UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18-35208

ROQUE DE LA FUENTE

Respondent,

v.

SECRETARY OF STATE KIM WYMAN,

Appellant.

On Appeal from the Final Orders of the
United States District Court for the District of Washington at Tacoma
No. 16-cv-05801
The Honorable Benjamin H. Settle, United States District Court Judge

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RESPONDENT'S ANSWER BRIEF

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I. COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Did the district court properly enjoin enforcement of Wash. Rev. Code § 29A.56.620 and Wash. Rev. Code § 29A.56.640(6) against Appellant because the impairment of rights guaranteed to Respondent under the First and Fourteenth Amendments clearly exceeds any interest advance and proven by the State of Washington.

SUGGESTED ANSWER: YES.

2. Should the district court have reached the same result in enjoining Wash. Rev. Code § 29A.56.620 and Wash. Rev. Code § 29A.56.640(6) based on strict scrutiny analysis because the challenged restrictions impose content based and/or severe restrictions on core political speech under the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and the challenged restrictions are not narrowly tailored to advance any, let alone a compelling governmental interest.

SUGGESTED ANSWER: YES.

II. COUNTER STATEMENT OF THE CASE

Respondent contests and rejects the blanket assertion in Appellant's Statement of the Case, without qualification, that the circulation of election petitions to place the name of minor party presidential candidates (already nominated at national party nominating conventions) and independent presidential candidates (who are not subject to any nominating convention process), are

accomplished at "nominating conventions." No other state calls the circulation of election petitions to place the name of a presidential candidate on the general election ballot a "nominating convention" and no court has upheld the requirement that presidential candidates need to give prior notice to the public before they exercise their rights under the First and Fourteenth Amendment to circulate election petitions and advocate directly to the public that they should appear on their state's presidential ballot. Furthermore, beyond the text of the statute, Appellant offered no factual evidence into the record that would cast a different light on the circulation of presidential election petitions in Washington , beyond the naked statutory requirement of giving 10 days' public notice and restricting petition circulation to a specific geographic area, which are the requirements that give rise to this action alleging that the challenged provisions impair rights guaranteed to Respondent under the First and Fourteenth Amendments to the United States Constitution.

The challenged statutory provisions attempt to justify publishing 10 days' notice in a newspaper of general circulation of the location of petition circulation by calling normal core political speech of signature gathering on election petitions to demonstrate that the candidate enjoys a "modicum of support" necessary to require the State of Washington to place the candidate's name on the general ballot a "nominating conventions" to create the patina that some sort of notice needs to

be given to registered voters before Respondent may begin to exercise what is guaranteed, without pause or prior notice to the public, under the First Amendment.

Presidential and vice presidential candidates are nominated at national nominating conventions. This is true for the Republican and Democratic parties, as well as for minor and third political parties such as the Libertarian, Green and Constitution parties. Unlike presidential candidates nominated by the Republican and Democratic parties, presidential candidates nominated by minor political parties and independent candidates (who are not nominated by anyone but themselves) do not gain automatic access to the general election ballot. Instead, independent presidential candidates and those nominated by minor political parties must either pay filing fees or, as in most states, timely file election petitions containing a certain number of valid signatures demonstrating that the candidates enjoys a "modicum of support" sufficient to require the state to place their name on the general election ballot.

Washington, improperly denominates the circulation of election petitions to demonstrate a "modicum of support" as a "nominating convention" when the candidates have either already been nominated by a national convention, or in the case of an independent candidate not subject to a formal nomination process at all to become a national presidential candidate. The circulation of presidential

election petitions in Washington always follows the act of national party conventions having already nominated the candidate, all that is left is the process to securing ballot access, not the re-nomination of candidates at the state level, which, in the context of a national presidential election is both patently absurd and a rank bastardization of the English language – all for the purpose of imposing a useless additional expense and complication on the exercise of core political speech by minor party and independent presidential candidates.

While the State of Washington and Appellants have the authority to require independent and third party presidential candidates to circulate election petitions, they do not have any constitutional authority in the nomination process of presidential candidates. Accordingly, the statutory characterization and Appellant's unyielding effort to cast run-of-the-mill core political speech of circulating presidential election petitions as a "nominating convention" is an intentional semantic deception to try to give rise to the notion that organized state gatherings to elevate an already nationally nominated presidential candidate to the general election ballot is both necessary and a proper characterization of what is happening on the ground in the State of Washington. On both counts the statute and Appellant advance a pure fiction, without evidence in the record, to justify what is a meaningless additional impairment of core political speech in the State of Washington.

III. SUMMARY OF THE ARGUMENT

The judgement and final Order of the district court should be affirmed. Washington Revised Code §§ 29A.56.620 and 29A.56.640(6) require that only third party and independent presidential candidates must pre-scout and pre-select one or more narrowly defined geographic locations within which they will circulate election petitions (what the State of Washington bizarrely denominates "nominating conventions") and then publish notices for each location in newspapers of general circulation and then wait an additional ten days after publication before they are permitted to collect their first signature. Furthermore, RCW §§ 29A.56.620 and 29A.56.620 then prohibit circulators from moving from their pre-selected locations to other locations that they learn are better locations to gather election petition signatures without going through the entire expense and time consuming task of publishing additional notices and wait a further 10 days before collecting signatures at the better location – all the while their circulators – including volunteer and professional circulators who may be residents of other states – must wait in their homes or hotel rooms, doing nothing.

In the first instance, the district court should have enjoined RCW § 29A.56.620 and RCW § 29A.56.640(6) based on strict scrutiny analysis because the challenged provisions clearly impose presumptively invalid content based restrictions on protected speech and/or impose severe restrictions on core political

speech under the *Anderson v. Celebrezze* analysis. *See*, *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). However, as the district court ultimately held, the challenged provisions also clearly fail the balancing test set forth in *Anderson* because Appellant and the State of Washington lack any interest in prohibiting third party and independent presidential candidates (and no other candidates) from circulating election petitions to gather signatures necessary to demonstrate that they enjoy the requisite "modicum of support" unless and until they wait ten days after publishing notice in newspapers of general circulation. Under the *Anderson* balancing test, even a 1% impairment of political speech is unconstitutional if the state's evidence shows a 0% advancement of a legitimate regulatory interest in the challenged ballot access restriction. As the district court properly found, the challenged provisions are nothing but a naked restriction on protected political speech without advancing any important regulatory interest. ER 12-15 (ECF No. 45).

More conclusively, Appellant utterly failed to offer any evidence that any of the asserted interests in support of the challenged provisions are either real or actually advanced by the challenged provisions. Appellant makes bald assertions of regulatory interest without introducing any evidence or record testimony as to hoe the challenged provisions acts works to advance an important regulatory interest. For instance, Appellant has introduced no evidence that a single

registered voter read any newspaper notice of the signature campaign prior to happening upon a petition circulator; Appellant has offered no evidence or record testimony that a single signature was secured as a result of any registered voter having read a newspaper notice required under the challenged statute and became motivate to seek out the circulators to sign the election petition of the presidential candidate publishing the notice; Appellant has offered no evidence that the notices provide any information about the presidential candidate; Appellant provided no evidence that the required notices of petition activity "provide the voting public with the first opportunity to learn about a minor party or an independent candidate and their platform" (Appellant's Br. at p. 25); Appellant has offered no evidence that "members and potential members of minor parties can attend and engage I debate both about the platform and about who the standard-bearer should be (Appellant's Br. at p. 25-26); Appellant produced no evidence that a "platform" is drafted or circulated for debate during the circulation of presidential election petitions in Washington or that party members can "suggest another nominee or compete with the existing candidate for the nomination" when the nomination of the national presidential candidate has already taken place (Appellant's Br. at p. 26). Frankly the list of bald face assumptions raised by Appellant in her brief are too numerous to counter and most of them implicate party decisions that have already been made at a real national nominating convention by the duly elected

delegate of the party – decisions such as who the nominee should be, who the party's presidential electors will be, and what the party platform should say. There is no record evidence that any such debate occur during the election petition phase of the ballot access process or how such debate in Washington can or should alter the decisions of national party nominating conventions held prior to the circulation of election petitions for the sole purpose of securing ballot access.

This court should also reject Appellant's invitation to permit Washington to upend party decisions made at proper national nominating conventions, even if such revolution could occur by the act of circulating election petitions for signature. What Appellant is advancing as a legitimate regulatory interest in the election arena is pure chaos – and chaos uniquely directed specifically at minor party and independent candidates. Political parties have the right to make the decisions, amongst themselves, as to who their standard bearers shall be. Political parties have the right to define their political agenda at national conventions attended by duly elected and registered delegates by the adoption of a party platform. Political parties have the sole authority to decide for themselves who shall serve as their Presidential Electors should their nominated candidates prevail in the general election. The State of Washington and Appellant have no constitutional authority to invite (even if they could at the petition stage of ballot access) the chaos of Washington voters overturning the results of national party

nominating conventions. Chaos in the conduct of elections is not a state interest and cannot be advanced to support the challenged provisions. In short, by the time election petitions are being circulated to the Washington electorate all of the issues that Appellant suggests that Washington voters should have the opportunity to involve themselves in, have already been decided – and decided by the proper party organs or by the independent presidential candidate himself/herself – decisions that the State of Washington and Appellant have no authority to open up to the entire corpus of registered voters.[1]

Accordingly, while Respondent respectfully contends that from a doctrinal standpoint, the challenged provisions should have been enjoined by the district court subsequent to strict scrutiny analysis, the lower court properly held that the challenged provisions are so void of any legitimate state interest that they fail the test of permissible restrictions on ballot access under the test set forth in *Anderson*. Accordingly, the judgment of the lower court should be affirmed.

[1] Washington voters have every opportunity to timely participate in who should be a minor party's presidential candidate, the form of the national party platform and to seek to become a presidential elector but they have to do so within the timeframe established by the party's rules and procedures. In short, if a voter wishes to participate in the presidential selection process of a minor party, they can become involved in the party and advance their views within the party in a timely manner. It is simply too late to try to give Washington voters a say in political party affairs after the party's national nominating convention has settled all of the issues that Appellant suggests need to be opened up to the entire electorate as a justification of the challenged notice requirement.

IV. ARGUMENT

A. Introduction

In order to gain access to Washington's general election ballot for the offices of Presidential and Vice Presidential of the United States, independent and minor political party candidates must collect signatures from 1,000 registered Washington voters. Wash. Rev. Code § 29A.56.640(5). Independent and third party presidential candidates may only gather signatures in pre-determined locations (improperly denominated by the State of Washington as "conventions") and providing 10 days' notice published in newspapers of general circulation – effectively imposing additional economic costs on the circulation of election petitions and a 10 day prior restraint on political speech during which no valid signatures may be collected. RCW §29A.56.620. The pre-selection of locations to circulate election petitions, the publishing of notice and the 10 day waiting period imposed under RCW § 29A.56.610 is enforced by Appellant through the requirements of RCW § 29A.56.640 which requires independent and third party candidates to execute a "certificate of nomination" which, in relevant part, is required to "contain proof of publication of the notice of calling the convention" and verified under oath of the "presiding officer and secretary" of the "conventions."

At its core, the foundational defect of RCW § 29A.56.620 and RCW § 29A.56.640(6) is the attempt of Appellant and the State of Washington to intentionally mischaracterize the circulation of presidential election petitions to strangers on the street (some of whom are merely exiting a Ferry line or Walmart) as "nominating conventions." All registered voters in the State of Washington are permitted to sign an election petition for independent and third party presidential candidates, not just party members or delegates called to a convention hall to debate and elect a party nominee in a rented convention or meeting facility where the political party may well want to provide notice to all enrolled party members or selected delegates. The circulation of election petitions is not a convention, especially in the context of presidential candidates where all political parties nominate their candidates at actual national conventions of all the States and not just by 1,000 registered voters in the State of Washington. Once minor political parties have nominated their presidential and vice-presidential candidates at their national conventions (or the independent candidate has announced his/her candidacy), local party members and supporters in the individual States are then tasked, as in Washington, to circulate election petitions to registered voters for their signatures to demonstrate the requisite constitutional threshold that the candidate enjoys a "modicum of support" to gain access to the general election ballot. The circulation of election petitions in the States, therefore, is not a

convention but conduct which follows presidential nominating conventions to gain ballot access where it is not statutorily granted automatically.

Appellant continues to interpret a "convention" to include routine petitioning conduct as door-to-door petitioning and the setting-up of a table at Ferry terminals to collect the required number of valid signatures on election petitions. However, RCW § 29A.56.620 requires that minor political parties and independent candidates must provide ten (10) days' notice of a "convention" held within a county by publishing a notice in a "newspaper of general circulation" within the county in which the party or the candidate intends to hold a "convention." The notice must publish the date, time, and place of the "convention" and include the mailing address of the person or organization sponsoring the "convention." These requirements essentially impose a 10 day free-speech waiting period (an additional time limitation in addition to the already established overall period of time in which election petitions may be circulated and filed) and further prevents the free movement of petition circulators to geographic areas not listed within the required public notice, such that if petition circulators spy more efficient locations to gather signatures, they must wait to publish a new public notice, triggering yet another 10 day waiting period before they may exercise rights guaranteed to Respondent under the First Amendment without abeyance.

Respondent timely filed with over 2,000 valid signatures of registered Washington voters who petitioned the State of Washington to place Respondent's name on Washington's 2016 general election ballot for the office of President of the United States. Appellant rejected Respondent's nominating petition for President of the United States for the sole reason that Respondent failed to comply with the requirements of RCW § 29A.56.620.

Respondent properly alleged that RCW § 29A.56.620 of the constitutes an unconstitutional prior restraint and/or severe impairment of "core political speech" which is not narrowly tailored to advance a compelling governmental interest. Furthermore, because the requirements of RCW § 29A.56.620 are only applied to speech advocating for ballot access of minor party and independent presidential candidates – and not any other political candidate or initiative and referendum petition in the State of Washington. The 10 day advance notice requirement imposed by RCW § 29A.56.620 uniquely impair and strike at core political speech whose content is asking the voters of Washington to place the names of independent and minor party candidates for the Offices of President and Vice-President of the United States on Washington's general election ballot. Furthermore, content-based restriction of speech also directly conflicts with the requirement that ballot access restrictions can only be upheld if they are non-discriminatory. The Supreme Court has established that ballot access restrictions

can be upheld if they are, among other thing, "nondiscriminatory" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Court explained in *Burdick* that: "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*. Accordingly, the presumptively invalid content-based restrictions on speech has been incorporated into the *Anderson-Burdick* balancing test for less than severe restriction on speech by requiring that the less than severe restriction on speech must be "nondiscriminatory." In the instant case, the requirements of RCW § 29A.56.620 and RCW §29A.56.640(6) are discriminatory because they are only applied to independent and minor party presidential candidates – and no other election petitions circulated by any other state or local candidates or the circulation of initiative and referendum petitions in Washington. Therefore, even if Appellant can articulate and prove that the challenged restrictions support an important regulatory interest (and Appellant cannot), they still fail under the balancing test articulated in *Anderson* and *Burdick* because the restrictions are discriminatory. Additionally, the asserted (fictitious) regulatory interests advanced by Appellant in support of the challenged restrictions are themselves discriminatory – at no point does the State of Washington or Appellant argue the need for the registered voters of Washington to be given 10 days' advance notice of the circulation of election

petitions for Republican and Democratic party candidates (either for president or statewide office) to give them full access and information about Republican and Democratic candidates, to debate the party platform or to alter the change the nomination of the party after the national party nominating conventions, or the opportunity to serve as a presidential elector for either the Republican or Democratic parties. The foregoing demonstrates not only the discriminatory impact of the challenged statutes but also how utterly ridiculous the asserted regulatory interest are that Appellant advances in support of the challenged statutes in the event strict scrutiny is not applied.

In addition, the practical operation of the RCW § 29A.56.620 imposes impermissible "free-speech" zones on public property only for independent and minor party candidates for the Offices of President and Vice-President of the United States because election petitions circulators are restricted to gathering valid signatures on their election petitions to the places named in the public notice. If they stray or wish to stray from the published location, they must wait until a new notice is published in a newspaper of general circulation and wait a new 10 day period before they can move to a new location to gather valid signatures. This prohibition on the ability to move to better locations imposes a unique impairment on independent candidates for President and Vice-President of the United States because they lack the local knowledge of where to best gather valid signatures that

some of the more established minor political parties obtained from years of local experience in circulating election petitions for their presidential candidates.

Accordingly, RCW § 29A.56.620 unconstitutionally impairs rights guaranteed to Respondent under the First and Fourteenth Amendments to the United States Constitution and this Court should affirm the decision of the lower court.

B. Legal Standard and Evaluation of RCW §29A.56.620 and RCW § 29A.56.640(6)

The United States Supreme Court has clearly instructed that courts must "be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 (1999). In evaluating the constitutionality of restriction on ballot access, "the rigorousness of [the court's] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When constitutional rights "are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id*. (internal quotation marks and citation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*.

The State of Washington requires only minor party and independent presidential candidates to hold "conventions" to "nominate" their candidates – even though the parties already nominated their standard-bearers and independent candidates do not need nomination, they just and need ballot access. Access to Washington's general election ballot for minor party and independent candidates for the office of President and Vice-President of the United States, in turn, depends upon the subsequent timely filing with defendant of nominating petitions containing 1,000 signatures of registered voters certifying that they attended the "convention" and that the named candidate should be placed on the state's general election ballot. A "convention" for minor political parties and independent candidates, however, has been interpreted as to not require that the "convention" be held in a hotel or any other indoor meeting space, as the term "convention" is commonly understood to require. Instead, defendant has interpreted a "convention" to mean as little as door-to-door canvassing or public petitioning and the setting up of a table in a public space or private space such as in the parking lot of a Walmart, Home Depot or any other such place of dense concentration of potential signers.

It is against this factual backdrop where the "convention" requirement has been watered down to mean any normal petitioning activity that RCW § 29A.56.620 imposes an unconstitutional impairment of "core political speech"

protected under the First and Fourteenth Amendments to the United States Constitution. Specifically, RCW § 29A.56.620 provides as follows:

> **Convention—Notice.**
> Each minor party or independent candidate must publish a notice in a newspaper of general circulation within the county in which the party or the candidate intends to hold a convention. The notice must appear at least ten days before the convention is to be held, and shall state the date, time, and place of the convention. Additionally, it shall include the mailing address of the person or organization sponsoring the convention.

Accordingly, RCW § 29A.56.620 prohibits any petitioning activity within a county unless and until ten (10) days' prior notice has been published in a newspaper of general circulation. Failure to comply with the notice requirements of RCW § 29A.56.620 is grounds for the complete rejection of otherwise timely filed election petitions containing "core political speech" of registered Washington.

An absolute bar on political speech, for any amount of time, of the kind imposed by RCW § 29A.56.620, constitutes a severe impairment of First Amendment protections and is subject to strict scrutiny by this Court – as opposed to normal ballot access requirements implicating the orderly construction of election ballots such as number of signatures required to filed on election petition, form of the election petition to be used, qualification requirements of signers, notarization of election petitions by circulators, deadlines to file nomination petitions and other election petition details to promote uniformity and regularity of the election process.

For instance, in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court struck down Colorado's prohibition on paid petition circulators. Holding that the restriction was "a limitation on political expression subject to exacting scrutiny" the Court reasoned that the state had failed to justify the burden on advocates' free speech rights. *Meyer*, 486 U.S. at 420. In *Buckley*, the Court invalidated a requirement that petition circulators be registered voters of the state, holding that the "requirement cuts down the number of message carriers in the ballot-access arena without impelling cause." *Buckley*, 525 U.S. at 197. Following *Buckley*, Courts have routinely subjected restrictions on who may circulate election petitions to strict scrutiny analysis because such restrictions do not merely implicate the mechanics or orderly administration of the election petition process, but rather impose an absolute exclusionary bar on the free exchange of political speech by large numbers of citizens. *See e.g.*, *Citizens in Charge v. Gale*, 810 F.Supp.2d 916 (D. Neb. 2011) (invalidating state residency requirement for circulators of candidacy and ballot initiative petitions); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (invalidating state residency requirement for circulators of presidential candidacy petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (same); *Daien v. Ysursa*, 711 F.Supp.2d 1215 (D. Idaho 2010) (same); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (invalidating residency requirement for circulators of petition for congressional candidacy petitions); *Libertarian Party of Virginia v.*

Judd, 718 F.3d 308 (4th Cir. 2013) (invalidating state residency requirement for circulators of candidacy petitions), *aff'd*., 881 F.Supp.2d 719 (E.D. Va. 2012) cert. denied, 571 U.S. ____, 134 S. Ct. 681 (Dec. 2, 2013); *Green Party of Pennsylvania v. Aichele*, 89 F.Supp3d 723 (E.D. Pa. 2015); *Wilmoth v. Merrill*, 3:16-cv-0223 (D. Conn., March 1, 2016); *Libertarian Party of Connecticut v. Merrill*, 3:15-cv-01851 (D. Conn., January 27, 2016). In *Green Party of Pennsylvania*, Judge Dalzell of the Eastern District of Pennsylvania explained the application of strict scrutiny:

> "We apply the strict scrutiny standard because the character and magnitude of the asserted injury outweighs the Commonwealth's interests as a justification for the burden it imposes. The Commonwealth's residency requirement is not narrowly tailored to advance a state interest of compelling importance. 'As the law has developed…, a consensus has emerged that petitioning restrictions like the one at issue here are subject to strict scrutiny analysis.'"

Green Party of Pennsylvania, 89 F.Supp.3d at 740 *citing Judd*, 718 F.3d at 316-17. In the instant appeal, the restriction on the circulation of an election petition within the time period allowed by law is subject to the additional restriction of a ten (10) day notice period in advance of any circulation of election petitions within a county. For 10 days within the time period allowed under law, no valid speech may be made to place the names of minor party and independent candidates on Washington's general election ballot. And these challenged restrictions are triggered yet again if the candidate or the circulators discover that the geographic locations noticed for the circulation of their election petition do not yield the

desired or even minimum number of 100 valid signatures such that they need to re-locate to a new location, which, in turn, requires a new public notice, followed by yet again a new 10 days' waiting period before any valid political speech may be exercised in Washington.

Beyond the confines of established constitutional analysis in the context of ballot access, the restrictions imposed on election petitioning in the State of Washington by RCW § 29A.56.620, can also be analogized to binding precedent on the constitutional analysis of licensing statutes which bar speech unless and until a governmental permit is obtained in advance of the intended political speech. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the United States Supreme Court explained that a law which prohibited door-to-door advocacy without first obtaining governmental permission violates the First Amendment. The Court explained that:

> "It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors…[and] constitutes a dramatic departure from our national heritage and constitutional tradition."

Id. at 165-66. In the instant appeal, a permit from government officials is not the requirement, but the public notice requirement of RCW § 29A.56.620, followed by the requirement that Respondent submit to Appellant evidence of publication in a newspaper of general circulation is the inverse of a licensing scheme and equally

offensive to the guarantee of free speech afforded to Respondent under the First and Fourteenth Amendments to the United States Constitution.

The requirements of RCW § 29A.56.620 also impose a temporary prior restraint on speech, which if violated (as is the case in the instant appeal) implicate a permanent punishment in the form of Appellant's rejection of Respondent's election petition signatures that were recorded before the expiration of the required ten (10) notice period. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a unanimous Supreme Court ruled that a state court injunction of petitioners seeking to picket and pass out literature of any kind in a specified area was unconstitutional. The Court explained that the injunction operated to suppress speech protected under the First Amendments and that any prior restraint on expression came to the Court with a "heavy presumption" against its constitutional validity. *See Carroll v. Princess Ann*, 393 U.S. 175, 181 (1968); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

In the instant appeal, any speech collected on election petitions within a specified area is censored by Appellant unless the requirements of RCW § 29A.56.620 are first satisfied. Accordingly, the requirements imposed by RCW § 29A.56.620 constitute a form of temporary prior restraint on speech protected under the First and Fourteenth Amendments to the United States Constitution.

Once strict scrutiny analysis is determined to be the proper scrutiny to be applied; it is presumed that the law, or regulation, or policy is unconstitutional. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The government then has the burden to prove that the challenged law is constitutional. *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 450-51 (2007). To withstand strict scrutiny, the government must prove that the law is necessary to achieve a compelling governmental interest. *Id*. If this is proved, the state must then demonstrate that the law is also narrowly tailored to achieve the asserted interest. *Id*.

In order to meet its burden of proof, the government "must do something more than merely posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). In other words, the government must factually prove the existence of the evil and that the asserted interest is necessary and narrowly tailored to remedy that evil. Under the requirement that any policy must be narrowly tailored to advance the asserted compelling governmental interest, Appellant cannot forego a policy which is clearly less burdensome on free speech and associational rights in favor of the policy challenged in this appeal. Accordingly, once strict scrutiny analysis is applied to RCW § 29A.56.620, Appellant must articulate and prove via evidence in the record that the asserted evil exists, that the challenged remedy of the evil

implicates a compelling governmental interest and that the challenged restriction is designed to narrowly remedy the asserted evil.

Appellant has failed to establish any evidence, or articulate the existence of any legitimate state interest, let alone an interest of compelling import, to force circulators of an election petition for a minor party or independent candidate for President of the United States to publish a notice in a newspaper that the circulators will be gathering signatures within a county ten (10) days before circulation. While the State of Washington may have an interest in requiring prior notice of actual political conventions called by established political parties with registered members who might require legitimate notice to attend a local or state party nominating convention (but not a national presidential nominating convention) held at a specific time and place, such a factual dynamic and associated state interest is wholly absent from the instant appeal Independent candidates are merely seeking access to the state's general election ballot. Independent candidates do not seek the nomination of a party or association of like-minded political activist beyond the individuals who decide, when approached by a circulator, to sign an election petition for the independent candidate to appear on the state's general election ballot. Likewise, minor political parties nominate their party's presidential and vice presidential candidates at national nominating conventions attended by credentialed delegates who have been given notice of the

conventions according to the internal party rules and procedures. Appellant has failed to articulate any legitimate state interest, compelling or otherwise, in support of the challenged regulation because none of the asserted interest are rational – they essentially advance the bizarre notion that Washington voters have the right to change or contest the party's nominee after the holding of a party's national nominating convention; that the voters have an interest in debating and changing the party's platform after the party's national nominating convention has been held; and that the voters of Washington have the right to notice so that they can become or contest presidential electors for the party or independent candidate for whom the election petition is being circulated. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) the Supreme Court explained that it is offensive to the First Amendment and a free society "that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors…."

Appellant has certainly not offered any record evidence that these asserted state interests are real rather than merely hypothetical or that any registered voter has ever engaged in such efforts at the point of contact with an election petition circulator supporting an independent or minor party presidential candidate. To the contrary, the asserted state interests advanced by Appellant are so fantastical and

barred by the linear nature of the time continuum that the interest are the very definition of hypothetical.

Additionally, even if RCW § 29A.56.620 might pass constitutional scrutiny if it sought to impose a ten (10) day notice requirement for the circulation of election petitions for state and local candidates in Washington (which it does not), as applied to the circulation of election petitions for the offices of President and Vice President of the United States, such petitions are circulated for federal offices, and case law makes it clear that individual states have a minimal interest in imposing unnecessary regulations because individual states do not retain a compelling interest in having their own local election laws from having an impact on a national election. Flatly stated, not every election regulation which is allowed for state offices are permitted to interfere with the nation-wide election for President and Vice-President. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983) the United States Supreme Court further clarified that:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements…has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than state-wide or local elections, because the outcome of the former will be largely determined by voters beyond the

> State's boundaries….The pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.

Anderson at 794-95.

The uncontested fact that RCW § 29A.56.620 is only imposed on the gathering of election petition signatures for independent and minor party candidates for President and Vice-President of the United States – and no other federal, state or local candidates – demonstrates that RCW § 29A.56.620 fails to advance any compelling or legitimate governmental regulatory interest sufficient to justify the cost to, and impairment of, protected First Amendment speech, especially in the arena of presidential elections where the State of Washington and Appellant possess a minimal interest in imposing ballot access restrictions beyond those necessary for the orderly administration of elections. If the 10 day notice requirement was necessary to advance a compelling or even a legitimate governmental interest it is difficult to understand why RCW § 29A.56.620 is not imposed on any other political candidate seeking access to Washington's general election ballot by election petition or to the circulation of initiative and referendum petitions.

C. The Challenged Restriction Impose Content-Based Restrictions on Speech Subject to Strict Scrutiny Analysis

The fact that the 10 day advance publishing requirement of RCW § 29A.56.620 is only imposed on independent and minor party candidates for the

Offices of President and Vice-President of the United States implicates a presumptively invalid content based restriction of speech. One of the most important principles of First Amendment jurisprudence states that the government may not regulate speech solely on the basis of its content. Public debate would be distorted, and individual autonomy impaired, if the government were allowed to pick and choose certain ideas, viewpoints, or types of information to suppress. A law is content based if it limits or restricts speech that concerns an entire topic (‘‘subject matter discrimination’’) or that expresses a particular stance or ideology (‘‘viewpoint discrimination’’). The Supreme Court generally invalidates content-based speech regulations unless the government can meet an exacting standard of justification known as ‘‘strict scrutiny’’ analysis.

The content distinction is a relatively recent development in First Amendment law. The Court first established its importance in *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972). In that case, postal worker Earl Mosely challenged a Chicago ordinance that prohibited all picketing outside schools except for ‘‘peaceful picketing of any school involved in a labor dispute.’’ Mosely had for several months picketed a high school that he believed engaged in racial discrimination. The Court struck down the ordinance because it applied selectively, depending on what message picketers carried on their signs. Writing for the Court, Justice Marshall explained that ‘‘above all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its viewpoint.'' *Id*. at 95-96.

Pursuant to strict scrutiny analysis, content regulations of speech are unconstitutional unless they are (1) justified by a compelling state interest; and (2) narrowly drawn to achieve that interest with the minimum abridgement of free expression. The compelling- interest prong of the test ensures that speech cannot be restricted just because the majority finds it offensive. For example, in *Texas v. Johnson*, 491 U.S. 397 (1989), the Court invalidated the conviction of a protestor who burned an American flag at the Republican National Convention. Although Texas claimed that its flag desecration statute served to prevent breaches of the peace and encourage respect for the flag, the Court found these arguments unconvincing. Rather, the Court concluded that the statute's real purpose was to eliminate political protests considered by many to be insulting and unpatriotic. In his opinion for the Court, Justice Brennan noted that ''the bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'' *Id*. at 414-15.

Even where a compelling justification exists, a content- based speech regulation will not meet the requirements of strict scrutiny if it is overbroad and limits too much speech. In *Simon & Schuster v. Members of the New York State*

Crime Victims Board, 502 U.S. 105 (1991), the Supreme Court unanimously declared New York's ''Son of Sam Law'' unconstitutional as penalizing expression based on its content.

In the instant case, only speech associated with the circulation of election petitions and the speech necessary to request voters to sign election petitions seeking to place independent and minor party candidates for the Offices of President and Vice-President of the United States are subject to the impairment that they must provide 10 days' public notice published in newspapers of general circulation. Speech attendant to the circulation of election petitions for other candidates for public office and the circulation of referendum and initiative petitions are not subject to the requirement of the challenged statute. Accordingly, by imposing the 10 day publication requirement only on independent and minor-party candidates for president and vice-president demonstrates that it is a restriction on speech which fails to advance a compelling or legitimate governmental interest and regulates protected political speech based on the content of the speech, namely, speech necessary to place independent and minor party candidates for president and vice-president on Washington's general election ballot.

D. Appellant Fails to Articulate or Provide Any Record Evidence That the Challenged Restrictions Advance Any Compelling or Legitimate Regulatory Interest to Remedy a Real Rather Than a Purely Hypothetical Evil

Simply stated, separate from the dispositive legal arguments under Section C above based on the content-based restriction of speech imposed by RCW § 29A.56.620, the statute must fail under the balancing test articulated by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Anderson*, the Court explained that even under a less exacting level of scrutiny where a regulation is deemed to be less than severe, the Court must weigh the impairment to First Amendment rights against the asserted interest advanced and proved by the state.

In the instant case, the costs imposed on the circulation of election petitions for independent and minor party presidential candidates both in terms of financial costs imposed in publishing the 10 day notice and the financial costs in scouting and finding a suitable location to gather signatures for the election petition drive or moving to a new location and the associated costs of down-time for professional circulators waiting for the new 10 day notice period to expire to permit them to move to circulate at a new location and the impairment of not gaining access to the general election ballot if RCW § 29A.56.620 is not properly followed by independent candidates lacking in the local knowledge on how to properly comply with the challenged statute clearly outweigh the any asserted state interest in the challenged statutes.

The lack of a state interest in enforcement of RCW 29A.56.620 is also demonstrated by the fact that actual notice (i.e. a signer of the election petition is required to have known about the "convention" through the public notice) of the "convention" is not required before a signer may validly sign the election petition. Anyone who comes upon an election petition circulator may sign, if they wish, the election petition. The signer need not know of the published site or occurrence, or even participation in, the alleged "convention" before they may sign the petition. In other words, the "convention" is nothing more than the normal every-day circulation of election petitions – anyone, including voters tumbling off of a Ferry who had no knowledge of the holding of a "convention" may sign an election petition. In fact, there is no convention, there is only the circulation of election petitions which need not be preceded by a 10 day public notice published in a newspaper of general circulation.

1. State Has No Constitutional Authority or Interest in the Nominating Conventions of Political Parties and Independent Candidates.

In rebuttal to Appellant's assertions that the state has an interest in providing 10 days' notice to registered voters of the circulation of election petitions petition for independent and minor party candidates so that they can participate and even challenge the nomination of a minor political party after the party has already nominated its candidates, or to help debate the party's platform

or contest for party positions as presidential electors, the United States Supreme Court has clearly held, that even in the context of a state sponsored and paid for election, that a state may not by statute, interfere with the associational rights of political parties. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) the Court explained that:

> A major political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any case the most important.
>
> Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon rights of the Party's members under the First Amendment to organize with-like minded citizens in support of common goals. As we have said, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 205 (1957).

Tashjian, 479 U.S. at 214-15.

Under the rational of *Tashjian* the individual States have no authority to expand or limit the associational rights of political parties, such decisions may

only be taken by the political party, not state governments. Under *Tashjian*, the freedom of association protected under the First and Fourteenth Amendments to the United States Constitution extend to partisan political organizations and the fact that the States possess the power to regulate the time place and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or the freedom of political association. *Id*. at 213-17.

It is in the conduct of their own affairs that political party and independent candidates are best able to assert their rights of free association and thus claim a broad exemption from government regulation. *See*, Virginia E. Sloan, *Judicial Intervention in Political Party Disputes*, 22 UCLA L. REV. 622 (1975) (providing an overview of the judicial role in this area). For instance, in *Heitmanis v. Austin*, 899 F.2d 521, 529 (6th Cir. 1990), that court held that a Michigan law granting state legislators *ex officio* delegate status at party's national convention was a violation of the state party's First Amendment right of free association. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the United States Supreme Court instructed that:

> The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end, the state political parties are "affiliated with a national party through acceptance of the national call to send delegates to the national convention." *Ray v. Blair*, 343 U.S. 214, 225 (1952). ***The States themselves have no constitutional mandated role in the great task of the selection of Presidential and Vice-Presidential candidates***.

Cousins, 419 U.S. at 489-90 (emphasis added).

Perhaps most importantly, all of Appellant's asserted state interests implicate an intrusion in the associational rights of political parties and independent candidates for President and Vice President. In particular, the State of Washington cannot force minor political parties and independent candidates for President and Vice President of the United States to delegate the most precious selection process of presidential electors to registered voters who are not the most loyal and staunch adherents to the party and/or the Presidential candidate. As the 2016 presidential election has clearly instructed, the identity and loyalty of presidential elections is of the most paramount importance and is clearly within the sole province of the associational rights of political parties and independent candidates. Certainly, the State of Washington makes no effort to open the doors of the Republican and Democratic parties' selection of presidential electors to non-party members. And, point-in-fact, no major or minor political party in the United States has consented, by internal party rule, to open their presidential elector selection process to anyone by the most senior party officials. Accordingly, the Appellant's asserted interest on this front must be clearly rejected by this court under ***any analytical scenario*** employed by this court. Additionally, Appellant's contention that Washington voters have an

interest in knowing who is sponsoring a particular convention and having a point of contact if they want to know more about the minor party and independent candidate is equally specious and violates the associational right of a minor party and independent candidate. To be blunt, the voters of Washington possess no such right to know who is sponsoring a "nominating convention" or the "mailing address of the person or organization sponsoring the convention." Such an asserted right flies in the face of the First Amendment right to anonymous speech if the party so desires. *See, McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343-57 (1995).

2. <u>Challenged Statutes Are Not Narrowly Drawn</u>.

In the context of strict scrutiny analysis, the 10 day notice period is too broad of a waiting period for which Appellant has failed to offer any record evidence in support as to why the waiting period must be the statutorily defined 10 day period instead of some other lesser time period. In *Elfbrandt v. Russell*, 384 U.S. 11 (1966) quoting, *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940), the Supreme Court proclaimed that: "[A] statute touching…protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state… Legitimate legislative goals "cannot be pursued by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Elfbrandt*, 384 U.S. at

18. Appellant have flatly failed to explain why a 10 day waiting period is necessary to achieve a specific and recognized state interest. This is especially true as the record is completely absent of any evidence that anyone signing any nomination petition in past election cycles did so based on having read a tiny newspaper notice 10 days before the circulation of the nominating petitions began. In fact, given the sparse space consumed by the required newspaper notices, it seems more logical that anyone actually taking the time to read these legal notices would be more inclined to remember and act upon the notice if the "nominating conventions" were being held within the next day or so after the notice had been published. It seems more likely that a shorter notice period might facilitate those few individuals who take the time to read legal notices to actually remember the content of the notice and act upon it, if they were so inclined. It seems more likely than not that individuals who read such legal notice are more likely to forget about the substance of the notice over the 10 day waiting period than if the time period between the publishing of the notice and the holding of the "nominating convention" was shorter in length that the currently mandated 10 day period.

Additionally, Appellant completely fails to explain (except to keep the fiction of "nominating conventions" plausible) why nominating petition circulators are confined to the specific location published in the newspaper for

the holding of the "nominating convention." None of Appellant's asserted state interest in support of the publishing requirement supports this aspect of the challenged statutes impact of First Amendment speech.

3. Appellant Fails to Advance Legitimate State Interests in Support of Challenged State Interests

Appellant argues in her brief that following state interests in support of the challenged statutes: (1) The voting public has a strong interest in participation in, and therefore notice of minor party and independent candidates conventions; (2) the conventions provide the public with the first opportunity to learn about a minor party or an independent candidate and their platform; (3) Registered voters must choose well because they can only sign one nominating petition; (4) Washington voters have an interest in knowing who is sponsoring a particular convention and having a point of contact if they want to know more about the minor party and independent candidate; and (5) Minor party and independent candidate conventions must also select a slate of presidential electors and if a Washington citizen wants to be selected to serve as an elector for a minor party and independent candidate, he or she must know when and where to show up for the convention. Appellant's Br. at pp. 24-27.

First, the last asserted interest is a direct violation of the associational interests of the minor party and independent presidential candidate. Casual registered voters without any particular affiliation or history with a minor party or

independent candidate have no right or expectation to be elected at a "nominating convention" as a presidential elector for that minor party and/or independent candidate. Furthermore, there is nothing in the record which suggests that any of these fictitious "nominating conventions" conduct any kind of formal program or vote. There is certainly no evidence that any presidential elector for either a minor party or independent presidential candidate has ever been elected at any of the "nominating conventions" commanded by the challenged statute. Respondent selected his slate of Washington presidential electors before his signature drive started in Washington. In fact, if this is a state interest it would trigger immediate Equal Protection concerns as neither the Republican and/or Democratic parties are forced to open the selection of their presidential electors to the general voting public. Selection of presidential electors is confined to the most trusted boosters of the minor party and independent candidates, just as it is with the Republican and Democratic presidential electors.

Appellant's assertion that Washington voters have an interest in knowing who is sponsoring a particular convention and having a point of contact if they want to know more about the minor party and independent candidate is equally unconstitutional the First Amendment guarantees anonymous speech. *See*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Furthermore, even if this is an actual interest, any one "attending" the "convention" has every

opportunity to ask whatever question they want as a condition to providing their signature on the nominating petition. The voter presented with a nominating petition has the power to command any information they want before signing the nominating petition. Accordingly, Appellant's asserted state interest on this front is neither advanced by the challenged statute nor is it narrowly drawn to advance the asserted state interest as petition signers so not need the challenged statutes in order to extract any information they deem important before providing support to the independent or minor party candidate. Furthermore, there is nothing in the record which demonstrates that voters desire the kind of information that Appellant seeks to elevate to a state interest on behalf of the voters.

Appellant's assertion that registered voters must choose well because they can only sign one nominating petition is not a state interest. Registered voter are not required, and the state cannot require, to engage in any careful thought before they sign a candidate's election petition. It is not for the state to impose, demand or expect a solemn thought process on the part of the registered voter who signs a presidential candidate's nominating petition. In fact the challenged statutes do not advance this interest at all. Based on Appellant's logic, if the notice requirement is to impart a universal knowledge on registered voters as to the universe of all potential minor and/or independent presidential candidates such that they can "choose well before they" provide their only lawful signature, the voter would

have to be exposed to all of the public notices and then only after considering all options "attend" the "convention" of his/her choice and sign the winning candidate's nominating petition. This, of course would require that the voter's minor party or independent preferred candidate still has ongoing "conventions" that he can "attend" to sign the desired petition. Since "nominating conventions" can be held by minor party and independent candidates at any time during the lawful period to circulate nominating petitions, there is no evidence that a voter will get the opportunity to weigh all potential option and then be afforded the opportunity to sign the desired nominating petition. And of course, this is not what happens in real life. In the real world, a voter is presented with a nominating petition – wholly unaware of the legal notice that was published in a newspaper about the holding of a "nominating convention" (and certainly unaware of all the candidates that might be circulating election petitions) and he or she either signs or refuses to sign based on the pitch given by the petition circulator at the moment the petition is offered for the voter's signature. Appellant's asserted interest is pure sophistry.

Appellant's asserted state interest that the conventions provide the public with the first opportunity to learn about a minor party or an independent candidate and their platform is not supported by the record. Appellant cannot possible assert that in the age of the internet and mass media that the notice of a "nominating

convention" is the first opportunity for the public to learn about a minor party or an independent candidate or their platforms. Furthermore, as there is no evidence as to how many, or if any voters, become aware of the "nominating conventions" through the notices required to be published under the challenged statutes, it is wholly speculative as to the impact that the publication notice has on informing the public about minor party and independent candidates for president. Furthermore, the State of Washington provides each registered voter with a pamphlet providing them with detailed information as to each candidate on the general election ballot. These information pamphlets provide far more detail about the candidates running for president than the scant and useless public notices of "nominating conventions" required under the challenged statutes.

Furthermore, it is not clear that the State has any interest in supporting the job of minor parties and independent candidates to do their own campaigning in support of their causes and/or candidates. In fact, the Court in *Anderson v. Celebrezze* explained that: "Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Anderson*, 460 U.S. at 797.

Likewise, Appellant's asserted state interest that the voting public has a strong interest in participation in, and therefore notice of minor party and independent candidates conventions is not supported by the record or history. A

minor party is a minor party precisely because the voting public has not historically taken an interest in participating in the affairs or "nominating conventions" of minor parties. There is simply nothing in the record to support that this a legitimate state interest in support of the challenged statute.

And, of course, none of the state interests asserted by Appellant in support of the challenged statute's publication requirement transfer over to the restriction of pure petitioning activity. All of Appellant's asserted state interests in support of the challenged statutes presuppose that the State may impose rules mandating the holding of state nominating conventions by minor parties and independent candidates for president. As explained above, the State lacks any constitutional authority to impose rules on the associational interest of any political party, especially the selection of national candidates. Under any analysis of the challenged statutes as restrictions on pure petitioning, none of the asserted state interests advanced by Appellant support the 10 day notice and waiting period and the prohibition on election petition circulators from moving their signature drive to new locations is not part of their publication.

It seems obvious to Respondent, that Appellant's asserted state interests in support of the challenged statutes is the product of a brain-storming session by Appellant's legal counsel that settled upon chirpy sounding electoral bromides that

do not have any substance in fact, do not advance any real world state interest and is not supported by the evidence in this case.

V. CONCLUSION

For all the foregoing stated reasons, the judgment of the lower court should be affirmed

Respectfully submitted,

Dated: August 22, 2018

/s/ Paul Rossi

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellant Procedure 28-2.6, Respondent, by and through his undersigned legal counsel, hereby state that he is unaware of any related cases to the instant appeal that are currently pending before this Court.

Dated: August 22, 2018

/s/ Paul Rossi
Paul A. Rossi, Esq.
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Federal Rule of Appellate Procedure 21(a)(7)(C) and the Ninth Circuit Rule of Appellate Procedure 32.1, the attached brief is proportionately spaced, has a typeface of 14 points and contains 10,238 words.

Dated: August 22, 2018

/s/ Paul Rossi
Paul A. Rossi, Esq.
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 22, 2018

/s/ Paul Rossi
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