No. 17-6010

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROQUE "ROCKY" DE LA FUENTE,
Candidate for President of the United States,
JILL STEIN, Candidate for President of the United States,
JONI ALANE LEVINESS, MAIGAN UNDERWOOD,
and RACHEL C. JACKSON,
Plaintiffs-Appellants,

v.

PAUL ZIRIAX, Secretary of the Oklahoma State Election Board;
Defendant-Appellee.

and the OKLAHOMA STATE ELECTION BOARD,
Defendant.

On Appeal from the United States District Court
for the Western District of Oklahoma

Honorable Stephen P. Friot, District Judge
D.C. No. CIV-16-914-F

APPELLANTS' OPENING BRIEF

JAMES C. LINGER
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 Telephone
bostonbarristers@tulsacoxmail.com
Counsel for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT
Counsel does not request oral argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The jurisdiction of the Trial Court below was invoked pursuant to Title 28, United States Code, §§ 1331, 2201, and 2202, and Title 42, United States Code, § 1983. The Order and Judgment appealed from were filed in the Trial Court below on December 13, 2016 (Aplt. App. at 165-172 and 173), Plaintiffs-Appellants filed their Notice of Appeal on January 12, 2017 (Aplt. App. at 174-175). Jurisdiction of the Court of Appeals is invoked pursuant to Title 28, United States Code, § 1291.

STATEMENT OF THE ISSUES

This appeal presents issues concerning whether the Trial Court below properly applied the standard of review as to deciding a motion to dismiss as applied to Oklahoma election laws controlling ballot access for Independent and non-recognized political party candidates for President and their supporters which require more petition signatures now than for the formation of a new political party, have a deadline for the submission of petition signatures before the nominating conventions of the major parties and certain minor parties, have not been complied with since 1992, and do not allow an alternative filing fee option for Presidential candidates as compared to the filing fee option for U.S. Senator. The issues on appeal are:

> Issue 1: Whether the District Court properly applied the standard of review as to a motion to dismiss by viewing the facts alleged in the Complaint as

true and granting all reasonable inferences in favor of the non-moving party which included heightened constitutional scrutiny required to judge state election laws which regulate Presidential elections, the history and effects of the challenged election laws, and the lack of success in complying with said laws.

Issue 2: Whether the District Court failed to consider equal protection analysis as to the discriminatory and relatively easier ballot access requirements for an independent U.S. Senate candidate in Oklahoma and new political party recognition as opposed to an independent or non-recognized political party presidential candidate.

Issue 3: Whether there is any compelling state interest or rational basis to justify Oklahoma's discriminatory filing fee option for one statewide federal office in Oklahoma (U.S. Senator) but not for the other statewide federal office in Oklahoma (U.S. President).

STATEMENT OF THE CASE

This case is a ballot access case on behalf of an independent candidate for President of the United States, a candidate for President of the United States of a political party not recognized currently by the State of Oklahoma, and individual Oklahoma voters. Plaintiffs sought declaratory and injunctive relief from the Court. The instant case had its origin in De La Fuente's earlier *pro se* filing on May 31, 2016, in *De La Fuente v. State of Oklahoma*, et al., case number CIV-16-583-F, with an amended complaint filed on June 14, 2016, to which the Defendants filed a motion to dismiss on July 6, 2016. Plaintiff De La Fuente did not file a response to the motion to dismiss and, before the time he was able to obtain local counsel to represent him, the case had already been dismissed without prejudice on July 29, 2016. Because Jill Stein, who had received the nomination of the Green

Party for President of the United States on August 6, 2016, and her supporters also wished to challenge the laws in question, they joined in the case at bar with Mr. De La Fuente's permission.

Plaintiffs sought specifically in their complaint to have Okla. Stat. tit. 26, §§ 10-101.1, and 10-101.2, as applied to the Plaintiffs herein for the 2016 Oklahoma Presidential general election and all subsequent Oklahoma Presidential general elections, and the facts and circumstances relating thereto, declared unconstitutional and permanently enjoined, for the reason that said laws violate in their application Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983, in that said laws are unnecessarily burdensome, oppressive, discriminatory, vague, overbroad, arbitrary, and further violate Plaintiffs' rights to equal protection and due process of the law (Aplt. App. at 5-10). While the Plaintiffs had originally considered filing a motion for preliminary injunctive relief from the Trial Court as to the 2016 Presidential general election in Oklahoma, after review of the time constraints in the case, the extent of petitioning done by the supporters of Dr. Jill Stein, the need to have witnesses present for a preliminary injunction hearing—particularly expert testimony, and the fact that the deadlines for the printing and distribution of different types of ballots were close or past, the Plaintiffs chose not to file a separate motion for preliminary injunction and supporting brief as required

and in consideration of the Court's order of August 10, 2016 (Record, Doc. No. 2). Rather, the Plaintiffs decided to pursue declaratory and injunctive relief as to the application of the laws in question as to future presidential general elections in Oklahoma, particularly since Plaintiff Stein, who has been a Presidential candidate in the past, intends to be a Presidential candidate in the future.

Plaintiffs filed their Complaint on August 9, 2016 (Aplt. App., at 5-25). On October 7, 2016, the Defendants Paul Ziriax, Secretary of the Oklahoma State Election Board, and the Oklahoma State Election Board (hereinafter sometimes referred to as "Secretary" and "Election Board," respectively) filed a Motion to Dismiss with Exhibits pursuant to Fed. R. Civ. P. 12(b)(6) (Aplt. App. at 26-90). Secretary and Election Board's motion to dismiss alleged that Plaintiffs failed to allege facts entitling them to relief pursuant to Fed. R. Civ. P. 12(b) (6), Defendant Election Board is entitled to sovereign immunity under the Eleventh Amendment to the U.S. Constitution (which was conceded by Plaintiffs below and not appealed), and Plaintiffs' case was filed in bad faith. Plaintiffs responded on October 28, 2016, with a Memorandum Brief in Opposition with Exhibits (Aplt. App. at 91-156), and Secretary and the Election Board filed a Reply Brief in support of their aforesaid Motion to Dismiss on November 4, 2016 (Aplt. App. at 157-164). The Trial Court filed an Order granting Defendants' Motion to Dismiss and filed a Judgment in favor of the Defendants on December 13, 2016 (Aplt.

App., at 165-172 and 173). This appeal is from the aforesaid Order and Judgment (Aplt. App., at 26-33 and 34) of the United States District Court for the Western District of Oklahoma, (Hon. Stephen P. Friot) in which the Trial Court granted the Defendant Secretary's Motion to Dismiss. The Plaintiffs filed their Notice of Appeal on January 12, 2017 (Aplt. App., at 174-75).

STATEMENT OF THE FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

The Plaintiffs set forth a number of alleged facts in their Complaint as to the petition signature deadline being earlier in Oklahoma for Presidential candidates than 38 states and the District of Columbia (Aplt. App. at 17-18), having the highest percentage petition signature requirement for Presidential candidates, the unavailability of a filing fee option for Presidential candidates in Oklahoma, the fact that the laws in question had not been complied with since 1992, the fact that the petition deadline in Oklahoma was before the political party Presidential nominating conventions of the Republican, Democratic, and Green parties (Aplt. App. at 13-14), and that Oklahoma had changed its law as to recognition of new political parties so that the petition signature requirement therefore was now significantly lower than for the petition signature requirement for Presidential candidates (Aplt. App., at 10-23).

The Plaintiffs below were an independent Presidential candidate (Roque "Rocky" De La Fuente), a Presidential candidate of a political party not recognized

by Oklahoma (Jill Stein of the Green Party, who was nominated at the Green Party's national convention on August 6, 2016), and individual Oklahoma voters (Aplt. App. at 5-6, 13-14, and 21). The case is both an as-applied and facial challenge to Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2 as to the application of the laws for ballot access as to future Presidential general elections in Oklahoma. The laws in question require for presidential candidates who are independent or the nominees of unrecognized political parties in Oklahoma a significantly higher petition signature number (e.g., 40,047 in 2016) for ballot access than is required for the formation of a new political party in Oklahoma (e.g., 24,745 in 2016), while also allowing the only other federal statewide office (i.e., U.S. Senator) to simply pay a $1,000.00 filing fee, and an unnecessarily early petition signature deadline of July 15 prior to the major party and some minor party nominating conventions (Aplt. App. at 7-8, 10-11, and 15-16). The challenged laws have not been successfully complied with since 1992 (Aplt. App. at 11). Oklahoma has the most restrictive ballot access laws for President in the United States (Aplt. App. at 14).

While the laws in question (at least, §10-101.1) have been challenged before--as noted in the decisions set forth in Defendants' Exhibits "1", "2", and "3" (Aplt. App. at 40-90), no one has been able to comply with the laws in question since those decisions, there have been significant changes in other election laws, and the application of said laws has tended to freeze the status quo as to

Presidential elections for Independent and non-recognized political party candidates in Oklahoma since 1992, while allowing continual multiple candidates to appear on the Oklahoma ballot for the only other federal statewide office (U.S. Senator) (Aplt. App. at 122-156), Affidavit of Richard Winger, Plaintiffs' Exhibit "1," ¶ 13; Curricula Vitae of Richard Winger, Plaintiffs' Exhibit "2," and Appendix, Plaintiffs' Exhibit "3").

In the year 2016, after the July 15th deadline of Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2, the Republican Party nominated its presidential and vice presidential candidates during its national convention from July 18 through July 21, 2016. The Democratic Party nominated its presidential and vice presidential candidates during its national convention from July 25 through July 28, 2016. Plaintiff Stein received the Green Party nomination for President of the United States and Ajamu Baraka received the Green Party nomination for Vice President of the United States at the Green Party's national convention on August 6, 2016 (Aplt. App. at 13 and 21).

The nominees of the Republican and Democratic parties were not required to present any nominating petitions indicating their support in Oklahoma because said nominees of the Republican and Democratic parties for President and Vice President are for parties already recognized in Oklahoma. In contrast, Independent presidential candidates or Presidential candidates of non-recognized political

parties in Oklahoma must submit petition signatures by July 15 of a presidential election year in the amount of 40,047 for the presidential election to be conducted in Oklahoma in the year 2016, and approximately the same number in future presidential elections in Oklahoma (Aplt. App. at 15-16).

Oklahoma has the most restrictive ballot access laws for presidential and vice presidential candidates of Independent or non-recognized political party status in the United States. In fact, Oklahoma is the only state having a petition signature requirement above two percent of the previous vote for President or Governor, with most states having a requirement of less than one percent of the previous vote for President or Governor (Aplt. App. at 10 and 138-156). Because of the relatively stringent ballot access laws in Oklahoma and the immense task of obtaining ballot status throughout the United States for a Presidential candidate in 2016, the supporters of De La Fuente and Stein were unable to marshal their resources in such a manner as to conduct a successful petition drive in Oklahoma, pursuant to Okla. Stat. tit. 26, §§ 10-101.1 and 10-101.2, respectively, and also achieve ballot status in the other States and the District of Columbia (Aplt. App. at 11-12).

SUMMARY OF THE ARGUMENT

The Oklahoma ballot access law of Okla. Stat. tit. 26, § 10-101.1, as such applies to Independent candidates under Oklahoma law for President of the United

States and their presidential electors, and Okla. Stat. tit. 26, § 10-101.2, as such applies to a non-recognized political party under the laws of the State of Oklahoma for President of the United States and their presidential electors, sets an early deadline of July 15th in presidential election years and requires the highest percentage of petition signatures of any State in the Union and significantly higher than the petition signature requirement in Oklahoma for full political party recognition. Said deadline is before the dates of the conventions of the major political parties. The results of the election laws in question have been devastating to Presidential ballot access in Oklahoma for minor political parties and Independent candidates.

Plaintiffs contend Oklahoma has set up an unconstitutional discrimination by allowing Independent candidates for the federal statewide election for U.S. Senator, but not for President and Vice President of the United States, to have an alternate and unequal route to the ballot by simply paying a filing fee, pursuant to Okla. Stat. tit. 26, § 5-112(A), of $1,000.00. While such a discrimination can be justified from the standpoint of ballot access for the formation of new political parties, or perhaps other non-federal state elective offices as was held by the District Court previously under different circumstances, it cannot be justified and is unconstitutional when applied to a presidential campaign because of the heightened constitutional scrutiny required to judge state election laws which

regulate presidential elections. Presidential election requirements should not be greater than what the State has found acceptable for the other statewide, federal office of U.S. Senator or what is required to form a new political party in Oklahoma. If the State of Oklahoma's compelling interests are satisfied by a $1,000.00 filing fee for U.S. Senate candidates who are not members of recognized political parties or by 24,745 petition signatures of Oklahoma voters for the formation of a new political party in Oklahoma, the State of Oklahoma cannot justify on either a compelling interest basis or a rational basis no filing fee option and a significantly higher petition signature requirement of 40,047 for Presidential candidates. While the laws in question were previously upheld in unpublished cases, the facts and circumstances have changed thereafter because the laws now require a higher number of signatures for Presidential candidates than they do for new political party formation in Oklahoma and the laws have not been complied with since 1992.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE STANDARD OF REVIEW AS TO A MOTION TO DISMISS WHICH REQUIRES VIEWING THE FACTS ALLEGED IN THE COMPLAINT AS TRUE AND GRANTING ALL REASONABLE INFERENCES IN FAVOR OF THE NON-MOVING PARTY WHICH INCLUDED HEIGHTENED CONSTITUTIONAL SCRUTINY REQUIRED TO JUDGE STATE ELECTION LAWS WHICH REGULATE PRESIDENTIAL ELECTIONS, THE HISTORY AND EFFECTS OF THE CHALLENGED ELECTION LAWS, AND THE LACK OF SUCCESS IN COMPLYING WITH SAID LAWS.

A. Standard of Review

An appellate court reviews the granting of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) by a trial court on a *de novo* basis. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). In conducting review by the appellate court, the appellate court assumes the truth of the plaintiff's well-pleaded factual allegations and views them in the light most favorable to the plaintiff. The appellate court in reviewing a dismissal must determine ". . . whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). The Plaintiff must "nudge [his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Thus, ". . . the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims. *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177. "Generally, a motion to dismiss on the grounds that Petition does not state a claim on which relief can be granted, admits all facts well pleaded, and the legal question presented thereby is governed by the facts as pleaded." *Galbreath v. Metropolitan Trust Co*., 134 F.2d 569, 570 (10th Cir. 1943). However, the "complaint" must contain sufficient factual material, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Further, a ballot access case requires the use of a standard of review which weighs the effects of the election law challenged. The United States Supreme Court has held in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), what the standard is to be used in determining whether election laws are unconstitutionally oppressive of potential voters' rights. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions, but rather that the Trial Court ". . . must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze,* 460 U.S. at 789. In a three-prong balancing test, the U.S. Supreme Court stated that the Trial Court must

> . . . first consider the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forth by the state as justifications for the burden imposed by its rules. In passing judgment, the court must not only determine legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provisions is unconstitutional. *Anderson v. Celebrezze,* 460 U.S. at 789.

When the law places "severe" burdens on the rights of political parties, candidates or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, at 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Plaintiffs' complaint (Aplt. App. at 5-25) challenges Oklahoma's election laws for ballot access for Independent and non-recognized political party candidates for President and Vice President which require a significantly higher petition signature number than is required for the formation of a new political party in Oklahoma, while also allowing the only other Federal statewide office (U.S. Senator) to simply pay a $1,000.00 filing fee, and an unnecessarily early petition deadline that is unconstitutionally early and serves no compelling state interest, while having a serious effect on alternative presidential candidates and their supporters. Motions to dismiss pursuant to Fed. R. Civ. P. 12(b) (6) are not viewed with favor. A complaint should not be dismissed simply because a Court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Accordingly, a well-pleaded complaint will survive a motion to dismiss even when the likelihood of recovery appears remote. *Id*.

B. Discussion

While the District Court below in its order granting the motion to dismiss (Aplt. App. at 165-172) put great importance on the unpublished decisions upholding the laws in question and did not think that changes in other laws and the continued failure of any parties to comply with the laws in question since 1992 was constitutionally significant, the prior unpublished decisions in 1996, *Natural Law*

Party v. Henley (Aplt. App. at 66-82), 2000, *Nader v. Ward* (Aplt. App. at 40-65), and 2009, *Barr v. Ziriax* (Aplt. App. at 83-90), as to the constitutionality of Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2 should not prevent this Court from reconsidering the constitutionality of the election laws in question because of various changes which have and have not occurred since the laws were last reviewed. Prior unpublished decisions of the District Court upholding the laws in question (Aplt. App. at 66-82, Defendants' Exhibit "2", *Natural Law Party v. Henley*, CIV-96-1525-R (W.D. Okla. Sept. 18, 1996) (which denied a motion for preliminary injunction); (Aplt. App. at 40-65, Defendants' Exhibit "1"), *Nader v. Ward*, CIV-00-1340-R (W.D. Okla. Aug. 30, 2000) (which denied a motion for preliminary injunction and entered a ruling on the merits as to the constitutionality of Okla. Stat., tit. 26, § 10-101.1); and (Aplt. App. at 83-90, Defendants' Exhibit "3"), *Barr v. Ziriax*, CIV-08-730-R (W.D. Okla. April 30, 2009) (which granted defendant's motion for summary judgment as to the constitutionality of Okla. Stat., tit. 26, § 10-101.1), were made prior to newer election results, changes in circumstances, failed ballot access attempts, and the passage of time which have shown that the laws have not been complied with since 1992.

District Judge David Russell, the trial Judge in each of the three previous unpublished cases, two on preliminary injunctions and one on summary judgment, not on motions to dismiss, were all essentially based on the reasoning of the

Natural Law decision of 21 years ago. At that time, in 1996, the laws in question had been complied with in the most recent Presidential election in 1992 by the billionaire Ross Perot. In 1992, the signature requirement which Ross Perot needed to comply with was lower than the signature requirement of today because it was based on three percent of the 1988 Presidential vote as opposed to three percent of the 2012 Presidential vote in Oklahoma (Aplt. App. at 16-17). Also distinguishing the *Natural Law* case from the case at bar is the fact that in 1996—as well as in 2000, 2004, 2008, and 2012—considerably less signatures were required for just Presidential candidates than for new political party formation in Oklahoma (the reverse of what is required now).

Prior decisions by the Tenth Circuit Court of Appeals and the District Court upholding certain election laws have not prevented a court from subsequently considering those laws again and later declaring the same laws unconstitutional. See *Rainbow Coalition v. Oklahoma State Election Board*, 685 F.Supp. 1193 (W.D. Okla. 1987), *affd*., 844 F.2d 740, at 747 (10th Cir. 1988) (relating to the upholding of the constitutionality of Oklahoma's prior law not allowing voters to register as members of a political party no longer recognized by the State of Oklahoma); but subsequently held unconstitutional ten years later because of changes in circumstances as to computerization so as to hold unconstitutional Okla. Stat. tit. 26, §§ 1-110 and 4-112. *Atherton v. Ward*, 22 F.Supp.2d 1265, at

1267-1268 (W.D. 1998); and the unpublished District Court case of *Mobley v. Hudlin*, CIV-84-2141-R (W.D. Okla., Oct. 5, 1984) (which denied Plaintiffs' Motion for Preliminary Injunction as to the constitutionality of the then Okla. Stat., tit. 26, § 6-106, partly because the Court was not persuaded that there was positional bias in the general election as to a law which required the Democratic candidates to have the top position on the ballot); but subsequently not followed and the law in question declared unconstitutional in a later decision by Judge David Russell (the same Judge as in the *Mobley* case) as to the same Okla. Stat., tit. 26, § 6-106, *Graves v. McElderry*, 946 F.Supp. 1569 (W.D. Okla. 1996). In fact, Judge Russell chose to not decide the *Graves* case on motions for summary judgment, but rather to hear the evidence at a non-jury trial. Thus, in two cases involving two different election laws subsequent courts did not find the previous decisions decisive or an impediment in later again reviewing the election laws in question when there had been a change in circumstances, differing proof, and the passage of time.

As the U.S. Supreme Court observed in an election controversy, the historical record of political parties' participation in elections is relevant as "[p]ast experience will be a helpful, if not always an unerring, guide." *Storer v. Brown*, 415 U.S. 724, at 742 (1974). Further, the election laws in question and the District Court's ruling below (Aplt. App., at 165-172) is contrary to what the Eighth

Circuit held in following Supreme Court decisions in emphasizing the importance ". . . that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary." *McLain v. Meier*, 637 F.2d 1159, at 1164 (8th Cir. 1980).

Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2 both require petition signatures of three percent of the total vote cast for President in Oklahoma in the last Presidential election, which makes Oklahoma the most restrictive state in the United States as to ballot access for Presidential elections for Independent and non-recognized political party candidates. The two laws challenged, Okla. Stat., tit. 26, §§10-101.1 and 10-101.2 are essentially the same except § 10-101.1 applies to Independent Presidential candidates while § 10-101.2 applies to Presidential candidates of political parties which are not recognized in Oklahoma. The laws in question are the same in their petition signature requirement.

While Okla. Stat. tit. 26, §§ 10-101.1 and 10-101.2 provide a means through petitioning for Independent and non-recognized political party candidates for President and Vice President to appear on the ballot in Oklahoma as an Independent candidate or with the party label of an unrecognized political party, respectively, the petition signature deadline is unnecessarily early and before the deadline in 38 states and the District of Columbia, as well as requiring significantly

higher petition signatures than that which is required to have a political party recognized in Oklahoma, as well as a percentage petition signature requirement higher than any other state in the Union (see Aplt. App. at 125-127 and 138-156, Plaintiffs' Exhibit "1", ¶¶ 5, 7, 8, and 10; and Plaintiffs' Exhibit "3"), not to mention higher than the number of signatures required to form a complete political party in Oklahoma.

On the other hand, Okla. Stat. tit. 26, § 5-112(A) provides a means in lieu of petition signatures for Independent candidates for statewide Federal office in Oklahoma, i.e., U.S. Senator, to appear on the Oklahoma ballot by simply paying a fee by cashier's or certified check of $1,000.00 and the filing of a Declaration of Candidacy with the Secretary of the State Election Board. Additionally, all Independent candidates in Oklahoma, whether for a statewide federal office or a statewide state office, since the adoption of the alternate options of paying a filing fee or gathering petition signatures for the statewide federal office of United States Senator or the statewide state office of Governor, or any other statewide state office, have used the filing fee option for ballot access instead of the petition signature option for ballot access of Okla. Stat. tit. 26, § 5-112(A)[1], which was

[1] In regard to the Republican Presidential primary in Oklahoma conducted on March 1, 2016, It is apparent that given a choice between paying a $2,500.00 filing fee or collecting 5,000 petition signatures, that Republican Presidential primary candidates prefer to pay the $2,500.00 filing fee pursuant to Okla. Stat., tit. 26, § 20-102 (see Aplt.

previously until August 27, 2010, five percent of the registered voters eligible to vote for a candidate in the first election wherein the candidate's name could appear on the ballot. The Oklahoma Legislature lowered the percentage to four percent, effective August 27, 2010, but still no one has used the lowered petitioning signature number to obtain statewide ballot status.

In order to illustrate the above point, while the Oklahoma ballot has been frozen in the status quo since the 1992 general election as to Presidential candidates obtaining ballot access status pursuant to either Okla. Stat. tit. 26, § 10-101.1, or 10-101.2 (with no presidential candidates who are independent or the nominees of a non-recognized political party obtaining ballot status in Oklahoma), Independent candidates for U.S. Senator have regularly appeared on the Oklahoma ballot by simply paying a filing fee from 1992 through 2016, with anywhere from one to three Independent U.S. Senate candidates being on the Oklahoma ballot in any general election year in which a U.S. Senator is up for election in Oklahoma (see Aplt. App. at 128-129, Plaintiffs' Exhibit "1", ¶13).

It should also be considered that the District Court failed to apply the heightened constitutional scrutiny required to judge state election laws which regulate Presidential elections. Since Okla. Stat., tit. 26, § 10-101.1 and 10-101.2

App. at 127-128, Plaintiffs' Exhibit "1", ¶11). This is another example as to Presidential candidates of the difficulty of obtaining petition signatures versus paying a filing fee.

impact ballot access in Oklahoma only as to Presidential elections, they are subject to a higher scrutiny than election laws that only impact an individual State. Because of the less restrictive and more reasonable ballot access requirements for presidential and vice presidential candidates of other states, the less restrictive laws of other states in the Union effectively subsidize and assist Oklahoma in maintaining its restrictive ballot access laws for presidential and vice presidential candidates who are not members of the major political parties recognized currently under Oklahoma election law. If all states of the United States had ballot access laws for presidential and vice presidential candidates not associated with the major political parties to the same extent as Oklahoma, presidential and vice presidential candidates of minor political parties and independent status would be prevented from maintaining a nationwide campaign as alternative choices to the major political party candidates, thus, maintaining the political status quo and stifling the exercise of First Amendment rights to political speech and political association. This point is important in analyzing election laws of an individual State which impact a presidential election as opposed to other elections.

State election laws which impact ballot access for Presidential candidates and their supporters are subject to a higher scrutiny under the U.S. Supreme Court's decision in *Anderson v. Celebrezze*, *Id*. Election restrictions which impact Presidential candidacies have consequences which go far beyond the boundaries of

Oklahoma and must be judged by a higher standard than election restrictions for state elective offices. *Anderson v. Celebrezze*, 460 U.S. at 790.

The District Court failed to consider the history and effects of the challenged election laws and the lack of success in complying with said laws. So restrictive and discriminative is Oklahoma's ballot access law for Presidential candidates who are Independent or the nominee of a political party not recognized in Oklahoma, that even a prominent Presidential candidate such as Ralph Nader failed to appear on the Oklahoma Presidential ballot in 1996, 2000, and 2004, and the nominee of the Libertarian Party failed to appear on the Oklahoma Presidential ballot in 2004, 2008, and 2012 (see Aplt. App. at 129, Plaintiffs' Exhibit "1", ¶¶14 and 15). In fact, in 2004, 2008, and 2012, Oklahoma was the only State in which there were only two candidates on the ballot for President of the United States (see Aplt. App. at 129, Plaintiffs' Exhibit "1", ¶14, and Aplt. App. at 138-156, Appendix, Plaintiffs' Exhibit "3", p. 12). Since the last time the District Court reviewed one of the election laws challenged herein, Oklahoma's ballot access for Presidential candidates of minor party or Independent status has become even less receptive to access for non-major party candidates so as to have the laws in question not complied with for an even longer period of time. In the aforesaid Presidential elections in Oklahoma in 2004, 2008, and 2012, even the nominee for President of the United States of the Democratic Party failed to carry any of the 77 counties of

Oklahoma (and in the Presidential election in Oklahoma of 2012, President Barack Obama lost every single county in Oklahoma by a landslide, viz.: a 10 percent margin or more (Aplt. App. at 14).

As a demonstration of how much Oklahoma's ballot access laws for Presidential candidates maintain the status quo and stifle First Amendment rights, neither Okla. Stat. tit. 26, § 10-101.1 or § 10-101.2 have been successfully complied with since 1992. While no political party had been able to obtain ballot recognition in Oklahoma, pursuant to Okla. Stat., tit. 26, § 1-108, since the 2000 Presidential election through 2015, and because previous election law changes had moved the deadline for filing political party recognition petitions from May 31 of the general election year to March 1st of the general election year, Oklahoma lowered the petition signature requirement in 2015 from five percent of the last gubernatorial or presidential vote to three percent of the last gubernatorial vote,[2] resulting in a higher number of signatures for a presidential candidate than that needed to form a new political party. In 2016, Oklahoma lowered the political party retention requirement of Okla. Stat., tit. 26, § 1-109 from 10 percent of the

[2] It is interesting to note that one of the reasons the Oklahoma Legislature changed the law as to Okla. Stat., tit. 26, § 1-108, from using on an alternating basis the total vote for governor and the total vote for president in the previous election in order to calculate the number of petition signatures required, was that the percentage ballot access requirement (then 5%, now 3%) based on the previous Presidential vote total was never complied with from 1974 until the law was changed in 2015.

last gubernatorial or presidential vote to 2 ½ percent of the last presidential or gubernatorial vote, and allowed for the Presidential electors of Presidential candidates in Oklahoma not to have their names printed on the Oklahoma ballot. Despite these changes, only the Libertarian Party was able to comply with the new requirements of Okla. Stat., tit. 26, § 1-108 for the general election in Oklahoma of 2016. The Libertarian Party of Oklahoma was further aided by the fact that the voter turnout in the most recent gubernatorial election in 2014, was 824,831 votes—the lowest vote total in an Oklahoma gubernatorial election since 1978, even though the population of Oklahoma has increased by approximately one million people since 1978 (see Aplt. App. at 129, Plaintiffs' Exhibit "1", ¶16).

In contrast, while only 24,745 petition signatures were required to obtain political party status in Oklahoma in 2016, 40,047 petition signatures were required to obtain ballot status for an Independent or non-recognized political party presidential candidate in Oklahoma in 2016 (see Aplt. App. at 127, Plaintiffs' Exhibit "1", ¶ 10). Thus, this constitutes another change in circumstances and the law since the Court last considered the laws challenged herein. While the party petition requirement for recognition and the independent and non-recognized political party presidential candidate petition requirement both now use a three percent petition requirement, the political party requirement of three percent applies to the last gubernatorial election vote total, while the Independent or non-

recognized political party presidential petition requirement of three percent applies to the last presidential election vote total, thus, resulting in a significantly higher requirement of petition signatures for independent and non-recognized presidential candidates, as opposed to recognition of a new political party in Oklahoma (unlike the situation when the questioned laws herein were last considered by this Court, see *Barr v. Ziriax*, Civ-08-730-R (W.D. Okla. April 30, 2009), (Aplt. App. at 83-90, Defendants' Exhibit "3"), because more than a half million more voters in Oklahoma participated in the 2012 presidential election than in the most recent gubernatorial election (1,334,872 in 2012 versus 824,831 in 2014) (Aplt. App. at 15-16). In Oklahoma, total voter turnout for Presidential elections is consistently much higher in Presidential elections than in Gubernatorial elections (see Aplt. App. at 129, Plaintiffs' Exhibit "1", ¶16).

The early filing deadline (38 states and the District of Columbia have Presidential petition deadlines in either August, September, or later of a general election year), combined with Oklahoma's absolute ban on write-in voting, the unequal and unnecessary signature requirement, and the lack of a filing fee alternative for presidential and vice presidential candidates operates to exclude candidates who must try to comply with the requirements of the other 49 States and the District of Columbia and/or whose prominence grows out of reactions to the events of the major party's primary season and changing political

developments, and who lack a recognized political party organizational structure by the State of Oklahoma. Only candidates who rely on paid petitioners can collect a significant number of signatures by the July 15th presidential deadline (e.g., Ross Perot in 1992). No previous alternative presidential candidates have been able to appear on the Oklahoma ballot without a substantial expenditure of money for paid petitioners. Such monetary expenditures in order to meet petition signature deadlines in Oklahoma operate to deny Oklahoma voters an opportunity to vote for late emerging candidates who have significant public support but lack a recognized political party organization or extensive financial resources. More significantly, the Oklahoma petition signature requirement—and the resulting number of signatures required percentagewise--is the highest in the United States (see Aplt. App. at 138-156, Plaintiffs' Exhibit "3").

Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2 have not been complied with since 1992, despite numerous attempts by Independent and non-recognized political party Presidential candidates and their supporters. As noted above, the history of attempts to comply with the laws in question since 1992 has not been a happy one. No Presidential candidate has complied with § 10-101.1 or 10-101.2 in Oklahoma since 1992. There have been numerous attempts to comply, as well as challenges to the laws in the District Court in 1996, 2000, and 2008-2009 (Aplt. App., at 40-90, Defendants' Exhibits "1," "2," and "3"). The Eighth Circuit Court

of Appeals in *McLain v. Meier*, *Id*., a case which has been cited with approval by the Tenth Circuit, *Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984), has considered the failure of compliance with a law over a period of time to be an important factor in judging whether the law is constitutional. It is one thing if the law has been complied with regularly and another thing if the law has been complied with rarely or not at all. *McLain v. Meier*, 637 F.2d at 1165; also see *Storer v. Brown,* 415 U.S. at 730; *Williams v. Rhodes,* 393 U.S. 23 (1968).

II. THE DISTRICT COURT FAILED TO CONSIDER EQUAL PROTECTION ANALYSIS AS TO THE DISCRIMINATORY AND RELATIVELY EASIER BALLOT ACCESS REQUIREMENTS FOR AN INDEPENDENT U.S. SENATE CANDIDATE IN OKLAHOMA AND NEW POLITICAL PARTY RECOGNITION AS OPPOSED TO AN INDEPENDENT OR NON-RECOGNIZED POLITICAL PARTY PRESIDENTIAL CANDIDATE.

A. Standard of Review

An Appellate Court reviews the granting of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) by a Trial Court on a *de novo* basis. *Beedle v. Wilson*, 422 F.3d at 1063. In conducting review by the appellate court, the appellate court assumes the truth of the plaintiff's well-pleaded factual allegations and views them in the light most favorable to the plaintiff. The appellate court in reviewing a dismissal must determine ". . . whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d at 1177, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 547. The

Plaintiff must "nudge [his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Thus, ". . . the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims. *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177.

B. Discussion

While the filing fee for U.S. Senator is $1,000.00, and the filing fee for other statewide state offices is $500.00, except for Governor, which is $1,500.00, there is no provision in the aforesaid Okla. Stat. tit. 26, § 5-112(A) for a filing fee means of candidacy for an Independent or non-recognized party candidate in Oklahoma for President and Vice President of the United States. This fact constitutes a violation of equal protection between the Oklahoma Federal statewide elections conducted for U.S. Senator as opposed to the Oklahoma statewide Federal Presidential election. Defendant Secretary should have been required by the District Court to prove by either compelling interest or rational basis the reason for this unequal treatment—particularly considering the results of the challenged election laws for the past 25 years (see Aplt. App. at 127-130, Plaintiffs' Exhibit "1", ¶¶ 10, 13, 14, 15, 16, and 17).

There is no compelling interest or rational basis for the State of Oklahoma to unequally discriminate between the requirements for ballot access for the only two federal statewide elections conducted in Oklahoma. While previously it had

been complained that the laws in question were unconstitutional because a filing fee option was available for Independent candidates (i.e., candidates in Oklahoma not associated with a recognized political party), except for President and Vice President of the United States, it was error in the unpublished cases (Aplt. App. at 40-90) to compare the aforesaid presidential requirements in Oklahoma to the ballot access requirements for all Independent candidates in Oklahoma, rather than to just the ballot access requirement for an Independent U.S. Senate candidate. This appeal poses an equal protection argument comparing the only two statewide elections conducted in Oklahoma for federal office, viz.: President and U.S. Senator. On the one hand, every four years, an election is conducted in Oklahoma for President and Vice President of the United States. On the other hand, in two of every three general elections in Oklahoma an election is conducted for United States Senator. In 2016, there was an election in Oklahoma for both President and Vice President and U.S. Senator. The equal protection violation occurs because U.S. Senator candidates may appear on the ballot by simply paying $1,000.00 pursuant to Okla. Stat., tit. 26, § 5-112, while the Presidential and Vice Presidential candidates running together must submit valid petition signatures of Oklahoma voters equal to at least three percent of the total vote cast for President and Vice President in Oklahoma in the previous Presidential election.

District Judge Russell's decision of 1996 in the *Natural Law* case on a motion for preliminary injunction, which he also cited in the Nader case in 2000 and the Barr case decided in 2009 (Aplt. App. at 40-90), is deserving of review because of the changes in the law since those decisions, the fact that there has been a continuation of noncompliance with the laws in question, and the fact that Judge Russell's analysis of why there was an alternative for all candidates but President and Vice President in Oklahoma has turned out to be incorrect in its speculation. Not only has the alternative Independent option of petitioning been lowered from a requirement of five percent of the registered voters to four percent of the registered voters, but it still has continued to be a law that has never been complied with despite the District Court's suggestions as to why the law was in existence. Further, because of continued inability of political parties to obtain ballot access under Okla. Stat., tit. 26, §§ 1-108 and 1-109, the legislature in 2015 and 2016 eliminated the Presidential election results as a basis for calculating the number of petition signatures required and decided to use exclusively the significantly lower voter turnout in gubernatorial elections, lower the ballot access requirement for new political parties from five percent to three percent, and lower the political party retention requirement from 10 percent to 2 ½ percent (Aplt. App. at 15). Thus, the requirements for full political party access resulted in significantly lower requirements of either petition signatures or votes than is required for petition

signatures for Presidential and Vice Presidential candidates under Okla. Stat., tit. 26, §§ 10-101.1 and 10-101.2. There is no compelling or rational basis for the foregoing change in law resulting in a higher requirement for Presidential and Vice Presidential candidates as opposed to full political party recognition. However, for the reasons set forth by the District Court below, this argument was unconvincing to the Trial Court (Aplt. App. at 165-172).

The Equal Protection Clause provides that "All persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985). The U.S. Supreme Court has used a three-part test to evaluate election statutes challenged under the First and Fourteenth Amendments. *Anderson v. Celebrezze*, 460 U.S. at 788-789. While the U.S. Supreme Court has not yet applied this test to ballot access challenges on purely equal-protection grounds, many federal courts have applied the *Anderson* balancing test to both First Amendment and Equal Protection Clause challenges to ballot access laws. *Rogers v. Corbett*, 468 F.3d 188, 193-194 (3rd Cir. 2006); *Republican Party of Ark. v. Faulkner Cnty., Ark*., 49 F.3d 1289, 1293, n.2 (8th Cir. 1995); and *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992). Certain state election laws have been held to be an unconstitutional burden and arbitrary classification so as to make it unreasonably difficult to obtain ballot access when an alternative is allowed for Independent statewide candidates as opposed to individuals who are

proponents of a new political party. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ark., W.Div. 1996). Further, the District Court for the Western District of Oklahoma has previously condemned as an unconstitutional violation of the equal protection clause of the Fourteenth Amendment, a political party durational registration requirement which was imposed on state elective offices in Oklahoma but not on federal elective offices in Oklahoma. *Crussel v. Oklahoma State Election Board*, 497 F.Supp. 646, at 652 (W.D. Okla. 1980). There is an equal protection violation in this case between the standards required for ballot access between the two statewide federal offices in Oklahoma (viz.: President and U.S. Senator). The burden caused by this distinction is not reasonable and non-discriminatory and, therefore, can have no rational basis, let alone serving a compelling interest. Plaintiffs' equal protection claim is partly based upon the effects of the Oklahoma election laws in question. As the U.S. Supreme Court stated in an election controversy: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification". *Williams v. Rhodes*, 393 U.S. at 31.

III. THERE IS NO COMPELLING STATE INTEREST OR RATIONAL BASIS TO JUSTIFY OKLAHOMA'S DISCRIMINATORY FILING FEE OPTION FOR ONE STATEWIDE FEDERAL OFFICE IN OKLAHOMA

(U.S. SENATOR) BUT NOT FOR THE OTHER STATEWIDE FEDERAL OFFICE IN OKLAHOMA (U.S. PRESIDENT).

A. Standard of Review

An Appellate Court reviews the granting of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) by a Trial Court on a *de novo* basis. *Beedle v. Wilson*, 422 F.3d at 1063. In conducting review by the appellate court, the appellate court assumes the truth of the plaintiff's well-pleaded factual allegations and views them in the light most favorable to the plaintiff. The appellate court in reviewing a dismissal must determine ". . . whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d at 1177, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 547. The Plaintiff must "nudge [his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Thus, ". . . the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims. *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177.

B. Discussion

The foregoing arguments and cases would indicate that the laws in question herein are unconstitutional under the *Anderson v. Celebrezze* test. "It is clear that the Supreme Court has consistently required a showing of necessity for significant burdens on ballot access." *Anderson v. Celebrezze*, 460 U.S. at 789; and *Storer v Brown*, 415 U.S. at 743. The final part of the *Anderson* test is that the Court must

consider the extent to which legitimate state interests make it necessary to burden the rights of the Plaintiffs. *Anderson v. Celebrezze, Id*.

A ballot access case requires the use of a standard of review which weighs the effects of the election law challenged. The United States Supreme Court has held in *Anderson v. Celebrezze*, *Id*., what the standard is to be used in determining whether election laws are unconstitutionally oppressive of potential voters' rights. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions, but rather that the Trial Court ". . . must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze,* 460 U.S. at 789. In a three-prong balancing test, the U.S. Supreme Court stated that the Trial Court must

> . . . first consider the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forth by the state as justifications for the burden imposed by its rules. In passing judgment, the court must not only determine legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provisions is unconstitutional. *Anderson v. Celebrezze,* 460 U.S. at 789.

When the law places "severe" burdens on the rights of political parties, candidates or voters, "the regulation must be 'narrowly drawn to advance a state interest of

compelling importance.'" *Burdick v. Takushi*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. at 289).

The final part of the analytical test set forth in *Anderson* is that the Court must consider the extent to which legitimate state interests make it necessary to burden the rights of the Plaintiffs. *Anderson v. Celebrezze, 460 U.S.* at 789. If, in fact, it is not necessary for there to be a filing fee exception for Independent and non-recognized political party Presidential candidates, then why are Independent candidates allowed to run for the other Federal statewide elective office in Oklahoma of U.S. Senator by simply presenting a filing fee and a Declaration of Candidacy pursuant to Okla. Stat. tit. 26, § 5-112(A)? Additionally, why is 24,745 petition signatures acceptable to obtain political party recognition in Oklahoma, but 40,047 petition signatures are required to obtain ballot status for a Presidential candidate in Oklahoma? It is unconstitutional for a state to discriminate by allowing an alternative for one class of federal statewide candidates (United States Senator) without providing such an alternative filing fee or an equal petition signature requirement for the truly national office of President of the United States. The case below should not have been disposed of on a motion to dismiss.

CONCLUSION

"[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of

those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny." *Anderson v. Celebrezze, 460 U.S.* at 793, n. 16. This is particularly important when we are concerned with a presidential election where the effect of a state's election laws go beyond the boundaries of that state. *Anderson v. Celebrezze, 460 U.S.* at 790. The instant appeal presents an important review of election laws in a state which has the most difficult state presidential ballot access laws in the United States for independent and non-recognized presidential candidates and their supporters--which has had the effect of significantly limiting electoral choice in Oklahoma. Plaintiffs are not asking the Court to determine what the law should be, but rather recognize—considering the law's effect over the last 25 years, changes in circumstances, and other election laws in Oklahoma, and the current status of Oklahoma as an extremely non-competitive state in Presidential elections, which has resulted in a near freeze of the status quo—that the laws in question have become unconstitutional and should be enjoined pending legislative action by the Oklahoma Legislature.

WHEREFORE, premises considered, the Plaintiffs request that, upon full consideration of this appeal, the Court of Appeals reverse the decision of the United States District Court for the Western District of Oklahoma in the case below, declare the relief prayed for herein by instructing the District Court upon remand to deny the Defendant Secretary of the Oklahoma State Election Board's

Motion to Dismiss and grant such other and further relief as to which Plaintiffs may be entitled, and which this Court may deem equitable and just.

Respectfully submitted this 8th day of March, 2017.

ROQUE "ROCKY" DE LA FUENTE, JILL STEIN, JONI ALANE LEVINESS, MAIGAN UNDERWOOD, and RACHEL C. JACKSON, Plaintiffs

s/ James C. Linger
James C. Linger, OBA#5441
Counsel for Plaintiffs
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 Telephone
(918) 583-8283 Facsimile
bostonbarristers@tulsacoxmail.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), and the word limit of Fed. R. App. P. 32(a)(7)(B)(i); because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   [X] this document contains 8,797 words, or

   [ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because:

   [X] this document has been prepared in a proportionally spaced typeface Using Word 13 in Times New Roman 14, or

   [ ] this document has been prepared in a monospaced typeface using <state Name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: March 8, 2017

/s/ James C. Linger
James C. Linger
Counsel for Appellants
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 Telephone
bostonbarristers@tulsacoxmail.com

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program: Trend Micro Internet Security 2017, date of most recent update: February 12, 2017, and according to the program are free of viruses.

s/ James C. Linger
James C. Linger

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Martin Daniel Weitman: Dan.Weitman@oag.ok.gov, fc_docket@oag.state.ok.us, deeona.rowden@oag.ok.gov

Date: March 8, 2017

s/ James C. Linger
James C. Linger
Counsel for Appellants
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 Telephone
bostonbarristers@tulsacoxmail.com