UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Abdul Karim Hassan, Plaintiff, -v- Federal Election Commission, Defendant.	**Civil Action #: 11-cv-2189 (EGS)** **OPPOSING MEMORANDUM**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Plaintiff respectfully submits the instant memorandum in opposition to defendant's motion to dismiss. The facts as alleged in the complaint must be taken as true and are incorporated herein. In essence however, plaintiff is a civil rights and employment attorney by profession who is a candidate for the Presidency of the United States in 2012 and if not successful, plaintiff intends to continue his campaign without interruption until the 2016 Presidential elections. Plaintiff is running for and intends to seek the nomination of the Democratic Party in 2012 and in 2016. The Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-9013, provides tens of millions of dollars in public funding to the nominee of major parties, which typically consists of the Democratic and Republican parties. However, the Federal Election Commission ("FEC") ruled on September 2, 2011[1] that because plaintiff is a naturalized citizen and not a natural born citizen, he is not eligible to receive public funding. Because of the FEC's reasoning and interpretation, plaintiff commenced the instant action to: 1) declare that the Fund Act's discrimination against plaintiff because of his national origin and status as a natural born citizen, violates the equal protection guarantee of the Fifth Amendment and the Citizenship Clause of the Fourteenth Amendment; and 2) declare that the Fifth and Fourteenth Amendments trump, abrogate and implicitly repeal the invidious national origin discrimination in the natural born provision of the Constitution (See Article II, Section 1, Clause 5) – the discrimination in the Fund Act is purportedly premised on the natural born provision as per the FEC's interpretation. Because the national origin discrimination in the Fund Act, standing independently, will without genuine dispute, violate the equal protection guarantee of the Fifth Amendment, such discrimination will fall if the national origin discrimination in the natural born provision also falls under the Absurdity Doctrine and the doctrine of implicit repeal. Also, the Citizenship Clause which was adopted to repeal citizenship discrimination in the

[1] http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

Constitution, as interpreted, protects naturalized citizenship from the type of discrimination, destruction and diminution, caused by the Fund Act and the natural born provision. As to whether plaintiff suffered the requisite "injury in fact" under Article III, the central question is whether the national origin discrimination in the Fund Act forces plaintiff to compete on an unequal footing with other Presidential candidates who are natural born citizens. The answer is obvious – plaintiff is being forced to compete on an unequal footing because he is forced to compete without the right to receive tens of millions in public financing if nominated. Moreover, as outlined below, the Supreme Court cases addressing standing under the Fund Act and the federal election laws, strongly support plaintiff's position that his claims are justiciable.

II. ARGUMENT

1. PLAINTIFF'S CLAIMS ARE JUSTICIABLE

In its opposition to plaintiff's motion for a three-judge panel, the FEC relied heavily on the Supreme Court's decision in Federal Election Com'n v. National Conservative Political Action Committee, 470 U.S. 480 (1985), ("NCPAC"), to argue that this Court lacks subject matter jurisdiction over this action. However, after plaintiff in reply pointed out that the FEC's use of NCPAC was misleading, deceptive and possibly worse, the FEC in its current motion to dismiss, while also arguing that plaintiff's claims are not justiciable, does not even mention NCPAC although it is the leading Supreme Court case dealing with standing under the Fund Act. (Def. Memo. 6-9). The reason for the FEC's prior misuse and its current omission of NCPAC is obvious – under NCPAC defendant's arguments are without merit and plaintiff has standing and this Court has subject matter jurisdiction over this case.

In NCPAC, the Supreme Court found in relevant part that the FEC had statutory and Article III standing to bring a declaratory judgment action like this one to determine the constitutionality of the Fund Act. The Supreme Court began its analysis with 26 USC § 9011(b) which specifically

grants the FEC the same right as an individual voter like plaintiff to bring an action to construe or implement the Fund Act. The Supreme Court specifically stated that, "an individual voter could sue the FEC under 26 U.S.C. § 9011(b) to implement or construe the Act." This is precisely what plaintiff herein has done – an action that is especially warranted in light of the FEC's ruling that the public funding law for primaries, and by extension the Fund Act, excludes naturalized citizens like plaintiff. The analysis is made more compelling by the fact that plaintiff is not just an eligible voter - he is also a Presidential candidate whom the FEC has ruled must comply with the obligations of the campaign finance laws like any other Presidential candidate but is not entitled to their benefits.

In terms of the Article III requirements, the Supreme Court in NCPAC found that the FEC satisfied them and that the requisite "injury-in-fact" existed and that the suit was ripe even though the FEC had not yet even taken any action directed at NCPAC – like an eligible voter, the FEC must also satisfy the statutory and Article III requirements. Here, plaintiff's injury-in-fact is much more profound here than the injury-in-fact that the Supreme Court in NCPAC found was sufficient under Article III – standing and ripeness are much more present here than in NCPAC.

Jurisdiction, including standing and ripeness also exist in this case under the Supreme Court's decision in FEC v. Akins et al, 524 U.S. 11, 22 (1998). In Akins, the FEC argued as it does here, that injury-in-fact, along with causation and redressibility did not exist. The FEC's arguments were rejected by the Supreme Court which found that, 'The "injury in fact" that respondents have suffered consists of their inability to obtain information.' See FEC v. Akins et al, 524 U.S. 11, 22 (1998). Here, plaintiff's "injury in fact" includes his inability and the denial of the right to obtain tens of millions in public funding, if nominated, because of the FEC's interpretation that plaintiff cannot receive public funding as a naturalized citizen. Because of this, and the various other forms of injury outlined below, plaintiff's case here is a lot more compelling than that of the plaintiffs in Akins which the Supreme Court found was sufficient to satisfy Article III requirements.

Furthermore, unlike the plaintiffs in Akins, plaintiff is also a Presidential candidate whom the FEC has opined must satisfy the obligations of the campaign finance laws, in the same manner as the other Presidential candidates who are natural born.

When Congress grants a plaintiff standing to sue under a statute like in the context of the present case, it abrogates the requirement of prudential standing although it cannot abrogate the requirements of Article III standing. See Akins et al, 524 U.S. at 19-20. Bennett v. Spear, 520 U.S. 154, 165 (1997). However, the decision of Congress in granting statutory standing should be given great weight in the Article III standing analysis. In granting an eligible voter like plaintiff the right to sue under 26 USC § 9011(b) to construe or implement the Fund Act, Congress is making an informed judgment that uncertainty over the Fund Act creates "injury in fact" and that such injury should be remedied by a declaratory judgment action like this one sooner rather than later in the Presidential campaign process. The courts recognize that Congress created these campaign finance laws to remedy harms in the area of elections and campaign finance and is uniquely positioned to judge what constitutes an injury, when and how such injury can be remedied by judicial action, and by whom. Not surprisingly, in almost every case like this one where statutory standing is established, Article III standing is also present as it easily is in this case.

Moreover, contrary to defendant's laments about the nature and extent of plaintiff's campaign (Def. Memo. 7), in enacting the "testing the waters" provisions[2] of the federal campaign law, Congress through statute, and the FEC, through regulation, wanted candidates to "test the waters" and identify and overcome obstacles at an early stage before making the significant commitment, effort and expense of running for President. Resolving such obstacles early, especially major obstacles like the discrimination and denial challenged by plaintiff herein, is not only in the

[2] See 11 CFR § 100.72 and 11 CFR § 100.131. See also the Federal Election Commission bulletin (http://www.fec.gov/pages/brochures/testing_waters.pdf), summarizing the relevant FECA provisions. See also Federal Election Campaign Act ("FECA"), 2 USC § 431 et Seq also contained at http://www.fec.gov/law/feca/feca.pdf.

interest of plaintiff, it is also in the interest of the voting public as well as the FEC. Significantly, FEC in its September 2011 ruling and deliberations intimated that campaigning and raising funds may constitute fraud in light of the natural born provision. The Supreme Court has never required a plaintiff to engage in illogical, unreasonable, futile, illegal or fraudulent conduct in order to establish standing and ripeness. In addition, whether a candidate can receive tens of millions in public funding is a significant factor that would influence whether a voter would vote for plaintiff as the candidate of the Democratic Party. In the ongoing Republican primaries, exits polls revealed that electability, and specifically, the ability to compete with the Democratic candidate in terms of money, was an extremely significant factor in who voters voted for. A significant number of Republican voters said they voted for Mitt Romney because he was more electable than the other candidates even though they preferred one of the other candidates. This is further reason why the answer to the questions presented herein should come before the voters vote so that their vote is not wasted or diminished – it is therefore not surprising that Congress provided an expedited procedure with direct appeal to the Supreme Court – Presidential elections cover the whole country and the Supreme Court is the only national court. Likewise, an early and expedited answer to this question will also help the FEC plan and administer the public funding programs – especially since the FEC informed plaintiff in writing that "the Commission cannot make any determination as to whether you can, as a naturalized citizen, serve as President[3]," – even though such a determination was key to the FEC's decision to deny plaintiff the right to receive public funding and even though plaintiff has a legal right to obtain the FEC's opinion on his entitlement to public funding. This type of confusion and inconsistency is itself sufficient to establish "injury in fact" warranting an action like this one to construe the Fund Act and clear up the confusion.

[3] http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

The presence of statutory and Article III standing and ripeness in this case can be further demonstrated based on Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-212 (1995). In the area of standing jurisprudence it is important to pick the right precedent. Standing is very fact and context specific and the stage of the proceedings is important as well. One can quickly observe that a lot of the leading cases on standing are environmental cases which are not analogous to equal protection cases, and because they generally involve associational standing – the plaintiffs in those cases usually have a more difficult burden than in cases involving individual standing where the harm is direct – like this one. Because this is an equal protection case based on a discriminatory classification – national origin, Adarand is a more relevant precedent than any case cited by defendant – based on the pattern of the FEC's advocacy thus far, one can reasonably conclude that the FEC avoided Adarand and other equal protection cases because these cases do not support its position on jurisdiction. In Adarand, 515 U.S. at 211-212, the U.S. Supreme Court stated in relevant part as follows (internal cites omitted):

> We note that, contrary to respondents' suggestion, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

Therefore, contrary to defendant's position herein, to establish "injury in fact" plaintiff here does not have to show he would become the Presidential nominee of a major party or otherwise qualify for public financing. Plaintiff is only required to show that the discrimination against naturalized citizens in the Fund Act has or will place him on an unequal footing with natural born candidates in competing for the Presidency or public funding. If only a presidential nominee for a major party can have standing, then the plain words of the statue that any voter can bring an action to interpret or construe the Act, will be meaningless. Nonetheless, plaintiff can easily make the showing of "unequal footing" in several ways. First, plaintiff has been injured because, unlike the

natural born citizens who are running for President, he is being forced to comply with the obligations of the federal campaign finance laws while being denied the benefits of these laws such as the right to receive Presidential matching funds – this denial is solely because plaintiff is a naturalized citizen. In a September 2, 2011 decision[4], the defendant in this case ruled that plaintiff as a person running for President is covered by the federal campaign finance laws like every other declared Presidential candidate and must comply with the obligations of those laws, even though he is a naturalized citizen. Under the campaign finance laws, the act of making a declaration of candidacy for the Presidency signals the start of the presidential campaign in the eyes of the law and triggers a series of significant obligations[5], as the FEC confirmed in its ruling about plaintiff's Presidential campaign. Here, plaintiff has not only declared his candidacy, he has actively campaigned, and has been promoting his candidacy through nationwide advertising. (See Complaint, ¶ 14, 15, 17, 22). However, because plaintiff is a naturalized citizen, he is being denied the right to receive public funding. Under penalty of law, plaintiff has been expending effort and money and has adjusted to satisfy the many other restrictions of the campaign finance laws. (See Complaint, ¶ 15). While paying the same types of costs of compliance as the other Presidential candidates who are natural born citizens, as forced upon him by the law and the FEC's ruling, plaintiff is being given less rights in return solely because he is a naturalized and not a natural born citizen – denial of the right to receive public funding. The FEC has taken the inconsistent position that as to the obligations imposed by the campaign finance laws, the national origin of the candidate does not matter but as to the benefits, national origin does matter. This inconsistency by itself is sufficient "injury in fact" in addition to the other types outlined herein.

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[4] http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1

[5] [5] See 11 CFR § 100.72 and 11 CFR § 100.131. See also the Federal Election Commission bulletin (http://www.fec.gov/pages/brochures/testing_waters.pdf), summarizing the relevant FECA provisions. See also Federal Election Campaign Act ("FECA"), 2 USC § 431 et Seq also contained at http://www.fec.gov/law/feca/feca.pdf.

Second, while "injury in fact" is more obvious where the law imposes costs on plaintiff and where plaintiff has no choice in the matter, "injury in fact" is also compellingly present in connection with plaintiff's other expenditures - plaintiff has been spending money on his presidential website as well as separate national advertising as part of his presidential campaign. (See Complaint, ¶ 14, 15, 17, 22). While making these expenditures as part of his presidential campaign, plaintiff is being placed on an unequal footing with candidates who are natural born citizens because the Fund Act denies plaintiff the right to receive public funding because of his national origin.

Third, and very significantly, denial of funds significantly hurts plaintiff's electoral chances. Obviously, having a candidate who is ineligible for tens of millions of dollars in public funding will seriously hurt the political party and the party's members and because of this, voters will not logically vote or are significantly less likely to vote to nominate plaintiff as the party's Presidential candidate. Exit polls in the recent Republican primaries reveal that a significant and material number of voters voted for Mitt Romney solely because they viewed him as more electable and better able to compete with the Democrats in terms of money. Being elected President is already a difficult task and to compete for nomination and the Presidency with a major handicap such as the denial of the right to receive public funding, places plaintiff on a hugely unequal footing solely with natural born candidates because of the national origin discrimination in the Fund Act. This is even more harmful in light of the fact that no candidate outside the two major political parties has even been elected President and the importance of money in Presidential campaigns – as the old saying goes, "money is the mother's milk of politics."

Fourth, the stigma of distrust has and will continue to hurt plaintiff's campaign. The discrimination against naturalized citizens in the Fund Act has its origins in the natural born provision of the Constitution (Article II, Section 1, Clause 5) and the natural born provision was

based on the legally impermissible assumption that foreign-born citizens bear less allegiance to the country and are less loyal than natural born citizens. In this regard, the Congressional Research Service has stated in relevant part that[6]:

> 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.

The job of President, more than any other, requires trust and loyalty. As such, for the Fund Act to exclude plaintiff, in essence, on the assumption that he bears less allegiance, trust and loyalty to this country is a stigma that is extremely harmful. This stigma took on a more direct and personal effect when the FEC specifically denied plaintiff the right to receive primary matching funds, and by extension, the right to receive funding under the Fund Act (Complaint, 23-25), solely because plaintiff is a foreign-born citizen. As an example, plaintiff recently did a radio interview on a popular NYC radio station[7] in which the host focused on the distrust rationale on which the natural born provision is based and in so doing, echoed the sentiments of many who use the perceived legitimacy of the laws and the FEC to promote unjustified stigma and hatred. See also National Journal Article[8]. As the Supreme Court recognized in Brown v. Board of Education, 347 U.S. 483 (1954), among many other cases, separate or unequal treatment because of immutable characteristics such as race or national origin, is inherently harmful and can be remedied in the courts.

[6] http://www.legistorm.com/score_crs/show/id/82388.html
[7] http://www.youtube.com/watch?v=sQmzIG6PvWw
[8] http://www.nationaljournal.com/hotline/campaign-law-watch/fec-no-u-s-birth-certificate-no-presidential-matching-funds-20110903

Defendant also mentions the case of Hassan v. USA, on the issue of standing. (Def. Memo. 8). In Hassan v. USA, the district court correctly applied binding precedent in finding that plaintiff had standing to challenge the natural born provision and that the claims were ripe for review. It was so obvious that the petitioner suffered the requisite "injury in fact," the government on appeal did not challenge the district court's ruling that petitioner suffered the requisite "injury in fact." As such, neither party before the Second Circuit addressed "injury in fact" in their briefs and the Second Circuit disagreed with the district court on standing solely based on the alleged absence of "injury in fact" – the one issue the parties did not contest and did not brief. The numerous errors in the Second Circuit's standing decision were due to the fact that unlike the district court, the Second Circuit did not have the benefit of briefing[9]. Instead of denying the unopposed petition for rehearing with a one-word denial as it usual does, likely realizing the merit of the standing/ripeness arguments the Second Circuit felt the need to explain that, "Appellant had ample opportunity to brief all relevant issues, including the issue of standing, before the district court and this Court and an opportunity to further advance his positions at oral argument." Notably, the Second Circuit did not take issue with the compelling merits of the standing arguments - instead, it said the arguments should have been raised earlier. Unlike the Second Circuit, this Court is being presented with the relevant arguments. Moreover, petitioner has been injured even more since the Second Circuit ruling including when the FEC issued its ruling that petitioner cannot obtain public funding because of his naturalized citizen status. In any event, under the rules of the Second Circuit, its summary order in Hassan has no precedential value especially because, "abbreviated explanations in summary orders might result in distortions of case law." (See 2d Cir. LCR 32).

[9] See http://www.abdulhassanforpresident.com/second_circuit/rehearing_petition.shtml.

Defendant seems to argue that plaintiff's claims are not justiciable because, "Hassan has not alleged in his complaint that he is the candidate of a major political party, that he seeks to become the candidate of a major political party, or that there is any imminent chance that he might become such a candidate." (Def. Memo. 6). At the outset, contrary to defendant's position, the Fund Act only requires plaintiff to be a voter in order to bring the instant action and this has been alleged. (See Complaint ¶ 11). 26 USC § 9011(b). In support of its argument, defendant urges this Court to review and use defendant's website on this motion and it claims that the February 23, 2012 version of the website does not state that plaintiff is running for the nomination of a major party. (Def. Memo. 6). Plaintiff agrees with defendant that the Court should review and use plaintiff's website on this motion to dismiss, especially where said website, on its homepage, now clarifies that plaintiff is seeking the nomination of the Democratic Party. Nonetheless, while plaintiff is not required to allege such facts in his complaint, Defendant is wrong on a number of other grounds as well. First, in drafting his complaint, plaintiff is not required to allege each fact that would be provided on an application for funds from the Fund Act or on a motion for summary judgment. However, in paragraph 26 of the complaint, plaintiff clearly states in relevant part that:

> Because PECFA denies funds to Plaintiff, Plaintiffs chances of becoming the nominee of a major political party is destroyed and the same can be said of Plaintiff's chances of winning the Presidency given that only candidates of the major political parties have won the Presidency throughout the history of the Country.

It is therefore clear, based on the complaint that plaintiff is running to be the "nominee of a major political party," – the Democratic Party. It is also important to remember the applicable standards at the pleadings stage. In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court stated in relevant part that:

> "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'

Furthermore, when standing and jurisdiction are challenged on the basis of the pleadings, the Court must, "accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party," Warth v. Seldin, 422 U.S. 490, 501 (1975). Here, the allegation that plaintiff is running for President and will seek funding under the Fund Act, "embrace those specific facts that are necessary to support the claim," such as the fact that plaintiff is running for the nomination of a major party etc. However, it is worth repeating, that defendant seems to misunderstand the type of injury required – likely because it relied on cases that did not involve a discriminatory classification. As pointed out above, plaintiff has been forced to compete on an unequal footing because of the discrimination in the Fund Act against naturalized citizens – he has in essence been forced to compete without the right to receive tens of millions of dollars in public funding - and as such has been clearly injured in several distinct ways as laid out above.

With injury-in-fact established, the causation and redressibility arguments can be quickly disposed of in this context. In essence, the harm is that because of the discrimination in the Fund Act plaintiff is forced to compete without the right to receive public funding, so causation is easily established. Likewise, if the discrimination in the Fund Act is struck down, plaintiff will not be denied the right to receive public funding because of his naturalized status and as such, it is obvious that a favorable ruling will redress the harm alleged. By way of clarification, plaintiff is only required to show that the injury caused by the Fund Act will be redressed by a favorable ruling – he is not required to show that a favorable ruling would remedy some other harm to plaintiff such as bigotry against Muslims.

A few other principles of standing jurisprudence are worth reiterating. First, plaintiff is not required to engage in futile conduct in order to establish standing and ripeness. See National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953 (D.C. Cir. 1980). In this regard, even if plaintiff satisfies every real or imagined requirement for public

funding that defendant puts forth, plaintiff still cannot receive public funding because plaintiff can never change his national origin – the fact he was born in another country. Second, standing jurisprudence does not require plaintiff to act unreasonably. As such, even though plaintiff is enduring the costs of seeking the Democratic Party nomination, it would be perfectly reasonable and logical if he first seeks a declaration invalidating the discrimination against him in the Fund Act, before seeking the nomination. In addition, the already strong standing argument is made even stronger by the fact that courts have traditionally applied a "broad and accommodating concept of standing in civil rights cases." La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469 (9th Cir. 1973). One of the reasons for this relaxed standard is the fact that invidious discrimination not only injures the petitioner but the whole society as well. As Justice O'Connor reiterated in Adarand v. Pena, 515 U.S. 200, 213 (1995), "[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." Where as here, our government discriminates against plaintiff and more than fifteen (15) million of its other naturalized citizens because of their national origin/ancestry – a strict scrutiny characteristic, this Court has no higher duty than to inform petitioner and the millions of other victims of such invidious discrimination across the nation whether they are required to endure such discrimination any longer and why.

2. THE INVIDIOUS NATIONAL ORIGIN DISCRIMINATION IN THE NATURAL BORN CLAUSE IS TRUMPED, ABROGRATED AND IMPLICITLY REPEALED BY THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

Defendants in their opposition to plaintiff's motion for a three-judge panel relied heavily on the decision and the arguments by the defendant in the district court decision in Hassan v. USA - EDNY ECF: 08-cv-00938-NG-LB – defendant does the same thing here. As such, Plaintiff will address defendants' arguments and Hassan v. USA together to show that implicit repeal has

occurred here. At the outset, the district court in Hassan v. USA, at 3, the district court stated as follows:

> As the parties acknowledge, this [implicit repeal] approach to statutes could, in theory, apply to the Constitution. For example, the Supreme Court held that the Fourteenth Amendment partially abrogated Eleventh Amendment sovereign immunity, even though the text of the Fourteenth Amendment does not explicitly require that result. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976)

Here, defendants have not put forth any logical explanation why implicit repeal cannot be applied in the Constitutional context. 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."

The district court in Hassan correctly found that plaintiff had standing to bring the case but made several errors on the merits – somewhat to be expected, given that this was a significant constitutional case of first impression and there are almost always mistakes the first time around. The job of everyone involved in this case is to learn from the mistakes made in Hassan v. USA and not repeat them.

First, the district Court in Hassan, like defendants here, hinged its decision on the principle that there is generally a presumption against implicit repeal and that such a presumption is greater in the constitutional context. This was a gigantic legal error. The general presumption against implicit repeal is based on the principle that statutes are presumed to be valid. However, because statutes which discriminate on the basis of race or national origin are not presumed to be valid, there is no presumption against their implicit repeal. See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (presumption of validity goes away when the subject is race or national origin

discrimination.). Not surprisingly, the defendant and district court in Hassan v. USA as well as the defendants in this case have 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 – such cases do not exist. Furthermore, as explained in the above excerpt, 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 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 (recognizing an **implied** equal protection guarantee in the Fifth Amendment – when the subject was discrimination). Fitzpatrick v. Bitzer (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.). Because the presumption against implicit repeal is removed when the subject law discriminates by race or national origin, there is no need to show "irreconcilability" or "intent" to repeal – the two conditions that would otherwise overcome the presumption against implicit repeal.

Second, the district court in Hassan v. USA did not have the benefit of the Supreme Court's decision in McDonald v. City of Chicago, Ill. 130 S.Ct. 3020, 3059 -3060 (U.S., 2010), which was handed down a few weeks after the district court's decision and which 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. Because defendant USA and the district court in Hassan agree that irreconcilability would trigger implicit repeal, implicit repeal should have been declared in Hassan v. USA and should be declared in this action – this Court has the benefit of McDonald but the district court in Hassan did not. There is a very easy technique to determine irreconcilability which the district court in Hassan failed to apply – maybe because it was not explicitly pointed out to the Court but is here. To determine irreconcilability, we simply assume that the natural born provision is a statute and determine whether it would violate the equal protection clause – because it discriminates on the basis of national origin, it will be subject to strict scrutiny and will quickly fail. 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 the Fund Act does. 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. No law which discriminates on the basis of race or national origin has survived in the Supreme Court in the last sixty years. Because the national origin discrimination in the Fund Act is unlawful under the Fifth Amendment but is permitted under the natural born provision, these two parts of the Constitution are irreconcilable and the Fifth Amendment trumps the natural born provision because of this irreconcilability and principles of implicit repeal.

Fourth, the district court in Hassan did not address the argument based on the Citizenship Clause – apparently confusing the Citizenship Clause with the Equal Protection Clause of the Fourteenth Amendment – the Court should have known that the Equal Protection Clause of the Fourteenth Amendment applies only to states and not to the federal government. (Pl. Br. 10-12).

Fifth, the district court in Hassan v. USA, like defendants here (Def. Memo. 9-10), while relying to some extent on dicta in Schneider v. Rusk, 377 U.S. 163, 168 (1964), and prior cases about the natural born provision, strangely did not address the seminal Citizenship Clause case of Afroyim v. Rusk 387 U.S. 253, 262 (1967) and which was the last and seminal case in the Schneider line of cases and in which the Supreme Court stated without exception as to presidential eligibility that a naturalized citizen, "becomes a member of the society, possessing all of the rights of a native citizen, and standing, in view of the constitution, on the footing of a native." First, the cases cited by defendant are not inconsistent with plaintiff's position herein. In those cases, the Court observed the distinction or conflict in the treatment of naturalized citizens – this case also does that but goes one step further and is asking the Court to resolve and this conflict in favor of equality in light of the evolution in constitutional jurisprudence in the last several decades. Importantly in the cases cited by defendant, the Courts were not presented with and did not decide the issues or arguments presented herein including the issue of Presidential eligibility – those were all immigration-type cases. Even though Afroyim involved a similar subject matter, the subject statement in Afroyim is not dicta because it was necessary to it was necessary to justify the ultimate holding that the Fourteenth Amendment was intended to "completely control" the status of citizenship and that it created "a citizenship" – singular not plural. This view is further supported by the context of the Afroyim case. The Supreme Court specifically granted certiorari in Afroyim to determine whether to overrule its 1957 decision in Perez v. Brownell, 356 U.S. 44 (1957). See Afroyim v. Rusk, 387 U.S. 253, 256 (U.S.N.Y. 1967) ("These cases, as well as many commentators, have cast great doubt upon the soundness of Perez. Under these circumstances, we granted certiorari to reconsider it"). As such, Afroyim is rightly considered to be the seminal case on the Citizenship clause and supersedes all prior cases on the subject, including Schneider and is binding precedent. Defendant's arguments are therefore without merit.

Sixth, the district court itself in Hassan v. USA, identified Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) as an example of implicit repeal/abrogation in the Constitutional context but had the court applied Fitzpatrick, it would have had to issue a declaration in plaintiff's favor. Based on Fitzpatrick, and its progeny, a finding of abrogation/implicit repeal is even more warranted in this case for several reasons. (See Pl. Brief at 12-14)).

Seventh, the district court in Hassan did not address the Absurdity Doctrine – this doctrine does not have the same requirements as the implicit repeal doctrine and is a powerful basis for plaintiff's arguments herein.

On appeal, the Second Circuit invalidated the erroneous merit rulings by the district court in Hassan v. USA by finding an absence of jurisdiction. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."). The following exchange during oral arguments on the merits before the Second Circuit is very revealing (Oral Argument Transcript, 9:7-25; 10:1-8 – See Ex. 1):

The rest of the Second Circuit's exchanges with plaintiff on the merits during oral arguments are attached hereto as Exhibit 1. As the transcript in Exhibit 1 shows, the Second Circuit did not challenge plaintiff's argument that there is no presumption against implicit repeal of laws that discriminate on the basis of race or national origin discrimination. Once plaintiff answering Judge Newman's question and explained that laws that discriminate based on age in this context are subject to rational basis review and are not presumed to be invalid but that laws that discriminate based on national origin are subject to strict scrutiny and are presumed invalid, the Second Circuit went from being a very "hot bench" to one that did not challenge plaintiff for the remainder of his oral arguments on the merits. (See Exhibit 1). It seems obvious from being in the room the day of oral arguments that the Second Circuit seemed to think that plaintiff was right on the merits. This

Court should follow the lead of the Second Circuit and not challenge plaintiff on the merits and in addition, issue the declaration that Plaintiff seeks in this case.

3. THE FOURTEENTH AMENDMENT'S CITIZENSHIP CLAUSE TRUMPS, ABROGATES AND IMPLICITLY REPEALS THE NATURLAL BORN CITIZEN CLAUSE

With respect to the Citizenship Clause argument, both grounds for implicit repeal exist herein and implicit repeal can occur based on either of them – irreconcilability or intent to repeal. 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 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 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.

4. 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

In Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982), the U.S. Supreme Court, in addressing the well established Absurdity Doctrine, stated in relevant part that, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Because it is much harder to remedy absurd results in the Constitutional context through legislative action than absurd results in the statutory context, the well-established Absurdity Doctrine applies with even greater force in the constitutional context.

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 wound[10]." See South Carolina v. Regan, 465 U.S. 367, 412 (1984). The Dredd Scott decision was handed down before the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted. Dredd Scott was wrongly decided because we now agree that the invidious discrimination based on race/ancestry that destroyed Dredd Scott's right to citizenship was irreconcilable with Constitutional equality and was absurd and that this absurd result should have been avoided by choosing an alternative interpretation that was consistent with the Constitution's liberty and justice, goals which are today embodied in the Fourteenth Amendment's equal protection guarantee and which at the time should have also been found in the Fifth Amendment's liberty and due process clauses. Dredd Scott's right to citizenship was destroyed because of his race and here, Hassan's right to full citizenship is being destroyed because of his national origin – like Dredd Scott, Hassan is being relegated to second class status.

[10] 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.'

See Schneider, 377 U.S. at 169 (discriminating against citizens because of their naturalized status "creates indeed a second-class citizenship"). It should be noted that although Dredd Scott dealt with citizenship and race discrimination, as a matter of constitutional law, race and national origin discrimination are viewed as equally bad as evidenced by the fact that they are both subject to strict scrutiny. See for example United States v. Virginia, 518 U.S. 515, 532 n. 6, (1996) (noting that "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin").

Simply put, because it is now universally accepted that it was incorrect and absurd for the Constitution to deny citizenship to Dredd Scott because of his race, it is also incorrect and absurd for the Constitution to deny plaintiff full citizenship because of his national origin. The lesson of the Dredd Scott case is that even if an absurd result has far greater constitutional support than a non-absurd result, the courts should choose the non-absurd result over the absurd result. Here, there is much more constitutional support for the non-absurd result of equality under the Fifth Amendment that plaintiff seeks and there is little or no support for the absurd result of invidious national origin discrimination that defendants seek under the natural born provision.

Almost a hundred years after Dredd Scott, the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), was faced with a situation in which the U.S. Constitution prohibited the states from engaging in invidious discrimination but did not prohibit the federal government from doing the same - the federal government was subjecting African Americans to invidious discrimination but the Fifth Amendment contained no equal protection clause and was never intended by the Founding Fathers to protect African Americans from discrimination. In order to avoid another great self-inflicted wound like the one caused by its Dredd Scott decision, the Supreme Court characterized this situation as "unthinkable" or absurd and stated that, "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be

unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Bolling, 347 U.S. at 500. Likewise, in light of the Supreme Court's interpretation that the Fifth and Fourteenth Amendments prohibit national origin discrimination by the federal and state governments respectively, it would be unthinkable that the same Constitution nonetheless allows them to engage in national origin discrimination. The lesson from the unanimous decision in Bolling is that invidious discrimination is an absurdity and that the Constitution should not be interpreted in a manner that permits invidious discrimination. In Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009), the Supreme Court noted that it recognized an implied right of action because in essence, it would be illogical or absurd to have a right without a remedy in the equal protection context. Thanks to Bolling and its progeny, the jurisprudential framework is already in place for this Court to rule in plaintiff's favor and it should do so without hesitation.

5. DEFENDANT'S ARGUMENTS FAIL THE DRED SCOTT TEST

Last but certainly not least, the best indication that defendants' arguments are without merit is the fact that under defendants' analysis, 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.[11] Defendant and the district court in Hassan v. USA as well as defendant 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. However, it was so obvious that the government's arguments and the district court's decision in Hassan v. USA were an endorsement of Dredd Scott, the government included the following remarkable disclaimer in its appellate brief, when forced to address the Dred Scott case on appeal (See USA Br. at 21, fn 10):

[11] [11] 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.' See also South Carolina v. Regan, 465 U.S. 367, 412 (1984).

> 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.

Like the district court and defendant in Hassan v. USA, the defendants in this case have 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 sues 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 district court's implicit repeal analysis in Hassan v. USA and of defendant in this case, 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 defendant in Hassan 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 – a position the Second Circuit did not challenge.

III. CONCLUSION

Based on the foregoing, plaintiff kindly and respectfully request that this Honorable Court grant deny defendant's motion in its entirety and issue the declaration(s) that plaintiff seeks in this action, together with such other, further and different relief, that the Court deems just and proper.

Dated: Queens Village, New York
March 23, 2012

Respectfully submitted,

_/s/ Abdul Hassan_____

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of March 2012, I caused to be field electronically using this Court's ECF system and sent via the ECF electronic notification system a true copy of plaintiff's memorandum in opposition to defendant's motion to dismiss, on defense counsel Greg J. Mueller, Federal Election Commission, 999 E. Street, N.W., Washington, D.C. 20463.

Dated: Queens Village, New York
March 23, 2012

_/s/ Abdul Hassan_____
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EXHIBIT 1

TRANSCRIPT OF PLAINTIFF'S ORAL ARGUMENTS ON THE MERITS BEFORE THE SECOND CIRCUIT COURT OF APPEAL ON JUNE 3, 2011

JUDGE NEWMAN: And on the merits, I think you
7 better focus on the argument that when there are two
8 clauses of the Constitution in alleged conflict, the more
9 precise governs.
10 MR. HASSAN: The more precise governs. The
11 argument that I made, Judge, and related to yours is that
12 there's an exception to that rule when we're dealing with
13 discrimination. That for example, under strict scrutiny
14 framework -- and strict scrutiny is not just a legal
15 framework, it's a factual framework, as well, a logical
16 framework, that we -- as Justice O'Connor said in
17 Adarand, "When the government discriminates against
18 people, there is no good reason for doing so."
19 JUDGE NEWMAN: Well you wouldn't say that a
20 thirty-four year old has a Fourteenth Amendment claim;
21 would you?
22 MR. HASSAN: No, because age, there's a
23 rational basis for that type of age discrimination. But
24 national origin discrimination is equated with racial
25 discrimination. It's considered -- it's a strict
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1 scrutiny characteristic, national origin.
2 So the assumptions or the presumptions for
3 national origin discrimination are much greater against
4 it.
5 So if you have a law that discriminates on the
6 basis of national origin, there's a presumption under our
7 existing constitutional jurisprudence that the law is
8 invalid. The lower court -- and you know in all fairness
9 to the lower court, the lower court said this is a rare
10 challenge and the higher courts have not put forth a
11 standard. So the lower court tried to create a standard
12 and Judge Gershon is a very good judge. And when I
13 mentioned in my brief the Dred Scott case, I in no way
14 equate her to Justice Taney or whatever. She's a -- I've
15 appeared before her many times. She's a wonderful judge.
16 But this is a new case and whenever you come up
17 with new standards and new cases, you are going to err.

18 And that's why there's the appellate court to fix those
19 errors. So I think you -- Dred Scott, Justice Taney in
20 Dred Scott said "As a matter of law, there is no
21 difference between an article of merchandise and a human
22 being held as slave property." He uses this tunnel
23 vision approach that I think the lower court used here.
24 He didn't make any distinction or any allowance for the
25 fact that you were dealing with invidious discrimination
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1 against a human being.
2 Today, a 160 years after that case, thank God
3 we've made that recognition. Starting in the 1940s and
4 '50s, Judge Newman I think you clerked for Chief Justice
5 Warren during the '50s when there was a moment of truth
6 in this country for the Fifth Amendment. He read equal
7 protection into the Fifth Amendment, simply because we
8 were dealing with discrimination. If we were dealing
9 with the right to fish or something else, he would not
10 have done that.
11 But here we understand the importance that
12 racial discrimination and prohibiting it has played in
13 this country and we correctly have remedied a lot of the
14 mistakes of the past, especially the Dred Scott case.
15 The government relied tremendously on original
16 intent; both the lower court and the government said
17 well, the Fifth Amendment was not intended to repeal the
18 discrimination that I'm challenging. Well the Fifth
19 Amendment was not, as you told Charlie Rose in an
20 interview two years back, it wasn't intended to prohibit
21 slavery, racial discrimination, national origin
22 discrimination or gender discrimination.
23 But today, we take the approach that we cannot
24 rely on original intent when it comes to issues of
25 discrimination. That is how today we interpret the Fifth
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1 Amendment as prohibiting all these types of
2 discrimination. And we had to do it, or else the
3 Constitution would become a suicide pact.
4 And so the mistake the government makes and the
5 lower court has made is to rely so heavily on original
6 intent. If you rely on original intent to issues of
7 discrimination, you have to throw all the civil rights

8 cases for the last fifty years in a garbage can. And
9 obviously, that's not something we can do.
10 So this is a critical moment. This is a
11 historical case for that reason. You don't see
12 discrimination -- this is the last instance of
13 discrimination in the constitution, invidious
14 discrimination in the constitution. Dred Scott was the
15 last one. That was in 1850s. We fixed that one. We
16 fought a civil war. A lot of people died and the stain
17 of that case still stays with us.
18 And this case is an opportunity for the
19 judiciary as well. This is the second time -- this is
20 the first time since Dred Scott that the courts are
21 facing a choice between invidious discrimination and
22 equality. Dred Scott, Justice Taney chose
23 discrimination. I'm asking you to choose equality. Also
24 one --
25 JUDGE LIVINGSTON: That's a very good statement

1 of your position and I think we understand it. The anti-
2 discrimination norm in the Constitution refers a
3 different than usual interpretative principles. You've
4 saved one minute for rebuttal.
5 MR. HASSAN: Thank you, your Honor.