UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDUL KARIM HASSAN, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 11-2189 (EGS) MOTION

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

The Federal Election Commission hereby moves this Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Pursuant to LCvR 7, a memorandum of points and authorities and a proposed order accompany this motion.

Respectfully submitted,

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February 27, 2012

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FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Court should dismiss Hassan's attempt to nullify the constitutional requirement that the President be a natural born citizen. Hassan fails to demonstrate an Article III case and controversy because he faces no concrete, imminent injury. Moreover, Hassan's constitutional claim — that the Fifth and Fourteenth Amendments have "trumped" or abrogated the Article II requirement that the President be a natural born citizen of the United States (Compl. ¶¶ 31-32) — fails to state a claim. The natural born citizenship requirement has never been explicitly or implicitly repealed, and the Supreme Court has repeatedly acknowledged the provision's vitality after ratification of the Fourteenth Amendment. It is constitutional to interpret the Presidential Election Campaign Fund Act to deny federal funds to the candidacy of a person who is ineligible to serve as President. This case should be dismissed.

I. BACKGROUND

A. The Plaintiff

Hassan is a naturalized United States citizen who in March 2008 announced his candidacy for President on his website. (Compl. ¶¶ 1, 6.) Hassan would like to receive funds through the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-13, but he has not alleged in his complaint that he is seeking the nomination of a "major" or "minor" political "party" as the Fund Act defines those terms, *id.* § 9002(6)-(8). (*See* Compl. ¶¶ 25-27.) In his complaint, Hassan describes his campaign as consisting largely of maintaining a website and posting videos on Youtube.com. (Compl. ¶¶ 13-22.)

Previously, Hassan asked the Commission for an advisory opinion on four questions related to his campaign, and, pursuant to its authority under the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), 2 U.S.C. § 437f, the Commission issued Advisory Opinion ("AO") 2011-15 on September 2, 2011. FEC Advisory Opinion 2011-15 (Sept. 2, 2011), http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3307. Hassan asked, *inter alia*, whether, as a naturalized citizen, he is eligible to receive matching funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"). The Commission answered that he was not eligible.

> While the Commission may not "appraise candidates' good faith, honesty, probity or general reliability when reviewing the agreements and other forward-looking commitments required" by the Matching Payment Act, *see LaRouche v. FEC*, 996 F.2d 1263, 1269 (D.C. Cir. 1993), situations may exist in which, "without assessment of subjective candidate intent, the Commission might conceivably withhold funds despite formal compliance with the statutorily expressed criteria." *Id.* Clear and self-avowed constitutional ineligibility for office is one of the few instances where the Commission's exercise of its discretion to withhold funds is appropriate.

AO 2011-15 at 4. The Commission then opined that "[b]ecause Mr. Hassan has clearly stated that he is a naturalized citizen of the United States, and not a natural born citizen under the constitutional requirement in Article II, Section 1, Clause 5, the Commission concludes that Mr. Hassan is not eligible to receive matching funds." *Id.*[1]

In a separate lawsuit, Hassan sought direct judicial review of AO 2011-15 before the D.C. Circuit. *See Hassan v. FEC,* No. 11-1354, slip op. at 1 (D.C. Cir. Feb. 10, 2012) (per curiam). The court dismissed the petition and explained that it "does not have jurisdiction to review directly the Federal Election Commission's advisory opinion" issued pursuant to 2 U.S.C. §§ 437d and 437f. *Id.*

B. Federal Election Commission

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA and the two statutes that provide public funds for presidential campaigns. The Matching Payment Act provides partial federal financing for the campaigns of presidential primary candidates who choose to participate and who satisfy certain eligibility criteria. *See* 26 U.S.C. §§ 9031-9042. One of those criteria requires a candidate to raise at least $5,000 in contributions from residents of at least 20 States, in increments of $250 or less. *See* 26 U.S.C. § 9033(b)(3)-(4).

The Fund Act provides optional public funding to the campaigns of eligible candidates in the general election for the presidency according to the percentage of the popular vote the candidate's party received in the prior election. 26 U.S.C. §§ 9001-9013. Parties that receive more than 25% of the vote are considered "major" parties and their candidates receive the largest subsidy. 26 U.S.C. §§ 9002(6), 9004(a)-(c). Parties that receive between 5% and 25% of the

[1] The Commission had earlier concluded that Hassan was a "candidate" for purposes of FECA. *See* AO 2011-15 at 2-3.

vote are considered "minor" parties and their candidates receive a lesser subsidy, proportionate to the number of votes received in the preceding presidential election. 26 U.S.C. §§ 9002(7), 9004(a). Candidates of parties receiving less than 5% of the vote receive nothing. *See* 26 U.S.C. §§ 9002(7)-(8), 9004(a). Only candidates of a political party are eligible for payments. 26 U.S.C. § 9003(a). *See generally Buckley v. Valeo*, 424 U.S. 1, 85-90 (1976).

The Fund Act provides for actions to construe it to be heard by a three-judge panel in accordance with the provisions of 28 U.S.C. § 2284, with direct appeal to the Supreme Court. *See* 26 U.S.C. § 9011(b). The Commission has opposed Hassan's application for a three-judge court in this case, however, because such applications should be denied when the case does not present a substantial question or when the complaint fails to present an Article III case or controversy. *See* FEC's Opp. to Pl's. Appl. for Three-Judge Ct. at 3-7 (Docket No. 4).

C. Natural Born Citizen Eligibility Requirement

A letter in 1787, from John Jay to George Washington, the presiding officer of the constitutional convention, explained that the constitution should "'declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural born Citizen.'" Jack Maskel, Cong. Research Srv., R 42097, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement*, 6 & n.31 (Nov. 14, 2011) http://www.fas.org/sgp/crs/misc/R42097.pdf (quoting Max Farrand, Appendix A, LXVII at 61; *Documentary History of the Constitution*, IV, at 237).

Accordingly, Article II, section I, clause 5, of the Constitution, states:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

II. ARGUMENT

The Court should dismiss Hassan's complaint. First, he fails to demonstrate an Article III case or controversy. Second, his claim that the natural born citizen requirement has been abrogated and that the Fund Act is therefore unconstitutional fails as a matter of law.

A. Standard of Review

Pursuant to Fed R. Civ. P. 12(b)(1), this Court must determine standing as a threshold jurisdictional requirement. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998); *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003). As the party invoking federal jurisdiction, Hassan bears the burden of establishing each element of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). To determine whether it has jurisdiction over a claim, the Court may consider materials outside the pleadings. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005); *Coal. For Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

Pursuant to Fed. R. Civ. P. 12(b)(6), dismissal of a complaint is appropriate where, accepting the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (holding dismissal appropriate "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief" (citation omitted)); *Kassem v. Wash. Hosp. Ctr*., 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). However, "the Federal Rules do not require courts to credit a complaint's conclusory statements [made] without reference to its factual context." *Ashcroft v. Iqbal*, 556 U.S. 662, __, 129 S. Ct. 1937, 1954 (2009).

B. Hassan Does Not Have Standing or Present a Ripe Controversy

Hassan fails to demonstrate a case or controversy within the meaning of Article III. He alleges injury based on his ineligibility for public funding under the Fund Act for his general presidential election campaign (*see* Compl. ¶¶ 24-27). But under that statute, only "the candidates of a political party" can receive public funding. 26 U.S.C. § 9003(a). Hassan has not alleged in his complaint that he is the candidate of any political party, that he seeks to become the candidate of any political party, or that there is any imminent chance that he might become such a candidate. Hassan's campaign materials, as posted on his campaign's website, also fail to show that he has sought to be the nominee of any political party. *See* Abdul K. Hassan, Esq. for President, http://www.abdulhassanforpresident.com/ (last visited Feb. 23, 2012).[2]

Standing requires that "(1) [Hassan] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan*, 504 U.S. at 560-561). Hassan fails all three prongs. Because he does not allege that he is seeking the nomination of a political party or has taken any steps to become any party's nominee (such as

[2] In support of his motion for a three-judge court, Hassan argued that he would seek the nomination of the Democratic Party. Pl.'s Reply in Support of Mot. for Three-Judge Ct. at 22 (Docket No. 6). However, he has not alleged this fact in his complaint or alleged that he has taken any steps that would support such an allegation. "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record. And it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations and internal quotation marks omitted). In particular, "'the necessary factual predicate may not be gleaned from the briefs and arguments themselves[.]'" *Id.* at 235 (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 547 (1986)).

competing in any state primaries), he has alleged no imminent or concrete injury-in-fact caused by the Fund Act that could be redressed by a favorable court ruling. Indeed, Hassan has done little more than announce that he is running for President, post information on a website, and file lawsuits.[3] (*See* Compl. ¶ 13-22.) And his allegation that he "intends to continue his current campaign without interruption until the next presidential elections in 2016" (Compl. ¶ 14) suggests that his intentions do not depend upon securing the nomination of any political party — thus further undermining any possible argument that he suffers a concrete injury caused by the Fund Act.

Moreover, to the extent that Hassan's campaign is currently incurring harm, he has not alleged any concrete facts showing that the natural born citizenship provision or the Fund Act, rather than some other factor, has caused his alleged harm. For example, his complaint contains no allegation that any potential voters, volunteers, or political parties are holding back their support because of Hassan's status as a naturalized citizen. As the D.C. Circuit has noted, "[t]he endless number of diverse factors potentially contributing to the outcome of . . . elections . . . forecloses any reliable conclusion that voter support of a candidate" is attributable to any one factor. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

Although Hassan alleges that his "chances of becoming the nominee of a major political party [are] destroyed" and that his "chances of winning the presidency" are greatly diminished (Comp. ¶ 26), such conclusory allegations are nothing more than speculation about potential future injury, not particularized facts about actual or imminent harm that constitutional standing

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[3] See *Hassan v. North Carolina*, No. 11-720 (E.D.N.C. filed Dec. 9, 2011); *Hassan v. McCulloch*, No. 11-72 (D. Mont. filed Dec. 8, 2011); *Hassan v. Colorado*, No. 11-3116 (D. Colo. filed Nov. 30, 2011); *Hassan v. Iowa*, No. 11-574 (S.D. Iowa filed Dec. 1, 2011); *Hassan v. New Hampshire*, No. 11-552 (D.N.H. filed Nov. 29, 2011).

requires. *See Lujan*, 504 U.S. at 564 n.2 (future injury must be "at least *imminent*," in the sense that it is "*certainly* impending") (internal quotation marks omitted; emphases in original); *Hassan v. United States*, No. 10-2622, 2011 WL 2490948, at *2 (2nd Cir. June 21, 2011) (holding, in a case raising substantially the same arguments, that Hassan lacked standing because of failure to "allege with any specificity how the natural born citizen requirement has already injured him or is likely to injure him in the immediate future"), *cert. denied*, 2012 WL 33325 (U.S. Jan. 9, 2012) (No. 11-507). "[T]he underlying purpose of the imminence requirement is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 564 n.2).

For many of the same reasons, Hassan also fails to present a controversy ripe for judicial intervention. "'[A] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir. 2011) (quoting *Texas v. United States*, 523 U.S. 296, 300, (1998)). Hassan presents no allegation "of an actual or imminent [violation] sufficient to present the constitutional issues in clean-cut and concrete form." *Renne v. Geary*, 501 U.S. 312, 313 (1991) (internal quotation marks omitted).

Whether Hassan will ever be in a position to consider the option of accepting public funds under the Fund Act to further his general election campaign to be President is speculative at best. To become eligible, he must first become the nominee of a major or minor party that has previously received, respectively, 25% or 5% of the vote in a preceding presidential election. *See supra* pp. 3-4. Asking the Court to opine now on whether the Fund Act would be unconstitutional as applied to him in the event that he might in the future become such a party

nominee is exactly the kind of abstract disagreement that the ripeness doctrine was designed to prevent the courts from adjudicating prematurely. The events that would need to unfold before Hassan could consider applying for money under the Fund Act are far too remote to present a ripe controversy under Article III.[4]

In sum, because Hassan lacks standing and has brought this case prematurely, the Court should dismiss his complaint for lack of jurisdiction.

B. Hassan Fails to State a Claim Because the Natural Born Citizen Requirement Has Never Been Repealed

Hassan's challenge to the Fund Act rests on his argument that the national born citizen requirement for the presidency has been implicitly repealed by the Fifth and Fourteenth Amendments (*see* Compl. ¶ 32). The argument fails as a matter of law. Nothing in those amendments makes any explicit or implicit reference to the Natural Born Citizen Clause in Article II, section I, clause 5, of the Constitution.

Nearly 100 years after the ratification of the Fourteenth Amendment, the Supreme Court explained that "[w]e start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that *only the 'natural born' citizen is eligible to be President.* Art. II, § 1."

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[4] Indeed, this case is far less ripe than the dispute before the Supreme Court in *Renne*, where the plaintiffs had a history of engaging in the conduct that the state constitution at issue prohibited; the challenged provision prohibited political parties from endorsing candidates in local, nonpartisan elections. 501 U.S. at 314. Even though the political parties had endorsed such candidates in recent elections and generally alleged that they wished to do so in the future, the Court determined that the case was not ripe because, among other reasons, none of the plaintiffs alleged a concrete plan to endorse any particular candidate in future elections. *Id.* at 321. *See also Robinson v. Bowen,* 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (denying preliminary injunction seeking to remove Senator McCain from ballot based on his birth in the Panama Canal Zone, stating that "[j]udicial review — if any — should occur only after the electoral and Congressional processes have run their course") (citing *Texas v. United States,* 523 U.S. at 300-02).

Schneider v. Rusk, 377 U.S. 163, 165 (1964) (emphasis added). The Court emphasized that although rights of citizenship derive from the Fourteenth Amendment, the Amendment left intact the distinction between the rights of natural born and naturalized citizens regarding eligibility to be President: "While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, *apart from the exception noted* [*i.e.*, the natural born requirement for the Presidency], becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native." *Id.* at 166 (emphasis added; internal quotation marks omitted).

The Court's decision in *Schneider* was consistent with repeated, earlier rulings by the Court affirming the continuing validity of this eligibility requirement. *See Knauer v. United States*, 328 U.S. 654, 658, (1946) (explaining that naturalized citizenship "carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency'"); *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944) (holding that "[u]nder our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency"); *Luria v. United States*, 231 U.S. 9, 22-23 (1913) (same). This line of Supreme Court precedent is anchored in principles dating back to the nation's very founding. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824) (Justice John Marshall explaining that a naturalized citizen "is distinguishable in nothing from a native citizen, *except so far as the constitution makes the distinction.*") (emphasis added)).

Hassan can point to no specific language in the Fifth or Fourteenth Amendments, or to any case interpreting those amendments, suggesting that they have abrogated the express natural

born citizen requirement for serving as President. *See generally Hassan v. United States*, No. 08-938, slip op. at 3-7 (E.D.N.Y. June 15, 2010), *aff'd on other grounds*, 2011 WL 2490948 (2nd Cir. June 21, 2011); John Hart Ely, *Interclausal Immunity,* 87 Va. L. Rev. 1185, 1199 (2001) (explaining that "[t]he Constitution says in no uncertain terms that each state is to have two Senators and the President is to be a native-born citizen, and no provision remotely intended or fairly read to repeal either of these provisions has since been enacted").[5]

Nor can Hassan can point to authority for abrogating a constitutional provision by mere implication, and even implicit repeals of *statutes* are highly disfavored. *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("Where there are two acts upon the same subject, effect should be given to both if possible."). *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest.") (internal quotation marks and citations omitted; alteration in original).

Even if a constitutional provision could be repealed by mere implication, there is no basis for an implied repeal here. Contrary to Hassan's contention, the Equal Protection Clause did not

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[5] When confronted with potentially conflicting constitutional provisions, the courts' first task is to reconcile them. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (noting that "the duty of the Court" is "to construe the [C]onstitution as to give effect to both provisions"). On the one occasion in which the Supreme Court held that the Fourteenth Amendment had partially abrogated the Eleventh Amendment immunity of states, it relied on *explicit* language to that effect. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). As the Court explained, the Fourteenth Amendment includes sections that "*by their own terms* embody limitations on state authority." *Id.* at 456 (emphasis added). That is, Section 1 of the Fourteenth Amendment includes an *explicit* limit on states' power to deprive citizens of certain rights, and in Section 5 "Congress is *expressly* granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment." *Id*. (emphasis added). In contrast, although Section 3 of the Fourteenth Amendment addresses eligibility for federal office by restricting former members of the Confederacy from holding such office (absent a waiver by a two-thirds vote of Congress), the Amendment's absolute silence concerning the Natural Born Citizen Clause forecloses any possible inference that it was meant to abrogate the natural born eligibility requirement for the presidency.

remove by implication all distinctions between natural born and naturalized citizens.[6] As explained above, cases decided after the ratification of the Fourteenth Amendment have acknowledged this constitutional distinction among citizens. *See Schneider*, 377 U.S. at 165-66; *Knauer*, 328 U.S. at 658; *Baumgartner*, 322 U.S. at 673.

Finally, the congressional debates at the time of the Fourteenth Amendment and the Civil Rights Act of 1866, 14 Stat. 27, do not mention any repeal of the natural born citizen requirement. For example, during the debates on the Civil Rights Act, Representative Raymond stated:

> There are only two classes of citizens, so far as I can detect, provided for in the Constitution of the United States. In the second article, I think, it is declared that none but a "natural born citizen" shall be President of the United States. That clause, and the one relating to naturalization, implying that there may be naturalized citizens, are the only two clauses designating the classes of citizens within the contemplation of the Constitution of the United States.

Cong. Globe, 39th Cong., 1st Sess. 1266 (March 8, 1866). *See also* Remarks of Senator Johnson, Cong. Globe, 39th Cong., 1st Sess. 2893 (May 30, 1866) ("The Constitution . . . provides that no person shall be eligible to the Presidency of the United States except a natural-

[6] The logical implications of Hassan's claim further demonstrate its weakness, because his theory appears to have no limiting principle and would suggest that the Fifth and Fourteenth Amendments have also abrogated other constitutional requirements for office based on length of citizenship. In particular, Article I, § 2, clause 2, and Article I, § 3, clause 3, require that naturalized citizens cannot be members of the House of Representatives or Senate until they have been citizens for, respectively, seven or nine years. Hassan can point to no legal authority suggesting that the Fifth and Fourteenth Amendments were intended to abrogate those citizenship requirements.

born citizen of the United States . . .").[7] Thus, neither the language of the Fourteenth Amendment nor contemporaneous legislative history supports Hassan's argument that the Natural Born Citizen Clause has been repealed by implication.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiff's complaint for lack of subject matter jurisdiction or for failure to state a claim on which relief can be granted.

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[7] Proposals to repeal the natural born citizen requirement were made both before and after ratification of the Fourteenth Amendment. See Cong. Globe, 40th Cong., 2d Sess. 2526 (May 18, 1868) (proposing amendment to Article II, § 1, providing that "no person, except a citizen of the United states, shall be eligible to the office of President…."); Cong. Globe, 41st Cong., 3d Sess. 538 (Jan. 17, 1871) (proposing to amend Presidential eligibility requirements to read: "Every person whether a natural-born or foreign-born citizen of the United States . . . shall be eligible to the office of President. . ."). Each of these proposals was defeated.

CERTIFICATE OF SERVICE

I certify that on this 27th day of February 2012, I caused to be filed electronically using this Court's ECF system and sent via the ECF electronic notification system a true copy of the Federal Election Commission's Opposition to Plaintiff's Application for a Three-Judge Court on the following counsel:

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