UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDUL KARIM HASSAN, Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	No. 12-5335 REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE AND RESPONSE TO MOTION FOR SUMMARY REVERSAL

APPELLEE FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE AND RESPONSE TO APPELLANT'S MOTION FOR SUMMARY REVERSAL

This case is well-suited for summary affirmance because Abdul Hassan faces no actual or imminent injury from the statute he challenges and thus raises no substantial challenge to the district court's dismissal of his suit for lack of Article III standing. Even if Hassan could present a colorable argument for standing, summary affirmance would still be warranted on the district court's alternative holding that Hassan's claim on the merits is doomed to fail. There is no legal or historical support for his argument that the natural born citizen clause of the United States Constitution has been abrogated or repealed. This Court should therefore

summarily affirm the district court's grant of the Federal Election Commission's motion to dismiss and deny Hassan's untimely motion for summary reversal.[1]

ARGUMENT

I. SUMMARY DISPOSITION IS ESPECIALLY APPROPRIATE BECAUSE HASSAN HAS REPEATEDLY LITIGATED AND LOST HIS CHALLENGE TO THE CONSTITUTIONALITY OF THE CONSTITUTION'S NATURAL BORN CITIZEN CLAUSE

This appeal's lack of merit is most clearly demonstrated by the fact that six district courts (including the court below) and four courts of appeals have already considered Hassan's claims regarding the natural born citizen clause, and *all ten* of those courts have rejected his arguments. Given this unanimous and extensive precedent — each decision of which is summarized below — the "merits of the parties' positions are so clear that expedited action is justified and further briefing unnecessary." *Gray v. Poole*, 243 F.3d 572, 575 (D.C. Cir. 2001).

- ***Hassan v. Colorado***, 870 F. Supp. 2d 1192 (D. Colo. 2012), *aff'd,* No. 12-1190, 2012 WL 3798182 (10th Cir. Sept. 4, 2012). Hassan challenged the Colorado Secretary of State's refusal to place Hassan's name on the ballot as a candidate for president on the grounds that he did not satisfy the Constitution's

[1] Hassan's response to the Commission's motion and his motion for summary reversal were untimely filed on December 28, 2012. Hassan's motion for summary reversal comes weeks after the December 10 deadline for such motions (*see* Order at 1 (Oct. 26, 2012)) and should be denied for that reason, as well as for the reasons set forth in the Commission's motion for summary affirmance. Hassan's response to the Commission's motion was due on December 26.

natural born citizenship requirement. The district court held that this eligibility requirement had not been implicitly repealed by the Fourteenth Amendment or invalidated under the absurdity doctrine — the same arguments that Hassan seeks to present to this Court on full briefing.

The Tenth Circuit affirmed, describing the district court's opinion as "extensive and thoughtful."

- ***Hassan v. Iowa***, No. 11-574, slip op. (S.D. Iowa Apr. 26, 2012), *aff'd*, No. 12-2037 (8th Cir. Nov. 21, 2012).[2] Hassan challenged Iowa's requirement that he certify his constitutional eligibility for the presidency in an affidavit of candidacy before he could appear on the state's presidential ballot. The district court found that Hassan had standing to raise this challenge because he would have been otherwise able and ready to complete the affidavit of candidacy if he prevailed in the litigation. However, the court dismissed the case for failure to state a claim, finding no authority to support Hassan's theory that the natural born citizen clause had been implicitly repealed.

The Eighth Circuit affirmed in a per curiam opinion.

- ***Hassan v. New Hampshire***, No. 11-552, 2012 WL 405620 (D. N.H. Feb. 8, 2012), *aff'd*, No. 12-1280 (1st Cir. Aug. 30, 2012). Hassan challenged

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[2] The district court's decision is available at https://ecf.iasd.uscourts.gov/doc1/07711567012. The Eighth Circuit's decision is available at https://ecf.iasd.uscourts.gov/doc1/07711683838.

New Hampshire's statement that it would not a accept declaration of candidacy for president from any declarant who was not a natural born citizen of the United States. The district court found that Hassan "[did] not provide any support for his argument" that the Fourteenth Amendment implicitly repealed the Natural Born Citizen Clause.

The First Circuit affirmed for the reasons given by the district court.

- ***Hassan v. United States***, No. 08-938, slip op. at 3-6 (E.D.N.Y. June 15, 2010), *aff'd on other grounds*, 441 F. App'x 10, 2011 WL 2490948 (2nd Cir. June 21, 2011), *cert. denied*, 132 S. Ct. 1016 (2012).[3] Hassan brought an action directly challenging the natural born citizenship provision, and the district court found that Hassan had standing based on his ineligibility to run for President. However, the court dismissed the case for failure to state a claim, finding that "[p]articularly given the disfavor of implicit repeal in the *statutory* context, this court cannot imply intent to overturn a specific constitutional provision based only on generalized principles plaintiff draws from the First, Fifth, Fourteenth, Fifteenth Amendments."

The Second Circuit affirmed the district court's judgment, holding that Hassan lacked standing because he had failed to allege with any specificity how

[3] The district court's decision is available at https://ecf.nyed.uscourts.gov/doc1/12315746772.

the natural born citizen requirement had injured him or was likely to do so in the immediate future.

- ***Hassan v. Montana,*** No. 11-072, slip op. (D. Mont. May 3, 2012), *appeal pending*, No. 12-35402 (9th Cir. May 17, 2012).[4] Hassan challenged the state's requirement that he execute a declaration of candidacy, including a statement that he is a natural born citizen of the United States, to run for president in Montana. The district court "adopted" the reasoning of the cases discussed above, finding that they "persuasively reject[ed]" Hassan's arguments that the Fourteenth Amendment had not implicitly repealed the natural born citizen requirement.

II. HASSAN LACKS STANDING

Hassan's response falls far short of showing each of the three essential elements of constitutional standing: injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-01 (1992). Hassan candidly admits that the "two main reasons why [he] brought this challenge" are to remedy perceived discrimination against citizens because of their national origin and to redress certain wrongs exemplified by the *Dred Scott* decision. (*See* Appellant's Opp'n to Mot. for Summ. Affirmance & Cross Mot. for Summ. Reversal ("Hassan

[4] The district court's decision is available at https://ecf.mtd.uscourts.gov/doc1/11111136316.

Opp'n") at 6-7.) Entirely absent from his legal reform agenda is any actual or imminent injury to Hassan himself.[5]

In response to the Commission's motion for summary affirmance, Hassan attempts to establish his standing by arguing that the "most remarkable and significant finding by the district court" was that "[n]either party disputes that the statute provides Hassan with authority to bring suit." (Hassan Opp'n at 21 (quoting Mem. Op. & Order ("Op.") Civ. No. 11-2189, 2012 WL 4470304, at 8 n.5 (D.D.C. Sept. 2012).) But this conflates a statutory right of action with Article III standing, which are distinct, independent requirements. Even if Hassan has a statutory right to sue under 26 U.S.C. § 9011, that would have no bearing on whether he meets the requirements of Article III. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (holding that 2 U.S.C. § 437g(a)(8) — a provision allowing certain private parties to bring suit against the Commission — "does not confer standing; it confers a right to sue upon parties who otherwise already have

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[5] Hassan does not address the district court's holding that he failed to satisfy the causation and redressability standing prongs (Op. at *5 n.8), which are independent bases for affirming the district court's decision. (FEC Mot. for Summ. Affirmance at 10 n.1.) Hassan does not allege concrete facts showing that the natural born citizenship provision caused harm to his campaign and that its repeal would redress his alleged injury.

standing"). "[B]ecause Article III standing is always an indispensable element of the plaintiff's case, neither [the courts] nor the Congress can dispense with the requirement — even if its application renders a [statutory] violation irremediable in a particular case." *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1020 (D.C. Cir. 1998). The district court correctly concluded that a statutory right of action does not provide Hassan constitutional standing under Article III. (Op. at *3.)

Hassan claims that his standing has been established by two Supreme Court decisions (Hassan Opp'n at 20-29), but neither decision supports that proposition. In *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480 (1985), the Commission had intervened in a lawsuit between private parties, arguing that the suit infringed on the Commission's exclusive civil jurisdiction over enforcement of the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-13. To defend that jurisdiction, the Commission argued that the private litigants had no "standing to bring a private action against another private party" under the Fund Act. *NCPAC*, 470 U.S. at 486. The Supreme Court agreed, holding that *the Commission* had standing "to bring a declaratory action to test the constitutionality of a provision of the Fund Act . . . because a favorable declaration would materially advance the FEC's ability to expedite its enforcement." 470 U.S. at 484-85. As a private party with no enforcement authority over the Fund Act, this holding cannot avail Hassan.

Hassan also relies on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212 (1995), in which the contractor plaintiff established injury-in-fact by showing that it would "very likely" compete with contractors favored by the statute at issue — an "imminent" injury that was "*certainly* impending." *Adarand*, 515 U.S. at 211 (internal quotation marks omitted). Hassan argues that he is similarly injured by being forced to compete on an unequal footing with candidates receiving grants under the Fund Act. (Hassan Opp'n at 21.) But, as the district court noted, Hassan cannot prevail on this argument without showing "that at some imminent or identifiable future time, he will be the nominee of a major or minor political party, as defined in the Fund Act, but will be denied funding, on an unequal footing with natural born citizens." (Op. at *5.) Hassan has not made and cannot possibly make such a showing on the basis of the facts alleged in his complaint. *See id.* (noting that Hassan's complaint contained no allegations that any voter or party held back support because of his status as a naturalized citizen); *see also Hassan*, 441 F. App'x at 12 (Second Circuit holding that Hassan lacked standing because he "d[id] not allege . . . that any potential voter or contributor has declined to support him in light of his ineligibility for office").

Finally, Hassan asserts at length that he faces competitive injury because he might be deemed a "candidate" within the meaning of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457, and certain Commission regulations,

11 C.F.R. §§ 100.72, 100.131. (Hassan Opp'n at 25-29.) This is simply irrelevant, as not all "candidates" qualify for grants under the Fund Act; only the presidential nominees of political parties so qualify. 26 U.S.C. §§ 9002(4), 9003; FEC Mot. for Summ. Affirmance at 3-4. Once again, Hassan has not shown any likelihood that he would ever become such a nominee even if he were constitutionally eligible to be elected president. (Op. at *4; FEC Mot. for Summ. Affirmance at 8-10.)[6]

III. HASSAN'S CLAIMS LACK MERIT

The Commission has shown that this Court should summarily affirm the district court's alternative holding that the natural born citizenship requirement has not been implicitly repealed. (FEC Mot. for Summ. Affirmance at 12-17; *see also supra* pp. 2-5 (noting that every federal court to consider Hassan's claims has rejected them).) In his response, Hassan argues that this Court should not summarily affirm because (1) the district court was required to empanel a three-judge court to review Hassan's claims, and (2) this case is, according to Hassan, one of first impression. His arguments are meritless.

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[6] Hassan notes that four of his prior lawsuits were dismissed for failure to state a claim, not on standing grounds. (Hassan Opp'n at 29; *see also supra* pp. 2-5.) Far from establishing a blanket injury sufficient to convey standing to sue here, those cases turned on a specific act — submitting a statement of candidacy — that Hassan was willing and able to complete in each case. Here, however, Hassan has made no showing that he is similarly able to become the nominee of a major or minor political party eligible for public funds under the Fund Act. *See* 26 U.S.C. § 9003.

A. A Three-Judge Court Is Not Required for Frivolous or Insubstantial Claims

Hassan argues that only a three-judge court can dismiss a case brought pursuant to 26 U.S.C. § 9011 for failure to state a claim. (Hassan Opp'n at 12-13.) Hassan relies on a sentence in *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001), which notes that, as a general matter, dismissals for failure to state a claim are considered by a three-judge court. However, Hassan ignores the well-established exception to that general rule for insubstantial or frivolous claims. (FEC Mot. for Summ Affirmance at 11 n.2.) "A single district court judge should not certify to a three judge panel . . . frivolous or non-justiciable claims." *Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm.*, 168 F.3d 360, 367 (9th Cir. 1999); *see also Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (holding that three-judge court is not required if claim is "wholly insubstantial" or "frivolous").[7] And Hassan's assertion that a three-judge court

[7] Section 9011(b) explicitly requires that it be construed in accordance with the three-judge court provision in 28 U.S.C. § 2284, the successor statute to the provision at issue in *Bailey*. A very similar standard also applies in the campaign-finance context under 2 U.S.C. § 437h, a provision of the Federal Election Campaign Act that provides for certification of constitutional questions directly to an *en banc* court of appeals. *See Judd v. FEC*, 304 F. App'x 874, 875 (D.C. Cir. 2008) ("[J]udicial review provisions under 2 U.S.C. § 437h . . . do not apply where, as here, the constitutional challenge . . . is frivolous."); *Goland v. United States*, 903 F.2d 1247, 1257-58 (9th Cir. 1990); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) ("[W]e do not construe § 437h to require certification of constitutional claims that are frivolous, or that involve purely hypothetical applications of the statute.") (citations omitted).

could conserve judicial resources by rapidly sending this case to the Supreme Court (Hassan Opp'n at 8) is even farther afield: If his claims are not substantial enough to merit the attention of three judges from the lower courts — and they are not — they *a fortiori* fail to merit the attention of nine Justices. This is precisely why district courts serve an important gate-keeping role in weeding out frivolous or insubstantial cases under 2 U.S.C. § 9011(b) — a role the single-judge district court properly carried out when it dismissed this case.

B. The Natural Born Citizenship Requirement Has Not Been Repealed

Hassan claims that his case cannot be deemed "insubstantial" for purposes of summary affirmance because there is no Supreme Court authority that has settled the issue he presents. (Hassan Opp'n at 12-20.) In fact, there is ample authority on this point. The district court properly concluded the *Schneider v. Rusk*, 377 U.S. 163, 165 (1964), line of cases — as well the decisions in the other cases brought by Hassan (discussed *supra* Part I) — stand for the proposition that the national born citizen requirement was not repealed by the Fifth and Fourteenth Amendments. (Op. at *6.) Decided long after the ratification of the Fourteenth Amendment, *Schneider* observed that "[t]he only difference [between naturalized and natural born citizens] drawn by the Constitution is that only the 'natural born' citizen is eligible to be President." 377 U.S. at 165.

Hassan suggests (Hassan Opp'n at 19) that the *Schneider* line of precedent has been superseded by *Afroyim v. Rusk*, 387 U.S. 253 (1967), in which the Court held that a naturalized citizen could not lose his citizenship by voting in a foreign country's election. Although *Afroyim* does not even mention the natural born citizen requirement, Hassan seizes (Hassan Opp'n at 19-20) on its statement that a naturalized citizen generally possesses "all of the rights of a native citizen" and stands "on the footing of a native." *Afroyim*, 387 U.S. at 261. But Hassan fails to note that the Court was actually quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824).[8] Because *Osborn* was decided long before the Fourteenth Amendment was ratified, it cannot lend any support to Hassan's claims about the impact that Amendment had on the natural born citizenship requirement. Cases decided since *Afroyim* continue to note the vitality of the natural born citizenship requirement. *See United States v. Klimavicius*, 847 F.2d 28, 32 (1st Cir. 1988) (quoting *Schneider* and explaining "[t]he only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President").

The unambiguous legislative history of the Fourteenth Amendment also supports summary affirmance. (Op. at *6 n.9.) Around the time of that

[8] The Court in *Afroyim* relied upon *Osborn* in explaining that *Congress* did not have the power to "enlarge or abridge" the rights of naturalized citizens. 387 U.S. at 261, 268. But *Afroyim* did not suggest that other provisions of the *Constitution* cannot determine the rights of naturalized citizens.

Amendment, Congress considered repealing the natural born citizen requirement. *See generally* Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. Rev. 53, 148 (2005) (citing H.R.J. Res. 52, 42d Cong. (2d Sess. 1871)); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 B.Y.U. L. Rev. 927, 947 (2005) (citing H.R.J. Res. 166-169, 42nd Cong. (3d Sess. 1872), and S. Res. 284, 41st Cong. (3d Sess. 1871)). In 2003, Congress considered amending the Constitution to repeal the requirement. *See, e.g.*, S.J. Res. 15, 108th Cong. (1st Sess. 2003). And as recently as 2008, the Senate unanimously passed a resolution premised on the fact that the "Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a 'natural born [c]itizen' of the United States." S. Res. 511, 110th Cong., 154 Cong. Rec. S3645-01, 2008 WL 1901585 (2d Sess. 2008). The resolution recounted the history of Senator John McCain's birth and concluded based on expert legal analysis that he qualified as a natural born citizen. *Id.* These actions make clear that Congress itself did not and does not believe that the Fourteenth Amendment silently accomplished the repeal that Hassan advocates.

The Constitution has its own specific and arduous amendment process. *See* U.S. Const. art. V. That process is primarily vested in the legislative branches of

the federal and state governments. *Id*. The judicial branch has no role in amending the Constitution. *See McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (rejecting the proposition that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made"); *New v. Pelosi*, No. 08-9055, 2008 WL 4755414, at *2 (S.D.N.Y. Oct. 29, 2008) ("Whatever the merits, Plaintiff's remedy lies in the constitutional amendment process, not the courts.").[9] Indeed, in the few instances in which the qualifications for federal office have changed, these changes were accomplished by constitutional amendment. *See* U.S. Const. amend. XIV sec. 3 (prohibiting certain members of confederacy from serving in Congress), XXII (establishing presidential term limits). At most, Hassan presents policy arguments in favor of such an amendment (Hassan Opp'n at 4-8), but until the amendment process specified in the Constitution itself takes place, the natural born citizen requirement will remain in the Constitution and, by definition, be constitutional.

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[9] Hassan relies heavily (Hassan Opp'n at 5-6, 9-10, 15, 16) on analogizing the decision below to *Dred Scott v. Sandford*, 60 U.S. 393 (1856). Such a comparison is absurd on its face: Dred Scott was held to be a non-citizen without power even to sue in federal court; Hassan has presented his claims before ten such courts. Hassan also relies (Hassan Opp'n at 15-16) on *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059-60 (2010), to argue that courts should find an implicit repeal of a portion of the Constitution when its provisions appear to be "irreconcilable" with each other. But Hassan fails to note that he is citing Justice Thomas's concurrence, which was joined by no other Justice, and which in any event does not engage in the kind of constitutional interpretation that Hassan advocates. Nothing in Justice Thomas's concurrence supports Hassan's theory that courts should infer that provisions of the Constitution have been repealed by implication.

CONCLUSION

For the foregoing reasons, and those explained in the Commission's Motion for Summary Affirmance, the Commission respectfully requests that this Court affirm the district court's grant of the Commission's motion to dismiss and deny Hassan's motion for summary reversal.

Respectfully submitted,

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January 10, 2013

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDUL KARIM HASSAN,	)	
Plaintiff-Appellant,	)	No. 12-5335
v.	)	
FEDERAL ELECTION COMMISSION,	)	CERTIFICATE OF SERVICE
Defendant-Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2013, I electronically filed the Appellee Federal Election Commission's Reply in Support of its Motion for Summary Affirmance and Response to Motion for Summary Reversal with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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