Case No. 522647

New York Supreme Court
Appellate Division – Third Department

BARRY KORMAN and WILLIAM GALLO,

Petitioners-Appellants,

-against-

NEW YORK STATE BOARD OF ELECTIONS
and RAFAEL EDWARD ("TED") CRUZ,

Respondents-Respondents.

BRIEF *AMICUS CURIAE* OF PROF. EINER ELHAUGE ON THE JUSTICIABILITY AND MEANING OF THE NATURAL BORN CITIZEN REQUIREMENT

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Statement of Interest of Amicus

The amicus is a Harvard Law Professor who has researched and written on the natural born citizen clause and other issues of constitutional and statutory interpretation. Because of his research and expertise, he can help identify law or arguments that might otherwise might escape the Court's consideration, and he can otherwise assist the Court with a neutral assessment of the legal issues. He is not involved in any political campaign, and his sole interest is in the sound development of constitutional law and legal interpretation. The amicus has no financial interest in the outcome of this matter. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief.

I. Whether Ted Cruz Is a Natural Born Citizen Is Not a Political Question

Ted Cruz argues that this court should not consider whether he is a natural born citizen eligible to appear on the Presidential ballot because the issue is a political question. The easy way to see that this cannot be true is to ask a simple question. Suppose that an election board instead ruled that Ted Cruz was not a natural born citizen and thus declined to allow him on the Presidential ballot: would any reasonable person deny that Ted Cruz could challenge such an adverse decision in the courts? Clearly not, which necessarily means that the issue cannot

be a political question exempt from judicial review. An issue cannot be a political question for one side but not the other.

As Ted Cruz acknowledges, the relevant standards for deciding what is a political question are provided in *Baker v. Carr*, 369 U.S. 186, 217 (1962). It holds that an issue is a political question when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.*

Even Ted Cruz does not claim that the latter element is met. As the discussion below shows, and Ted Cruz's own brief confirms, whether he is a natural born citizen does not turn on any open-ended political judgments. It turns instead on technical arguments about the legal text and history, which are well within the institutional competence of the courts. Indeed, the courts have a comparative advantage over the political process in deciding such technical legal issues.

Instead, Ted Cruz rests his entire political question argument on the claim that the issue of whether he is eligible to be on the Presidential ballot has been textually committed to a political department. His argument fails for two independent reasons.

First, the issue of whether a candidate is a natural born citizen eligible to be on a Presidential ballot has not been textually committed to ***any*** political

department. The U.S. Constitution says that state legislatures may determine the "Manner" of choosing Electors, and that Congress can count the votes and determine when Electors are chosen and vote, *see* U.S. Const. art. II, § 1, cl.2-4, but immediately following that specifically limits their power by declaring "No Person except a natural born Citizen … shall be eligible to the Office of President," *id.* cl. 5. This is not a commitment of the issue to political judgment; it is a ***limitation*** on political judgment. It means that even if Congress, state legislatures, and voters politically want to elect a President who is not a natural born citizen, the Constitution forbids them from doing so.

Indeed, all the constitutional qualifications requirements are necessarily ***constraints*** on the political process rather than a commitment of the issue to the political process. If any qualification were deemed a political question committed to the open-ended political judgment of the political branches, the result would be the same as reading the qualification out of the Constitution and would be directly contrary to the plain purpose of those qualifications clauses. For courts to defer to the political branches on the meaning of a limitation on the political branches would be to abdicate the courts' role in enforcing the Constitution.

Nor is the issue textually committed to Congress by the Twelfth or Twentieth Amendment. The Twelfth Amendment provides that, when no candidate has an Electoral College majority, the House of Representatives can

choose a President. *See id.* amend. XII. The Twentieth Amendment provides that when there is no qualified President Elect or Vice President Elect, then Congress can "by law" provide a method for choosing a President until a qualified President or Vice President has been elected. *See id.* amend. XX, § 3. Neither Amendment is relevant because neither situation has come to pass. Even if it did arise, Congress would, in order to act by law, have to comply with constitutional limits, and thus Congress could not choose a President who the Constitution says is not qualified to be President. Nothing in the Twelfth or Twentieth Amendment even hints at an intent to give Congress open-ended political discretion to declare who is a natural born citizen qualified to be President.

Second, all Ted Cruz's political question arguments are irrelevant because the issue before the court is ***not*** whether Congress should count elector votes for a particular candidate nor whether Congress should select a particular candidate if there is no qualified candidate with an Electoral College majority. The issue before the Court is instead whether Ted Cruz is eligible to be on the Presidential ballot. Congress makes no decisions about who is eligible to be on the Presidential ballot. Those decisions are instead made by state election officials, here the New York Board of Elections, and even Ted Cruz does not claim that whether he is eligible to run for President has been constitutionally committed to open-ended political judgment by the Board of Elections.

Nor could Ted Cruz make such a claim because that would lead to the ludicrous conclusion that the courts could not review a Board of Elections decision to exclude him from the ballot. That it is why it is so telling to ask the reverse hypothetical of how the issue would be handled if Ted Cruz were excluded from the ballot. The reverse hypothetical makes it plain that the relevant political department on ballot access is the Board of Elections, and not only does the U.S. Constitution clearly not commit the natural born citizen issue to the Board, but the Board affirmatively disavows any ability to consider it. R. 93, 94; Tr. at 27-28.

Nor do Congress' constitutional powers give it the ability to fix retroactively any errors that might be made by the New York Board of Elections. If the Board mistakenly excluded Ted Cruz from the ballot, another candidate would get the Electoral votes and the issue of Ted Cruz's qualifications would never reach Congress. If the Board mistakenly included Ted Cruz on the ballot and he won a majority of the Electoral votes, Congress could refuse to count his votes because he is not qualified, but then there would be no candidate with an electoral majority. In that situation, the House could pick a President, but the People would suffer the irreparable harm of being deprived of the right to themselves select among the qualified candidates.

In short, even if accepted, Ted Cruz's arguments about textual commitment would at most establish that the political question doctrine would prevent judicial

review of any Congressional determinations about how to count electoral votes or who to choose when no qualified candidate has an electoral majority. But that is not the issue before the court today. The issue before the court is ballot access, and Ted Cruz's arguments provide no grounds for treating ballot access decisions as a political question.

* * *

Ted Cruz's brief suggests two fundamental confusions. One is confusing the political importance of an issue with whether it is a political question. Whether Ted Cruz is eligible to be President is surely politically important. But many justiciable legal issues are politically important. Ted Cruz's eligibility is simply not a political question. It is an issue clearly amenable to resolution using standard legal methodologies. Moreover, not only has the issue never been committed to the political branches, but the issue is supposed to operate as a constraint on the political branches.

The other confusion is confusing a political question with an issue that requires uniform resolution. Much of the Cruz brief stresses that varying court decisions could lead to varying judgments that could produce political chaos. *See* Cruz Brief at 26-27. One problem with that argument is that declaring an issue a political question would keep the courts out of it, but would do nothing to avoid

varying judgments by election boards. The other problem is that to the extent courts do get involved, they have standard methods for avoiding any irreparable harm from varying judgments. The Court could, for example, rule that Cruz was ineligible but stay that judgment until the U.S. Supreme Court decided the issue in a way that assured uniformity. That way the Cruz votes could be counted if the Supreme Court decided he was eligible, but excluded if the Supreme Court decided he was ineligible.

II. Ted Cruz Is Not a Natural Born Citizen

Although Ted Cruz tries to discredit this case as a "birther" case, it has nothing to do with the birther challenges against President Obama. Those birther challenges rested on wild claims that some murky conspiracy fabricated the birth certificates and newspapers that showed President Obama was born in the United States. In contrast, the challenge here is purely legal: it accepts the facts, as stated by Ted Cruz, that he was born in Canada to a mother who was a private U.S. citizen. Those facts make Ted Cruz a citizen at birth. But the legal issue is whether they make him a *natural* born citizen eligible to be President under the Constitution.

The Constitutional Meaning of Natural Born Citizen. Constitutional interpretation must, of course, begin with the constitutional text. Leaving aside the now-moot issue of persons who were citizens when the Constitution was enacted,

the Constitution provides that to be eligible to be President, a candidate must be a "natural born Citizen." U.S. Const. art. II, § 1, cl.5. Ted Cruz's interpretation is that this phrase means anyone born a citizen. But his interpretation is erroneous for several reasons.

First, the language "natural born citizen" fairly clearly indicates it could not mean anyone born a citizen or else the text would have just simply stated "born citizen." The word "natural" is a limiting qualifier that indicates only some persons who are born citizens qualify. Ted Cruz's interpretation simply reads the word "natural" out of the constitutional text.

Second, the Constitutional Framers actually rejected a proposal to make any "born citizen" eligible to be President. Alexander Hamilton had proposed a presidential eligibility clause that omitted the word "natural", providing that: "No person shall be eligible to the office of President of the United States unless he be now a citizen of one of the States, or hereafter be born a citizen of the United States." Hamilton Plan, Art. IX, §1, 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 619, 629 (Max Farrand ed., rev. ed. 1938). The Framers did not adopt Hamilton's proposal, but instead adopted the text requiring that a President must be "natural born Citizen." This indicates that adding the word "natural" was a deliberate choice and that the Framers believed it was an important additional limitation.

Third, even if we did not have this direct evidence that the Framers thought the word "natural" had significance, a prominent canon of construction requires that texts should be interpreted to give all the words in the text meaning. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) (rejecting constitutional interpretation that would make some words of the constitution "mere surplusage"); ANTONIN SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174-75 (2012) (pointing out that the surplusage canon provides that texts should be interpreted to give all the words meaning). Ted Cruz's interpretation would violate this canon because it would render the word "natural" mere surplusage.

Fourth, Ted Cruz's interpretation of "natural born" rests on citations to dictionaries written more than a century after the adoption of the Constitution. *See* Cruz Brief at 28 n.6. In contrast, at the time the Constitution was enacted, the word "natural" meant arising from the nature of things.[1] Thus, "natural law" was distinguished from statutory law, and natural rights were distinguished from statutory rights. Thus, the ordinary meaning at the time was that "natural born" citizenship meant the citizenship that arose as a matter of the natural law that was

[1] See JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1721).

recognized at common law. In contrast, a "naturalized" citizen meant (and today continues to mean) someone whose citizenship was conferred by statute.

Fifth, at the time of the framing, Blackstone was regarded by the Framers as the authoritative source of the common law meaning of "natural born," and Blackstone makes clear that "natural born" meant (with one narrow exception) someone who was born within the sovereign territory. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354-55 (1765) ("Natural-born subjects are such as are born within the dominions of the crown of England, … and aliens, such as are born out of it.") The narrow common law exception was that a natural born subjected included a child born abroad whose parent was a public official who was serving his country, such as an ambassador or soldier. *Id.* at 361 ("the children of the king's embassadors born abroad were always held to be natural subjects").

Sixth, other evidence confirms that the Constitutional Framers meant to adopt the common law understanding of "natural born." On May 22, 1789, James Madison, the principal drafter of the Constitution, himself stated in Congress that the United States used the place of birth rather than parentage:

> It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, *place is the most certain criterion; it is what applies in the United States; it will therefore be unnecessary to investigate any other.*

1 ANNALS OF THE CONGRESS OF THE UNITED STATES 404 (Joseph Gales ed., 1834). Other sources likewise indicate that the constitutional language "natural born citizen" was understood to adopt its common law meaning. *See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. L. REV. 317, 331, 335 (2015) (collecting treatises by leading early commentators on the U.S. Constitution that understood natural born citizenship to mean the common law understanding of being born either in a United States territory or to a public minister abroad).

In short, the text, history, canons of interpretation, contemporaneous dictionaries, and other evidence strongly indicate that by "natural born citizen" the Constitution meant someone who was a natural born citizen at common law, meaning someone who was born either (a) in a United States territory or (b) to a U.S. official serving his country abroad. Contrary to the Cruz brief, *see* Cruz Brief at 33, this understanding is entirely consistent with the common understanding that John McCain was a natural born citizen because McCain actually met both of these grounds. John McCain was both (a) born in a U.S. territory (the Panama Canal Zone) and (b) born to parents who were both U.S. soldiers serving their nation abroad. However, the Constitutional meaning of "natural born citizen" excludes Ted Cruz because he was (a) born in Canada rather than a U.S. territory (b) to a

father who was not a U.S. citizen and to a mother who was a private U.S. citizen who was not serving for the U.S. in Canada.

The Constitutional Meaning of Natural Born Citizen Has Not Been Expanded by Decisions or Statutes. Contrary to the analysis above, the Cruz brief asserts that: "Every judicial decision and virtually every constitutional authority agrees that a 'natural born Citizen' is anyone who was a citizen at the moment he was born—as opposed to becoming a citizen through the naturalization process at some point after his birth." Cruz Brief at 29.

The Supreme Court's Understanding. The Cruz Brief's assertion that "every judicial decision" adopted this understanding of "natural born citizen" conflicts with the very first decision the brief cites in support of this claim, *United States v. Wong Kim Ark*, 169 U.S. 649 (1897). That Supreme Court decision expressly stated:

> Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. **A person born out of the jurisdiction of the United States can only become a citizen by being naturalized**, either by treaty, as in the case of the annexation of foreign territory, or by authority of congress, exercised either by declaring certain classes of persons to be citizens, **as in the enactments conferring citizenship upon foreign-born children of citizens**, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

Id. at 702-03. The highlighted portion of *Wong Kim Ark* thus explicitly stated that persons who are born abroad and become citizens at birth only because a Congressional statute makes them so are "naturalized", not natural born citizens.

In other words, *Wong Kim Ark* confirms the analysis above that the true distinction is that ***natural born*** citizens become citizens at birth under common law, whereas ***naturalized*** citizens become citizens (whether at birth or latter) because of Congressional statute. Accordingly, those persons who become citizens at birth only because of a Congressional statute are "naturalized" even though they are naturalized automatically rather than requiring completion of the post-birth naturalization process that Congress requires for other persons.

The Supreme Court's understanding in *Wong Kim Ark* also fits a basic fact about the Constitution. The Constitution only gives Congress certain enumerated powers. Those enumerated powers give Congress the power of "Naturalization." U.S. Const. art. I, §8, cl.4. But nothing in the Constitution gives Congress any power to create natural born citizens or modify the meaning of natural born citizens. Thus, to the extent Cruz was born a citizen only because of a Congressional statute, he is necessarily a naturalized citizen rather than a natural born citizen.

The Supposed Scholarly Consensus. On the claim that "virtually every constitutional authority" agrees with Cruz's contrary understanding, the Cruz Brief cites two articles: (a) a brief article by Paul Clement and Neal Katyal in the online Harvard Law Review Forum; and (b) a brief memo by Laurence Tribe and Theodore Olson on why John McCain was eligible. *See* Cruz Brief at 29. Cruz's claim omits many scholars who have concluded that precisely the opposite is true. *See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. L. REV. 317, 331 (2015); Einer Elhauge, *Ted Cruz is not eligible to run for president: A Harvard Law professor close-reads the Constitution*, SALON (Jan. 20, 2016); Eric Posner, *Ted Cruz Is Not Eligible to Be President*, SLATE (Feb. 8, 2016); Mary Brigid McManamon, *Ted Cruz Is Not Eligible to be President*, WASH. POST (Jan. 12, 2016). His claim also ignores many scholars, including Laurence Tribe himself, who have expressly concluded that Ted Cruz is not eligible under the original meaning of the Constitution and that it is unsettled whether he would be eligible under a living constitution view. *See* Laurence H. Tribe, *Under Ted Cruz's Own Logic, He's Ineligible for the White House*, BOSTON GLOBE (Jan. 11, 2016); Thomas Lee, *Is Ted Cruz a 'natural born Citizen'? Not if you're a constitutional originalist*, L.A. TIMES (Jan. 10, 2016). His claim further ignores many other scholars who have concluded that the question of who is a natural born citizen is ambiguous and unsettled. *See* 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 (2005); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause,* 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty,* 97 YALE L.J. 881 (1988).

The Cruz Brief argument thus rests heavily on the analysis by Paul Clement and Neal Katyal. While they are illustrious legal commentators, many obviously disagree with their conclusions and one must examine their actual analysis to determine whether or not it is persuasive. The Clement-Katyal article starts with the proposition that: "The Supreme Court has long recognized that two particularly useful sources in understanding constitutional terms are British common law and enactments of the First Congress." Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen,"* 128 Harv. L. Rev. F. 161, 161 (Mar. 11, 2015). Let's address each point in turn.

British Common Law v. British Naturalization Statutes. Although Clement and Katyal are correct that the U.S. Constitution incorporated British common law understanding, what the article cites on British common law is actually not common law at all, but rather British naturalization ***statutes***. *See id.* at

n.6. The article thus conflates the crucial distinction between British common law, which determines who is a natural born citizen, and British statutes, which determine who is a naturalized citizen. So does the Cruz Brief at 30-31.

Although the article and Cruz Brief cite to Blackstone's discussion of these statutes, they omit the crucial point that Blackstone described them as "naturalization" statutes that went beyond the common law. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1765). They also omit the fact that these English statutes all described themselves as "naturalization" statutes and did not say that the persons covered by them "were" natural born subjects by virtue of their birth, but rather that they were being treated as natural born by virtue of statute. The Clement-Katyal article cites a 1708 and 1730 statute. The 1708 statute was titled "An Act for ***naturalizing*** foreign Protestants," and it provided that "[T]he Children of all natural born Subjects born out of the Ligeance [i.e., dominions] of her Majesty Her Heires and Successors shall be ***deemed adjudged and taken to be natural born Subjects*** of this Kingdom to all Intents Constructions and Purposes whatsoever." 7 Anne, ch. 5 (1708), 9 STATUTES OF THE REALM 63 (1822) (1963 reprint).[2] The statute seemed to require both

[2] "Ligence" meant "within the dominions of the crown of England." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354-55 (1765). As the Act's title suggests, it went even further to naturalize foreign born protestants who pledged loyalty to the English crown, but that aspect of the statute was repealed three years later. 10 Anne ch. 9 (1711), 9 STATUTES OF THE REALM 557 (1822) (1963 reprint).

parents to be natural born subjects for a foreign born child to be treated like one. The 1730 statute was called "An act to explain a clause in an act made in the seventh year of the reign of her late majesty Queen Anne, for ***naturalizing*** foreign Protestants", and it clarified that children born outside of Great Britain "whose ***fathers*** were or shall be natural-born subjects of the crown of England or of Great Britain, at the time of the birth of such children respectively, shall … ***be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects*** of the crown of Great Britain to all intents, constructions and purposes whatsoever." 4 Geo. II, ch. 21 (1730), 16 STATUTES AT LARGE 243-244 (Danby Pickering, ed., 1765).

The Cruz Brief and Clement-Katyal article also omit other statutes that confirm that Parliament meant to treat these naturalized citizens as natural born subjects, rather than really indicate they "were" natural born subjects by virtue of their birth. One 1740 statute provided that persons with two years of wartime service on English ships "shall to all intents and purposes be deemed and taken to be a natural born subject."[3] Another 1740 statute provided that persons who resided in the American colonies for seven years "shall be deemed, adjudged, and taken to be his Majesty's natural born Subjects of this kingdom, to all Intents,

[3] 13 Geo. II ch. 3 (1740), 17 STATUTES AT LARGE 358, 359.

Constructions and Purposes."[4] A 1749 statute had similar language deeming persons natural born subjects if they served on British whale boats,[5] as did a 1761 statute if they served as soldiers for the American regiment.[6] In all these statutes, the relevant persons acquired citizenship by post-birth activities, and thus Parliament could not possibly have thought they were really natural born subjects at birth. Yet Parliaments used the same sort of "deemed," "taken to be", or "adjudged" a "natural born subject" language that it used in the naturalization statutes for children born abroad to fathers who were British subjects. This shows Parliament meant such language to give these persons the rights of natural born subjects rather than to really declare they were natural born subjects at birth.

Accordingly, although Clement and Katyal are correct that the Constitutional meaning of "natural born citizen" incorporated British common law, they are incorrect that the content of British common law was provided by British naturalization statutes. Those British statutes merely exercised Parliament's naturalization power to give others the same rights as natural born subjects.

Further, even if one thought the U.S. Constitution's meaning of natural born citizen ***did*** incorporate British statutes, those British statutes gave foreign born children the rights of natural born subjects only if their ***father*** was a natural born

[4] 13 Geo. II ch. 7 (1740), 17 STATUTES AT LARGE 370, 371.
[5] 22 Geo. II ch. 45 (1749), 19 STATUTES AT LARGE 365, 369.
[6] 2 Geo. III ch. 25 (1761), 25 STATUTES AT LARGE 162.

subject. Incorporating these British statutes thus would not help Ted Cruz's eligibility because his father was not a US citizen when he was born, only his mother. This again distinguishes the case of John McCain because both his parents were U.S. citizens when he was born.

Early Congressional Statutes. Because the English statutes are of little help, the Clement-Katyal article and the Cruz Brief really rests strongly on the fact that in 1790 Congress passed, "An act to establish a uniform rule of naturalization," which provided that "children of citizens of the United States" that are born abroad "shall be considered as natural born Citizens." 1 Stat. 103 (repealed 1795). However, this Act is far less telling than they seem to think.

First, nothing in the 1790 statute indicates that it meant Congress thought that in 1787, when the Constitution was ratified, a "natural born citizen" was understood to include someone born abroad to a U.S. citizen. To the contrary, there would have been no need to pass the statute if such persons were already understood to be natural born citizens. Indeed, the legislative history affirmatively indicates that Congress was trying to ***change*** who became a citizen at birth. *See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. L. REV. 317, 331, 332-333 (2015). Thus, the statute affirmatively indicates that the 1790 Congress did ***not*** believe that the 1787

Constitutional meaning of "natural born citizens" included children born abroad to U.S. citizens.

Second, even on its face, this statute did not say children born abroad to U.S. citizens *were* natural born citizens. The statute instead carefully said they "shall be considered as" natural born citizens, suggesting that Congress thought they were not natural born citizens but should be treated as such. Further, the Act's title indicates it is a "naturalization" Act, and by definition Congress can only "naturalize" someone who is ***not*** already a natural born citizen.

Third, there is not a whiff in the statute or legislative history to suggest that Congress thought it was changing who was constitutionally eligible to be President. Nor is there a scintilla of evidence that Congress thought it had any authority to change the constitutional meaning of "natural born citizen." The legislative history indicates that Congress was instead focused on changing naturalization law because (under the then-prevailing principle that aliens could not hold U.S. land) the change would alter the extent to which foreign-born persons could hold lands in the United States. *See id.* at 332-333.

Fourth, when the 1790 Naturalization Act was reconsidered in a few years, James Madison himself pointed out that Congress only had constitutional authority to naturalize "aliens." 4 Annals of Cong. 1027 (Dec. 29, 1794). Madison's observation again confirms the point noted above that Congress can only naturalize

persons who are not already natural born citizens. The bill was then committed on January 2, 1795 to a three-person committee that included Madison. *Id.* at 1058. On January 5, 1795, Madison reported a new Naturalization bill. *Id.* at 1060. The bill reported by Madison was adopted by Congress, and it amended the statute to eliminate the words "natural born" and simply state that "the children of citizens of the United States" born abroad "shall be considered as citizens." *See* An Act To Establish an Uniform Rule of Naturalization; and To Repeal the Act Heretofore Passed on That Subject, ch. 20, § 3, 1 Stat. 414, 415 (1795). This amendment clearly indicates that the view of Madison, and the Congressmen who adopted the amendment, was that children born abroad of US citizens were natural aliens, rather than natural born citizens, and thus could be natural*ized* by Congressional statute but should not be considered "natural born".

Fifth, the view that the 1790 and 1795 statutes did ***not*** alter the constitutional meaning of the "natural born citizen" eligibility requirement was confirmed by the most contemporaneous scholars. In 1803, St. George Tucker published an edition of Blackstone's Commentaries that added his own notes on American law. After citing to the 1790 and 1795 U.S. naturalization statutes, he stated that that "[p]ersons [] naturalized according to these acts, are entitled to all the rights of natural-born citizens, except . . . they are forever incapable of being chosen to the office of president of the United States." ST. GEORGE TUCKER,

BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 374 n.12 (Philadelphia, William Young Birch & Abraham Small 1803). *See also See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. L. REV. 317, 331 (2015) (collecting other scholars in the early 1800s expressing similar views).

Sixth, the interpretation that anyone who Congress deems a citizen at birth is a natural born citizen would run counter to the plain purpose of the clause, which was to impose constitutional limits on who is eligible to be President. If Congress can by statute expand the meaning of a constitutional limit on who is eligible to be President, then the Constitution would impose no effective limit on Congress.

The Purpose of the Natural Born Citizen Requirement. Although the above analysis indicates that the meaning of the natural born citizen clause was quite clear, suppose one instead thought the clause was ambiguous? Then one must interpret any ambiguity to best further the purpose of the clause.

Some have suggested that any ambiguity should be interpreted to maximize the ability of voters to vote for whomever they want. But that is the one purpose we know the clause could ***not*** have had because the whole point of any eligibility clause is to ***limit*** whom the voters can choose. To interpret any ambiguity to

further voter discretion would thus be antithetical to the clause. It would make no more sense than to say that any law restraining pollution must be interpreted to maximize the discretion to pollute.

The natural born citizen clause imposes an eligibility requirement that is not imposed on any member of Congress or other government official. It does so because the Presidency creates unique risks because the President is the commander in chief. The purpose was plainly to minimize the risk that voters might be bamboozled into voting for someone who might be more loyal to foreign interests than to U.S. interests. *See* 3 FARRAND, RECORDS, *supra*, at 387 (speech to U.S. Senate, Mar. 28, 1800) (the natural born citizen clause's purpose was to "insure … attachment to the country"); Tucker, *supra*, at App. 316-29 (the natural born citizen clause's purpose was to prevent "foreign influence"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 332-33 (1833) ("It is indispensable, too, 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").

Interpreting the natural born citizen clause to conform to its common law meaning fits cleanly within this purpose. Although most persons born abroad to private U.S. citizens are likely loyal to U.S. interests, there is at least some risk that

persons born in a foreign country might be more loyal to foreign interests, especially when their parents voluntarily left the country in a private capacity. On the other hand, that risk seems far lower for children born abroad to parents who are abroad only because they are serving the U.S. government. Any line is surely imperfect, but the issue is how to minimize risk for the one government job where the risk of foreign influence would be most disastrous. The risk cutoff drawn at common law seems no less rational than Ted Cruz's proposed line between anyone born abroad to a U.S. citizen (who he would say are automatically eligible to be President) and those who were foreign born to foreign parents but spent most of their lives in the U.S, who he would say are not eligible to be President even though they went through a naturalization process that tested their knowledge about the U.S. system and required them to swear loyalty to the U.S.

The Clement-Katyal article points to evidence that the idea for the natural born citizen clause came from John Jay, and argues that because "John Jay's own children were born abroad while he served on diplomatic assignments, … it would be absurd to conclude that Jay proposed to exclude his own children, as foreigners of dubious loyalty, from presidential eligibility." *See* Clement & Katyal, *supra*, at n.12, 14. The Cruz Brief repeats the same argument. *See* Cruz Brief at 31-32. Their argument suggests they did not realize that (as noted above) the common law meaning of natural born citizen made the foreign-born children of U.S.

ambassadors natural born citizens who were eligible to be President. Once one realizes that, there is no tension at all because John Jay was proposing a constitutional test that ***would*** make his children eligible to be President.

Conclusion

For the reasons set forth herein, the issue of whether Ted Cruz is a natural born citizen is justiciable and should be resolved in the negative.

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