No. 14-36

IN THE

Supreme Court of the United States

CHRISTOPHER JOHN RUDY, *Petitioner*,
v.
MICHELLE K. LEE, *et al., Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, U.S. Border Control, U.S. Border Control Foundation, Institute on the Constitution, Policy Analysis Center, and Conservative Legal Defense and Education Fund in Support of Petitioner

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae U.S. Justice Foundation

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*
Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

U.S. Justice Foundation, Lincoln Institute for Research and Education, U.S. Border Control Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund, are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Abraham Lincoln Foundation for Public Policy Research and U.S. Border Control are nonprofit social welfare organizations exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed numerous *amicus curiae* briefs in this Court and other federal courts.

STATEMENT

On January 25 and April 27, 2012, Christopher John Rudy, a registered patent attorney, paid to the

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Patent and Trademark Office ("PTO") fee increases totaling $90, as required by the America Invents Act ("AIA"), purportedly enacted into law in September 2011 by Congress and the President in accordance with Article I, Section 7, Clause 2 of the U.S. Constitution. *See* Petition for a Writ of Certiorari ("Pet.") at 4. Mr. Rudy then requested and petitioned the PTO for a refund of the fee increases on the ground that the AIA was invalid, having been signed into law by Barack Obama, a person who, Mr. Rudy claimed, was not a "natural born Citizen," and thus, was ineligible to hold the office of President of the United States. *Id.* PTO denied Mr. Rudy's request, advising Mr. Rudy that it "had no authority to look into Mr. Obama's citizenship status." *Id.* at 5.

Mr. Rudy filed suit in the U.S. District Court for the Eastern District of Virginia. In response to PTO's motion to dismiss on the ground that whether President Obama was a "natural born Citizen" was a "political question," the district court agreed, dismissing Mr. Rudy's complaint for lack of jurisdiction. *See* Pet. at App. 4 -11. The U.S. Court of Appeals for the Federal Circuit summarily affirmed. *Id.* at App. 1-2.

During the same time period that Mr. Rudy was being rebuffed by the courts, Noel Canning, a Pepsi Cola distributor,[2] found the courts open to address the merits of his claim against the National Labor Relations Board ("NLRB"). Like Mr. Rudy's complaint, Mr. Canning complained that the action taken against

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[2] NLRB v. Canning, 573 U.S. ___, 134 S.Ct. 2550, 2557 (2014).

him by the NLRB was invalid because a majority of the Board was ineligible to serve. Further, like Mr. Rudy's claim that President Obama did not meet the constitutionally required natural born citizenship under Article II, Section 1, Mr. Canning asserted that three members of the Board neither met the constitutionally required advice and consent of the Senate, nor were properly appointed under Article II, Section 2, Clause 3.

Unlike the courts below, which quickly dispatched Mr. Rudy's claim as nonjusticiable, the U.S. Court of Appeals for the District of Columbia and this Court unhesitatingly addressed the merits of Mr. Canning's claim, without even a tip of the hat to the political question doctrine.

Explaining this Court's readiness to reach the merits in Canning, Justice Breyer prefaced the majority's decision with a quotation from Alexander Hamilton's *Federalist Paper No. 76*:

> The Federalist Papers make clear that the Founders intended th[e] method of appointment, requiring Senate approval, to be the norm ... because ... the need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." [Canning, 134 S.Ct. at 2558-59.]

"[C]oncurring in the judgment," Justice Scalia observed that "when questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch 'to say what the law is.'" *Id.* at 2593 (Scalia, J., concurring) (citations omitted). Indeed, as Justice Scalia emphasized, "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Id.* (citations omitted).

Like the executive appointments clause of Article II, Section 2, the presidential eligibility provision of Article II, Section 1 — especially its "natural born Citizen" requirement — is part of the "enduring structure" of the federal government established by the U.S. Constitution. As Joseph Story observed in his acclaimed Commentaries on the Constitution:

> It is indispensable ... that the president should be a natural born citizen of the United States.... It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.... [J. Story, Commentaries on the Constitution, § 1473 (1833), reprinted in 3 The Founders' Constitution, Item 2, p. 564 (P.

Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987) (hereinafter "Founders").[3]]

More vociferously, St. George Tucker declared "[t]hat [the] provision in the constitution which requires that the president shall be a native-born citizen ... is a happy means of security against foreign influence, which ... is to be dreaded more than the plague." St. George Tucker, View of the Constitution of the United States at 260 (Liberty Fund: 1999).

Strikingly, the Article II limit on presidential eligibility parallels the Article II limit on the presidential appointment power. Both are designed as checks against corrupting influences in the executive branch: (i) the limit on the presidential appointment power guarding against such influences arising from within the country, and (ii) the limit on presidential eligibility guarding against improper influences arising from outside the country.

In Canning, this Court unanimously decided that there are judicially enforceable standards limiting the President's recess appointment power. In the instant case, the question before the Court is whether there are judicially enforceable limits governing the exercise of the powers of the presidency by a person who allegedly does not meet the eligibility requirement that he be a "natural born Citizen," or whether that

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[3] *See also* 1 James Kent, Commentaries on American Law at 255 (Lecture XIII) (Claytor's, Baton Rouge: 1826). *Accord* Deuteronomy 17:15.

question is nonjusticiable, enforceable only at the discretion of the Congress.

SUMMARY OF ARGUMENT

The question in this case is whether a complaint for money damages and a declaratory judgment is subject to a motion to dismiss because the claims are based upon a nonjusticiable political question — whether President Barack Obama is a natural born citizen and, thus, eligible to exercise the power vested in the President to sign a bill into law.

Purporting to apply this Court's political question criteria under Baker v. Carr, the courts below erroneously assumed that Article II, and the Twelfth, Twentieth, and Twenty-Fifth Amendments (i) committed the determination of presidential eligibility to Congress, (ii) that the citizenship particularly was not amenable to judicial resolution, and (iii) any order for the payment of damages or for declaratory relief would be tantamount to a removal of President Obama from office.

First, Article II, even as modified by the Twelfth, Twentieth and Twenty-Fifth Amendments, prescribes a narrow role for Congress in the selection of the President, vesting primary control of the presidential election process in the legislatures of the several state and in the Electoral College. None of these provisions commit the question of eligibility to the discretion of Congress.

Second, this Court's case precedents are replete with legal terminology and distinctions that confirm that the issue of a person's birth citizenship is quintessentially a legal question, governed by judicially discoverable and manageable standards.

Third, both the Government and the court below have vastly overstated the remedy actually being sought. Nothing in the complaint calls for the removal of the President. Rather, it is foremost a claim for money damages. While the complaint seeks a declaratory judgment, it does so without asking for any injunctive relief, all of which is subject to the discretion of the court.

Finally, this Court has never before refused to address on the merits claims of citizenship by birth. There is no justification to carve out an exception here just because the issue involves the President of the United States.

ARGUMENT

I. WHETHER RUDY'S CLAIM DEPENDS UPON A NONJUSTICIABLE POLITICAL QUESTION IS A VITALLY IMPORTANT ISSUE FOR THIS COURT TO SETTLE.

The district court below purported to apply the six political question guidelines set forth in Baker v. Carr, 369 U.S. 186, 217 (1962), and agreed with the Government's contention that "the issue of the President's qualifications and his removal from office are textually committed to the legislative branch and

not the judicial branch." *See* Pet. at App. 6-8. Thus, the court concluded that Mr. Rudy had "completely failed to establish that this Court has jurisdiction ...." *Id*. at App. 10. By its summary affirmance, the court of appeals below implicitly adopted the district court's analysis. These decisions are seriously flawed, conflicting with both the constitutional text and relevant history.

A. The Constitution Does Not Commit the Presidential Eligibility Requirement to Congress.

Foremost among the factors underlying the political question doctrine is whether the resolution of the question has been textually committed to one or the other political branches of the federal government. *See* Pet. Br. at App. 6. The question of presidential eligibility has not been so committed.

1. The Original Text

As originally adopted, Article II, Section 1, Clauses 2 and 3, prescribed the procedure by which a person was elected to the office of President of the United States. First, it vested in the legislatures of the several states, not Congress, the power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled." Second, the Constitution commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation's seat of government.

Third, the Constitution commanded, upon receipt, the President of the Senate to open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives. Fourth, only in the case of a tie, or the absence of a majority, did the Constitution allow Congress to choose the President and Vice President.

Significantly, the Constitution did not vest any power in Congress over the process by which the President and Vice President were normally to be chosen, other than the very limited one of determining the day on which the electors were to "give their votes." Even then the Constitution dictated that Congress choose the same day for all electors to cast their votes which, as Joseph Story observed, was "calculated to repress political intrigues...." Story's Commentaries reprinted in 3 Founders, Item # 2 at 562. Indeed, the Constitution decreed that no member of Congress may serve as presidential electors, an additional measure to minimize corruption of the process. *See The Federalist No. 68* at 352-53 (G. Carey & J. McClellan, eds., Liberty Fund: 2001). Thus, the Constitutional design was to insulate the presidential election process from — not to commit it to — Congress.

This constitutional scheme to protect the presidential selection process from Congressional interference was summarized in 1800 by Charles Pinckney, a delegate from South Carolina to the Constitutional Convention:

> great care was used to provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their hands. The votes are to be given by Electors appointed for that express purpose, the Electors are to be *appointed* by each State, and the whole direction as to the manner of their appointment is given to the State Legislatures. Nothing was more clear ... than that Congress had no right to meddle with it at all.... [10 Senate Annals, reprinted in 3 Founders, Item # 7 at 553.]

Thus, Congress was to have no authority to determine a person's presidential eligibility. Rather, its role would be ministerial, facilitating the votes of the presidential electors of the several states. As Justice Story observed:

> The immediate election [of the president] should be made by men, the most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to judicious combination of all the inducements, which ought to govern their choice. A small number of persons, selected by their fellow citizens from the general mass for this special object, would be most likely to possess the information, and discernment, and independence, essential for the proper discharge of the duty. [Story's Commentaries, § 1451, reprinted in Founders, Item # 11, at p. 558.]

Not only did the Founders envision an electoral college well-suited to make such decisions as those concerning eligibility, but also the college would serve to ensure that "[t]he president ... thus appointed, would be far more independent, than if chosen by a legislative body, to whom he might be expected to make correspondent sacrifices, to gratify their wishes, or reward their services." *Id.* at 558.

2. The Twelfth Amendment.

Lumping the Twelfth Amendment into its opinion without examining the actual text, the district court failed to note that the amendment changed only Clause 3, leaving untouched (i) the power over the "manner" of the election of the President in the state legislatures, and (ii) the narrow role of Congress setting the day on which the electoral vote was tallied. Further, by not examining the language of the Twelfth Amendment, the court below failed to parse the text to ascertain whether that Amendment vested any new powers in Congress.

First, the Twelfth Amendment changed the electoral college's voting procedure, requiring each elector to cast two ballots, one expressly for President and the other distinctly for Vice-President. Second, that Amendment reaffirmed Congress's role in counting the ballots, merely revising the procedure to be followed in case no one of the candidates obtained a majority of electoral votes. Third, and most importantly in this case, the Amendment added: "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of

the United States." None of these provisions evidences a "textually demonstrable constitutional commitment of the issue [of presidential eligibility] to a coordinate political department" — here the Congress — as argued by the government, and found by the district court below. *See* Pet. Br. at App. 6-7.

To the contrary, the first two provisions demonstrably impose (i) upon the electoral college the balloting procedure governing its casting and transmitting of votes and (ii) upon Congress the procedure by which it is to count the votes and to resolve any presidential contest in which no person has received a majority. The third provision — concerning presidential eligibility — reads not as a grant of power, but as a prohibition on the modified powers conferred on the electoral college and the Congress in the Twelfth Amendment's revised vote counting process. While the prohibition imposes the presidential eligibility requirements expressly on candidates for Vice President, it would be anomalous to contend that the prohibition would not extend to the President, himself. Rather, by expressly applying the prohibition to the office of the Vice President, the Twelfth Amendment imported the presidential eligibility requirements stated in Article II, Section 1, Clause 5, as a limit on both the power of the electoral college and, in the case of a tie or lack of a majority, on the power of Congress to elect the President. As such, Article II, Section 1, Clause 5 is judicially enforceable. *See* Powell v. McCormack, 395 U.S. 486, 518-22 (1969).

3. The Twentieth Amendment.

Like the Twelfth Amendment, the Twentieth Amendment was neither designed to change the eligibility requirements for election to the office of President, nor vest new powers in Congress. Rather, like the Twelfth, the Twentieth was primarily a remedial measure. Responding to changes in communication and transportation technology, Section 1 of the Twentieth Amendment shortened the length of time between the November election of the President and the beginning of his term of office, moving the date forward from March 4 to January 20. By that same section, the Amendment fixed the beginning of the terms of Senators and Representatives to January 5, ostensibly to prevent a "lame duck" Congress from electing the President and or Vice-President should no candidate for either or both offices have received a majority vote of the electoral college. *See* Thomas Neale, "Election of the President and Vice President by Congress: Contingent Election" at 5 (CRS Report: Aug. 16, 1999).

Section 3 of the Twentieth Amendment detailed a procedure to govern the transition of power from the President Elect to the Vice President Elect in the extraordinary event that the President Elect died or otherwise "failed to qualify." In the event that the Vice President Elect shall also have failed to "qualify," Congress was empowered by law to provide for an Acting President, but only until either the President or Vice President "shall have qualified." In the further event that neither the President or Vice President qualified, Congress was empowered to enact a

governing law of presidential succession, which it has done. *See* Annotated Constitution, Twentieth Amendment, p. 2.

The Twentieth Amendment left intact (i) the authority of the state legislatures to establish the manner by which the President and Vice President were to be elected, and (ii) the role of the electoral college in the process. Importantly, no new powers were assigned to Congress under the Twentieth Amendment to change the "qualifications" for election to either office, including the constitutional requirement that both the President and the Vice President be "natural born Citizens."

4. The Twenty-Fifth Amendment.

In the court below, the Government contended that "the Twenty-Fifth Amendment explicitly directs that disagreements regarding presidential succession shall be decided by Congress." *See* Pet. Br. at App. 8. On its face, that Amendment is limited to cases of "removal of the President from office or of his death or resignation," providing for Congressional action tightly tailored to replace him if he is "unable to discharge the powers and duties of his office." The Amendment has nothing to do with presidential **eligibility**, but only with presidential **ability**.

In sum, by failing to address the text and history of either Article II, the Twelfth Amendment, the Twentieth Amendment, or the Twenty-Fifth Amendment, the court below erred in concluding that the citizenship eligibility question was "committed" to

Congress. To the contrary, as the Twelfth Amendment expressly attests, Congress has strictly limited powers with respect to the selection of the President, and the exclusive vetting of whether a person meets the presidential eligibility requirements, including the nature of his citizenship, is not one of them.

B. There Is No Lack of Judicially Discoverable and Manageable Standards.

The issue of presidential eligibility is not beyond judicial competence due to a lack of standards to apply.

Unquestionably, there are two distinct classes of citizenship, "first, by birth, and second, by naturalization." Minor v. Happensett, 88 U.S. 162, 167 (1874). *See also* Miller v. Albright, 523 U.S. 420, 423 (1998) ("There are 'two sources of citizenship, and two only: birth and naturalization.' *United States v. Wong Kim Ark, 169 U.S. 649, 702 ... (1898)*"). These two classes are distinguished both politically and legally in (i) the "natural born Citizen" requirement of Article II, Section 1, Clause 5, and (ii) the grant of power to Congress "to establish a uniform rule of naturalization" in Article I, Section 8, Clause 4. *See* Minor at 167.

It is well-established that there are two kinds of birth citizenships, one acquired by parentage of birth and the other by place of birth. As for the first kind, this Court stated assuredly in the 1875 case of Minor v. Happersett that:

> At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was **never doubted** that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. [*Id.* (emphasis added).]

Less confidently, this Court opined in that same case that:

> **Some** authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. [*Id.* at 167-68 (emphasis added).]

However, 23 years later, this Court appeared to elevate this second view, asserting that citizenship acquired by birth was governed by the English common law rule that citizenship at birth was defined by place of birth, except in those cases where the parents owed an official allegiance to a foreign government. *See* Wong Kim Ark, 169 U.S. 649, at 655 (1898). In a cogent dissent, Chief Justice Fuller refuted the claim that the English common law of citizenry by place of birth applied in the United States, given its origin in "feudalism between the individual and the soil on which he lived, and the allegiance due was that of liegemen to their liege lord." *Id.* at 707 (Fuller, C.J., dissenting). In the English monarchical rule's stead, the Chief Justice drew on the international law of nations which held that "natives,

or natural-born citizens, are those born ... [of] parents who are citizens." *Id.* at 708.

Whatever the merits of the two views of citizenship by birth, Wong Kim Ark settles the question of its justiciability. Without hesitation, Justice Gray addressed the merits of the claim of a Chinese man — born in America to a father and mother, both of whom were Chinese citizens, although domiciled in the United States — that he was a citizen by birth, not subject to the Chinese exclusion laws. Beginning with an exposition of the English common law, Justice Gray surveyed the cases and legal treatises addressing the subject. *Id.* at 655-58. He then reviewed early American authorities which, he concluded, supported the view that America's judges, federal and state, had applied the English rule. *Id.* at 658-66. Thus, Justice Gray concluded:

> there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." [*Id.* at 694.]

Equally thorough, Chief Justice Fuller began his analysis citing the international legal authority, de Vattel, extensively surveying domestic legal authorities to support the view that a natural born citizen was defined by the parents to whom a person

was born, not by the place of birth. *See id.* at 708-29. Thus, the Chief Justice concluded:

> citizenship of the United States ... differed from the English common law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary, and birth during permanent, residence. [*Id.* at 729 (Fuller, C.J. dissenting).[4]]

C. It Is Imperative That This Court Recognize That the Question, Whether a President Is a Natural Born Citizen, Is Justiciable.

It is not necessary at this point to decide whether President Obama is a natural born citizen. Nor is it necessary now to endorse Justice Gray's views over those of dissenting Chief Justice Fuller, or vice versa. Indeed, Mr. Rudy's case against President Obama's citizenship is based upon both views — that he is not a natural born citizen based either on his place of birth, or on the citizenship of his parents.

Designed as a limit on power, as expressly stated in the Twelfth Amendment, it is the duty of this Court "to say what the law is,"[5] not to defer to the other two branches of the federal government.

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[4] The district court also discussed the third factor in Baker v. Carr, which was addressed by petitioner. *See* Pet. at 17, 25.

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

As previously demonstrated, once the electoral votes are counted and a candidate for President has won a majority of the electoral vote, the Constitution does not expressly vest any political organ of the federal government with the power to ensure that only persons who are constitutionally eligible will exercise the vital executive power vested in the President. Furthermore, unlike the legislative power, which is vested in two separate bodies, the Senate and the House, there is no internal check upon the President's exercise of the legislative veto power vested in him. Additionally, there is no internal check upon a person, once elected to the presidency, to assume the full powers of that office, such powers having been vested in the President, himself alone.

Finally, "[e]ach house [of Congress] shall be the Judge of the Elections, Returns, and Qualifications of its own Members,"[6] including whether they have the requisite U.S. citizenship required for service in the house to which the person has been elected. *See* Article I, Section 2, Clause 2; Article I, Section 3, Clause 3. No one, then, can serve in Congress without satisfying its internally enforced membership rules. However, any one may serve as President so long he has won a majority of the electoral vote, unless checked by the law of the Constitution as applied by the judicial branch.

Not only is the office and power of the executive branch vested in one person alone, that office is the only office vested by the Constitution with the sworn

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[6] Article I, Section 4, Clause1.

duty to "preserve, protect and defend the Constitution of the United States." Article II, Section 1, Clause 8. All other civil government officers — legislative, executive, and judicial, federal and state — are only "bound by Oath or Affirmation, to support this Constitution." *See* Article VI, Clause 3. As originally proposed, the presidential oath read only that one would "faithfully execute the Office of President of the United States." By seven votes in favor, one against, and two abstentions, the oath was extended to "preserve, protect and defend the Constitution of the United States." Records of the Convention reprinted in 3 Founders, Item # 1 at 574.

Had the presidential oath or affirmation been adopted without modification, then the President's fealty to the Constitution would have been no different from that of any other government official, federal or state, a "guaranty ... that he will be conscientious in the discharge of his duty." Story's Commentaries § 1838 reprinted in 4 Founders, Item # 17 at 645. But more was to be required of the President. By extending his oath or affirmation to include the duty to "preserve, protect and defend," the President not only is constrained to act in accord with his specific constitutional obligations, but also, as Joseph Story so eloquently wrote in his Commentaries:

> It is a suitable pledge of his fidelity and responsibility to his country; and creates upon his conscience a deep sense of duty, by an appeal, at once in the presence of God and man, to the most sacred and solemn sanctions which can operate upon the human mind. [2 J. Story

Commentaries at § 1488 at 325-26 (Little, Brown, 5th ed., 1891.)]

In order for the President to discharge his duty to "defend" the Constitution, he must be vigilant, for example, to "drive back," to "repel" and to "secure against" attacks on the liberties of American citizens. In order to discharge his duty to "preserve" the Constitution, the president must, for example, "keep or save from injury," "keep or defend from corruption," and "save from decay" the federal system of the rights of the States. Finally, to be true to his oath to "protect" the Constitution, the President must, for example, "cover or shield from danger," "preserve in safety" the separation of powers among the three branches of the federal government. In contrast, the Constitution requires all other officers of the judicial and legislative branches of the federal government, and the President's subordinates in the executive branch, simply to swear or affirm their "support" of the Constitution.

The vitality of the President's distinctive oath has not waned, for it is the President, and the President alone, who wields the power of the "sword." *See Federalist Paper No. 78* at 402. It is he who decides whether and how a law enacted by Congress is executed, or an order entered by this Court is enforced. Armed with all of the executive power vested in the office of the presidency, it is, as Justice Story stated in his Commentaries, "indispensable" that the person who is elected to that high office possess the singular national loyalty of a natural born citizen. *See* Statement, *supra* at 4-5.

II. MR. RUDY SEEKS A REMEDY WELL WITHIN THE JUDICIAL POWER VESTED IN THE COURTS.

A. The Court Below Based its Ruling on an Incomplete and Improper Characterization of the Judicial Relief Sought by Mr. Rudy.

Both the Government and the court below, have mistakenly characterized Mr. Rudy's case as one for the "removal" of the President in supporting their conclusion that this lawsuit presents a nonjusticiable political question. *See* Pet. Br. at App. 6-8, 10. But, as the district court below admitted, the "plaintiff does not literally seek removal of Mr. Obama from his office as President." *Id.* at App. 10. Nevertheless, the court asserted that, because Mr. Rudy seeks a "declaration ... that the President 'was and is' unqualified to hold his office," his complaint "is the equivalent of seeking the President's removal," in that it would "require this Court to examine the President's qualifications." *Id.* Any such examination would then, the court concluded, intrude upon the "authority" of the legislative department which alone has the power to "conduct ... a removal proceeding or a determination regarding presidential succession." *Id.* The court's decision is based upon an incomplete and improper characterization of Mr. Rudy's complaint and the relief that he is seeking in this case.

As the court below acknowledged, "[i]n his Amended Complaint, plaintiff alleges that he requested a refund of patent application fees from the USPTO ... seeking to recover the difference between

patent applications fees in effect before the September 2011 enactment of the [AIA] and those he paid on January 25, 2012" and that his request for refund was denied. *Id.* at App. 4. Further, the court stated that, by his amended complaint, Mr. Rudy seeks three things: (i) "a refund of $90.00 in patent application fees;" (ii) "a declaration that President Obama is not a natural born citizen of the United States and therefore is not eligible to be the President;" and (iii) "a declaration that the AIA is null and void because it was signed by a person not authorized to do so under the Constitution." *Id.* at App. 5. None of the relief sought in the amended complaint asks for a mandatory injunction or other order to remove President Obama from office.

As to the claim for a $90.00 refund, Mr. Rudy seeks what could best be characterized as money damages. An order awarding Mr. Rudy $90.00 in damages does not, itself, constitute an award of removal. True, to sustain Mr. Rudy's claim for damages would require this Court to examine the President's eligibility to hold the office of the presidency. That question standing alone, however, is not a political one, but rather is, as discussed above, a legal question for the court to decide on its merits. Furthermore, a court may decide Mr. Rudy's damage claim without having also to enter a declaratory judgment. As for the declaratory judgment claims themselves, a court is not obligated to address either one on the merits under the Declaratory Judgment Act, which confers upon the courts discretion not to issue such a judgment even where there is a case or controversy. *See* 28 U.S.C. § 2201. In short, under the Act, a court could address and

decide the question whether President Obama is a natural born citizen, and upon finding that he is not, award Mr. Rudy money damages, declining on "traditional equitable principles"[7] to render any declaratory judgment on the ground that the money award of $90.00 is adequate.

B. The Court Below Unnecessarily and Improperly Decided that the Question of Natural Born Citizenship is a Political Question in Conflict with This Court's Precedents.

In their treatise on Constitutional Law, Professors John Nowak, Ronald D. Rotunda, and J. Nelson Young observed:

> An important consequence of the political question doctrine is that a holding of its applicability to a theory of a cause of action renders the government conduct immune from judicial review. [J. Nowak, R. Rotunda & J. Young, Constitutional Law, § 2.15, p. 102 (West, 3d ed. 1986).]

More fundamentally, Professor Laurence Tribe has cautioned against the invocation of the political question doctrine because "one should not accept lightly the proposition that there are provisions of the Constitution which the courts may not independently interpret, since it is plainly inconsistent with *Marbury*

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[7] Samuels v. Mackell, 401 U.S. 66, 70 (1971). *See also* Green v. Mansour, 474 U.S. 64, 72-74 (1985).

v. Madison's basic assumption that the Constitution is judicially declarable law." L. Tribe, American Constitutional Law, § 3-13, p. 97 (2d ed., 1988).

The issue of American citizenship, including that of a natural born citizen, is not inextricably linked to the question of eligibility of the President, but has arisen, and will continue to rise, in cases involving ordinary persons unconnected to any office. *See, e.g.,* Wong Kim Ark, *supra;* Miller v. Albright, 523 U.S. 420, 423 (1998). To date, this Court has never retreated behind the political question doctrine to avoid resolving the question of citizenship before it, but has discharged its duty to address the merits of a claim of citizenship. *See, e.g.,* Rogers v. Bellei, 401 U.S. 815 (1971); Schneider v. Rusk, 377 U.S. 163 (1964). Most recently, this Court has acknowledged this fact, restating emphatically the rule that the "Eighth Amendment prohibits certain punishments as a categorical matter. No natural born citizen may be denaturalized." Hall v. Florida, ___ U.S. ___, 134 S.Ct. 1986, 1992 (2014). Plainly, this rule could never be applied if the question of natural born citizen were a nonjusticiable political question. *See* Trop v. Dulles, 356 U.S. 86 (1958).

By ruling that the question of natural born citizenship — as applied to the eligibility criterion for holding the office of the President — is a political question the court below disregarded these numerous precedents. A person who aspires to the presidency, like an ordinary person who aspires to American citizenship, must meet the legal requirements. A presidential aspirant must not be considered immune from judicial review if justice is to be administered in

the United States in accordance with the principle that the law is no respecter of persons.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D STREET, STE. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*
Attorneys for Amici Curiae
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