹ Pl. Br. 35-37 refers to pages 35-37 of plaintiff's opening brief.

bound by the equal protection mandate of the Fourteenth Amendment and state in relevant part that (Def. Br. 21):

Bolling thus clarified that the federal government, like the states, was bound by principles of equal protection. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215-18 (1995) (*Bolling* “impos[ed] on the Federal Government...an obligation equivalent to that of the States”).

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

But there is more. In addressing the irreconcilable conflict between the equal protection clause of the Fourteenth/Fifth Amendments and the natural born clause, defendants admit that, “the *concepts* espoused in the two clauses appear to be at odds with one another.” (Def. Br. 21-22). However, defendants make the strange argument that this irreconcilable conflict is not really an actual or irreconcilable

conflict because “The Constitution is not the Government.” (Def. Br. 21).

Defendants explain further (Def. Br. 21):

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

Obviously realizing that this is a trivial point, defendants preemptively state, “this is not a trivial point.” (Def. Br. 22). This point is not only trivial - it is a very strange one – made by defendants most likely because no legitimate argument exists to erase the existence of the irreconcilable conflict. It is very easy to correct defendants on this point because nowhere is plaintiff arguing that the equal protection clause applies to the Constitution – assuming we can even understand what this means. What plaintiff is arguing is that the equal protection clause applies to state and federal governments – a point that defendants themselves make. (See Def. Br. 21 – “the Clause is directed at *the government*.”). The defendants in this case are the government of the state of Iowa and its Secretary of State who discriminated against Hassan because of his national origin – the Constitution is not the defendant as can be confirmed by the case caption and the complaint. Simply put, the Fourteenth and Fifth Amendments instruct the government not to discriminate on the basis of national origin, while the natural born clause instructs the government to discriminate on the basis of national origin. The government cannot follow both of these irreconcilably conflicting instructions and the natural born clause must give way, because, among other reasons, it came

earlier in time. Because defendants' attempt to avoid an irreconcilable conflict is premised on the erroneous belief that plaintiff was relying on the equal protection clause applying to the Constitution, once this error is corrected, as it has been, the irreconcilable conflict stands and implicit repeal is triggered.

Defendants' "trivial point" that the "Constitution is not the government" is also destroyed by defendants very own arguments. In addressing the case of Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), defendants argue that Fitzpatrick (Def. Br. 12), "addressed a direct conflict between two Constitutional provisions," - the Fourteenth Amendment and the Eleventh Amendment. If as defendants argue, the Fourteenth Amendment in this case cannot be in conflict with another part of the Constitution because the Fourteenth Amendment "does not apply to the Constitution itself," then there could not have been a conflict between the Fourteenth and Eleventh Amendments in Fitzpatrick – a conflict defendants admit was present. It is difficult, or even impossible, for anyone with a good understanding of equal protection jurisprudence to argue that an irreconcilable conflict does not exist in this case between the Fourteenth/Fifth Amendments and the natural born clause. As such, this Court should reverse the district court and make a finding of implicit repeal.

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

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

**2. DEFENDANTS MISPERCEIVE THE EFFECT OF
REJECTED RATIONALES ESPECIALLY IN LIGHT OF
THE SUPREME COURT’S IMPLICIT REPEAL RULING IN
CREDIT SUISSE V. BILLINGS**

Defendants argue that the fact that the Supreme Court has rejected the rationale behind the natural born clause (Pl. Br. 48-50) does not mean the clause is invalid. (Def. Br. 28). Defendants misperceive the role that rejected rationales have played in constitutional cases involving discrimination. For example, decisions

such as Dred Scott and Plessy were based on the rationale that blacks were inferior and sub-human. When the Supreme Court began rejecting this rationale in the 1950s, the body of constitutional law based on this rejected rationale also collapsed and the modern era of equal protection jurisprudence was born. When the Supreme Court in Schneider v. Rusk, 377 U.S. 163, 168 (1964), rejected the rationale that naturalized citizens are less trustworthy than natural born citizens, the natural born clause lost its foundation and has collapsed for all practical purposes. Such a rejection was a universal fact of which every court can thereafter take judicial notice and was logically not confined to the Schneider case.

This rejected rationale argument has greater significance in light of the Supreme Court's recent implicit repeal ruling in Credit Suisse Securities (USA) LLC v. Billing 551 U.S. 264 (2007). In Credit Suisse, 551 U.S. 254, 275, an almost unanimous Supreme Court, including liberal as well as conservative justices, found implicit repeal using a more relaxed standard where the laws were "incompatible" but not necessarily "irreconcilable." The comparative value of the laws also played a role in the Court's implicit repeal finding. Here, it is clear that the equal protection clause has a lot of value and the natural born clause has no value at all. Moreover, while the invidious national origin discrimination in the natural born clause is irreconcilable with the equal protection clause, at minimum,

these clauses are incompatible – a condition which under Credit Suisse is sufficient to trigger implicit repeal.

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

Despite being over 150 years old, Dredd Scott v. Sandford, 60 U.S. 393 (1857), is the most recent Supreme Court case to deal with invidious citizenship discrimination that is contained in the Constitution itself – the very thing we face in this case where plaintiff challenges invidious citizenship discrimination that is contained in the Constitution’s natural born provision. Plaintiff relies on Dredd Scott not because of the holding in this 1857 case but because the Supreme Court today views its decision in Dredd Scott as a great self-inflicted wound. (See Pl. Br. 23). Importantly, Dred Scott is central because it dealt with citizenship discrimination in the Constitution itself – if the natural born clause was a statute, and not in the Constitution itself, it would obviously violate the Fourteenth and Fifth Amendments and we would have no need for this case. As such, plaintiff relied on Dred Scott probably more than any other case. In this regard, plaintiff argued that the repudiation of the Dred Scott citizenship ruling, standing alone, is sufficient to warrant a ruling in his favor. In addition, plaintiff argues that the conclusion that the Dred Scott Court was very wrong in upholding citizenship discrimination in the Constitution even before the Fourteenth and Thirteenth

Amendments were adopted, demonstrates that the implicit repeal and absurdity doctrine analysis employed by the district court and defendants is very wrong. The parties and the Court have an obligation to address relevant precedent and dispositive arguments. As such, when the district court and the defendants fail to address the most recent and relevant Supreme Court precedent, a red flag goes up and it should grab this Court's attention – such a failure amounts to a concession that plaintiff is right. It seems clear that defendants and the district court ignored the Dred Scott arguments because under the logic and reasoning of defendants and the district court in this case, the Dred Scott ruling would be viewed as correct even though the Supreme Court and the current judiciary now views the Dred Scott citizenship ruling as erroneous. (See Pl. Br. 24-25). However, a court and a party cannot ignore precedent and arguments simply because they contradict their desired outcome. If the Court is unable to distinguish Dred Scott and the arguments based on it, the Court would be required to change its ruling. It is now the duty of the Court of Appeals to change the ruling of the district court and reject the logic and reasoning of Dred Scott. Action speaks louder than words – we cannot condemn Justice Taney and when faced with similar citizenship discrimination in the Constitution, do the very thing he did and affirm the invidious discrimination in the Constitution.

The avoidance of the discrimination label and of the Dred Scott case can also be construed as a message from the district court and defendants that the legal, social and political issues implicated in this case are too extraordinary and sensitive for them to handle and that they should be addressed by the Court of Appeals or the Supreme Court. In fact, in discussing the issues presented herein, the chairperson of the Federal Election Commission stated as follows²:

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

In the event this Court believes that the issues herein should be decided by the Supreme Court, it should certify the questions presented herein to the Supreme Court pursuant to 28 USC § 1254(2).

4. DEFENDANTS' RESPONSE TO FITZPATRICK V. BITZER FURTHER DEMONSTRATES THAT PLAINTIFF IS CORRECT ON THE MERITS

In their opposition, defendants concede that, “Fitzpatrick, (Def. Br. 10), “involved a direct conflict between two Constitutional provisions.” Defendants’ argument that this conflict was reconciled in Fitzpatrick highlights their misunderstanding of Fitzpatrick and abrogation analysis in general. In Fitzpatrick, the Supreme Court found that the state’s gender discrimination violated the

² <http://www.fec.gov/audio/2011/2011090102.mp3>.

Fourteenth Amendment and that the state's Eleventh Amendment immunity was abrogated as a result. This outcome means that there was no reconciling of the conflict in Fitzpatrick. In general, the Supreme Court has explained in Kimel v. Florida Board of Regents, 528 U.S. 62, 82 (2000), that Fourteenth Amendment will abrogate the Eleventh Amendment only where the discrimination at issue violates the Fourteenth Amendment as is the case here. If as defendants concede, the Fourteenth and Eleventh Amendments were in direct conflict in Fitzpatrick, there is an even bigger direct conflict between the Fourteenth Amendment and the natural born clause in this case. In this regard, it should first be noted that under the Fourteenth Amendment, national origin discrimination that is at issue in this case, like race discrimination, is subject to a higher level of scrutiny (strict scrutiny) than the gender discrimination in Fitzpatrick. (Pl. Br. 15-18). As such, the national origin discrimination in this case is more violative of the Fourteenth Amendment than the gender discrimination in Fitzpatrick, and therefore creates a greater conflict between the Fourteenth Amendment and the natural born clause than the conflict between the Fourteenth Amendment and the Eleventh Amendment. Moreover, while the Eleventh Amendment has a legitimate purpose of protecting state finances, the natural born clause is based on an "impermissible rationale" that foreign born citizens cannot be trusted solely because their mothers gave birth to

them outside the United States – “an assumption that is impossible for us to make.” (Pl. Br. 48-49).

The problem for defendants is that the Supreme Court found implicit repeal in Fitzpatrick, even though the Fourteenth Amendment would have a lot of meaning and effectiveness even without an implicit abrogation/repeal finding. This is because Congress can still enforce the Fourteenth Amendment even without money suits by citizens against states – the subject of the Eleventh Amendment – the Eleventh Amendment does not prohibit suits by the federal government through the Justice Department or the EEOC against the states and it does not prohibit suits by citizens against the states for injunctive relief and for monetary damages incidental to such injunctive relief. In fact, for most of the Fourteenth Amendment’s existence, Congress enforced it without the use of money suits by citizens against the states. By contrast, the alternatives that were available in Fitzpatrick are not available here – in this case, if the natural born clause is given effect, there is no alternative use of the Fourteenth Amendment that could combat the national origin discrimination in the natural born clause and permit plaintiff to become President free of national origin discrimination – something the Fifth and Fourteenth Amendments would clearly and undoubtedly allow in the absence of the natural born clause.

Defendants also point out that while the Fourteenth Amendment abrogates the Eleventh Amendment, the Commerce Clause does not abrogate the Eleventh Amendment. (Def. Br. 10). This is because the Fourteenth Amendment came after the Eleventh but the Commerce Clause did not. This is also because the implicit repeal analysis, as plaintiff argues, changes when the subject is invidious discrimination (Pl. Br. 30-34) – it is not a coincidence that as far as is known, all cases in which the Fourteenth Amendment abrogated the Eleventh, the subject was discrimination. In the last sixty years, the Supreme Court has always adopted an interpretation of the Constitution that resulted in the invalidation or eradication of discrimination based on suspect classifications such as race or national origin. The immense difficulty defendants and the district court are having with Fitzpatrick amply demonstrates that their implicit repeal arguments are wrong.

5. DEFENDANTS FAIL TO UNDERMINE PLAINTIFF'S ARGUMENTS BASED ON THE ABSURDITY DOCTRINE

Defendants argue that while the invidious discrimination in the natural born clause may be absurd as a matter of fact, it is not absurd as a matter of law because the drafters of the Constitution intended such absurdity. (Def. Br. 24-26). This point is addressed at length in plaintiff's opening brief. (See Pl. Br. 19-31).

Defendants also argue that the alternative interpretation put forth by plaintiff is a rehashing of the implicit repeal arguments. Defendants are very wrong. We can quickly dispose of this argument by focusing on the requirements of the absurdity

doctrine which are: 1) an absurd result; and 2) an alternative explanation consistent with the legislative purpose. As such, for the absurdity doctrine to apply in this case, plaintiff does not have to show that the Fifth and Fourteenth Amendments were intended to abrogate or are in irreconcilable conflict with the natural born clause. Likewise, because the application of the absurdity doctrine does not require a showing of intent to abrogate or irreconcilability, the alternative interpretation put forth by plaintiff in the form of constitutional equality in the Fourteenth and Fifth Amendments, is not a rehashing of the implicit repeal arguments. Defendants try to improperly conflate the two doctrines.

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

Likely because the conditions for the implicit repeal and absurdity doctrines are present in this case, defendants argue that these doctrines do not apply in the constitutional context because there is a formal process for amending the Constitution (Def. Br. 9-14). At the same time, defendants recognize that the district court disagreed with them on this point when they stated as follows (Def. Br. 9):

citing the Supreme Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the district court held that implied repeal does in fact apply in the constitutional context. ROA: 182.

Defendants' argument can be quickly destroyed using their very own words and logic. In this regard, defendants state in relevant part as follows (Def. Br. 14):

explicit alteration via Article V represents the only mechanism by which any of the Constitution's provisions may be modified, eliminated, or rendered unenforceable. *See, e.g.* Amendment XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

Unlike the Twenty-First amendment which as defendants point out, contains explicit language repealing the Eighteenth Amendment, the Thirteenth Amendment does not contain any repeal language at all. This means that the Thirteenth Amendment's repeal of the Constitution's slavery provisions was implicit and not explicit. *See also Credit Suisse Securities (USA) LLC v. Billing* 551 U.S. 264, 270-271 (2007) (explaining the difference between explicit and implicit repeal and stating that, "Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws ... Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws.").

Likewise, the Fourteenth Amendment does not contain any repeal language at all. This means that the Fourteenth Amendment's repeal of the Constitution's denial of citizenship to black persons, among other things, was implicit and not explicit. Also, the Twentieth Amendment contained no repeal language and as

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

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

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

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

by the fact that except where intent is present, an irreconcilable conflict is required to trigger implicit repeal and an absurd result is required to trigger the absurdity doctrine. An irreconcilable conflict by definition is a situation where it is impossible to follow two provisions of the Constitution at the same time and as such, the court must pick the later provision over the earlier provision – the Constitution cannot make possible what is impossible. Not surprisingly, defendants have cited no Supreme Court case holding that implicit repeal or absurdity doctrines cannot be applied in the constitutional context. By contrast, plaintiff cites examples of implicit repeal and absurdity doctrines in the constitutional context in his opening brief and the district court itself cited the Supreme Court’s decision in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), as an example of implicit repeal/abrogation in the constitutional context. Furthermore, cases such as Dred Scott, are chilling reminders why the implicit repeal and absurdity doctrines are vital and necessary tools in constitutional interpretation.

7. DEFENDANTS’ DISCRIMINATION IS INVALID EVEN IF THE NATURAL BORN PROVISION IS VALID

Plaintiff argues that even if the natural born provision is still valid, defendants’ invidious national origin discrimination against him is still invalid. (Pl. Br. 12-18). At the outset, defendants do not disagree that the natural born clause does not require defendants to deny ballot access to plaintiff. Instead, defendants

argue that states are allowed to regulate who gets on the ballot and pursuant to this general authority, defendants can choose to deny plaintiff ballot access because of his national origin. However, while a state has some role in federal presidential elections, defendants do not deny that the actions of the state in regulating ballot access are still subject to the equal protection mandate of the Fourteenth Amendment. When the government discriminates on the basis of national origin – a “suspect” classification, such discrimination is subject to strict scrutiny. In this regard, the First Circuit in Gill v. Office of Personnel Management, 2012 WL 1948017, 4 (1st Cir. 2012) stated in relevant part that:

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

Defendants have not cited any case in which the government was allowed to deny ballot access based on a suspect classification such as race or national origin - it is defendants that have the very high burden of proving the justifications for their discrimination, especially because the natural born clause does not require any denial of ballot access. In any event, defendants have no legitimate interest whatsoever in discriminating against plaintiff because of his national origin - such bigotry is absurd, irrational and senseless. While defendants have mentioned the prevention of voter confusion and dilution as justifications, defendants have failed to put forth any evidence to support these justifications, and in any event, the

Supreme Court has never allowed a state to engage in the evil of race or national origin discrimination in the name of avoiding alleged voter confusion.

Importantly, the presidency is a federal government job and defendants did not address the position of the federal government that the natural born clause does not prevent plaintiff from appearing on the ballot and being elected. (Pl. Br. 13). This failure to address this position of the federal government is an implicit concession that plaintiff is not prevented by the natural born clause from appearing on the presidential ballot. Not surprisingly, defendants could not cite any case where the Supreme Court allowed a state to engage in race or national origin discrimination based on a law which did not require such discrimination – the natural born provision deals with taking office not with ballot access.

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

It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall

have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance.

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

8. DEFENDANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

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

First, plaintiff argued that context is important in applying the doctrine of implicit repeal. Specifically, plaintiff argues that because laws which discriminate on the basis of national origin or race are presumed to be invalid, there is no presumption against the implicit repeal of such laws and implicit repeal of such laws can occur without any showing of intent to repeal or irreconcilability (Pl. Br. 30-34), even though both conditions exist in this case – only one of these conditions is required to trigger implicit repeal. Plaintiff is not trying to change the implicit repeal standard as defendants intimate because there is no case and defendants have not cited any case where there was a presumption against implicit repeal of a law which discriminated on the basis of race or national origin. Also, defendants have not explained why there would be a presumption against implicit repeal of discrimination that is presumed to be invalid – race and national origin discrimination for example, are presumed to be invalid. (Pl. Br. 12-18). Under defendants' logic, as between the Fifth Amendment and the slavery provision in the Constitution, there would be a presumption against implicit repeal of the

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

Defendants also argue that there is no irreconcilable conflict because the Fourteenth Amendment and the natural born clause have coexisted without incident since 1868. Defendants are wrong once again. It is only in the last several decades that the Supreme Court interpreted the equal protection guarantee of the Fifth and Fourteenth Amendments as prohibiting national origin discrimination so no conflict would have existed before such interpretation and hence, no challenge could have been brought. This point is underscored by defendants' argument that there was a conflict between the Fourteenth and Eleventh Amendments in Fitzpatrick. It was only in 1971 that the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971), interpreted the Fourteenth Amendment as prohibiting gender discrimination so the conflict that existed in Fitzpatrick would not have existed before 1971. Additionally, as best as one can discern, plaintiff is the first naturalized citizen who was denied ballot access by defendants – without a denial there would be no incident or court action like this one. Notably, there were

questions about the natural born status of presidential candidates John McCain (born in Panama Canal Zone), George Romney (born in Mexico) and Barry Goldwater (born in Arizona before it was a state) but defendants never denied any of those candidates ballot access.

Another of defendants' arguments is that the Fourteenth Amendment was not intended to implicitly repeal the natural born clause – this point is addressed at length in plaintiff's opening brief. (Pl. Br. 37-46). Even though intent to repeal need not be shown where an irreconcilable conflict exists, defendants' already questionable opposition is totally destroyed by Afroyim v. Rusk, 387 U.S. 253 (1967) as discussed in the opening brief. (Pl. Br. 37-46). Afroyim established that the purpose of the Fourteenth Amendment and its Citizenship Clause was to take complete control of the status of citizenship and to remove all distinctions among citizens regardless of whether citizenship was acquired by birth or naturalization. Defendants cannot ignore the leading Supreme Court case on an issue simply because the case is contrary to defendants' arguments. As laid out in Afroyim, the Citizenship Clause of the Fourteenth Amendment created a single citizenship and birth and naturalization were simply means of acquiring this single citizenship. By contrast, the natural born clause creates two classes of citizenship – one class that can become President and one class that cannot become President. This irreconcilable conflict must be resolved in favor of the Citizenship Clause.

Likewise, the intent of the Citizenship Clause as laid out in Afroyim was to create a single citizenship and equalize natural born and naturalized citizens – it was therefore clearly intended as a substitute for natural born provision which invidiously discriminates and creates inequality among citizens.

In any event, defendants and the district court commit several other errors in trying to ascertain the purpose and intent of the Fourteenth Amendment. Defendants invoke the statements of Representatives such as Henry Raymond as well as the attempts in Congress to repeal the natural born provision. The reliance on Representative Raymond’s statement is misplaced –t he cited statements were made during the debates of the Civil Rights Act of 1866 and not in connection with the Citizenship Clause of the Fourteenth Amendment. This fact is significant because there is a material difference between the Civil Rights Act (“CRA”) and the Citizenship Clause of the Fourteenth Amendment – the CRA granted citizenship only to persons *born* in the United States, but the Fourteenth Amendment granted citizenship to persons *born or naturalized* in the United States. It is therefore misleading to use statements about a statute that did not deal with citizenship through naturalization to show the intent behind a constitutional provision that did grant citizenship through naturalization. Likewise, defendants’ invocation of the attempts to repeal the natural born clause through amendment is also misplaced. Prior to the 1940s, the Supreme Court did not interpret the

Fourteenth Amendment as prohibiting national origin discrimination and before this time, invidious discrimination was not viewed as an absurd result – Plessy v. Ferguson, 163 U.S. 537 (1896), was still the law of the land until 1954 and there was a period of evolution in equal protection jurisprudence since then that in many ways continues today. As such, prior to the 1970s, an amendment would have been the only way to remedy the discrimination in the natural born clause because prior to the Supreme Court decisions through the 1970s, plaintiff would not have been able to make the arguments he now makes in this case that the discrimination in the natural born clause is legally absurd and irreconcilable with the equal protection guarantees of the Fourteenth and Fifth Amendments. As for the attempts to repeal the natural born clause through amendment in more recent times, these attempts can be construed as a recognition of the irreconcilable conflict and absurdity that plaintiff argues exist – else why would they try to get rid of it. In any event, while an amendment is a more explicit confirmation of constitutional law, attempts by some to amend does not mean that the same result cannot be achieved through interpretation and – almost every major change in constitutional law through interpretation such as Brown v. Board of Education, 347 U.S. 483, 489 (1954) and Roe v. Wade, 410 U.S. 113 (1973) could have also been achieved through amendment and vice versa – Reed for example, also prevents the gender discrimination that the Nineteenth Amendment was adopted to address. Notably,

since plaintiff began his challenge to the natural born clause, there have been no attempts to repeal the natural born clause through amendment and there has been considerable support for plaintiff's challenge to the natural born clause.

**9. DEFENDANTS' USE OF MINOR V. HAPPERSTAT
HIGHLIGHTS A MAJOR WEAKNESS IN THEIR CASE**

A major weakness in defendants' opposition and the district court's decision can be highlighted by defendants' use of Minor v. Happerstat, 88 U.S. 162, 171 (1874). Defendant relies on Minor to argue that even after the adoption of the Fourteenth Amendment, female citizens were still without the right to vote (Def. Br. 23) and defendants further argue that it took the 19th Amendment to give women the right to vote. (Def. Br. 23, Fn 5). In other words, defendants argue that the Fourteenth Amendment was not intended to protect women from discrimination and that an amendment was the only way to give women this protection. The weakness in defendants' logic is that defendants fail to recognize the role of judicial interpretation. Even without the Nineteenth Amendment women would be protected against discrimination and discrimination in voting under the current interpretation of the Fourteenth Amendment. See Reed v. Reed, 404 U.S. 71 (1971). This reality reinforces the point that the Supreme Court's rulings as to the purpose and intent of the Fourteenth Amendment are final and binding regardless of what some may speculate is the intent of those who voted for the Fourteenth Amendment. This example also reinforces plaintiff's point that we do

not need a constitutional amendment in order to produce a change or clarification in constitutional law. Likewise, the position of Justice Taney in Dred Scott and of defendants and district court in this case that injustice and invidious discrimination in the Constitution can only be remedied through formal amendment is without merit.

10. PLAINTIFF'S CLAIMS ARE RIPE FOR REVIEW

In the alternative, defendant argues that plaintiff's claims are not ripe for review. Interestingly, it seems that defendants concede that plaintiff has standing but claims that ripeness is absent. The district court was correct to reject this argument in finding that plaintiff has standing to bring his claims and that his claims are ripe for review. This finding in Hassan's favor is also supported by the reasons stated in the record (ROA 51-58). Notably, plaintiff brought four cases against state election authorities like defendants. Cases were brought in New Hampshire, Iowa, Montana and Colorado. Like the instant case, defendants in those cases took the position that Hassan could not be placed on their presidential ballot because of his national origin. At the district court level, only Iowa and Colorado contested standing/ripeness and the district court ruled against both of them on this issue and found the existence of standing and ripeness. Montana and New Hampshire did not even oppose Hassan on these grounds because standing and ripeness are obviously present. All four cases were decided against plaintiff on

the merits mainly because of an absence of guiding precedents from the appellate courts which will now exist with the appeal of these cases. On appeal, Iowa dropped its standing and ripeness arguments. Unlike the defendants in the other cases, Colorado has persisted with its ripeness argument, albeit in a belated manner – Colorado is wrong as the district court found.

11. THE TENTH CIRCUIT SHOULD AVOID THE JUDICIAL MISTAKES OF THE PAST

As a citizen who cares about this country and the Courts, and as a practitioner in the courts, plaintiff pleads with this Court not to repeat the judicial mistakes of the past. Discrimination cases have posed the greatest test to the American judicial system and the record of the courts in the most significant of these cases is one of much regret. In the most significant discrimination cases, the Court has almost always made the wrong decision the first time around. In Dred Scott the Court upheld invidious discrimination in the Constitution. It took a civil war and several constitutional amendments to try to fix this horrendous judicial mistake. Justices of the Supreme Court have subsequently described the Dredd Scott decision as a great self-inflicted wound from which it will take the Court generations to recover. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court gave constitutional protection to “separate but equal” race discrimination. It took the Supreme Court almost sixty years to fix this huge mistake when it overruled Plessy in Brown v. Board of Education, 347 U.S. 483 (1954). In Oyama

v. California, 332 U. S. 633, 644-646 (1948), Korematsu v. United States, 323 U. S. 214, 216 (1944) and Hirabayashi v. United States, 320 U. S. 81, 100 (1943), the Supreme Court upheld as constitutional, the internment of Japanese Americans because of their national origin. It took several decades, a congressional apology, millions in compensation and a few subsequent court decisions to try to fix this horrendous mistake. In this case, we once again face a significant discrimination issue of first impression in the form of invidious national origin discrimination against more than 15 million American citizens. It cannot be that our judicial system is condemned to failure each time it faces significant issues of discrimination - it cannot be that we are condemned to deciding issues of discrimination incorrectly the first time we face them. It must be that we are capable of learning from the mistakes of the past and getting it right the first time. I kindly urge this Court to break from the tradition of Dredd Scott, Plessy and Hirabayashi by rejecting the invidious discrimination challenged in this case.

III. CONCLUSION

Plaintiff respectfully requests that this Honorable Court: 1) reverse the district court and the invidious discrimination challenged in this case; 2) deny defendants' motion in its entirety and declare the natural born provision to be trumped, mooted, abrogated 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.

Dated: Queens Village, New York
August 8, 2012

Respectfully submitted,

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

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Date: August 8, 2012

/s/ Abdul Hassan

Abdul Karim Hassan, Esq.

Plaintiff-Appellant Pro Se

215-28 Hillside Avenue

Queens Village, New York 11427

Tel: 718-740-1000

Fax: 718-468-3894

Email: abdul@abdulhassan.com

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Date: August 8, 2012

/s/ Abdul Hassan

Abdul Karim Hassan, Esq.
Plaintiff-Appellant Pro Se
215-28 Hillside Avenue
Queens Village, New York 11427
Tel: 718-740-1000
Fax: 718-468-3894
Email: abdul@abdulhassan.com

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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 August 8, 2012, I have mailed or served 1 copy of the foregoing appellant brief by Federal Express, postage pre-paid to the following:

Matthew D. Grove, Esq.
Office of the Attorney General for the State of Colorado
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
303-866-4500

Date: August 8, 2012

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