**UNITED STATES COURT OF APPEALS**
**DISTRICT OF COLUMBIA CIRCUIT**

| | |
|---|---|
| Abdul Karim Hassan,<br><br>Plaintiff,<br>-v-<br><br>Federal Election Commission,<br><br>Defendant. | **Case #: 12-cv-5335**<br><br>**PLAINTIFF'S REPLY - MOTION AND CROSS MOTION FOR SUMMARY DISPOSITION** |

## I. PRELIMINARY STATEMENT

Plaintiff Abdul K. Hassan, Esq., respectfully submits the instant reply in further support of his cross-motion for summary reversal and in further oppositon to defendant's motion for summary affirmance.

## II. ARGUMENT

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

The first step an attorney, judge, or law clerk takes on a motion is to set forth the legal standard that applies and then examines the motion papers to see if that standard has been met. Here, there is a heavy burden on a motion for summary affirmance that is a lot higher than would apply if the appeal is fully briefed. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297-298, (D.C. Cir., 1987). Defendant does not dispute it does not meet and does not even attempt to address

or meet the standard for summary affirmance – defendant is arguing a standard that would apply on full briefing or before a three-judge district court. As such, defendant's motion for summary affirmance must be swiftly denied. Such a denial is especially warranted in light of the D.C. Circuit's warning that, "Parties should avoid requesting summary disposition of issues of first impression for the Court." *See, e.g.*, D.C. Circuit Handbook at 36.

**2. 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 his opening papers, plaintiff invokes Wertheimer v. Federal Election Com'n, 268 F.3d 1070, 1074, 348 U.S. App. D.C. 1, 5 (C.A.D.C., 2001), and argued that only a three-judge district court can dismiss a claim under the Fund Act for failure to state a claim on the merits. In its reply papers, the FEC states as follows:

> 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.

However, while stating that a three judge court need not be convened where the issue is insubstantial or frivolous, the FEC does not argue that the issues herein

are insubstantial or frivolous but instead, like the district court, argued only that plaintiff is wrong and fails to state a claim on the merits. Moreover, defendant and the district court could not show insubstantiality because the issues herein were never clearly settled or settled by the Supreme Court as explained below. 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.

While the merits of the issues should be decided by a three-judge district court and are not even before this Court on appeal, it would be helpful in order to understand the context of the case to examine defendant' response to Hassan's arguments based on Dred Scott v. Sandford, 60 U.S. 393 (1856) and McDonald v. City of Chicago, 130 S. Ct. 3020, 3059-60 (2010). In addressing Dred Scott, defendant states in relevant part that (Def. Rep. pg 14, fn 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.

The FEC was right to hide its comments in a footnote. Is the FEC stating that if the natural born provision prohibited Hassan from suing in court the natural born provision would be invalid and that Hassan's implicit repeal and absurdity doctrine arguments would prevail? This seems to be the argument of the FEC but if it is then Hassan must win this case because this position of the FEC is a concession that formal amendment is not required to remedy discrimination in the Constitution. To make the point clearer, the FEC seem to finally but reluctantly concede the obvious point that Dred Scott was wrongly decided even though the slavery and citizenship discrimination at issue in Dred Scott were in the Constitution itself – this is a concession by the FEC that formal amendment is not required to remedy discrimination in the Constitution. These reluctant concessions by the FEC confirms plaintiff's explanation in his opening papers that slavery and invidious citizenship discrimination were irreconcilable with and therefore implicitly repealed by the liberty, due process and equality guarantees of the Fifth Amendment. Likewise, the invidious citizenship discrimination challenged in this case is irreconcilable with and therefore implicitly repealed by the equal protection clause of the Fourteenth Amendment.

Next, in responding to McDonald, the FEC stated in relevant part as follows:

> 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 …

At the outset, it is well settled and even the district court stated that when two provisions are irreconcilable the later provision implicitly repeals the earlier provision. (Opinion, 16). Plaintiff cited Justice Thomas' concurrence in McDonald because he stated the obvious fact that constitutional slavery/citizenship discrimination are irreconcilable with constitutional equality - a condition that triggers implicit repeal. The FEC responded by arguing that that Justice Thomas "was joined by no other Justice." Is the FEC arguing that the other Justices like the FEC in this case, believe that equality and slavery/citizenship discrimination are not in conflict and are not irreconcilable? The FEC refuses to acknowledge the obvious irreconcilability between equality and invidious citizenship discrimination because it knows that such an admission of obvious irreconcilability will trigger implicit repeal of the natural born clause – the very result plaintiff is seeking in this case. As far as I know, the Klu Klax Klan is the only organization that believes slavery/national origin discrimination are not irreconcilable with the equality guarantees in the Constitution. In vetting Justice Anthony Kennedy for the Supreme Court, the Reagan Administration and the FBI asked Justice Kennedy to answer the following question[1]:

[1] http://www.businessinsider.com/justice-anthony-kennedys-background-check-2012-7

> Have you ever been a member of any club or organization that excludes as members or restricts access to individuals on the basis of race or national origin (e.g., KKK) religion (e.g., certain country clubs), or sex (e.g., Masons, Cosmos Club, Metropolitan Club)?

Ironically, the Regan Administration and the FBI associated "national origin" discrimination with organizations like the "KKK" - not with the governmental agencies, the courts or the Constitution. Additionally, Canon 2(C) of the federal Code of Judicial Conduct, stated in relevant part as follows:

> A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Because national origin discrimination is generally associated with organizations like the "KKK" and is such a bad thing that it would likely disqualify a person from being nominated as a judge, the FEC's vigorous support of the national origin discrimination in this case is very troubling. It seems the FEC is willing to become the merchant of hate simply to try to win a court case. This Court should immediately put an end to such hate and discrimination.

### 3. 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

In its reply papers, the FEC does not seem to oppose plaintiff's argument that a finding of insubstantiality can only be made where the issue has been clearly settled by U.S. Supreme Court precedent and there is no room for disagreement.

See Giles v. Ashcroft, 193 F.Supp.2d 258, 262 (D.C. Cir., 2002). Wolf v. Boyd, 287 F.2d 520, 522 (C.A.9 1961) 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."'). Significantly, 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. Moreover, "Parties should avoid requesting summary disposition of issues of first impression for the Court." *See*, *e.g.*, D.C. Circuit Handbook at 36.

**4. THIS COURT SHOULD SUMMARILY REVERSE THE DISTRICT COURT'S RULING ON STANDING**

In his opening papers, plaintiff established that 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). In response to NCPAC, defendant argues that, "As a private party with no enforcement authority over the Fund Act, this holding cannot avail Hassan." (Def. Rep. 7). The

FEC's use of NCPAC is grossly misleading and deceptive because even the district court noted as follows in reference to NCPAC (Opinion, pg 8, fn 5):

> (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").

Contrary to the FEC's deceptive and misleading use of NCPAC, even the district court noted that the Supreme Court in NCPAC specifically held that a private party like plaintiff has standing to sue the FEC especially where the FEC has issued an interpretation. This applies with even greater force here because the challenged interpretation was issued by the FEC and plaintiff himself is the subject of said interpretation. It is obvious that the FEC misrepresented NCPAC because it is the leading Supreme Court case about standing under the Fund Act and it clearly settles the standing question in plaintiff's favor and thus, summary reversal for plaintiff is warranted.

We now turn to defendant's response to Adarand Constructors, Inc. v.Pena, 515 U.S. 200 (1995). Significantly, the FEC does not deny that plaintiff is a presidential candidate as a matter of law who must comply with the laws governing contributions, spending, and campaigning, the same as any other presidential candidate. (Def. Rep. 8-9). However, defendant states that Hassan's status as a presidential candidate 'is simply irrelevant, as not all "candidates" qualify for grants under the Fund Act.' (Def. Rep. 9). Like the district court, the FEC grossly

misapplies Adarand. As plaintiff explained, the injury is that plaintiff is competing for the presidency on an unequal footing – competing for the presidency without the signficiant right to recievie funds under the Fund Act, solely because of his national origin and where plaintiff will never be able to change his national origin.

While leading off its reply brief with the merits ruling from the other cases involving Hassan, the FEC hid the standing ruling from these cases in a footnote and stated as follows (Def. Rep. pg 9, fn 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.

Once again, the FEC is incorrect. In each of these cases, the defendants took the position that Hassan could not be placed on their presidential ballots because of his national origin in light of the natural born clause. In each of those cases, the courts explicitly or implicity found that, "because defendants' inclusion of this allegedly discriminatory requirement in the Affidavit of Candidacy effectively places plaintiff on unequal footing with natural born candidates for the United States Presidency, the Court finds plaintiff has standing to bring the present

matter[2]." Likewise, because defendant's discriminatory requirement for funds under the Fund Act "effectively places plaintiff on unequal footing with natural born candidates for the United States Presidency … plaintiff has standing to bring the present matter." In Hassan v. Colorado, 870 F.Supp.2d 1192, 1198 (D.Colo.,2012), the court stated as follows:

> Plaintiff's claim is directed specifically at the natural born requirement; plaintiff is not challenging the other requirements found in the Colorado statute such as the electors requirement. While it is true that plaintiff failed to allege that he could meet the electors requirement, the merits of plaintiff's claim turn strictly on a legal issue (i.e., the implicit repeal of the natural born provision) and does not require the development of additional facts for its determination.

Relatedly, the D.C. Circuit has reiterated that a plaintiff need not engage in futile conduct in order to have standing. See National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953 (D.C. Cir. 1980). Respondent made clear in its subject ruling that petitioner will be denied funds even if there is "formal compliance with the statutorily expressed criteria," because petitioner is a naturalized citizen. Here, because it is impossible for petitioner to change his foreign-born status upon which the subject FEC ruling is based, it is futile and irrelevant whether plaintiff will eventually win nomination or satisfy any other requirement. As such, standing and ripeness clearly exist.

[2] See *Hassan v. Iowa*, No. 4-11-CV-00574, slip op. (S.D. Iowa Apr. 26, 2012) (Docket No. 16)

## III. CONCLUSION

Plaintiff respectfully requests that this Honorable Court deny defendant FEC's motion for summary affirmance and grant plaintiff Hassan's cross-motion for summary reversal.

Dated: Queens Village, New York
January 13, 2013

Respectfully submitted,

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

## CERTIFICATE OF SERVICE

I, Abdul K. Hassan, plaintiff pro se in the above-entitled action, hereby certify that a copy of plaintiff's within reply, was served on January 13, 2013 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
January 13, 2013

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