APPEAL NO. 20-12107

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INDEPENDENT PARTY OF FLORIDA and
PARTY FOR SOCIALISM AND LIBERATION.,

Plaintiffs-Appellants,

versus

LAUREL M. LEE, Florida Secretary of State, in her official capacity,

Defendant-Appellee.

ON APPEAL FROM CIVIL JUDGMENT
IN THE U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
HON. MARK E. WALKER, UNITED STATES DISTRICT JUDGE
DISTRICT COURT CASE NO. 4:20-cv-00110-MW-MAF

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons or entities, have an interest in the outcome of this appeal:

1. Ernest Wm. Bach, Chairman for Independent Party of Florida;
2. Bernhoft Law Firm, S.C., Law Firm for Plaintiffs-Appellants;
3. Ashley E. Davis, Attorney for Defendant-Appellee;
4. Independent Party of Florida, Plaintiff-Appellant;
5. Laurel M. Lee, Defendant-Appellee;
6. Maria Matthew, Witness for Defendant-Appellee;
7. Bradley R. McVay, Attorney for Defendant-Appellee;
8. Colleen E. O'Brien, Attorney for Defendant-Appellee;
9. Party for Socialism and Liberation, Plaintiff-Appellant;
10. Daniel J. Treuden, Attorney for Plaintiffs-Appellants.
11. Richard Winger, Witness for Plaintiffs-Appellants.

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: June 25, 2020

/s/ Daniel J. Treuden
Daniel J. Treuden
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STATEMENT ON ORAL ARGUMENT

The Plaintiffs-Appellants believe that an engaged colloquy between the panelists and counsel at oral argument will assist the court in resolving the complex issues this appeal presents, concomitantly improving the ultimate decisional quality. This case, however, requires a decision before the end of August or the Plaintiffs-Appellants may nonetheless be deprived of any meaningful relief, even in the event they prevail.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction because the action arises under the Constitution and Laws of the United States pursuant to 28 U.S.C. § 1331. Specifically, the cause of action is a civil rights action under 42 U.S.C. § 1983 alleging that Florida's election law statutes violate the Plaintiffs-Appellants constitutional rights.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), because the district court's order of June 5, 2020 was an order refusing to enjoin the enforcement of certain election law statutes to keep the Plaintiffs-Appellants' candidates off Florida's Presidential and Vice-Presidential general election ballot.

The Order denying the Plaintiffs-Appellants' motion for preliminary injunction was entered on June 5, 2020. (Doc. 39.) A notice of appeal was filed on June 5, 2020. (Doc. 40.) The notice was timely because it was filed within the 30 days allowed by Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by failing to consider the undermining effect the alternative association method of ballot access had on the Secretary of State's claim that the one-percent signature requirement was still justified, and by holding that a state is justified in foregoing any proof of in-state support when there is some proof of a minor party's national support.

2. Whether, in a ballot access case, the national party association method of ballot access violates the equal protection clause because the class distinction between minor parties that are automatically eligible for ballot access and those minor parties that are not eligible is established solely by the minor party's exercise of the First Amendment right of association.

STATEMENT OF THE CASE

Nature of the Case:

This is an interlocutory appeal seeking review of the district court's order denying the Independent Party of Florida's and the Party for Socialism and Liberation's ("Plaintiff Parties") motion for preliminary injunction that challenged the enforcement of two election law statutes,

both of which prohibited the Plaintiff Parties from nominating their Presidential candidate by certification and sought to impose a signature requirement that constitutes an unconstitutional burden to ballot access. The case is a civil rights case filed under 42 U.S.C. § 1983.

Course of the Proceedings:

On February 24, 2020, the Independent Party of Florida and the Party for Socialism and Liberation filed a complaint against Laurel M. Lee in her official capacity as Florida's Secretary of State alleging that Fla. Stat. §§ 103.021(4)(a) and (4)(b) violate several of the Plaintiffs' constitutional rights. (Doc. 1.) Lee filed a motion to dismiss on March 27, 2020 pursuant to Fed. R. Civ. P. 12(b)(6) alleging a failure to state a claim. (Doc. 8.)

On April 6, 2020, the Plaintiff Parties filed a Motion for Preliminary Injunction asking the district court to hold: (1) that the requirement that a minor political party associate with a national party that is recognized by the Federal Election Commission as a "national committee" is unconstitutional and that the Plaintiff Parties should be allowed to access the ballot by certification in the same manner as other

minor parties; and (2) that the one-percent signature requirement is an unconstitutional burden to ballot access. (Doc. 9.)

The two motions were fully briefed, and on June 5, 2020 the district court took oral argument. (Doc. 44.) The district court issued an order denying Lee's motion to dismiss and denying the Plaintiff Parties' motion for preliminary injunction on June 8, 2020. (Docs. 37 and 39.) The Notice of Appeal was filed later that day on June 8, 2020. (Doc. 40.)

Statement of Facts:

For approximately fifty years from 1949 to 1999, Florida provided ballot access for presidential candidates for minor political parties based solely on ballot access petitions. (Doc. 9-1, ¶¶ 4-9) ("Winger Decl."). In 1998, Florida amended its state constitution to declare that all candidates for political office should be treated equally. *Id*., ¶ 9. The legislature subsequently passed SB 754 in 1999 wherein minor political parties could become a "qualified party" if it filed a list of officers, a copy of its bylaws, and agreed to report information about its finances. *Id*. Once qualified, a minor political party could affiliate with a "national" political party that held a national presidential convention, and could then place its presidential nominee on the ballot. *Id*. The 2000 election

was the first time since before 1949 that a minor political party could nominate its candidates without circulating nomination petitions. *Id*. For parties that were not considered "national" parties, or if they were not affiliated with a party that held a national convention, the path to the ballot was achieved by submitting nomination petition with signatures at least equal to 1% of registered voters in the state. *Id*.

In 2000, with the ease some minor parties had to get on the ballot, the sky did not fall and voters were not befuddled over the number of choices on the ballot. Minor political parties freely placed presidential candidates on the ballot for the following parties: Green, Reform, Libertarian, Natural Law, Workers World, Constitution, Socialist, and Socialist Workers. *Id*. Including the two major political party candidates, voters were presented with a candidate list that included a mere ten partisan candidates. *Id*.

In 2004, six minor political parties nominated presidential candidates to the ballot: Constitution, Green, Libertarian, Reform, Socialist, and Socialist Workers. *See* https://uselectionatlas.org/RESULTS/state.php?year=2004&fips=12&f=0&off=0&elect=0&minper=0 (last accessed June 19, 2020). In 2008,

eleven minor political parties nominated their candidates by certification: America's Independent, Boston Tea, Constitution, Ecology, Green, Libertarian, Objectivist, Prohibition, Socialism and Liberation, Socialist, and Socialist Workers. *See* https://uselectionatlas.org/RESULTS/state.php?year=2008&fips=12&f=0&off=0&elect=0&minper=0 (last accessed June 19, 2020). The partisan candidate list presented to voters numbered eight in 2004 and thirteen in 2008.

In 2011, the legislature passed a new law which changed the definition of a "national" party to one that is "registered with and recognized as a qualified national committee of a political party by the Federal Election Commission." (Doc. 9-1, ¶ 12.) This definition is the current definition at issue in this case. *See* Fla. Stat. § 103.021(4)(a). This change severely limited the number of minor political parties that qualified to nominate their candidates by certification to the state's presidential election ballot. The previous definition defined a national party as a party that was previously on the ballot in two states, a threshold that would typically be met by every party that also holds a national convention. *See* Fla Stat. § 103.021(4)(a) (2010 version) ("In

this section, the term 'national party' means a political party established and admitted to the ballot in at least one state other than Florida.")

In 2011, counsel for the American Elect's party received a letter from the Florida Secretary of State advising the party that the new definition of "national party" would not be enforced and all minor parties acted accordingly in reliance on that official advisement. (Doc. 9-1, ¶ 13, and Doc. 9-2.)

Although the Americans Elect Party ultimately decided not to run a candidate in 2012, this letter provided the basis for five minor political parties to nominate candidates by certification even though they were not FEC-recognized: American Independent, Justice, Objectivist, Peace & Freedom, and Socialism and Liberation. (Doc. 9-1, ¶ 13.) The FEC-recognized minor parties that certified candidates for the presidential ballot in Florida totaled four: Constitution, Green, Libertarian, and Socialist. With the two major political parties, that put the presidential ballot at eleven partisan candidates. *See* https://uselectionatlas.org/RESULTS/state.php?year=2012&fips=12&f=0&off=0&elect=0&minper=0 (last accessed on June 19, 2020).

In summary, the four presidential elections from 2000 through 2012 featured minor political party ballot access by mere certification, including most particularly 2012, when *all* minor political parties were granted access to the ballot by certification of the party chairman. The total partisan candidates on the presidential ballot ranged from eight to thirteen candidates. The Secretary declares the state needs a 1% signature threshold to protect against a confusing ballot. (Doc. 34-1, ¶ 8.) The number of candidates based on actual experience are not so numerous to make a typical voter confused or make it difficult for them to locate their candidate of choice.

The 2016 Election Cycle – Plaintiff Parties' Attempts to Nominate

In 2016, both Plaintiff Parties attempted to nominate candidates for office. (Doc. 9-3; Doc. 9-7, ¶ 4; and Doc. 9-8, ¶ 4) ("Ellis Decl."). Both Bach and Ellis received letters similar to the one set forth as Doc. 9-3, wherein the Secretary advised she would not be including their candidates on the presidential ballot for the 2016 election. (Doc. 9-7, ¶ 5; and Doc. 9-8, ¶ 5.) In both cases this advisement occurred too close to the election for either party to seek judicial relief from the Secretary's decision. (Doc. 9-7, ¶ 6; and Doc. 9-8, ¶ 6.)

The 2020 Election Cycle – Plaintiff Parties' Intentions to Run Presidential Candidates

The Party for Socialism and Liberation has chosen Gloria La Riva to be its Presidential candidate. (Doc. 35-3, ¶ 1.) The Party for Socialism and Liberation associates with a national party of the same name. *Id*. Regarding the Independent Party of Florida, they have not yet chosen their nominee. They have received interest from a number of potential candidates and are currently in the process of narrowing their search of those potential candidates. (Doc. 35-2, ¶ 2.)

The Independent Party has expressed no desire to associate with a national party, instead opting to best express its political candidate preferences by retaining the ability to associate with and nominate whichever candidate they choose each presidential election cycle. (Doc. 20-2, ¶ 8.) One of the Independent Party's main tenets is that they are not beholden to any other party or organization and can truly pursue their own political path and concomitant political expression. *Id*. With 3,620,513 people currently registered in Florida as "No Party Affiliation," there is a large base of people to which they can market this political principle. (Doc. 33-7.)

The Department of State decertified the Independent Party at the end of 2016 when they party had 262,599 registered voters. (Doc. 35-2, ¶ 4.) The Independent Party had to start the recruitment process over and they now have 106,580 registered voters, more than twice the amount of all other minor political parties combined. (Doc. 33-7; and Doc. 35-2, ¶ 5.)

The Signature Method of Ballot Access

Minor political parties must circulate Form DS-DE 18B to have its presidential candidate nominee placed on the ballot using the signature petition method. A copy of this form is in the record. (Doc. 35-4.) It can be downloaded from the internet from the following web address: https://dos.myflorida.com/media/693250/dsde18b.pdf (last accessed on June 19, 2020). The only information required to be set forth by the circulating party is the personal information of the registered voter, the name of the minor political party seeking ballot access, and the year of the presidential election. *Id*.

Only one time in United States history has a minor political party, new political party, or independent candidate ever overcome a petition requirement more than 132,781 signatures to obtain ballot access. (Doc.

9-1, ¶ 42; Doc. 9-4; and Doc. 20-1, ¶¶ 4-5.) Richard Winger's analysis does not include major party candidates (Democrats or Republicans) that succeeded in obtaining ballot access by the petition method. (Doc. 35-1, ¶ 5.) In 1996, both the Libertarian and Reform Party candidates met the 1% signature requirement in Florida, but that year required only 65,596 signatures, which is approximately half of the current required amount. *Id.*, ¶ 6.

Independent Party's Registration Representation

The Independent Party has 106,580 registered voters as of the last count made on February 18, 2020. (Doc. 33-7.) Attorney Maria Matthews set forth an affidavit in which she asserted a belief that some voters did not intend to become Independent Party registrants. (Doc. 34-1, ¶ 5.) She advised that some people may write "Independent" in the minor party line intending to be "no party affiliation." *Id.* She also references a rule development workshop from August 6, 2019. This workshop can be found online at: https://thefloridachannel.org/videos/8-6-19-division-of-elections-rule-development-workshop/ (last accessed on June 19, 2020). The discussion she refers to begins at the 2:16 point in the video and lasts for about seven minutes.

The Independent Party of Florida believes Attorney Matthews' concerns are dramatically overstated based on the voter registration application form. (Doc. 35-6.). As can be seen in the lower left hand corner, a person must forego the "No Party Affiliation" option, choose "Minor Party," and print the name "Independent" or a variation of that on the blank line. *Id*. That is not something that would be frequently be done on an accidental basis.

The Standard of Review:

The Eleventh Circuit reviews preliminary injunction decisions for an abuse of discretion. *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1247 (11th Cir. 2016) (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). "A district court abuses its discretion when its factual findings are clearly erroneous, when it follows improper procedures, when it applies the incorrect legal standard, or when it applies the law in an unreasonable or incorrect manner." *Id*. (citing *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004).

When reviewing the substantial likelihood of success on the merits, the Eleventh Circuit reviews ballot access restrictions using the standards set by the United States Supreme Court in *Anderson v.*

Celebrezze, 460 U.S. 780, 787-78 (1983) and its progeny. The appeals court:

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [plaintiff] seeks to vindicated. [The appeals court] then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In making this evaluation, a court must determine the legitimacy and strength of the State's interests and consider the extent to which those interest make it necessary to burden the [plaintiff's] rights.
>
> Furthermore, if the state election scheme imposes severe burdens on the plaintiffs' constitutional rights, it may survive only if it is narrowly tailored and advances a compelling state interest. But when a state ballot access law provision imposes only reasonable, nondiscriminatory restrictions upon the plaintiffs' First and Fourteenth Amendment rights, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Lesser burdens . . . trigger les exacting review.

Swanson v. Worley, 490 F.3d 894, 902-03 (11th Cir. 2007).

In a case involving challenges to two ballot access restrictions, the Court must consider the burdens both "independently and in combination." *Id*. at 903.

SUMMARY OF THE ARGUMENT

The one-percent signature requirement is unconstitutional, notwithstanding the fact that it has previously been upheld. In 1999, the Florida legislature passed a new statute that allowed minor political parties to access the ballot if they associated with a national party that held a national convention, which the Plaintiff Parties here call the "affiliation method" of ballot access. Then in 2011, the Florida legislature further limited ballot access by re-defining the term "national party" to include only parties recognized by the FEC as a national committee. The district court failed to consider the one-percent signature requirement in light of these changes. The prior cases upholding the one-percent signature requirement did not consider how the affiliation method affects the state's interest in avoiding a confusing or unwieldy ballot by allowing candidates on the ballot who have no obligation to show a modicum of Florida electoral support, yet require a petition with over 132,000 signatures – an extremely high burden – for minor political parties that choose to exercise their right to associate in another way. A signature petition requirement of 132,000 is unconstitutional under these new circumstances.

The two alternative methods of ballot access also violate the equal protection clause. Some minor political parties can get on the ballot by writing a letter to the Secretary of State certifying the names of the candidates that should appear on the general election ballot for President and other political parties must present a ballot access petition signed by over 132,000 registered Florida voters. The difference between these two groups is solely based on who the minor political parties associate with and how they exercise this fundamental First Amendment right. Because the regulation directly implicates the exercise of a fundamental right, the equal protection clause is violated and strict scrutiny governs the analysis if the regulation is non-discriminatory and is reasonably designed to further a state interest. Consequently, the statute barring parties who are not affiliated with a national party that is recognized by the FEC as a national committee is unconstitutional and the affiliation aspect of the statute should be struck down.

For all of these reasons, the judgment of the district court should be reversed and the case remanded with instructions to grant the Plaintiff Parties' motion for preliminary injunction.

ARGUMENT

I. Judicial Review of Election Laws Requires Consideration of the Statutory Schema in the Aggregate, Weighing of the Burdens on Plaintiff's Constitutional Rights Against the State Justifications, Recognizing that Burdens on Fundamental Rights Require Strict Scrutiny Analysis if the Statutory Schema is Discriminatory or Not Reasonably Related to Furthering Legitimate State Interests.

The district court's preliminary injunction order failed to consider how the affiliation method of ballot access under Fla. Stat. § 103.021(4)(a) influenced Florida's separate signature petition ballot access method under Fla. Stat. § 103.021(4)(a), and vice versa. Rather than consider the two regulations within the full statutory context, the court considered the two ballot access distinctly and independently from each other. It is necessary to determine whether a statutory burden to obtaining a place on the ballot is, in and of itself, unconstitutionally burdensome, but it is equally important to determine whether the statutory burdens are reasonable and nondiscriminatory within the unique election law schema set up by Florida, especially where Florida is the only state that distinguishes between minor political parties that associate with a national committee as that term is defined by the FEC and minor parties that do not associate with a national committee.

Election laws are unique areas of government regulations. Obviously, they implicate numerous fundamental rights, but nonetheless, the Supreme Court has required a type of sliding scale standard of review because states have a duty to regulate elections. Therefore, statutes that are reasonably designed to further a legitimate state interest are usually upheld if they are non-discriminatory. They require a weighing of the burdens imposed against the state interests sought to be protected or furthered by the statute.

The right to vote, the right to associate for political purposes, the right of voters to cast votes effectively, and the right to be a political candidate are fundamental constitutional rights protected by the First and Fourteenth Amendments. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986); and *Anderson*, 460 U.S. at 787.

First Amendment rights are implicated whenever a state action imposes a barrier to the free exercise of the voting franchise or any First Amendment Right. That barrier does not have to wholly prevent voters from exercising a First Amendment right to be found unconstitutional.

And "'that right is burdened when the state makes it more difficult for these voters to cast ballots.'" *Molinari v. Bloomberg*, 564 F.3d 587, 604 (2nd Cir. 2009) (quoting *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2nd Cir. 2008)). The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on federal courts to manage the market by preventing too many buyers from settling on a single product." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (internal citations omitted). "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu*, 489 U.S. at 223 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 886, 913 (1971)). Thus, any limits on speech in the context of a political campaign is subject to strict scrutiny. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010).

In ballot access cases, the First Amendment right of free association is found in three associational relationships: (1) the right of voters to associate through the organization of a political party; (2) the rights of an organized political party to control the determination of those

candidates with which it associates; and (3) the rights of an organized political party to control its nominations by controlling who may participate in such nominations. *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-122 (1981).

The implications of the Equal Protection Clause on the constitutionality of ballot access statutes generally focuses on (a) the disparate treatment of major and minor parties, and (b) the disparate treatment of the candidates of parties and independent candidates. *See Anderson*, 460 U.S. at 793-94:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preference lie outside the existing political parties. . . . By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.

Anderson, 460 U.S. at 793-94 (internal citations omitted).

The unique situation here is that Florida's statute impinges directly on minor political parties' "associational choices" allowing ballot access by writing a letter to the Secretary of State certifying the names of the

candidates and electors for the Presidential ballot if you associate one way, but requiring an extremely heavy burden of obtaining over 132,000 signatures of registered voters to obtain ballot access if the minor party associates another way.

There are two statutes that limit access to the ballot. First, the Plaintiffs are barred from the ballot if they are not associated with a party that is nationally recognized by the Federal Election Commission ("FEC") as a national committee even though there is no indication that FEC recognition has any logical correlation to voter support in Florida. Second, the requirement that a minor political party submit a ballot access petition signed by one-percent of registered voters is unconstitutionally burdensome for the same reasons set forth by *Green Party of Georgia*, 171 F.Supp.3d 1340 (N.D. Ga. 2016) (aff'd on appeal in *Green Party of Georgia*, 674 Fed. Appx. 974 (11th Cir. 2017)).

As further explained below, these burdens are either unconstitutionally burdensome in their own right, or are applicable in violation of the equal protection clause. Florida's stated justification that ballots must be stringently regulated to avoid voter confusion on the ballot proves a baseless reason for the regulation when from 2000

through 2008, the three presidential election ballots had no practical limit on ballot access other than organizing as a minor political party and associating with a national party that held a national convention, and the 2012 presidential election ballot allowed all minor political parties to nominate candidates by certification.

The largest election ballot had thirteen partisan options between 2000 and 2012, and 2012 proved that the great state interest we need to protect against – a confusing and unwieldy ballot – was nothing more than a strawman. https://uselectionatlas.org/RESULTS/state.php?year=2012&fips=12&f=0&off=0&elect=0&minper=0 (last accessed on June 19, 2020). A list of eleven names is not confusing. Based on this actual experience, the stated purpose of the ballot access restrictions prove that the risk of an unwieldy ballot is extremely low and therefore, the State's justification is weak. Consequently, the statute is not reasonably related to protect against a legitimate state interest and strict scrutiny should apply to any statutory burden requiring anything in excess of a party chairman's certification.

Political parties exist to advocate positions and philosophies and serve as a vehicle where like-minded people can assemble: "Under our political system, a basic function of a political party is to select candidates for public office to be offered to voters at elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Williams v. Rhodes, 393 U.S. 23, 31 (1968).

Thus, "'only a compelling state interest in the regulation of the subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Ballot access limiting statutes must be considered in the aggregate: "The concept of 'totality' is applicable . . . in the sense that a number of racially valid provisions of elections laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). "A court would want to examine the *cumulative* burdens imposed by the *overall* scheme of electoral

regulations upon the rights of voters and parties to associate through primary elections." *Clingman v. Beaver*, 544 U.S. 581, 607 (2005) (O'Connor, *concurring*) (recognizing that the appellant failed to properly raise the issue in that case) (emphasis in original).

A district court evaluates constitutional challenges to state election laws as the Supreme Court set out in *Anderson*, 460 U.S. 780:

> [A district court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the 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.

Anderson, 460 U.S. at 789.

"[A]s a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal citations omitted). This scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 312 (internal quotations omitted).

"Ordinarily, 'the strict scrutiny test is applicable under the Equal Protection Clause to classifications affecting the exercise of fundamental rights.'" *Fulani v. Krivanek*, 973 F.2d 1539, 1542 (11th Cir. 1992) (quoting *American Booksellers v. Webb*, 919 F.2d 1493, 1499 (11th Cir. 1990)).

In testing the legitimacy of a State's asserted interest, a court is not required to accept at face value any justification the state may give for its practices. Rather, the court must determine whether the offered justification is real and not merely a pretextual justification for its practices. *See Reform Party of Allegheny County v. Allegheny Count Dep't of Elections*, 174 F.3d 305, 315 (3rd Cir. 1999).

Even an otherwise legitimate state concern cannot be accepted without evidence that the problem the state is asserting is real.

> The State has made no clear argument regarding the precise interests it feels are protected by the regulations at issue in the case, relying instead on generalized and hypothetical interests identified in other cases. Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment Rights.

Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 593 (6th Cir. 2006).

Therefore, it is insufficient for the state to merely assert a defense; instead, it must present evidence of a real problem that its ballot access limiting statutes seek to address. In addition to actually having a legitimate reason for its practice, the state must also show that the statute actually addresses the problem. *Reform Party*, 174 F.3d at 315.

There are also limits on the State's interests when elections to federal office are involved: "The Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995).

Here, actual experience from 2000 through 2012 shows that almost unfettered access to the ballot by a minor party chairman's certification will not result in a confusing or unwieldly ballot. Indeed, there are only seven minor political parties currently active in Florida. *See* https://dos.myflorida.com/elections/candidates-committees/political-parties/ (last accessed on June 24, 2020). Furthermore, as outlined below in Section III, *infra*, the criteria for access to the ballot, namely that the FEC recognized a national party as a national committee, has

no logical correlation to the level of party support in the Florida electorate, and consequently, the statute fails to actually address the problem the state claims exists.

II. The Plaintiff Parties are Substantially Likely to Prevail on the Merits Because the Heavily Burdensome One-Percent Signature Requirement Cannot be Justified in Light of the Alternative Association Method of Ballot Access Which Fails to Measure Any Modicum of Support Among the Likely Voters in Florida, but Rather Solely Measures Some Modicum of Support Outside of Florida.

Two fundamental flaws require reversal of the Court's Order denying the motion for preliminary injunction motion regarding the one-percent signature method. First, the district court failed to consider how the one-percent signature petition statute fairs under the *Anderson* analysis in light of the alternative affiliation method of ballot access. Second, the district court found that a state can rely on a national modicum of support *in lieu of* a finding of a modicum of support among Florida voters to justify ballot access when every case in the past only allowed a state to require a modicum of support among the state's voters.

A. The District Court's Failure to Consider How the State's Alternative Association Method of Ballot Access Affects the State's Claim of a Need to Set the Signature Requirement at One-Percent is Reversible Error.

The district court applied the *Anderson* test to the signature requirement as if the signature requirement were the only method of ballot access. The district court failed to consider how the alternative affiliation method of ballot access undermined the State's justification for a one-percent signature requirement. Because the affiliation method allows parties a place on the ballot without any showing of a modicum of Florida voter support, it is impossible to justify why a heavy one-percent signature petition is necessary for other minor political parties. The affiliation method demonstrates that Florida decided that no showing of statewide voter support is unnecessary to avoid a confusing or unwieldly ballot, yet the Plaintiff Parties are faced with one of the largest ballot access petition burdens in the country: over 132,000 signatures.

The district court's justification for the one-percent signature requirement compared the relative burdens and context in *Green Party of Georgia v. Kemp*, 171 F.Supp.3d 1340 (N.D. Ga. 2016) with the Florida statutory context (excepting, of course, any discussion of the

alternative affiliation method). The Plaintiff Parties disagree with how the district court weighed the burdens and applied the *Anderson* test.

The one-percent signature requirement would require the Plaintiffs to obtain 132,781 valid signatures, (Doc. 9-1, ¶ 42), a task that would require a massive financial and time commitment that other minor parties are not required to achieve, even some that poll at much lower levels than the Plaintiffs. But aside from these costs, the key error in the district court's analysis was its failure to account for the fact that some minor political parties don't have to show *any* substantial support in Florida by submitting a signature petition. If the stated justification for requiring a signature petition is ensuring that there is a modicum of support in the Florida electorate *before* appearing on the ballot, why is it that some parties that can demonstrate a level of organization and support *outside* of Florida get a complete pass on showing any Florida support? This weighs heavily in favor of the Plaintiffs' claims that their rights are severely burdened by the signature petition requirement because apparently showing a modicum of support within Florida *is not a prerequisite necessary* to avoid a confusing and unwieldy ballot. Hence, the signature petition requirement is not designed to meet a

legitimate state concern, but rather is the very type of limitation of political participation that *Anderson* condemns: "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 793-94 (internal citations omitted).

Importantly and further undermining the State's justification that the signature requirement is necessary at all, Supreme Court Justice Harlan, concurring in *Williams v. Rhodes*, also opined that "'the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion.'" *Green Party*, 171 F.Supp.3d at 1365-66 (quoting *Williams v. Rhodes*, 393 U.S. 23, 47 (1968). That is similar to what we've had here. For four presidential election cycles from 2000 through 2012, Florida allowed all minor political parties to nominate their candidates by certification if they were associated with any national party that held a national convention (which was most of them), and the Plaintiffs know of no reports of widespread voter confusion even though at least one ballot had fourteen

partisan candidates listed. And although Justice Harlan held that eight candidacies cannot be said to be confusing, the Plaintiffs assert that a list of fourteen is still in that same non-confusing arena, must less the mere ten partisan candidates that might appear on the Florida 2020 presidential ballot. There are currently only seven minor political parties in Florida, and that means when you add the two major parties to the list, Florida voters will have to decide from a list of nine partisan candidates when they vote for president.

Regarding the analysis of alternative ballot access methods and how they affect the signature requirement, we should look to the Supreme Court's case of *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). In *Socialist Workers Party*, Illinois had a signature requirement for ballot access in a statewide election that required a fixed 25,000 signatures. *Id.* at 175. In a local election, the signature requirement was 5% of the number of persons who voted in the last election. *Id.* at 176. As the City of Chicago population grew, it ended up that political parties that wanted access to the Chicago ballot had to obtain 63,373 valid signatures. *Id.* at 177. Therefore, a new political party could gain ballot access in a race for governor by submitting

25,000 signatures from residents in the entire state, but to get on the ballot in Chicago, the party had to submit 63,373 signatures from a smaller geographic area.

The Supreme Court applied the equal protection clause and struck down the 5% signature requirement because when considering the statutory schema as a whole, the restriction could not be reconciled. Here in Florida, we have a similar situation and should use a similar approach. The one-percent signature requirement cannot be reconciled with the statute that allows another party access for what really amounts to significant support *outside* of Florida. If a party is popular outside of Florida, then they effectively are exempt from having to show any modicum of support in Florida before presenting their candidates to the voters on a general election ballot. For this reason, the one-percent signature requirement is due to be deemed unconstitutional.

Finally, no minor or new political party or independent candidate has ever achieved ballot access with a signature requirement as high as the one effective in Florida under Fla. Stat. § 103.021(4)(b) except once in California. Winger prepared a chart for his newsletter *Ballot Access News* in 2009 outlining the highest petition requirement met by a

candidate. The chart is attached as Exhibit C. (Doc. 9-1, ¶ 42, Doc. 9-4, and Doc. 20-1.) This chart makes clear that it's not necessarily just a high *percentage* of the electorate that can provide an effective unconstitutional bar to the ballot, but also the size of the signature campaign itself is an effective bar. This Court should grant this motion for preliminary injunction and allow all minor political parties to nominate their candidates by certification to the Secretary of State by September 1, 2020.

B. No Court has Previously Held that the Existence of Some Evidence of National Minor Party Support is Sufficient to Supplant the Need for a State to Require the Minor Party to Make any Showing of In-State Support.

One of the key errors in the district court's decision is its reliance on the novel idea that the State of Florida can predicate ballot access to the Florida presidential ballot on the showing of *national* support rather than support among Florida's voters. The district court cites to no authority for that proposition and the Plaintiff Parties have also been unable to find any such case. The district court held: "The State's articulated interest, a modicum of state *or national* support, is a longstanding legitimate interest and the Secretary's contention that the articulated interest is advanced by both the petition method and the

affiliation method is supported by the record." (Doc. 39, pp. 18-19) (emphasis added). There simply is no authority that recognizes national support as furthering the state's interest in avoiding a convoluted and confusing ballot and keeping frivolous campaigns off of any ballot, and there is no citation because none exists.

The State attempted to justify a showing of national support by taking an *Anderson* citation out of context. The Supreme Court has recognized that a State's interest in regulating a national Presidential election is lower than it is in an election held wholly within its own borders. "[T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). This holding, however, did not give any states license to enact a statutory schema that unduly restricts minor parties based on associational rights; rather, the Supreme Court merely pointed out that it is always a bit more difficult for a state to justify ballot access regulations in Presidential elections because it is not only the state's interests at stake.

The *Anderson* quotation relied on another ballot access case from 1975 where it first recognized this lesser interest. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the Supreme Court considered whether Illinois state law governing the election of delegates by the major parties to the national party convention could override the national party's rules determining the qualifications of a delegate. *Id*. at 483. The Supreme Court held that the process of a political party choosing its candidate is vital to the election process and it's "a process which usually involves coalitions cutting across state lines." *Id*. at 490. For this reason, the Illinois laws establishing delegate qualifications had to fall. "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." *Id*. at 491.

In turn, *Anderson* involved whether Ohio's early ballot access deadlines were constitutional as applied to an independent candidate for President. John Anderson, the plaintiff in *Anderson*, decided to run as an independent candidate on April 24, 1980 and by that date, the March deadline for filing a "statement of candidacy" had already passed in Ohio. *Anderson*, 460 U.S. at 782. It was within this context that the

Supreme Court extended the rule that a state's interest in regulating elections is more difficult to justify in a Presidential election than other statewide or local elections, by clearly applying that consideration to a *candidate ballot access* issue. *Id*. at 791.

As the Supreme Court observed in *Anderson*: "If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties." *Id*. at 791. The early Ohio deadline could not stand in *Anderson* because it unduly prohibited later-emerging campaigns. A similar concern exists here in Florida when they treat minor parties differently and prohibit certain of them from obtaining ballot access by certification made on or before September 1, 2020 like other minor parties.

Ample evidence of influential independent candidates attempts to obtain ballot access was set forth in the record below showing that these candidates were on the ballot for minor parties that were organized in only one state. (Doc. 9-5.) These names include Hubert Humphrey, Ross Perot, Donald Trump, Ralph Nader, George Wallace, and John

Anderson. Here, the Independent Party of Florida is still considering who to nominate for President. (Doc. 35-2, ¶ 2.) It is common for independent candidates to solicit the nomination of minor parties, like the Plaintiff Parties in this case, that exist in different states throughout the United States. (Doc. 9-1, ¶¶ 43-48.) Here, one of the Plaintiff Parties is the Independent Party of Florida, which has a stated goal of remaining independent from the influences of other parties. (Doc. 9-7, ¶ 8.) When the Independent Party chooses a Presidential candidate, whether that candidate is likely to be on the ballot in other states is likely going to be a strong consideration that influences the party's decision. Consequently, keeping these Plaintiff Parties off the ballot in Florida has a similar prohibitory effect that the Supreme Court justifiably struck down in *Anderson*.

There are only two Plaintiff Parties in this lawsuit, and a total of three minor political parties in Florida that are not associated with a national party recognized by the FEC as a national committee. *See* https://dos.myflorida.com/elections/candidates-committees/political-parties/ (last accessed on June 24, 2020). There is no great threat the State will present to its voters a convoluted or confusing Presidential

ballot. The State has already established that no modicum of Florida voter support is necessary to access the ballot as a minor political party under the affiliation method.

Consequently, keeping minor parties off the ballot solely because they are not associated with one of a few FEC-recognized parties violates equal protection, and the state cannot justify the regulation as necessary because a showing of national support is not "longstanding legitimate [state] interest." (Doc. 39, p. 18.) Rather, the affiliation method undermines the State's articulated basis for requiring a signature petition to show a modicum of support within the state. Consequently, this Court should reverse the district court's decision with instructions to grant the Motion for Preliminary Injunction that sought to bar the State from enforcing the "national party" affiliation requirement before a party can certify its candidates to the presidential ballot and allow the Plaintiff Parties to certify their candidates to the ballot by the statutory deadline of September 1, 2020 as all other minor parties are allowed to do.

III. The National Party Association Requirement Violates the Equal Protection Clause Because it Treats Similarly Situated Minor Political Parties Radically Different Solely on the Basis of Who Those Parties Associate With.

The district court's order denying the preliminary injunction claim seeking to bar the national party affiliation requirement in order to qualify for ballot access using the certification method failed to discuss equal protection and how the distinguishing fact that separates minor parties into two groups for ballot access purposes is how the parties exercise the fundamental First Amendment right to freely associate. Rather, the district court's order's discussion was a single paragraph that summarized its decision: "For the same reasons outlined above, the burden placed on Plaintiffs' rights by the Ballot Access Statute is not severe and the Ballot Access Statute rationally serves important state interest." (Doc. 39, p. 19.)

Important fundamental rights are implicated by the affiliation method of determining which minor political parties are exempt from establishing a modicum of statewide voter support before appearing on the general election ballots. Requiring a minor political party to be associated with an organization recognized by the FEC as national committee implicates rights to free speech, association, ballot access,

and political participation. The statute also abjectly fails to further a legitimate state interest when you consider the types of organizations that the FEC has accepted and rejected for national committee recognition, and then look at those organizations' various levels of political support in the Florida. The burdens this statute imposes on minor parties are severe because failing to convince the FEC that the party deserves national committee status potentially bars the minor party from the ballot.

The equal protection clause is implicated because the distinguishing factor between one minor political party and another is how that party exercises its First Amendment right to associate. The statute can't be justified by the State either because minor political parties that have very little or no Florida voter support might be recognized by the FEC, and in other instances, the FEC might reject a party that has significant Florida. Richard Winger ("Winger") is an expert in ballot access laws and both independent candidates and minor political parties' participation in elections. (Doc. 9-1, ¶ 3.) Winger's curriculum vitae sets forth his extensive experience and expertise. (Doc. 9-1, ¶ 3 and Doc. 9-6.)

Winger's declaration at paragraphs 15-41 articulates over the course of several decades how minor political parties have fared and whether they were recognized by the FEC as a national committee. (Doc. 9-1, ¶¶ 15-41.) There is simply no logical correlation between the FEC's decisions to grant or reject a political party's application for national committee status and whether they have any support in Florida. To date, only six parties besides the two dominant ones – Democrat and Republican – have been granted national committee status, and those are: (1) Libertarian Party in 1975; (2) Socialist Party[1] in 1980; (3) Natural Law Party in 1992; (4) U.S. Taxpayers Party in 1995 (which subsequently changed its name to Constitution Party in 1999); (5) Reform Party in 1998; and (6) Green Party in 2001. (Doc. 9-1, ¶ 15.)

In turn, nine parties have applied for national committee recognition and were denied: (1) Liberal Party of New York in 1976; (2) Pyramid Freedom Party in 1978; (3) Citizens Party in 1980; (4) National Unity Party in 1980; (5) Populist Party in 1988; (6) U.S. Taxpayers Party in

[1] This Socialist Party is not associated with the Plaintiff in this case. Rather, the Party for Socialism and Liberation is associated with a national party of the same name that is not recognized by the FEC as a national committee.

1992;[2] (7) Green Party in 1996;[3] (8) 1787 Party in 2013; and (9) United Party in 2016. (Doc. 9-1, ¶ 16.)

As such, there are only six minor parties that could possibly qualify for ballot access in Florida by virtue of their FEC national committee recognition. But only four of those parties are even organized as minor political parties in Florida. *See* https://dos.myflorida.com/elections/candidates-committees/political-parties/ (last accessed on June 24, 2020). To become a minor political party, you must merely follow the steps set forth in Fla. Stat. § 103.095(1). Analyzing Fla. § 103.095(1)-(3) and 103.021(1), a minor political party can form with as few as three Florida residents and then nominate a presidential candidate with as few as twenty-nine Florida registered voters. Hence, if the Socialist Party or National Law Party found as few as twenty-nine sympathetic Florida residents to organize as an affiliated minor political party, they could nominate a presidential candidate.

[2] The U.S. Taxpayers Party was subsequently granted national committee status two years later in 1994. (Doc. 9-1, ¶ 15.)
[3] The Green Party was subsequently granted national committee status five years later in 2001. (Doc. 9-1, ¶ 15.)

Both Plaintiffs are well-established in Florida, having been active in Florida politics for several election cycles with many more than three members. (Doc. 9-7, ¶ 7; Doc. 9-8, ¶ 7.) The Independent Party has more registered voters in the state than all other minor political parties combined, and the Party for Socialism and Liberation has placed candidates on the Presidential ballot in 2008 and 2012 since they organized. (Doc. 20-2, ¶ 7 and Doc. 9-8, ¶ 7.)

There are also good reasons not to seek national committee recognition because national committee recognition brings with it added responsibilities to keep and file detailed federal campaign reports. (Doc. 9-1, ¶ 18.) A party may not believe that taking on that added administrative obligation is in their best interest, but that does not mean they can't have an impact in the election. Six parties have never asked for national committee status and yet polled over 50,000 votes nationwide. *Id*.

The FEC is also not considering particular states' interests when deciding to grant or deny national committee recognition. For example, the FEC tends to deny applications unless the party first places candidates on the ballot in several states and is organized across the

nation. *Id*. ¶¶ 20-21. This requirement harms the Independent Party in particular because, true to its name, it desires to be Independent from any national organization. (Doc. 9-7, ¶ 8.) Rather, the Independent Party remains free to associate with any candidate they choose in each election cycle. *Id*.

This is not an uncommon or ineffective approach to exercising their rights to participate in a political election. Howie Hawkins was nominated to be the Socialist Party USA candidate for President, but is also seeking the nomination of the Green Party. https://howiehawkins.us/howie-hawkins-wins-socialist-party-usa-nomination-green-candidate-seeks-to-build-left-unity-with-multiple-nominations/ (last accessed on June 24, 2020). Howie Hawkins' website also indicates that he is seeking the nomination of several "state-level independent progressive parties." *Id*. These include the Peace and Freedom Party of California, the Progressive Party of Oregon, the Citizens and Labor parties of South Carolina, and the Liberty Union and Progressive parties of Vermont. *Id*. As the Supreme Court has said:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. . . . And the freedom to associate for the common advancement

> of political beliefs, . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Democratic Party, 450 U.S. at 121-22 (internal quotations and citations omitted) (upholding the right of the Democratic National Committee to bar Wisconsin delegates from participation in the national convention if the Wisconsin open primary election violates the National Committee's convention rules). Here, the Independent Party and its members like to retain the control of who they nominate as a candidate for president in the state party, and are not necessarily interested in submitting that control to a national convention. (Doc. 9-7, ¶ 8.)

The Independent Party's approach to these elections is a legitimate exercise of its constitutional right of association, and imposing ballot access requirements that would require them to abandon that approach is severely burdensome. Indeed, Winger has charted the number of states that were organized in a single state and also nominated a candidate for office. (Doc. 9-1, ¶ 43 and Doc. 9-5.) Several names on the chart pop off the page because they are well-known household names that were influential in elections over the last 25 years or so, including Donald Trump (who actually won the Presidency appearing as the

nominee for the American Independent Party of California),[4] Ralph Nader, Ross Perot and others. *Id.*

Finally, the FEC does not consider the modicum of support nationwide or in any states to determine national committee eligibility making this requirement an extremely weak proxy to show a modicum of support in Florida. The Libertarian Party polled only 3,673 votes in the entire nation in 1972, but was granted national committee status in 1975. (Doc. 9-1, ¶ 23.) Then in 1980, the Socialist Party polled 6,898 votes nationwide and was granted national committee status in December 1980, but then the FEC rejected the Citizens Party application despite polling 234,294 nationwide in 1980. *Id.*, ¶ 24.

In 1988, the New Alliance Party polled 217,219 in the nationwide presidential election, but was denied national committee status, but the Socialist Party, which continued to be recognized only polled 3,882 nationwide votes. *Id.*, ¶¶ 25-26. And the examples continue in Winger's declaration at ¶¶ 27-41, all of which are important for this Court to review. What these examples make clear is that there is absolutely no

[4] Donald Trump was also nominated by the California Republican Party and appeared on the 2016 California presidential general election ballot with two party nominations.

correlation between national or Florida electorate support and FEC national committee recognition.

If a modicum of voter support is not a factor in the FEC's national committee status determinations, the question has to be asked: what is the logic behind Florida using a 1% voter signature requirement *as an alternative* ballot access avenue if a minor political party is not an FEC recognized national committee? The answer is obvious, there is no logical basis and therefore, the ballot access restrictions cannot be upheld.

Florida's current statutory construct does not hold up to the Supreme Court's constitutional test set forth in *Anderson* and the Plaintiffs' equal protection and other First Amendment rights are violated by the unequal treatment and imposing burden placed upon them to gain ballot access. Therefore, the statute that bars the Plaintiff parties from accessing the ballot by certification because they are not affiliated with a national party that is recognized by the FEC as a national committee should be enjoined and the Plaintiffs allowed to nominate their candidates by certification by September 1, just like all other minor parties in Florida.

CONCLUSION

For all the foregoing reasons, this case should be reversed and remanded with instructions to grant the Plaintiff Parties' motion for preliminary injunction.

Dated at Austin, Texas, on this the 25th day of June, 2020.

Respectfully submitted,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 8,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 25, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the parties by electronic filing:

Ashley E. Davis
Bradley R. McVay

Dated: June 25, 2020

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