UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Abdul Karim Hassan, Plaintiff-Appellant, -v- Federal Election Commission, Defendant-Appellee.	**Case #: 12-cv-5335** **APPELLANT'S OPPOSIITON TO MOTION FOR SUMMARY AFFIRMANCE AND CROSS MOTION FOR SUMMARY REVERSAL**

I. PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

Plaintiff Abdul K. Hassan, Esq., respectfully submits the instant opposition to defendant's motion for summary affirmance and in support of his request for summary reversal.

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 was a candidate for the Presidency of the United States in 2012 and is now a candidate for presidential nomination of the Democratic Party and in the 2016 presidential general elections and who has continued his campaign from 2012 without interruption. 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. The instant action was brought pursuant to 26 USC § 9011(b) which requires that claims like this one to construe or implement the Fund Act to be heard by a three-judge district court. Defendant opposed plaintiff's motion for a three-judge district court on the grounds that the issues were insubstantial and that plaintiff lacked standing. The district court denied the motion for a three judge court.

On appeal, defendant filed the instant motion for summary affirmance. The standard on a motion for summary affirmance is not whether plaintiff will loose the appeal but whether plaintiff should be denied his right to appeal and full briefing

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

because the issues on appeal are insubstantial or frivolous. Defendant's summary affirmance motion can be denied swiftly because defendant did not even bother to state or satisfy the summary affirmance standard and instead only argues based on the standard that would apply if full briefing were to ensure – whether plaintiff is wrong or right.

While defendant's summary affirmance motion must be denied, plaintiff's request herein for summary reversal must be granted even with the higher standard that applies to summary disposition. First, the district court's ruling on the merits must be reversed summarily because it is well settled that only a three-judge court can rule dismiss a case under the Fund Act for failure to state a claim. Second, in order for an issue to be insubstantial it must have been clearly settled by Supreme Court precedent. Summary reversal on the insubstantiality issue must be granted because neither the district court nor defendant has cited any Supreme Court case that even addressed, much less settled the issues herein – this is a case of first impression. Third, summary reversal is warranted on the standing issue which is settled by at least two Supreme Court cases.

While the merits of the implicit repeal and absurdity doctrine arguments will be presented to a three-judge district court are not before this Court, appellant has included his opening

(http://www.abdulhassanforpresident.com/tenth_circuit/appellate_brief.pdf) and

closing brief (http://www.abdulhassanforpresident.com/tenth_circuit/reply_brief.pdf) from the case of Hassan v. Colorado to provide a better context and understanding of the issues.

Plaintiff, kindly and respectfully request, that this Honorable Court deny defendant's request for summary affirmance and grant plaintiff's request for summary reversal.

II. AN OVERVIEW OF THE CHALLENGED DISCRIMINATION

There is a famous saying that those who forget the past are condemned to repeat it. This saying has greater significance in a case like this which involves a very bad form of invidious discrimination and in light of the unfortunate history of discrimination in our otherwise wonderful country.

When the Founding Fathers gave us the Constitution, it contained three major forms of invidious discrimination. The first and most infamous was the provisions of the Constitution which allowed black people to be owned as slaves. The second was the denial of citizenship to people of African origin. The third was the denial of full citizenship to citizens like Mr. Hassan because of national origin – denying naturalized citizens the right to hold the presidency based on the invidious and erroneous belief and stigma that American citizens who were born outside the United States cannot be trusted. This was not unlike other invidious and

erroneous beliefs of the day such as that Blacks are inferior to Whites and that women are inferior to men. After many struggles in and out of the courts, our country today is a very different place that has rejected almost all of the invidious discrimination supported and practiced by our Founding Fathers in the eighteenth century when our Constitution was adopted. The only form of invidious discrimination that remains in our Constitution today is the invidious national origin discrimination that Mr. Hassan is challenging in this case – such discrimination is irreconcilable with the rest of the Constitution, including the Fifth Amendment's equal protection guarantee. In light of this irreconcilability, the equality provisions of the Constitution should trump and prevail over the natural born provision which discriminates on the basis of national origin – a type of discrimination the Supreme Court condemned in Adarand v. Pena, 515 U.S. 200, 213 (1995), when in reference to earlier national origin discrimination against Japanese Americans stated, "[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."

Today, we scratch our heads in bewilderment and ask how can a man who challenged slavery lose his case as happened in Dred Scott v. Sandford, 60 U.S. 393 (1857)? How can a court choose the evil of slavery and race discrimination over liberty and equality in the Constitution? The answer can be found in the

papers of the Federal Election Commission. Dred Scott lost his case because, Jutice Taney in Dred Scott, like the FEC in this case, took the position that the only way to remedy invidious discrimination in the Constitution is through formal amendment and that the implicit repeal and absurdity doctrines should not be used to remedy such invidious discrimination. Fortunately, unlike the FEC and the district court which have both been mysteriously silent on the Dred Scott arguments made by plaintiff while supporting the logic in Dred Scott, the Supreme Court and the D.C. Circuit have stated that Dred Scott was wrongly decided. See Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir., 2007) ("Dred Scott is as infamous as it was erroneous in holding that African-Americans are not citizens."). The FEC is now the first unit of the federal government, since the internment of Japanese Americans by the U.S. military because of their national origin in the 1940s, to engage in and vigorously defend invidious national origin discrimination - against Mr. Hassan and more than 15 million other foreign-born American citizens.

There are two main reasons why I brought this challenge. The first is the Supreme Court's interpretation that the equal protection guarantee of the Fifth Amendment and the citizenship clause of the Fourteenth Amendment prohibit the federal government from discriminating against American citizens because of their national origin – at the point of such interpretation which began in the last several

decades only, the Fifth and Fourteenth Amendments were placed in irreconcilable conflict with the national origin discrimination in the natural born clause – even the district court agreed that irreconcilability is a condition that triggers implicit repeal. The second is the Supreme Court's current view and the D.C. Circuit's current view that Dred Scott case was wrongly decided – that Justice Taney was wrong to hold that the only way to remedy invidious citizenship discrimination in the Constitution itself was through formal amendment. The third is the fact the Supreme Court has condemned, reverse and apologized for its rulings and reasoning in Dred Scott, Plessy v. Ferguson, 163 U.S. 537 (1896), and Hirabayashi v. United States – all cases in which the Supreme Court, like the FEC and district court in this case, chose invidious discrimination over equality, only to later regret that choice and the damage to our country that flowed therefrom. History has shown that whenever the courts and the government chose invidious discrimination over equality the government and the courts have ended up on the wrong side of history. If Mr. Hassan loses this case, future generations will no doubt ask in bewilderment why did a man who challenged invidious national origin discrimination lose his case? Why did the FEC oppose a man who challenged the evil of invidious national origin discrimination? Why didn't the FEC follow the lead of the Justice Department and refuse to defend a law (DOMA) that invidiously discriminates especially where national origin discrimination here is subject to a

higher level of judicial scrutiny (strict scrutiny) than sexual orientation discrimination (rational basis or intermediate scrutiny). It is my hope that we will remember these mistakes of the past so that we are not condemned to repeating them in this case.

III. ARGUMENT

1. A THREE-JUDGE COURT IN THIS CASE WOULD NOT REQUIRE A LOT OF THE JUDICIAL RESOURCES

In footnote 10, page 20 of its opinion, the district court stated that this case is not "appropriate to occupy the judicial resources of three judges in this jurisdiction." After a careful review of the decision and proceedings in the district court, it seems that the major factor in the district court's ruling was its concern over judicial resources. While this is not a proper legal basis under the Fund Act to refuse to convene a three-judge district court, from a practical standpoint, it did play a role and will be addressed at the outset. A three-judge district court will take very little judicial resources because the significant constitutional issues of first impression realistically belong in the Supreme Court and a three-judge court can do the minimum and send the case to the Supreme Court – under the Fund Act, appeals go directly to the Supreme Court. In addressing the merit issues in the context of the Supreme Court, the Chairperson of the FEC stated in relevant part as

follows during the FEC's September 1, 2011 deliberations as to plaintiff' arguments[2]:

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

The FEC Chairperson was correct to state that the merit issues herein are Supreme Court material. Defendant's own Chairperson, after studying the issue and deliberating it intensely with her fellow commissioners for half-hour on September 1, 2011, echoed the sentiments of her fellow commissioners and concluded that the abrogation/implicit repeal issues herein are not just substantial, they are so substantial they should be heard by the highest court in the land. Realistically, every judge is understandably fearful of being condemned by the judgment of history the way Justice Taney was for his writings in Dred Scott – this is why all the judges and all the defendants in the several cases brought by Mr. Hassan thus far, have all ran away from Mr. Hassan's arguments based on the rulings and reasoning in Dred Scott even though those arguments were central and material to the cases – despite being more than 150 years old, Dred Scott is still the most recent Supreme Court precedent on the issue of invidious citizenship discrimination in the Constitution itself – the same issue in this case. A three-judge

[2] http://www.fec.gov/audio/2011/2011090102.mp3

court can simply grant or deny the FEC's motion without much time spent on research or explanation if it chooses to and that would pave the way for the case to go to the Supreme Court where it really belongs.

2. DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE DEFENDANT DID NOT EVEN ADDRESS OR ATTEMPT TO SATISFY THE STANDARD ON A MOTION FOR SUMMARY AFFIRMANCE

On a motion for summary disposition, the standard is not whether appellant is wrong or right on the issues, it is whether plaintiff's arguments are insubstantial or frivolous so that plaintiff should be denied his due process right to appeal and to brief the merits of his arguments and have them heard and decided by a merits panel. In Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297-298, (D.C. Cir., 1987), the D.C. Circuit addressed the standard for summary disposition and stated in relevant part as follows:

> A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. See Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir.), cert. denied, 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 292 (1980). To summarily affirm *298 an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented. Sills v. Bureau of Prisons, 761 F.2d 792, 793-94 (D.C.Cir.1985). In addition, this court is now obligated to view the record and the inferences to be drawn therefrom "in the light most favorable to [taxpayers]." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962).

In re Thomas 508 F.3d 1225, 1226 -1227 (9th Cir., 2007), the Ninth Circuit

explained the standard governing summary affirmance and stated in relevant part as follows:

> Because our decisions pursuant to a pre-filing review order are rarely published, we have not yet clarified the standard for determining whether an appeal or petition has sufficient merit to proceed. We take the opportunity to do so now. In addressing this issue, we are guided by prior decisions setting standards for disposing of cases on a summary basis.
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> In *United States v. Hooton*, we permitted summary affirmance of a final judgment*1227 in a nonemergency situation only where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 693 F.2d 857, 858 (9th Cir.1982) (citations omitted). Such summary affirmances "should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality [of the appeal] is manifest from the face of appellant's brief." *Id.*

Notably, defendant does not even attempt to meet this standard and defendant does not even attempt to argue that plaintiff's arguments or issues are insubstantial or frivolous. On pages 8-11 of its motion papers, defendant argues that plaintiff is wrong on the issue of standing and does not even attempt to argue that plaintiff's standing arguments are frivolous or insubstantial. On pages 12-17 of its motion papers, defendant argues that the natural born provision has not been trumped and implicitly repealed by the equal protection guarantee of the Fifth Amendment and defendant does not even attempt to argue that plaintiff's implicit repeal and absurdity doctrine arguments are insubstantial or frivolous – the proper standard.

3. THIS COURT SHOULD SUMMARILY REVERSE ANY RULING ON THE MERITS BECAUSE ONLY A THREE-JUDGE DISTRICT COURT CAN DISMISS FOR FAILURE TO STATE A CLAIM

On pages 13-16 of its motion papers, defendant argues that the lower court's finding on the merits and its dismissal for failure to state a cause of action (Opinion, 15-18) should be affirmed. In Wertheimer v. Federal Election Com'n, 268 F.3d 1070, 1074, 348 U.S. App. D.C. 1, 5 (C.A.D.C., 2001), the D.C. Circuit stated in relevant part as follows:

> the court's reasoning seems to us to sound more applicable to cause of action considerations than to subject matter jurisdiction. The district judge, however, lacked authority, by herself, to dismiss on cause of action grounds.

It is therefore settled by the case law in this Circuit as well the text of 26 USC § 9011(b) that only a three-judge district court can dismiss a case brought under 26 USC § 9011(b) for failure to state a claim. As such, this Court should summarily reverse that part of the district court's ruling (Opinion, 15-18) which dismissed on cause of action grounds and this Court should dismiss that part of defendant's instant motion (Def. Mot. 12-17) which seeks to affirm this ruling of the district court. This is just one of many examples, as detailed further below, where the defendant and the district court simply did not follow established law.

4. THIS COURT SHOULD SUMMARILY REVERSE ANY RULINGS AS TO INSUBSTATIALITY BECAUSE THERE IS NO SUPREME COURT CASE THAT HAS SETTLED THE ISSUES OF FIRST IMPRESSION IN THIS CASE

It should be noted that while the district court dabbled in the discussion about insubstantiality in footnote 10, page 19-20 of its opinion, it made no explicit finding as to insubstantiality and could not do so – summary disposition in plaintiff's favor is warranted on this issue. Notably, in Ninth Circuit Court of Appeals case of Hassan v. Montana, Case No. 12-35402, (See http://www.abdulhassanforpresident.com/ninth_circuit/discharge_OSC.pdf), the Ninth Circuit was faced with the same implicit repeal issues as in this case and the same arguments made by defendant and discharged its order to show cause for summary affirmance - necessarily finding that the issues were not insubstantial.

In Giles v. Ashcroft, 193 F.Supp.2d 258, 262 (D.C. Cir., 2002), the D.C. Circuit pointed out that a three-judge court need not be convened where the claims are "wholly insubstantial." In Giles, 193 F.Supp.2d at 262 -263, the D.C. Circuit also explained the meaning of "insubstantial' and stated in relevant part as follows:

> The Supreme Court explained in Goosby that "[a] claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." 409 U.S. at 518, 93 S.Ct. 854.

In Wolf v. Boyd, 287 F.2d 520, 522 (C.A.9 1961), the Ninth Circuit, also explained the meaning of "insubstantial" and stated in relevant part as follows:

> The issue upon this appeal is not whether appellant is correct in her construction of her constitutional rights, but whether her contentions raise a substantial constitutional question. In the

> words of the Supreme Court, a question is to be regarded as insubstantial if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' Hannis Distilling Company v. Mayor and City Council of Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482.
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> … The issues presented by these circumstances have not clearly been settled by existing precedent and the constitutional question which they present is not, in our view, an insubstantial one.

Significantly, as the D.C. Circuit pointed out above in Giles, the determination as to whether or not to convene a three-judge court must be made on the basis of the Supreme Court's previous decisions. See also, Lopez v. Butz, 535 F.2d 1170, 1172, fn 1 (9th Cir. 1976) ('A determination to convene or not to convene a three-judge court must be made on the basis of the Supreme Court's "previous decisions."'). The decisions must be from the Supreme Court because in denying a plaintiff a three-judge panel and his day in court, it must be clear that the three-judge court cannot possibly rule in plaintiff's favor and such possibility will always exist as long as the highest court in the land has not clearly settled the issue – especially where as here, any appeal from the three-judge court goes directly to the Supreme Court.

In the instant case, both the defendant and the district court have failed to identify any Supreme Court decision which has clearly settled the issues in this

case based on the implicit repeal and absurdity doctrines. Such a Supreme Court decision does not exist because plaintiff's challenge is the first time in history that these issues have been presented in the courts and have never "clearly been settled by existing precedent," from the Supreme Court.

Not only are there no precedents clearly resolving the issues presented, there are Supreme Court precedents strongly supporting the position of plaintiff. See Dred Scott v. Sandford, 60 U.S. 393 (1857) (supportive and material because the modern judiciary and society have rejected as erroneous, the holding in Dred Scott which affirmed citizenship discrimination in the Constitution and rejected as erroneous the reasoning of Justice Taney that a constitutional amendment was needed to avoid the result in Dred Scott.). Afroyim v. Rusk, 387 U.S. 253, 262 (1967) (holding that, "(The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native."). Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (finding that the 14th Amendment *impliedly* abrogated the 11th Amendment where the subject, like here, was discrimination). McDonald v. City of Chicago, Ill. 130 S.Ct. 3020, 3059 -3060 (U.S., 2010), (explaining that Constitutional slavery/citizenship discrimination and Constitutional equality are "irreconcilable" - a condition that triggers ***implicit*** repeal.). Afroyim v. Rusk, 387 U.S. 253 (1967) (invalidating statute which discriminated against plaintiff because he was a

naturalized citizen and not a natural born citizen.). United States v. Virginia, 518 U.S. 515, 532 n. 6, (1996) (noting that "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or *national origin*.").

In footnote 10, page 19-20 of its decision, the district court suggests that because several other courts have ruled against plaintiff on the merits of the issues that would confront a three-judge panel, such a three-judge court should not be convened. The district court was very wrong. First, because the finding of insubstantiality can only be made based on Supreme Court precedent, these other cases which were not decided by the Supreme Court cannot be the basis for a finding of insubstantiality. Very significantly, these cases clearly favor plaintiff because none of these other cases found the questions presented by plaintiff to be insubstantial or frivolous. While all these other cases were decided against plaintiff on motions to dismiss - such dismissals were not because the issues presented were addressed by existing precedent or because they were easy. To the contrary, all of these decisions were based on the absence of precedent directly addressing the issues and an unexplained and mysterious avoidance of some very sensitive issues such as those arguments based on the citizenship ruling in Dred Scott and the judiciary's current view that such a ruling was erroneous – this was Mr. Hassan's central argument but amazingly, it was never addressed by any of the courts or any of the defendants. By contrast, the D.C. Circuit has ruled that the citizenship ruling

in Dred Scott was wrong. See Parker v. District of Columbia, 478 F.3d 370, 391 (D.C. Cir., 2007) ("Dred Scott is as infamous as it was erroneous in holding that African-Americans are not citizens."). Each of these courts struggled to discern the correct law and outcome. The absence of direct precedent which was the bases for the decisions in the several district courts is exactly why this court should convene a three-judge court.

In addition, the district court in Hassan v. Colorado, 2012 WL 1560449 (DCO, May 3, 2012) felt that the issues were so substantial that it designated its decision for publication. Ironically, the district court in this case felt the issues were so substantial that it also designated its decision for publication. As this Court is aware, the vast majority of judicial opinions are unpublished and courts only designate for publication, decisions on the most substantial legal issues.

Also, the district court in Hassan v. Iowa, in response to *Fitzpatrick v. Bitzer*, 427 U.S. 445 456 (1976), as an example of implicit repeal in the constitutional context stated that[3], "a majority of federal courts have declined to view *Fitzpatrick* as holding that the Fourteenth Amendment effected an *implicit repeal* of the Eleventh Amendment." The Supreme Court's abrogation ruling in Fitzpatick can be the basis for a ruling in plaintiff's favor in this case. An issue cannot be insubstantial where its resolution hinges on resolving a split in authority

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

among the courts of appeals – the split shows that the issue is not clearly settled by existing precedent – a split in the courts of appeals is also one of the grounds for Supreme Court review – hardly an insubstantial matter. In fact, the Iowa court even relied on the proposition that[4] it is, "unlikely that a majority of the present Supreme Court would sustain a holding that the fourteenth amendment, of its own force, represents a pro tanto repeal of the eleventh amendment." Once again, an issue cannot be insubstantial where in order for the Court to resolve the issue against plaintiff, it has to engage in a projection of how the Supreme Court would rule today or make a finding that the Supreme Court would change an existing ruling. Such projections require careful analysis and full and complete consideration of the issues by a three-judge court as required by statute.

On pages 12-14 of its motion, defendant cites Schneider v. Rusk, 377 U.S. 163 (1964) and several prior cases in which the Supreme Court observed that the natural born clause discriminates against citizens but that the rest of the constitutional such as the Fifth and Fourteenth Amendments prohibits such discrimination. When placed in proper context, these cases actually provide powerful support for plaintiff's position herein. First and foremost, in all of these cases, the Supreme emphatically held that discrimination against citizens because of their national origin violates the equal protection guarantee of the Fifth

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

Amendment and the Citizenship clause of the Fourteenth Amendment – this consistent holding in these cases answers the first question in this case in plaintiff's favor as to whether the national origin discrimination in the Fund Act against naturalized citizens like Mr. Hassan violates the equal protection guarantee of the Fifth Amendment and the Citizenship Clause of the Fourteenth Amendment. Second, in these cases, the Supreme Court was never presented with and never answered the implicit repeal and absurdity doctrine arguments presented in this case – none of those cases involved the issue of presidential eligibility. In those cases, the Supreme Court merely highlighted the difference or the conflict between the natural born clause and the Fifth/Fourteenth Amendments in terms of national origin discrimination – a point that is central to plaintiff's case. Unlike those cases, plaintiff here not only identifies this conflict, he is asking this Court to resolve that conflict between discrimination and equality in favor of equality – something the Supreme Court has never been asked to do in any case before this one. Third, defendant mysteriously fails to mention or even address Afroyim v. Rusk 387 U.S. 253, 262 (1967) even though it is the seminal and most recent case in the Schneider line of cases. Defendant and the district court stayed away from Afroyim because in Afroyim, 387 U.S. at 262 the Supreme Court stated without exception as to presidential eligibility that, "(The naturalized citizen) becomes a member of

the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native."

Finally, even though the Supreme Court has never addressed or settled the merits issues in this case - even if it had done so, plaintiff's issues would still not be insubstantial because history has shown that the Supreme Court has always overruled its decisions such Dred Scott, Plessy v. Ferguson, 163 U.S. 537 (1896), and Hirabayashi v. United States, 320 U. S. 81, 100 (1943) in which it chose invidious discrimination over equality.

5. THIS COURT SHOULD SUMMARILY REVERSE THE DISTRICT COURT'S RULING ON STANDING BECAUSE PLAINTIFF CLEARLY HAS STANDING UNDER AT LEAST TWO U.S. SUPREME COURT PRECEDENTS

The standing question can be decided in plaintiff's favor at the summary affirmance stage because the standing question has been clearly settled in plaintiff's favor by the Supreme Court's decision in FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 487 (1984). No surprisingly, despite the fact that NCPAC is the leading Supreme Court case on standing under the Fund Act, the defendant and the district court only address NCPAC brief and only in footnotes - in reference to NCPAC the district court stated in relevant part as follows (Opinion, fn 5, pg 8):

> (holding that, although private parties do not have standing to sue other private parties under the Act, "an 'appropriate' role for private

> parties under § 9011(b)(1) [is] to bring suits against the FEC to challenge its interpretations of various provisions of the Act").

The district court's own description of NCPAC is a description of the instant case. Not surprisingly, tucked away in footnote 5, page 8 of the district court's decision is probably the most remarkable and significant finding by the district court which is as follows (Opinion, fn 5, pg 8):

> Neither party disputes that the statute provides Hassan with authority to bring suit.

As per the above excerpt, plaintiff is a private party who has brought "suit against the FEC to challenge its interpretation of various provisions of the Act." Here, there is no dispute that the FEC interprets the Fund Act as prohibiting petitioner from obtaining funds solely because of his national origin – an interpretation that flows from the FEC's September 2, 2011 ruling that was directed specifically at plaintiff.

We have a situation where the Supreme Court has ruled that voters would have standing to sue the FEC to challenge its interpretations of the Fund Act. By contrast, the district court in total disregard of the Supreme Court reaches the opposition conclusion and rules in effect that no voter can sue under the Fund Act – that only those whose nomination as presidential candidates of major or minor parties is imminent can bring suit. Of course, the district court cannot overrule the Supreme Court and its standing ruling must be summarily reversed.

Realizing that its analysis was in direct conflict with the Fund Act and the Supreme Court's interpretation of standing under the Fund Act, the district court concluded that Hassan still does not have standing under the Constitution because, "Congress' grant of a right to sue cannot abrogate the requirements of Article III standing." However, while it is true that Congress cannot abrogate the Constitution, it is also true that Congress is free to create rights, the exercise or violation of which gives rise to Article III standing. This fact was prominent in *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1984). Like plaintiff in this case, the FEC in NCPAC had to demonstrate that it met the requirements of Article III standing. What was the injury that the FEC suffered in NPAC? The injury was the lack of clarity as to the constitutionality of the statute – because of the inherent harm uncertainty in the Fund Act causes in the context of presidential campaigns, Congress made an informed judgment in 26 USC 9011(b) to give the FEC and voters like plaintiff the right to clarity and certainty in the statute and gave them the right to bring an action to construe the Act to achieve such clarity and remove the uncertainty. If plaintiff wins this case, it will materially help the FEC implement the Fund Act as to plaintiff and the FEC as it must, will change its ruling and no longer deny plaintiff the right to funds because of his national origin. In fact, during its September 2, 2011 deliberations[5] that led to the

[5] http://www.fec.gov/audio/2011/2011090102.mp3

matching fund ruling against plaintiff, the FEC commissioners struggled immensely with the issue and indicated that they will follow a court ruling in plaintiff's favor on the issue. Moreover, plaintiff's standing arguments under NCPAC are even stronger because he is not only a voter, he is also a presidential candidate who has been forced to compete on an unequal footing because of the FEC's discriminatory interpretation that plaintiff cannot receive funds solely because of his national origin. The standing ruling of the district court is in direct conflict with Supreme Court precedent in NCPAC and said ruling must be summarily reversed by this court.

In addition to having constitutional standing as a voter through the operation of the Fund Act as explained above, plaintiff also has standing as a person and/or candidate running for President in the 2012 and 2016 election cycles, under the Supreme Court decision in Adarand Constructors, Inc. v.Pena, 515 U.S. 200 (1995). The fact that defendant does not even mention Adarand in its motion is a concession that plaintiff has standing under Adarand and that summary reversal of the standing ruling is warranted. The district court stated in relevant part as follows (Opinion, 10):

> In addition, Hassan relies on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), for the proposition that to satisfy the injury-in-fact element, he need not demonstrate that he has been or imminently will be injured, but only that he is forced to compete on unequal footing. *See* Pl.'s Opp'n at 6.

The district court badly confuses the logic and holding in Adarand and plaintiff's argument based thereon. Contrary to the district court, plaintiff is not arguing that he need not show injury because he is competing on an unequal footing – plaintiff is arguing that under Adarand, competing for President on an unequal footing is the injury. The district court's error is made even more glaring by the following statement by the Supreme Court in Adarand, 515 U.S. at 211:

> [t]he injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'"

The district court failed to understand that in Adarand, the injury was competing on an unequal footing, and that the discussion about imminent injury in Adarand was about whether it was imminent that Adarand would be competing for contracts in the future. The instant case is a lot stronger than Adarand because here, the competing, and hence the injury, is not only imminent – it is actual. Here, under law, plaintiff began competing for the presidency when he declared his presidential candidacy and has been competing on an unequal footing ever since because he has been forced to compete for the presidency without the right to obtain significant funding under the Fund Act solely because of his national origin – this injury is obviously as a result of the discrimination in the Fund Act as per the FEC's interpretation, and obviously, this injury can be remedied by a favorable ruling that declares the national origin discrimination against plaintiff to be in

violation of the Fourteenth and Fifth Amendments and trumped and implicitly repealed by these amendments.

It seems that the district court's misapplication of Adarand was compounded by a lack of knowledge as to when Hassan began competing for the presidency. How do we know when a person is considered a person or candidate running for President under the law? Is the determination made based on polls? Is it made based on gut feeling as to who is presidential material? Is it based on our personal view of what a presidential campaign should look like? Is it made based on the opinion of talking heads on television?

The determination as to whether someone is a person or candidate running for President is governed by the Federal Elections Campaign Act ("FECA") and the regulations thereunder such as 11 CFR 100.72(b) and 100.131(b). The Federal Elections Commission summarized the relevant legal standards in its Presidential brochure and stated in relevant part as follows[6]:

> An individual may conduct a variety of activities to test the waters. Examples of permissible testing-the-waters activities include polling, travel and telephone calls to determine whether the individual should become a candidate. 11 CFR 100.72(a) and 100.131(a).
> Certain activities, however, indicate that the individual has decided to become a candidate and is no longer testing the waters. In that case, once the individual has raised or spent more than $5,000, he or she must register as a candidate. Intent to become a candidate, for example, is apparent when individuals:

[6] See http://www.fec.gov/pages/brochures/testing_waters.pdf

> - Make or authorize statements that refer to themselves as candidates ("Smith in 2012" or "Smith for Senate");
> - Use general public political advertising to publicize their intention to campaign;
> - Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
> - Conduct activities over a protracted period of time or shortly before the election; or
> - Take action to qualify for the ballot. 11 CFR 100.72(b) and 100.131(b).

As laid out in the complaint, appellant qualifies a person or candidate running for President under law based on either of four of the five grounds listed above and in 11 CFR 100.72(b) and 100.131(b). First, plaintiff is considered to be a person/candidate for president because he has announced in writing and orally that he is a candidate for President in 2012 and 2016. See also http://www.abdulhassanforpresident.com. Notably, Hassan's video on youtube[7] in which he discusses his issue positions and campaign has received over 350,000 views and numerous supportive comments in just the last year – typically only nationally known presidential candidates with a solid support and following get so many video views. When a person does not announce his or her candidacy, the FEC looks to the other four factors, either of which would indicate or qualify the person as running – with the exception of raising money factor, the other three factors are satisfied and any of them would qualify plaintiff as running for President. As confirmed by the FEC's September 2011 ruling, when plaintiff

[7] http://www.youtube.com/watch?v=7Cd18lsx1ls

declared his presidential candidacy be became subject to numerous obligations under law including those governing record-keeping, contributions, expenditures and campaigning. The FEC made it clear that plaintiff is subject to the requirements of law the same as other candidates. However, plaintiff is complying with his legal obligations and campaigning like the other candidates but is doing so on an unequal footing because he has been denied the right to receive funds under the Fund Act and must contend with all the negative consequences that flow from such a denial.

There is a popular misconception that a person cannot be a presidential candidate without registering with the FEC. When a person announces his candidacy for president, he exits the testing the waters phase and he becomes a candidate for president under law. However, that candidate does not become a candidate for registration and reporting purposes under FECA until he has $5,000 in qualified expenses or contributions. As such, it is possible for a presidential candidate to run for president and win the presidency without registering with the FEC if that person does not cross the $5,000 threshhold. In fact, it is my understanding that in one of the previous presidential election cycles, Ralph Nader, the most well-known third party candidate in years, became the presidential nominee of a third party without crossing the $5,000 threshold and without having to register with the FEC as a result.

The district court and defendant rely on the unpublished Second Circuit opinion in Hassan v. USA for the proposition that plaintiff has not done enough to qualify as a person or candidate running for President. (Opinion, 13-14). However, this reliance is seriously misplaced. We begin with the following exchange between Judge Newman and counsel for the government during oral arguments before the Second Circuit:

> JUDGE NEWMAN: Is there any electoral step and
> 3 some sort official step that a New York resident or
> 4 citizen must take to become a presidential candidate?
>
> JUDGE NEWMAN: So what I am wondering is there
> 16 an official step one takes to go to some election
> 17 official and obtain a form or do you register? What do
> 18 you do?
> 19 MS. DEMAS: Well, I believe that --
> 20 JUDGE NEWMAN: Not having wanted to run for
> 21 president, I'm rather ignorant about these mattes.
> 22 MS. DEMAS: I will try to enlighten the Court
> 23 as best as I can, however having never tried to run for
> 24 president, I am not as facile with these requirements
> 25 either …

Remarkably, both the Second Circuit and the government admitted that they did not know at what point someone becomes a candidate or person running for president – a critical determination in determining injury for standing purposes. In essence, the Second Circuit's erroneous standing decision was because it was by its own admission, "rather ignorant about these mattes." That ignorance was made worse because neither side briefed the "injury" issue before the Second Circuit.

Significantly, the district court in the Second Circuit case ruling against the government and found that Hassan had standing to bring suit. On appeal, the government did not challenge the lower courts finding of injury in fact.

Unlike the Second Circuit, the lower court and this Court have the benefit of briefing on the issue of standing and on the presidential campaign process. As such, the courts in this case cannot claim to be "rather ignorant about these mattes," and cannot make the error on standing that the Second Circuit made.

Very significantly, the four cases against state election authorities referenced by defendant as well as the district court (Opinion, fn 6, pg 12) compellingly demonstrate that plaintiff has standing to challenge the natural born clause. It is so obvious that plaintiff has standing, the defendants in Hassan v. New Hampshire and Hassan v. Montana, did not even bother to challenge Hassan on standing and ripeness grounds. While the defendants in Hassan v. Iowa and Hassan v. Colorado did raise standing and ripeness, those arguments were rejected by the district courts in both cases which found that plaintiff had standing and that his claims were ripe for review. Here, standing and ripeness are even more present because in addition to the usual standing and ripeness factors which are satisfied, the statute in this case allows any "individuals eligible to vote for President" to bring a declaratory judgment case like this one. See 26 USC § 9011(b)(1).

IV. CONCLUSION

Based on the foregoing, plaintiff respectfully requests that this Honorable Court deny defendant's request for summary affirmance and grant plaintiff's request for summary reversal and convene a three-judge district court in this matter.

Dated: Queens Village, New York
December 28, 2012

Respectfully submitted,

/s/ Abdul Hassan

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CERTIFICATE OF SERVICE

I, Abdul K. Hassan, plaintiff pro se in the above-entitled action, hereby certify that a copy of plaintiff's opposition to defendant's motion for summary affirmance and plaintiff's request for summary reversal, was served on December 28, 2012 on counsel of record for defendant, Mr. Greg J. Mueller, (FEC's General Counsel's Office), via this court's ECF system.

Dated: Queens Village, New York
December 28, 2012

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