**IN THE SUPREME COURT OF PENNSYLVANIA**

**No. 29 MAP 2016**

CARMON ELLIOTT,

Appellant,

v.

TED CRUZ,

Appellee.

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

Appeal from the March 10, 2016 Order of the Commonwealth Court of Pennsylvania at Docket No. 77 MD 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution:



Legislative Materials:



Other Authorities:

## 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.[1] Because of his research and expertise, he can help identify law or arguments that may not be presented by the parties or that might otherwise escape the Court's consideration, and he can otherwise assist the Court with an objective 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

In the court below, Judge Pellegrini correctly rejected Ted Cruz's argument that no court can consider whether Cruz 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 the issue cannot be a political question is to ask a simple question. Suppose that a Secretary of State or an election board were to rule that Cruz was not a natural

[1] Professor Elhauge submits this brief purely in his individual capacity. Nothing in this brief represents the views or positions of Harvard University.

born citizen and thus declined to allow him on the Presidential ballot: would any reasonable person deny that 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 the court held below—and as Cruz acknowledged below—an issue is a political question only 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." Op. at 5; Cruz Brief in Opposition to Objection to Nomination Petition (in Commonwealth Court, March 7, 2016) [hereinafter "Cruz Brief"] at 3-4.

Cruz does not claim that there are no judicially manageable standards for deciding whether he is a natural born citizen. *Id.* at 3-14. Indeed, on the merits, he offers his own legal standards to resolve the natural born citizen issue his way. *Id.* at 14-26. Also demonstrating the clear existence of manageable legal standards is the fact that courts already decide the natural born citizen issue in other contexts. Op. 9-10. As Part II of this brief details, whether Cruz 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, 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 by the U.S. Constitution. Cruz Brief at 3-14. His argument fails for multiple 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: (1) state legislatures may determine the "Manner" of choosing Electors; (2) the Electors shall vote by ballot for President; and (3) Congress can determine when the Electors are chosen and when the Electors vote and can count the resulting votes of the Electors. *See* U.S. Const. art. II, § 1, cl.2-4. Immediately following those clauses, the Constitution specifically limits the power of these political departments 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 state legislatures, Electors, Congress, and voters politically want to elect a President who is not a natural born citizen, the Constitution forbids them from doing so.

***Second,*** all of Cruz's political question arguments are irrelevant because the issue before the Court is ***not*** whether Electors should vote for Cruz or whether Congress should count Elector votes for him. The issue before the Court is instead whether Cruz is eligible to be on a Presidential ballot voted on by the general electorate. Neither the Electoral College nor Congress has any authority to decide who is eligible to be on a Presidential primary ballot, nor have they ever purported to have such an authority. To the extent the Constitution commits that issue to any political department, it commits it to each state's "Legislature", which has the authority to determine the "Manner" of choosing Presidential Electors. As Cruz's own brief acknowledges, the Pennsylvania Legislature has chosen to exercise its authority by adopting a state statute that leaves the resolution of objections to a candidate's qualifications up to the Pennsylvania court system. Cruz Brief at 1-2; 25 P.S. § 2937. In short, to the extent the Constitution textually commits the issue to anyone, it has committed the issue to the Pennsylvania Legislature, which in turn has committed it to the Pennsylvania courts. That can hardly disable the Pennsylvania courts from deciding the issue.

***Third,*** Cruz is wrong that anything in the Constitution textually commits the natural born citizen issue to the Electoral College. All the Constitution says is that the Electors shall "vote by ballot" for President. U.S. Const. art. II, § 1, cl.3 & amend. XII. The Office of the Federal Register "administers the Electoral College"

and has specifically addressed the issue of "Who verifies if a candidate is qualified to run for President?" *See* http://www.archives.gov/federal-register/electoral-college/faq.html#no270. The Office of the Federal Register does not say that it or the Electors decide this issue. Instead, it says:

> The Office of the Federal Register **does not have the authority to handle** issues related to the general election, such as **candidate qualifications**…. **Because the process of qualifying for the election and having a candidate's name put on the ballot varies from state to state, you should contact your state's top election officer** for more information. In most states, the Secretary of State is the official responsible for oversight of state elections, including the presidential election.

*Id.* (emphasis added). Thus, the federal agency that administers the Electoral College itself concludes that the process for challenging candidate qualifications is a state law process. As noted above, this conclusion makes sense because the Constitution gives state legislatures the power to choose the "Manner" of choosing Electors, *see* U.S. Const. art. II, § 1, cl.2, and the manner of choosing Presidential Electors is precisely the issue at hand in this case.

Moreover, the Office of the Federal Register stresses that Electors in most states "are bound by State Law or by pledges to cast their vote for a specific candidate." *See* http://www.archives.gov/federal-register/electoral-college/electors.html. While Pennsylvania is not one of those states, if a candidate wins any state, his or her slate of Electors is chosen. *Id.* Not surprisingly, a candidate's own slate of Electors has voted for that candidate "more than 99 percent"

of the time, *id.*, and it is implausible to think that a candidate's own Electors could neutrally assess that candidate's qualifications. In any event, even if Pennsylvania Electors might consider the qualifications issue, nothing in the Constitution textually commits the issue exclusively to them rather than to state law. Further, the fact that Electors from most states cannot consider the qualifications issue at all means that surely the issue cannot be deemed committed to the Electoral College as a whole, contrary to Cruz's argument. *See* Cruz Brief at 5-6.

***Fourth,*** Cruz is wrong that the Twelfth and Twentieth Amendments textually commit the natural born citizen issue to Congress. The Twelfth Amendment provides that Congress must count the Electoral votes and declare the winner of a majority of Electoral votes the President and that, if no candidate has an Electoral College majority, the House of Representatives can choose the President. *See* U.S. Const. amend. XII. The Twentieth Amendment provides that, in elections for which neither a President Elect nor a Vice President Elect has qualified by the beginning of a Presidential term, Congress can "by law" provide a method for choosing a temporary President until a President or Vice President has qualified. *See id.* amend. XX, § 3.[2] Neither Amendment is relevant to this case because neither situation has come to pass. Nor does anything in the Twelfth or Twentieth Amendment even hint

[2] The Twentieth Amendment specifies that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President" and thus only a natural born citizen is eligible to be Vice-President as well.

at an intent to give Congress open-ended political discretion to declare who is a natural born citizen eligible to be President.

Further, to the extent the Constitution does authorize Congress to consider a challenge to Presidential qualifications, Congress itself has committed the issue to state legal processes. In the Electoral Count Act, Congress provides that:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, … such determination made pursuant to such law . . .shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution…

3 U.S.C. §5. Thus, Congress has affirmatively indicated a preference to have state legal processes resolve controversies about the eligibility of a candidate to receive Presidential electors. Further, given that Pennsylvania law provides for a judicial process for challenging the eligibility of a candidate to receive Presidential electors, Congress would treat such judicial determinations as binding.

The Electoral Count Act also provides that each State certifies the appointment of its Electors, 3 U.S.C. §6, and that when counting the Electoral votes in Congress, "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected." 3 U.S.C. §15. If Congress receives two conflicting state certificates, then "those votes, and those only, shall be counted which shall have been regularly

given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed." *Id.* It is only when there is a question about "which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State," that Congress decides the controversy itself. Again, this Act indicates a strong Congressional preference to have controversies, such as challenges to a candidate's eligibility, resolved at the state level through a state legal process, and effectively disables Congress from considering the issue when such a state legal process produces an authoritative result.

***Fifth,*** as Judge Pellegrini correctly noted, the Constitutional text affirmatively cuts against any claim that the Constitution textually commits judgments about qualifications to either Congress or the Electoral College. The Constitution explicitly makes each House of Congress "the Judge" of the qualifications of its members, but does ***not*** have any similar clause making Congress the judge of the qualifications of Presidential candidates. Op. 7-8. This shows that the Constitutional Framers knew how to textually commit qualifications judgments to a political branch, and they chose to do so only for Congressional qualifications, not Presidential qualifications.

***Sixth,*** nothing in the constitutional powers or the Electoral College or Congress gives them any ability to fix retroactively an erroneous inclusion of

exclusion of Cruz from the Presidential ballot. If Cruz were erroneously excluded from the ballot, another candidate would get the Electoral votes, and the issue of Cruz's qualifications would never reach Congress. If Cruz were erroneously included on the ballot and won a majority of the Electoral votes, the Electoral Count Act would likely preclude any Congressional review of the issue. If despite the Electoral Count Act, Congress refused to count Cruz's Electors, then there would be no candidate with an electoral majority, and the House would have to pick a President under the Twelfth Amendment, which would cause the People to suffer the irreparable harm of being deprived of the right to themselves select among the qualified candidates. And that would produce precisely the political "turmoil" and "chaos" that Cruz stresses the courts should avoid. Cruz Brief at 7, 11, 14.

Further, because any resolution by Electors or Congress in one election would be political, it would not create any binding precedent that could prevent similar turmoil from recurring in future elections. In contrast, the judicial process can provide a timely and orderly answer on the issue that would not only resolve the issue in this election, but also produce binding precedent for future elections.

***Seventh,*** Cruz is wrong that barring judicial review helps assure uniform resolution of the issue. He argues that judicial review could result in varying court decisions that would produce political chaos. *See* Cruz Brief at 7, 11-14. But courts have standard methods for avoiding any irreparable harm from varying judgments.

This 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. With such a stay in place, the Cruz votes could be counted if the U.S. Supreme Court ultimately decided he was eligible, but excluded if the U.S. Supreme Court decided he was ineligible. Further, such court precedent would provide a uniform resolution for future elections, which is important because this issue is likely to recur.

In contrast, ***declaring*** the issue a political question could preclude uniform resolution in this and future elections. The reason is that declaring the issue a political question would leave it in the unreviewable hands of state election officials in 50 different states, who might reach varying judgments about the eligibility of Cruz or of any future Presidential candidate. This seems especially likely because candidates are likely to be more politically popular in some states than others. Because the issue would have been deemed political, such varying decisions by state election officials would create no precedent that could provide uniformity or even bind that state in future years. Having held the issue a political question, the courts would be unable to use judicial review and precedent to impose a uniform resolution before the Presidential election. Holding the issue a political question would thus be far more likely to cause turmoil and chaos in this or future elections than would correctly holding that the issue is subject to judicial review, which can provide timely uniform resolutions and precedent to guide future elections.

* * *

One should not confuse the political importance of an issue with whether it is a political question. Whether Cruz is eligible to be President is surely politically important. But many justiciable legal issues are politically important. 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 involves a provision that is supposed to operate as a constraint on the political branches.

Even if accepted, 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 whether Cruz should be on a Presidential ballot. The Constitution has given state legislatures authority over that issue, and the Pennsylvania legislature has chosen to give the Pennsylvania courts the authority to judge disputes about candidate eligibility. Having the courts decide the issue can also provide a timely uniform resolution for this and future elections. In contrast, leaving the issue to unreviewable political judgments by state election officials, Presidential Electors, or Congress is a recipe for turmoil and conflict in this or future elections.

## II. Ted Cruz Is Not a Natural Born Citizen

This case has nothing to do with "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.

Nor does this case have anything to do with far-fetched legal claims that even Presidents or Presidential candidates who were born in the United States, such as President Obama, Charles Evan Hughes, and Marco Rubio, are not natural born citizens because their father was not a U.S. citizen when they were born. The argument here is instead that the U.S. Constitution's reference to "natural born" incorporates the common law meaning of that term, which (as detailed below) makes persons "natural born" only if they were either (1) born in a U.S. territory to a parent who was not serving a foreign nation as ambassador or soldier *or* (2) born abroad to parent who was serving the U.S. abroad as an ambassador or soldier. This common law meaning clearly makes Obama, Hughes and Rubio natural born citizens because they were all born in the United States to parents who were not serving a foreign nation. This common law meaning even more clearly makes John McCain a natural born citizen because he 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. This case thus has nothing to do with prior challenges to the eligibility of Obama, Hughes, Rubio, or McCain, contrary to the suggestions of the opinion below. Op. 11-12.

The point, instead, is that unlike with these past Presidential candidates, the common law meaning of "natural born citizen" clearly excludes Cruz because he was (a) born in Canada, rather than a U.S. territory, and (b) his mother was a private U.S. citizen who was not serving the U.S. in Canada. Although those facts made Cruz a citizen at birth, they did so only because a "naturalization" statute so provides, rather than because he was otherwise "natural" born. Accordingly, the issue before the Court is whether the Constitution adopts the common law meaning of "natural born citizen" (which would exclude Cruz), or instead adopts Cruz's interpretation that anyone who is a born a citizen is a "natural" born citizen even though they are only born a citizen because of a "naturalization" statute.

***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. 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. Cruz's interpretation simply reads the word "natural" out of the constitutional text.

***Second,*** 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). Cruz's interpretation would violate this canon because it would render the word "natural" mere surplusage. Even a source that Cruz cites in favor of his position agrees with this point. *See* Michael D. Ramsey, *The Original Meaning of 'Natural Born'* at 5 (Feb 12, 2016), http://ssrn.com/abstract=2712485 ("reading the clause in this way violates the surplusage canon… If all persons who are born citizens are eligible, the word 'natural' has no effect. The framers could as well have written 'No person except a born Citizen' (or perhaps 'No person except one born a Citizen') shall be eligible. An interpretation of the clause should therefore strive to find some meaning of the word natural."), cited in Cruz Brief at 15-16.

***Third,*** the point that the Framers knew to say "born citizen" if that is what they meant has particular force here because Alexander Hamilton had proposed a presidential eligibility clause that omitted the word "natural", instead 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). Although Hamilton wrote up his draft constitution during the convention, he apparently did not communicate it to James Madison until near the close of the Convention. *See* Hamilton letter to Timothy Pickering (Sept. 16, 1803). However, it seems likely that Hamilton shared his draft or views with others during the Convention, and Hamilton was himself on the Committee of Style that finalized the Constitutional text. It thus seems implausible that his linguistic suggestions were unknown and that he would not have suggesting cutting the word "natural" if what the Framers meant was "born a citizen." In any event, Hamilton's draft certainly establishes that people at the time of the Framing knew to say "born a citizen" if that is what they meant.

***Fourth,*** the ordinary legal meaning at the time was that "natural" born citizenship meant a citizenship that arose as a matter of the natural law that was recognized at common law, rather than a citizenship that was created by a "naturalization" statute. As Professor Ramsey notes:

> giving 'natural' its ordinary legal meaning suggests the exact opposite of … citizenship derived from statutes. In eighteenth-century legal language "natural" meant arising from the nature of things – a usage reflected, for example, in natural law (as opposed to statutory law) and natural rights (as opposed to statutory rights). Under this common meaning of natural, "natural" citizenship should be distinct from – not coextensive with – statutory citizenship.[3]

*Id.* at 5-6. Again, this is a source that the Cruz Brief itself cites in support of its position. Cruz Brief at 15-16.

At the time of the framing, Blackstone was regarded by the Framers as the authoritative source on 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. He stated: "Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354-55 (1765). Thus, persons born within the nation were natural born even if their parents were aliens. *Id.* at 361 ("The children of aliens, born here in England, are, generally speaking, natural-born subjects").

[3] *Id.* at 5-6, citing in support 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).

The narrow common law exception dealt with children born to parents who were serving their nation in a foreign land. A natural born subject included a child born abroad only if their parent 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"). Likewise, a natural born subject excluded someone born in the nation only if their parents were serving a foreign nation, such as an ambassador or soldier for a foreign nation. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1897) (under common law, "Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects"); *id.* at 657-65 (citing Dicey and numerous other authorities and cases for the same place-of-birth rule with the same exception for ambassadors and soldiers).[4]

[4] Cruz incorrectly argues that *Wong Kim Ark* adopted his interpretation instead because it quoted Dicey as saying "'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth." Cruz Brief at 18 (quoting 169 U.S. at 657). But Cruz omits the very next sentence of *Wong Kim Ark*, which quotes Dicey as saying "'Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject.'" 169 U.S. at 657. *Wong Kim Ark* went on to state that "The exceptions afterwards mentioned by Mr. Dicey are only these two: '(1) Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien.' '(2) Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien.'" *Id.* at 657-58. Thus, *Wong Kim Ark* clearly read Dicey as stating the common law rule and as excluding the statutory changes to that rule. Moreover, *Wong Kim Ark* cited many authorities other than Dicey as indicating the natural born citizen concept followed the common law rule. *Id.* at 657-65.

Cruz's contrary linguistic interpretation of "natural born" rests on two sorts of sources. First, he cites to dictionaries about the meaning of "natural born" that discuss lay understandings and were written more than a century after the adoption of the Constitution. *See* Cruz Brief at 21 n.3. These cannot reliably tell us what the Framers meant when using the term in a legal sense back in 1787. Second, Cruz cites various legal dictionaries closer to the Constitutional Framing that all equate being "born within the dominions" of the nation with "allegiance" or "ligeance" to the nation. *Id.* at 21 n.4. These dictionaries prove precisely the opposite of his point: that at common law, allegiance or ligeance was equated with the place of birth. Indeed, even current dictionaries define "ligeance" to mean in Britain "the jurisdiction or territory of a liege lord or of a sovereign", http://www.merriam-webster.com/dictionary/ligeance, and to mean at law "the territory subject to a sovereign or liege lord." http://www.dictionary.com/browse/ligeance. Moreover, even Cruz's own citations to Black's Law Dictionary note that it consistently defined "natural born" as "born within the dominions" until 1990, when Cruz says it "defin[ed] 'natural born citizen' **for the first time** to include 'those born of citizens temporarily residing abroad.'" *See* Cruz Brief at 21 n.4 (emphasis added).

***Fifth,*** the understanding that a "natural" born citizen was a citizen who was naturally a citizen at common law fits with how the word "natural" was used elsewhere in the Constitution. Among Congress' enumerated powers, the

Constitution gives Congress the power of "Naturalization." U.S. Const. art. I, §8, cl.4. In contrast, nothing in the Constitution gives Congress any power to create or modify the natural born citizenship that is conferred by the Constitution. *Wong Kim Ark*, 169 U.S. at 702-703. To "natural*ize*" something necessarily implies it was not otherwise "natural". The suffix "-ize" means "to render, make" or "to convert into, give a specified character or form to". http://www.dictionary.com/browse/-ize?o=0. You cannot sterilize someone who is already sterile, radicalize someone who is already radical, or legalize something that is already legal. Likewise, you cannot naturalize someone who is already natural. Describing Congress' statutory power as "naturalization" thus fits the understanding that "natural" born citizens were those born citizens under common law, whereas "naturalized" citizens were those who became citizens (whether at birth or later) only because of a Congressional statute.

The only other place the word "natural" appears in the Constitution is the Fourteenth Amendment, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens." *See* U.S. Const. amend. XIV, §1. This clause assumes a distinction between being born in the United States and being "naturalized", which implies that those born in the United States are "natural" born citizens rather than naturalized citizens. The "and subject to the jurisdiction thereof" language embodied the common law exception that persons

born in the United States to parents who were foreign ambassadors or soldiers were not natural born citizens since they were not subject to the jurisdiction of the United States. *Wong Kim Ark*, 169 U.S. at 682, 689-90.

***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). In short, Madison stated that because in 1789 place of birth determined citizenship in the United States, it was unnecessary to investigate criteria used in other nations. 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).

***Seventh,*** understanding the constitutional term "natural born citizen" to correspond to its common law meaning also comports with U.S. Supreme Court precedent. In *Wong Kim Ark*, the Court stated: "The constitution of the United States … uses the words … 'natural-born citizen of the United States.'… The constitution nowhere defines the meaning of these words…. In this, as in other respects, it must be interpreted in the light of the common law." 169 U.S. at 654. The Court further stated that the part of the Fourteenth Amendment which recognizes citizenship by birth affirms the ancient common law doctrines on natural born citizenship. *Id.* at 693. Based on exhaustive analysis, the Court then concluded that:

> The fourteenth amendment of the constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' contemplates **two sources of citizenship, and two only,—birth and naturalization**. 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 (emphasis added). *Wong Kim Ark* thus recognized that natural born citizenship and naturalized citizenship were mutually exclusive categories, with the

first reflecting common law and the latter reflecting citizenship conferred by statute. The highlighted portion of *Wong Kim Ark* further explicitly stated that persons who are born abroad, and become citizens at birth only by virtue of a Congressional statute, 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 Supposed Contrary Scholarly Consensus.*** Contrary to the analysis above, the opinion below concluded that anyone who is born a citizen is a natural born citizen. It did so based on three articles that so concluded. Op. 12-20. The court rejected the contrary conclusion of Professor McManamon, that the "natural born citizen" clause instead incorporates the common law meaning, based on the premise that her views were "Undoubtedly … a minority view among legal scholars. Op. 21. That premise was apparently based on Cruz's assertion that: "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 15.

However, Cruz's claim ignores other commentators who have concluded that precisely the opposite is true. *See* 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); P. McElwee, Natural Born Citizen, 113 Cong. Rec. 15875-80 (June 14, 1967); Blum, *Is Gov. George Romney Eligible to Be President?*, N.Y.L.J., Oct. 16, 1967, at 1, col. 7; Oct. 17, 1967, at 1, col. 7.. Further, Cruz also omits that Prof. Tribe, an author of one of the three articles Cruz cites for his position, Cruz Brief at 15-16, has expressly concluded that 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). Other scholars have reached the same conclusion. *See* Thomas Lee, *Is Ted Cruz a 'natural born Citizen'? Not if you're a constitutional originalist*, L.A. TIMES (Jan. 10, 2016).

Cruz's claim also omits that Professor Neal Katyal, an author of a second of the three articles Cruz cites for his position, Cruz Brief at 15-16, had as Solicitor General reached a different conclusion in a case involving a person born abroad whose a father who was a U.S. Citizen. *See* Brief for the United States in Flores-

Villar v. U.S., U.S, Supreme Court No. 09-5801 (August 2010). In that case, Katyal concluded that, given that *Wong Kim Ark* held one can obtain citizenship only by either being born in the United States or by naturalization, this person was governed by the principle that any person "born outside the United States … is therefore not entitled—as a constitutional matter—to citizenship by virtue of his birth." *Id.* at 15-16. Katyal further concluded that "individuals born abroad" were "individuals who are aliens insofar as the Constitution is concerned." *Id.* at 17. Natural born citizens are constitutionally entitled to citizenship that Congress cannot take away. *See Wong Kim Ark*, 169 U.S. at 703 ("The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away…. no act or omission of congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the constitution itself..") Thus, Katyal's position in that case necessarily meant that persons born abroad to U.S. citizens were not natural born citizens within the Constitutional meaning.

Finally, the Cruz Brief ignores many other scholars who have concluded that the question of who is a natural born citizen is ambiguous and unsettled. *See, e.g.*, 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). These scholars include Professor Ramsay, the third of three scholars that Cruz cites for his position. *See* Cruz Brief at 15-16. Ramsey calls Cruz's position, that anyone who is born a citizen is a natural born citizen, the "conventional wisdom," but Ramsey notes:

> That conventional wisdom is now increasingly under attack … [based] on extensive examination of historical materials in support. In contrast, despite the confident ring of the conventional wisdom, there are essential no sustained scholarly defenses of it. Its leading recent affirmation [the Clement-Katyal article stressed by the opinion below] is only four pages long, and other scholarly examinations have found it mysterious and ambiguous…. Not only does the previous conventional wisdom rest on surprisingly thin scholarly foundations, it faces daunting textual and historical challenges.

Ramsey, *supra*, at 1-2. Ramsey concludes that Cruz's position is "probably" correct but that "the argument is complicated and not entirely free from doubt." *Id.* at 3. Indeed, Ramsey says "I think Ted Cruz is a natural born citizen. But it's a mystery to me why any one thinks it's an easy question." Ramsey, *Is Ted Cruz a Natural Born Citizen? (Again, with Canons of Construction)*, http://originalismblog.typepad.com/the-originalism-blog/2013/08/is-ted-cruz-a-natural-born-citizen-againmichael-ramsey.html.

Given the quite conflicted and unsettled state of scholarship on the issue, the Court must address the merits of their analysis to determine which scholars are more

persuasive. The claim that any born citizen is eligible to run for President rests on 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). The below demonstrates that neither British common law nor early congressional statutes support Cruz's interpretation.

***British Common Law v. British Naturalization Statutes.*** On the claim that British common law supports Cruz's interpretation, all three articles cited in the opinion below conflate British common law with British statutes. Op. 12-20. In doing so, they did not consider the above-noted textual and historical evidence that the clause incorporated only the common law understanding of natural born citizenship. Their conflation also conflicts with *Wong Kim Ark*, where the U.S. Supreme Court expressly rejected the claim that English naturalization statutes were declarative of the common law principles that were incorporated into the US Constitution's understanding of natural born citizenship. 169 U.S. at 669-671.

While Clement and Katyal correctly state that the Constitution's meaning of natural born citizen incorporated British "common law," what their article cites on British common law is actually not common law at all, but rather British naturalization statutes. *See id.* at n.6. Similarly, Jack Maskell starts with the strong

position that the term "natural born" must be derived from common law. Jack Maskell, Cong. Research Serv., R42097, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement* 4-5, 12-17 (2011). However, when arguing that British common law makes the foreign born children of U.S. citizens natural born citizens, he relies on British statutes or references to them, which he acknowledges "might thus be broader than the early, strict English 'common law' meaning of that term." *Id.* at 22. He argues that some commentators and justices have concluded that the British statutes were declarative of common law, but he acknowledges that *Wong Kim Ark* specifically rejected that claim. *Id.* at 18-19. Charles Gordon likewise starts with the point that it is "reasonable to assume . . . that when the Framers used an undefined common law term, e.g., 'natural-born,' they must have intended to accept the connotation of the common law, as it had developed in 1787." Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 6 (1968). However, when arguing that this concept includes children born abroad to U.S. citizens, he cites to British statutes rather than to any common law decisions. *Id.* at 6-7.

Also conflating the two is Cruz. His brief below begins with the proposition that Constitutional provisions "are framed in the language of the English common law" and that "language of the Constitution cannot be interpreted safely except by reference to the common law." Cruz Brief at 16-17. But all Cruz cites in support of

his assertions about British common law are British statutes, rather than any common law decisions. *Id.* at 18.

Although these sources 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. BLACKSTONE, *supra*, at 361. 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 key statutes they cite are from 1708 and 1731. 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 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) (emphasis added).[5] The 1708 statute seemed to require both parents to be natural born subjects for a foreign born child to be treated like one. To address that issue, the 1731 statute, which was titled "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", clarified

[5] 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).

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 (1731), 16 STATUTES AT LARGE 243-244 (Danby Pickering, ed., 1765) (emphasis added).

These sources also omit other statutes that confirm that Parliament meant to treat these naturalized citizens as natural born subjects, rather than indicate that they actually "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."[6] 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, Constructions and Purposes."[7] A 1749 statute had similar language, which deemed persons to be natural born subjects if they served on British whale boats,[8] as did a 1761 statute if they served as soldiers

[6] 13 Geo. II ch. 3 (1740), 17 STATUTES AT LARGE 358, 359 (emphasis added).
[7] 13 Geo. II ch. 7 (1740), 17 STATUTES AT LARGE 370, 371 (emphasis added).
[8] 22 Geo. II ch. 45 (1749), 19 STATUTES AT LARGE 365, 369.

for the American regiment.[9] 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. These statutes show that Parliament meant such language to give these persons the rights of natural born subjects, rather than to actually declare they were natural born subjects at birth.

Ramsey dismisses these statutes on the grounds that they had clauses preventing these statutorily-created natural born subjects from serving in Parliament or on Privy Counsel. Ramsey, *supra*, at 22-23. But that is irrelevant. The key point is that these statutes, about persons who plainly could not have been born a subject, used the same 'deemed and taken to be natural born subject' type of language that Parliament used in the 1708 and 1731 Acts for persons born abroad to a British father. Thus, all these statutes must have meant such language to provide that the persons naturalized by the statutes would be ***treated*** as having the same rights as natural born subjects, rather than saying they actually ***were*** natural born. The fact that Parliament thought these foreign-born subjects should not be able to serve in Parliament or Privy Council does not matter, just as it does not matter that English

[9] 2 Geo. III ch. 25 (1761), 25 STATUTES AT LARGE 162.

law allowed foreign-born Kings to ascend the throne even when they were plainly not natural born. The U.S. Constitution uses common law language to describe categories of persons, but plainly does not track British substantive positions about which categories of persons are eligible for which government office. Indeed, the U.S. Constitution essentially takes the opposite of the British approach: requiring Presidents to be natural born citizens, while not requiring members of Congress or federal officials to be either natural born citizens or born citizens.

Accordingly, although the articles cited by the opinion below 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 subject. Incorporating these British statutes thus would not help Cruz's eligibility because his father was not a U.S. 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, Cruz and the articles cited by the court below really rest 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, Cruz and those articles fail to address the following evidence that this Act fails to support their position.

***First,*** nothing in the 1790 statute indicates that it meant Congress thought that in 1787, when the Constitution was written, a "natural born citizen" was understood to include someone who was 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* McManamon, *supra*, at 332-33. 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 that 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 of the Congressmen who adopted his 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) (emphasis added). *See also* McManamon, *supra*, at 331 (collecting other scholars in the early 1800s expressing similar views).

***Sixth,*** the interpretation that anyone whom 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 clause was inserted shortly after George Washington received a letter

from John Jay stating that it would be wise "to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in chief of the american army shall not be given to, nor devolved on, any but a natural born Citizen." John Jay Letter to George Washington (July 25, 1787). The purpose was plainly to minimize the risk that voters might be bamboozled into voting for a commander in chief who might be more loyal to foreign interests than to U.S. interests. Constitutional convention delegate Charles Pinckney stated that the natural born citizen clause's purpose was to "insure … attachment to the country." 3 FARRAND, RECORDS, *supra*, at 387 (Pinckney speech to U.S. Senate, Mar. 28, 1800). Other early commentators reached a similar conclusion. *See* 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 Cruz's proposed line between: (1) anyone born abroad to a U.S. citizen, who his test would make automatically eligible to be President if they were U.S. residents for 14 years, even if they spent their childhood and most of their life in a foreign nation; and (2) U.S. citizens who were foreign born to foreign parents, who his test would make automatically ineligible to be President, even if they spent most of their childhood and life in the U.S. and even though they were required to go through a post-birth 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 19. Their

argument suggests they did not realize that (as detailed 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.

Dated: Cambridge, Massachusetts
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Respectfully submitted,

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Certification of Compliance With Word Limit

Pursuant to Pennsylvania Rule of Appellate Procedure 2135, I certify that the word count made by the word processing system used to prepare this amicus brief, exclusive of the table of contents and the table of authorities, is 9680 words.

Dated: Cambridge, MA
March 22, 2016

Einer Elhauge