IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
NO. 18-1123

WILLIAM SEMPLE, individually; THE COALITION FOR COLORADO UNIVERSAL HEALTH CARE, a/k/a COOPERATE COLORADO, a Colorado not-for-profit corporation; COLORADOCAREYES, a Colorado not-for-profit corporation; and DANIEL HAYES, individually,

Plaintiffs-Appellees,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable William J. Martinez, District Judge
Case No. 1:17-cv-1007-WJM

Appellees' Motion for Rehearing *En Banc*

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Oral Argument is Not Allowed

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Pursuant to F.R.A.P. 35(b), the plaintiffs-appellees request a rehearing en banc to consider anew the issues raised in the Colorado Secretary of State's appeal, as decided in Judge Murphy's August 20, 2019, 2-1 published opinion (Briscoe, J., dissenting).

CONSIDERATIONS WARRANTING A REHEARING *EN BANC*

In a 2-1 opinion (Judge Briscoe dissenting) Judges Murphy and McHugh applied *Evenwel v. Abbott,* 136 S.Ct. 1120 (2016), which holds that total population, as opposed to the eligible voter population, is the relevant metric for apportioning legislative districts, and held that *Evenwel* also governs the plaintiffs' Equal Protection-vote dilution claim and mandates that their claim be dismissed.

This is a decision of first impression in the United States. Plaintiffs believe that, as Judge Briscoe's dissent notes, this holding is inconsistent with the *Evenwel* decision.

If the majority is correct, it means that *Evenwel sub silento* overruled every vote-dilution and voter equality case decided by the Supreme Court and the Courts of Appeals, beginning with *Williams v. Rhodes,* 393 U.S. 23, 30 (1968) and *Moore v. Oglivie,* 394 U.S. 814 (1969). *See also, Communist Party v. State board of*

Elections, 518 F.2d 517 (7th Cir. 1975); *Bloomquist v. Thompson,* 739 F.2d 525 (10th Cir. 1984); *Angle v. Miller,* 673 F.2d 1122 (9th Cir. 2012); *Gallivan v. Walker,* 202 UT 89, 54 P.3d 1069 (2002).

The case thus involves a question of exceptional importance which should be addressed by the entire Court rather than in a 2-1 panel decision.

INTRODUCTION

This case involves an Equal Protection challenge to that part of Article V, section 1 of the Colorado Constitution which concerns citizen initiated amendments to the Constitution. Prior to the 2016 change at issue here,[1] the Constitution required successful initiative petitions to have the signatures of 5% of those registered voters voting in the most recent election for secretary of state regardless of where those voters lived. The challenged portion keeps the 5% requirement but adds a requirement that the 5% figure include the signatures of 2% of the registered voters in each of the state's thirty-five senate districts in order to be placed on the ballot.

Plaintiffs argued, and the district court agreed, *see, Semple v. Williams,* 290 F.Supp.3d 1187 (D. Colo. 2018) that because there was a huge disparity in the

[1] The change was added by 2016 Amendment 71. The full text of the relevant portion appears in Appendix A.

number of registered voters from one district to the next, and because registered voters were the relevant population metric, the 2% requirement diluted the value of their signatures and thus violated their rights under the Equal Protection Clause and cases such as *Moore v. Oglivie,* 394 U.S. 814 (1969) and its progeny.

It is undisputed, and indeed, undisputable, that there is an enormous variation in the number of registered voters in the thirty-five districts because the figures relied on by the plaintiffs and not challenged by the defendant, were taken from the defendant's own website. *See,* www.sos.state.co.us/pubs/elections/VoterRegNumbers/html.

The defendant's primary argument below and on appeal is that this case is governed by the Supreme Court decision in *Evenwell v. Abbott,* 136 U.S. 1120 (2016). The district court rejected this argument and held that *Evenwel* does not apply to vote dilution cases. *See, Semple v. Williams,* 290 F.Supp.3d at 1197: "In the context of direct democracy, however, the tension between preventing vote dilution and ensuring equality of representation falls away because, with no 'representation' in the ballot petition form of direct democratic rule, there is no representative equality component of the equation to balance against the integrity of the vote. In other words, there is no representation; there is only voting." This opinion is the first and only district court in the country to address the question of

whether *Evenwel* applies to vote dilution cases in addition to legislative apportionment cases.[2]

THE MAJORITY OPINION WRONGLY APPLIES THE SUPREME COURT OPINION IN *EVENWEL* TO VOTE DILUTION CASES

Evenwel involved a challenge to Texas' reapportionment laws that required legislative districts to be roughly equal in total population. The plaintiffs argued that the "[v]voter-eligible population, not total population. . . .must be used to ensure that their votes w[ould] not be devalued in relation to citizens' votes in other districts." 136 S.Ct. at 1123. It thus differs fundamentally from the situation here, in which the Colorado Constitution's metric has nothing to do with equal population districts and instead concerns the number of registered voters within those districts.

The majority, however, over a strong dissent, holds that *Evenwel* is controlling in vote dilution cases. Its reasoning, which is wholly unsupported by a single authority of any kind, is that

> [I]n the direct democracy context, voters are able to directly advance the interests of non-voting members of their families and communities when they decide whether to support a citizen initiative. Although citizens, unlike elected representatives, are not "subject to requests and suggestions" from constituents, their vote on citizen initiative petitions can be influenced by private discussions with non-voting friends, family, and neighbors. In this way, voting-eligible

[2] The full text of the district court's discussion of *Evenwel* appears in Appendix B.

> citizens assume a role similar to that of elected representatives when those voters engage in the initiative process.

Majority Opinion at 14 (footnote omitted). As the Dissent notes, however,

> [W]hen an individual casts a vote or provides a signature, he or she is representing only himself or herself and no one else. Of course, a voter or signator may well have in mind the interests of others when casting a vote or providing a signature. . . . .But that does not mean that the voter is officially representing anyone else, let alone all of the people in his or her district or state. . . . In the end, I agree with plaintiffs' counsel: a voter or signator represents only himself or herself. As a result, I conclude that the case at hand does not implicate the principle of representational equality and is thus distinguishable from *Evenwel.* (Dissent, at 9-10)[3]

The majority concludes that "[j]ust as it is not unconstitutional to apportion seats in a state legislature based on districts of equal total population, it is not unconstitutional to base direct democracy signature requirements on total population." (Slip Op. at 15) As the dissent notes, this misses the point of the plaintiffs' Equal Protection claim because although the senate districts are roughly equal in total population, the Colorado Constitution does not use total population as the basis for computing the signature requirements: instead it uses the

[3] Contrary to the majority's claim that counsel "conceded during oral argument in this matter that citizen initiatives and direct democracy do, in fact, implicate the principle of representational equality" (Slip Op. at 13) counsel made no such concession, as the transcript of oral argument, quoted at length in the dissent, at pages 7 and 8 amply demonstrates.

population of registered voters, and it is that lesser population, rather the total population of the districts that is relevant for Equal Protection analysis. Plaintiffs would have no case if, for example, the Constitution required the signatures of a percentage of the total population in each district rather than the signatures of a percentage of the registered voters. See, the Dissent at 19:

> The chief problem with defendant's arguments, aside from being grounded on *Evenwel,* is that they ignore the fact that Amendment 71 does not rely solely on a total population framework in imposing its 2% petition requirement. To be sure, Amendment 71 makes a passing nod to total-population figures by requiring that a petition for an initiated constitutional amendment contain signatures from each state senate district in Colorado. But that is where its reliance on total-population figures ends. Amendment 71 then shifts course and mandates that the required signatures come not simply from residents of each state senate district, but rather from "registered electors" in each state senate district. And that is where the problem in this case lies. As the record establishes, there are significant variances in registered electors from one state senate district to another. And those variances in numbers of registered electors effectively undercut defendant's reliance on the relatively equal total population figures. (footnote omitted)

Moore v. Oglivie, 394 U.S. 814 (1969) is the seminal Supreme Court vote dilution case. It is not mentioned anywhere in the *Evenwel* opinion. The Court struck an Illinois law which required that nominating petitions contain the signatures of at least 25,000 electors and that included in this number there must be the signatures of at least 200 electors from each of at least fifty counties. The Court first held that "[T]he use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. . . . All procedures

used by a State as an integral part of the election process must pass muster against the charges of discrimination or abridgement of the right to vote." 394 U.S. at 818. The Court went on: "It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. . . . The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* *See also, Communist Party v. State Board of Elections, supra* and *Bloomquist v. Thompson, supra*. Like *Moore* and *Communist Party, Bloomquist* holds that requiring a new political party to show a modicum of support throughout the state does not justify a situation in which the value of the voters' votes in one district is greater than the value of the votes in another district. *Accord: Angle v. Miller,* 673 F.2d at 1135 note 7.

Under the Illinois law struck down by *Moore,* "the electorate in 49 of the counties which contain[ed] 93.4% of the registered voters [could] not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties [could] form a new party to elect candidates for office." *Id.* at 819. The law "thus discriminate[d] against the residents of populous counties of the State in favor of rural sections" and therefore "lack[ed] the equality to which the exercise of

political rights [w]as entitled under the Fourteenth Amendment." *Id.* (quoted in the Dissent at 14)

This is closely analogous to the situation here, where voters in one district anywhere in the state can veto the decision to place an initiative on the ballot by voters in every other district. This significantly dilutes the value of the signatures-votes of the voters who want the initiative placed on the ballot in these other districts. The case here is thus a classic vote dilution case under the Equal Protection Clause.

Surely if the *Evenwel* Court intended to overrule *Moore* and its progeny it would have done so directly rather than surreptitiously as the Majority holds that it must have done.

The consequences of the majority decision are enormous. If, as the majority suggests, *Evenwel* either rejected or abandoned the concept of voter equality in favor of representational equality, it means that the Court also rejected or abandoned "a long line of Supreme Court decisions, some of which arose in contexts other than the drawing of legislative districts, that explicitly recognize the right of individual voters to have their votes weighed equally to all other voters." Dissent at 11.

As the dissent further notes at page 11, "It would also mean, in practical terms, that a State could legitimately assign different weights to votes placed in different geographic locations within the State. For example, Colorado could, in terms of its ballot initiative process, require initiative proponents to gather signatures from ten thousand registered voters in each urban state senate district, while requiring initiative proponents to gather signatures from only one hundred registered voters in each rural state senate district. Surely the Court in *Evenwel* did not intend such a result." (footnote omitted)

Nonetheless, the majority agrees that under its analysis of *Evenwel,* "this is exactly the result condoned by the Court in *Evenwel. . . .*" Majority Opinion at page 15, note 14. (referring to the above statement in the dissent)

If the Majority is correct, it means that *Evenwel sub silento* guts *Moore* and every other voter equality-ballot access case decided by the Supreme Court and the Circuit Courts of Appeal.

The importance of this case is further shown by the fact that, as the defendant argued below, at least nine other states potentially dilute the value of registered voters' signatures in the same manner that Colorado does. 290 F.Supp.3d at 1203 note 9.

The majority opinion is further flawed because it only addresses one of the plaintiffs' three Equal Protection claims; i.e., the one based on the great disparity in the number of registered voters in the several districts. The other two claims are important ones that do not depend on the inapplicability of *Evenwel.* They are significant and should in all fairness be addressed as they were fully briefed by the plaintiffs.

These issues are framed by Colorado's requirement that signatures be collected from every senate district in the state rather than a more limited number. This unanimity requirement is unique among the states allowing citizen initiatives; every other state only requires signatures from a specified number of districts rather than all of them.

First, plaintiffs claimed that the requirement that initiative proponents collect signatures from all thirty-five senate districts gives voters in each district a veto power over potential initiatives that have the support of substantial numbers of registered voters in the other thirty-four districts. This in turn does what *Moore v. Oglive, Communist Party, Bloomquist, Angle,* and a host of other decisions expressly forbid: it was intended to and does give voters in sparsely populated districts (which are predominantly rural) a greater say in, and indeed, a veto power over, what proposed amendments can appear on the ballot, thus giving rural voters who oppose a measure greater voting strength than urban voters who want the

measure to appear on the ballot but are blocked by rural ones who refuse to sign the petition. This dilutes the value of the votes of those voters in districts that want the measure to appear on the ballot. (Answer Brief, page 22).[4] *See, e.g., Idaho Coalition United for Bears v. Cenarrusa,* 342 F.3d 1073, 1075 (9th Cir. 2002): an initiative that has overwhelming support in some districts could be kept off the ballot by voters in other districts even if "three quarters of the state's population" signed the petition." *Accord: Gallivan v. Walker, supra*, at 1088.

Second, since amendments are approved or rejected in a statewide election, a measure that has no support in some districts could still receive the 55% percent necessary for passage if it is strongly supported in other districts. Thus, the 2% requirement allows voters in one district to veto the wishes of voters in thirty-four

[4] In the district court below the defendant's primary justification for the two percent requirement was that it ensured that "initiated constitutional amendments have some level of support from citizens across the state before they appear on the ballot." (Response to the Show Cause Order, page 7, Appx. at 105) A related argument was that it was designed to give rural voters a greater say in what amendments appear on the ballot. *See also*, the Blue Book, published by the Colorado Legislative Council after consultation with the amendment's proponents and distributed to every registered voter in the State: under "Arguments For" Amendment 71, it states, "Requiring that signatures for constitutional initiatives be gathered from each state senate district ensures that citizens from across the state have a say in which measures are placed on the ballot. Due to the relative ease of collecting signatures in heavily populated urban areas compared to sparsely populated rural areas, rural citizens currently have a limited voice in determining which issues appear on the ballot." (Complaint, paragraph 28; Appx. at 14) (Legislative Council of the Colorado General Assembly, 2016 State Ballot Information Booklet, at page 32 (September 12, 2016), https://tinyurl.com/ydco2dtq). These justifications were flatly rejected in *Moore, Communist Party, Bloomquist* and *Angle*. The Colorado Supreme Court often refers to the Blue Book in interpreting initiated amendments. *See, e.g., In re Submission of Interrogatories on House Bill 99-1325,* 979 P.2d 549 (Colo. 1999).

other districts who overwhelmingly support placing a measure on the ballot and whose support could easily translate into approval in the general election. (Answer brief at 24)

These two Equal Protection-vote dilution claims are separate and distinct from the claims of an Equal Protection violation based on the fact that the registered voter population varies significantly from district to district. They are important and should be addressed.

The Correct Test for Determining Vote Dilution Claims

The balancing test set forth in *Anderson v. Celebrezze,* 460 U.S. 780 (1983) was argued and briefed in the district court below and then applied by the district court in reaching its decision that the great disparity in registered voter populations violated the plaintiffs' rights under the Equal Protection Clause to have their votes counted the same as every other voter in every other district. 290 F.Supp.3d at 1198. The Dissent correctly applies it to resolve defendant's appeal in the plaintiffs' favor. Dissent at 16-25.

Anderson involved a ballot access question; i.e., whether Ohio's early filing deadline for presidential candidates "placed an unconstitutional burden on the voting and associational rights of [petitioned] Anderson's supporters." *Id.* at 782.

The Court articulated a balancing test for determining "[c]onstitutional challenges to specific provisions of a state's election laws." *Id.* at 789. As noted in the Dissent, that test requires a reviewing court to 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." Id. The reviewing court "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." Id. In doing so, a reviewing court "must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "Only after weighing all these factors," the Court stated, "is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.* Thus, in sum, the Court established a balancing test for resolving Fourteenth Amendment challenges to voting-related laws that the panel in this case must apply.

Dissent at 17.

Plaintiffs agree that it represents the correct test for resolving their claims.[5]

[5] As the dissent notes, the Majority suggest that because this case was decided on the defendant's motion to dismiss, the *Anderson* balancing test cannot be applied. Dissent at 17 note 4. The case was not, however, decided on the motion to dismiss. Rather, the district court first denied that motion and then ordered the defendant to show cause why final judgment should be not entered in the plaintiffs' favor on their Equal Protection-vote dilution claim. The court's order denying the motion to dismiss applies the Anderson test and the defendant addresses it in her response to the order to show cause. The procedure utilized by the district court is the same as the procedure outlined in F.R.C.P. 56(f): "Judgment Independent if Motion. After giving notice and a reasonable time to respond, the court may (1) grant summary judgment for a nonmovant; . . . .(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." That's precisely what the district court did: It gave notice, in the form of the show cause order, that it intended to enter judgement for the plaintiffs and gave the defendant time to show cause why it shouldn't. It also notified the parties that the material facts it considered not in dispute were the registered voter figures for the thirty-five senate districts. Defendant did not dispute those figures.

THE COURT SHOULD REMAND THE CASE FOR CONSIDERATION OF THE PLAINTIFFS' BALLOT ACCESS CLAIMS

The majority opinion fails to address the plaintiffs' ballot access claims and instead remands for the entry of judgment on all claims. The ballot access claim is important and should be addressed. It was fully briefed by the plaintiffs (Answer Brief at pages 46-53) and by the defendant. (Opening Brief at pages 41-47 and Reply Brief at 22-28).

Plaintiffs claimed that the two percent requirement created an almost insurmountable financial logistical burden on their ballot access rights. (Complaint, Third Claim for Relief, paragraphs 57-62; Appx. 15-16). *See, generally, Bullock v. Carter,* 405 U.S. 134, 143-144 (1972) and *Krislov v. Rednour,* 226 F.3d 851, 860 (7th Cir. 2000) for the proposition that increased costs and difficulties in collecting signatures or obtaining a place on the ballot substantially burden a candidate's First Amendment rights.

In *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1097 (10th Cir. 1997), *affirmed,* 525 U.S. 182 (1999), this Court stated that "A successful [initiative] petition results in a question being submitted to the voters . . . .the petition process is a ballot access vehicle. . . ." Thus, Amendment 71's two percent requirement is a ballot access requirement because it regulates the process

which proponents of an initiative must follow in order to place their initiative on the ballot.

In *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. at 184, the Court held that, ". . . .The freedom to associate as a political party, a right we have recognized as fundamental. . . .has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referenda, voters can assert their preferences only through candidates or parties or both. . . . By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." (internal citations and quotation marks omitted).

The Court then stated that, "an election campaign is a means of disseminating ideas as well as attaining political office." 440 U.S. at 186. Initiative campaigns serve the same function of disseminating ideas, placing them in the marketplace for voters to think about, debate, and accept or reject. In Colorado, they are an essential "guarantee of participation in the political process." *Loonan v. Woodley,* 882 P.2d 1380, 1383 (Colo. 1994).

CONCLUSIONS

Because the Majority wrongly concludes that the *Evenwel* decision applies to vote dilution-voter equality cases as well as to representational equality ones, the Court should grant *en banc* consideration, apply the *Anderson* balancing test, and issue a new opinion that correctly resolves the case.

Respectfully submitted,

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Appendix A – Text of Sub-section 2.5 of Article V, Section 1 of the Colorado Constitution

(2.5) In order to make it more difficult to amend this Constitution, a petition for an initiated constitutional amendment shall be signed by registered electors who reside in each state senate district in Colorado in an amount equal to at least two percent of the total number of signatures of registered electors in the senate district provided that the total number of signatures of registered electors on the petition shall at least equal the number of signatures required by subsection (2) of this section. For purposes of this subsection (2.5), the number and boundaries of the senate districts and the number of registered electors in the senate districts shall be those in effect at the time the form of the petition has been approved for circulation as provided by law.

Appendix B: The District Court's Full Discussion of *Evenwel*

The *Evenwel* lawsuit exposed a problem lurking in the phrase "one person, one vote," namely, although every person counts when drawing legislative districts, not every person is both qualified and registered to vote. Emphasizing this disconnect, the *Evenwel* plaintiffs sued the state of Texas, claiming that drawing state legislative lines "on the basis of total population. . . .produces unequal districts when measured by voter-eligible population." 136 S.Ct. at 1123. The plaintiffs urged that such districts must be drawn based on voter-eligible population "to ensure that their votes will not be devalued in relation to citizens' votes in other districts." *Id.*

The Supreme Court ruled against the plaintiffs, but notably, it never disagreed with their basic premise that a disparity in voter population among legislative districts dilutes the voting power of eligible voters in voter-rich districts as compared to districts with a lower ratio of voting-eligible population to total population. This, of course, is undeniable, and it is precisely the problem the Supreme Court thought it was addressing in the original "one person, one vote" cases such as *Reynolds*: "Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor." 377 U.S. at 563. But *Evenwel* forefronted the potential *non sequitur* between the problem (vote dilution) and the Supreme Court's long-standing prescribed solution (redistricting based on total population).

Because the Supreme Court could not deny that the *Evenwel* plaintiffs alleged a classic vote dilution problem, the Court fell back on "constitutional history, [its own prior] decisions, and long–standing practice" to reject their claim. 136 S.Ct. at 1123. Given these sources of authority, the Court held that drawing districts based on total population complies with the requirements of the one-person, one-vote principle." *Id.* at 1132. The Court chose not to address the United States' contention (as *amicus curiae*) "that reapportionment by total population is the only permissible standard," *id*. at 1141 (Thomas, J., concurring in judgment); see also *id*. at 1143 (Alito, J., concurring in judgment), or Texas's argument that reapportionment based on voter-eligible population would be permissible, even if Texas does not currently do it, *id.* at 1133.

Evenwel nonetheless acknowledges the tension between total population and voter population when discussing the "one person, one vote" principle: "For every

sentence [the plaintiffs quoted from previous 'one person, one vote' opinions regarding dilution of actual voting power], one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality." *Id.* at 1131. The Court went on to say that its prior decisions had "suggested, repeatedly, that districting based on total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation," *id.* (emphasis in original), but the Court did not explain how these "suggestions" could be accurate, empirically speaking.

Regardless, this is where the inapplicability of *Evenwel* to the present dispute becomes most appearant. In *Evenwel,* as in nearly every previous "one person, one vote" case, there were *two* potentially competing interests involved: (1) "preventing vote dilution" and (2) "ensuring equality of representation." *Id.* (emphasis added). Avoiding vote dilution, "demonstrable mathematically," is supposedly the hallmark of "one person, one vote." *Reynolds,* 377 U.S. at 563. But there is also a deeply rooted constitutional commitment to the idea that elected representatives represent all people within their legislative districts, not just those who have the power to put them into or remove them from office (i.e., registered voters). *Evenwell,* 136 S.Ct. at 1127-1130. The fact that those two interests cannot always be reconciled is the basic problem with which *Evenwel* struggled. The Supreme Court chose to resolve the problem on the narrowest ground possible, namely, Texas had not violated the Equal Protection Clause by favoring equality of representation over equality of voting power. Id. at 1132-1133.

In the context of direct democracy, however, the tension between preventing vote dilution and ensuring equality of representation falls away because, with no "representation" in the ballot petition form of direct democratic rule, there is no representative equality component of the equation to balance against the integrity of the vote. In other words, there is no representation; there is only voting.

290 F.Supp.3d at 1196-1197.

CERTIFICATE OF COMPLIANCE

Counsel certifies that this motion complies with the word limitation set forth in Federal Rule of Appellate Procedure 35(b)(2)(A). According to the word processing system used to prepare this motion, Microsoft Office 2013 (Word), the word count, excluding the cover page, the table of contents, the table of authorities and the certificates of counsel is 3,800.

Counsel further certifies that this motion complies with Tenth Circuit Rule 25.5 and all privacy redactions required have been made.

Counsel further certifies that the paper copies submitted are exact copies of the electronic version and that attached to paper copy is a copy of the majority opinion and the dissent that are the subject of this motion.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that with respect to this brief:

1. All required privacy redactions have been made in compliance with Tenth Circuit Rule 25.5
2. The correct number of paper copies submitted to the Court are exact duplicates of this digital submission.
3. The digital submissions have been scanned for viruses with the most recent version of Malwarebytes Premium 3.5.1 which was updated on August 31, 2019, and according to that program, the digital submissions are free of viruses.

/s/ Ralph Ogden

July 2, 2018

CERTIFICATE OF FILING AND SERVICE

I certify that on the 3rd day of September 2019, I electronically filed this motion and electronically served all counsel of record using the Court's CM/ECF system. I further certify that I have filed six hard copies of this motion with the Court's majority and dissenting opinions attached.

/s/ Ralph Ogden