**No. 20-2309**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**DAN WHITFIELD,**
**Plaintiff – Appellant**

**GARY FULTS**
**Plaintiff**

**v.**

**JOHN THURSTON, in his official capacity as**
**Secretary of State for the State of Arkansas,**
**Defendant – Appellee**

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**On Appeal from the United States District Court**
**For the Eastern District of Arkansas, Central Division**

**Honorable Kristine G. Baker, District Judge**
**D.C. No. 4:20-cv-00466-KGB**

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# APPELLANT'S OPENING BRIEF

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The District Court in the case below granted judgment to the Defendant Secretary of State against the Plaintiff Whitfield because the District Court found that the petition deadline for Independent candidates of May 1 at Noon (well before the general election ballots have to be printed), the 90-day fixed petitioning period, the 10,000 petition signature requirement for statewide candidates, and the effects of the COVID-19 pandemic were not a severe burden so that the State's regulatory interests were sufficient to justify a non-severe burden so as to be necessary to meet a legitimate State interest. Therefore, both declaratory and injunctive relief were denied Plaintiff-Appellant.

Counsel for Appellant feels that due to the need for a quick resolution to the instant appeal and the close analysis needed, it would be advantageous to the Court to be able to ask questions at oral argument by way of a video conference—particularly as to the distinctions between past and present Arkansas election laws and the effect of the COVID-19 pandemic on petitioning this year in relationship to the success of Independent candidates obtaining ballot status in Arkansas. Counsel for Appellant requests oral argument of 20 minutes.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 8th Cir. R. 26.1A, Dan Whitfield, who is the Plaintiff – Appellant, is an individual and not a publicly held corporation or other publicly held entity or trade association, does not have a parent corporation, there are no other publicly held corporations or other publicly held entities, not a party to the appeal, that have a financial interest in the outcome of the litigation, and this case does not arise out of a bankruptcy proceeding.

## PRIOR OR RELATED APPEALS

There are no prior or related appeals.

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## JURISDICTIONAL STATEMENT

The jurisdiction of the District Court below was invoked pursuant to Title 28, United States Code, §§ 1331, 2201, and 2202, and Title 42, United States Code, § 1983. The Findings of Fact and Conclusions of Law denying Plaintiffs' Motion for Preliminary Injunction and Request for Injunctive Relief and entering judgment in favor of Defendant and denying the relief requested and Judgment in favor of the Defendant appealed from were filed in the District Court below on June 24, 2020 (JA at 114-174 and 175), and the Plaintiff-Appellant filed his Notice of Appeal on June 26, 2020 (JA at 176-177). Jurisdiction of the Court of Appeals is invoked pursuant to Title 28, United States Code, § 1291.

## STATEMENT OF ISSUES

This appeal presents issues concerning whether the District Court below correctly applied the standard of review as to deciding a motion for preliminary injunction in conjunction with a trial on the merits and the analytical test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983) as to the particular facts in the case at bar, and/or misunderstood the severity of the Arkansas election laws in question, as applied to the plaintiff Dan Whitfield, a 2020 statewide independent candidate, in their application this year because of the COVID-19 pandemic and the implications

of the *Anderson* test in relation to what was necessary to properly protect a legitimate state interest. These issues are:

Issue 1: Whether the Noon, May 1 petition deadline requirement, coupled with the 90-day fixed and non-rolling petitioning period, and the 10,000 petition signature requirement for a statewide independent candidates in Arkansas of Ark. Code Ann., §§ 7-7-101, 7-7-103, and 7-7-203(c)(1) is unconstitutional, as applied to Plaintiff Whitfield as an Independent candidate for U.S. Senator from Arkansas, under strict scrutiny and the authority of previous decisions and the particular facts in this case concerning the effects of the COVID-19 pandemic on petitioning in 2020 because under the particular circumstances of this case the burden imposed by the laws in question on Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983 are severe. *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); *Moore v. Martin*, 854 F.3d 1021 (8th Cir. 2017); *Moore v. Martin*, Case No. 4:14-cv-00065-JM, 2018 WL 10320761 (E.D. Ark., W.Div., Jan. 31, 2018); and *Moore v. Thurston*, 928 F.3d 753 (8th Cir. 2019).

Issue 2: Whether the Noon, May 1 petition deadline requirement, coupled with the 90-day fixed and non-rolling petitioning period, and the 10,000 petition signature requirement for statewide independent candidates in Arkansas of Ark. Code Ann., §§ 7-7-101, 7-7-103, and 7-7-203(c)(1) is unconstitutional, particularly

considering the effects of the COVID-19 pandemic on petitioning in 2020, under the equal protection clause because Independent presidential candidates in Arkansas need only submit by August 3, 2020, 1,000 petition signatures which can be collected in an unlimited petitioning period, and is not necessary to serve any compelling state interest in violation of Plaintiff's equal protection rights under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983. *Williams v. Rhodes*, 393 U.S. 23 (1968); *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); and *Anderson v. Celebrezze*, 406 U.S. 780 (1983).

Issue 3: Whether the 6,622 petition signatures (6,514 of which were turned in before noon on May 1, 2020, along with an additional 108 petition signatures signed before May 1, 2020, but not received back in the mail until after the 6,514 petition signatures had been turned in), is a sufficient modicum of support to place Plaintiff Dan Whitfield's name on the 2020 Arkansas general election ballot as a candidate for U.S. Senator. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Anderson v. Celebrezze*, 406 U.S. 780 (1983); *Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984); and *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d 882 (E.D. Ark. 2019), *aff'd*., No. 19-2503, 2020 WL 3273239 (8th Cir. June 18, 2020).

## STATEMENT OF THE CASE

I. Course of the Proceeding and Disposition in the Court below.

This case is a ballot access and election law case on behalf of a registered Arkansas voter and Independent candidate for the 2020 Arkansas general election ballot for the office of United States Senator, who must successfully complete a petition drive for Independent candidate recognition under Arkansas law--which has been made very much more difficult by the effects of the coronavirus on petitioning. The Plaintiff had asked in the case below that he be permitted to finish a petition drive for statewide independent ballot status with a petition signature requirement of no more than twenty to thirty percent (20-30%) of the number of now required petition signatures of registered Arkansas voters along with a later petition signature deadline and a longer petition collection period for the general election to be conducted on November 3, 2020. Because of the continuing problem created by the coronavirus for petitioning, Plaintiff suggested to the District Court that it would be better to decrease the number of petition signatures required for Independent candidates for the 2020 general election in Arkansas, rather than moving at this time the petitioning deadline further in the future and/or extending the petitioning period beyond 90 days because of the uncertainty involving future developments. In fact, plaintiff ended up turning in more than 6,500 petition signatures of Arkansas voters before Noon on May 1, 2020 (JA 98-99, 260 [Tr. p. 83, lines 21-23]).

The facts and witnesses presented to the District Court at the hearing on Plaintiffs' motion for preliminary injunction and trial on the merits showed the effects of the coronavirus on the Plaintiff Whitfield's petition drive (see the Declaration and Supplemental Declaration of Dan Whitfield, Plaintiffs' Exhibit "1" and "9"; JA 19-21, 97-100). Under the circumstances existing this year particularly, requiring an excessive and unnecessary number of valid petition signatures of registered Arkansas voters which must be collected during a fixed 90-day period, and with a petition signature deadline of no later than May 1, 2020, at 12:00 noon--which is long before the general election ballot needs to be printed and only one month after the general primary runoff election on March 31, 2020, Ark. Code Ann., §7-7-203(a), is unconstitutional in its application to Plaintiff under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983.

After filing a complaint on April 29, 2020 (JA 6-18), Plaintiffs filed a motion for preliminary injunction with attachments containing declarations by the Plaintiffs on April 30, 2020 (JA 19-21, 22-26, 27-31). A Joint Stipulation of Facts was filed by the parties on May 11, 2020 (JA 32-36). On May 14, 2020, Defendant filed exhibits containing declarations by Peyton Murphy and Meghan Cox attached to his Response to the Motion for Preliminary Injunction (JA 37-41, 42-61), along with an Answer (JA 62-67). On May 18, 2020, the Plaintiffs filed a Reply to response to

motion for preliminary injunction with various exhibits—Exhibit 3, Declaration of Richard Winger (JA 68-77), Exhibit 4, CV of Richard Winger (JA 78-85), Exhibit 5, 2020 Ballot Access Chart (JA 86-88), Exhibit 6, Amended Order of 4/30/2018 in Moore v. Martin (JA 89), Exhibit 7, Letter of 7/29/2019, from Thurston to Pakko (JA 91-93), Exhibit 8, Letter of 12/10/2019, Thurston to Pakko (JA 94-96), Exhibit 9, Supplemental Declaration of Dan Whitfield (JA 97-100), Exhibit 10, Supplemental Declaration of Gary Fults (JA 101-104), Exhibit 11, Ballotpedia for Meghan Cox (JA 105-106), and Exhibit 12, Administrative Order Five of 4/17/2020 (JA 107-110). On May 21, 2020, a Joint Stipulation Regarding Witnesses & Exhibits was filed which stipulated to the admission of the aforesaid exhibits of the Plaintiffs and Defendant for the hearing (JA 111-113).

After a bench trial on Plaintiffs' motion for preliminary injunction and trial on the merits on May 27, 2020 (Transcript of Hearing filed 6/4/2020, JA 178-431, [Tr. pp. 1-254], at which time Plaintiff's Exhibit 13, Letters between Sandra Furrer and John Thurston, Secretary of State's Office, and Governor Hutchinson were introduced and admitted by the District Court without objection by the Defendant), the District Court on June 24, 2020, filed Findings of Fact and Conclusions of Law and a Judgment denying Plaintiff's motion for preliminary injunction and granting a judgment to Defendant (JA 114-174, 175).

This appeal is from the aforesaid Findings of Fact and Conclusions of Law and Judgment (JA 114-174, 175) of the United States District Court for the Eastern District of Arkansas, Central Division (Hon. Kristine G. Baker), in which the District Court denied Plaintiffs' motion for preliminary injunction and granted judgment to the Defendant Secretary of State. The Plaintiff Dan Whitfield filed his Notice of Appeal on June 26, 2020 (JA 176-177). On July 8, 2020, Plaintiff Whitfield filed a motion for expedited appeal and for order granting injunction with supporting suggestions wherein—among other requests—Plaintiff Whitfield requested the Court to expedite the appeal by advancing the date that the appendix and brief of Appellant Whitfield are due from the current due date of August 10, 2020, to no later than July 20, 2020, and advancing the date the Appellee's brief is due from thirty days to twenty days from the date the Court issues the notice of docket activity filing the Brief of Appellant, along with decreasing the time for any reply brief by the Appellant to be filed to five days from the date the Court issues the notice of docket activity filing the Brief of Appellee. In conformity to the aforesaid motion, Plaintiff Whitfield now files his Brief of Appellant along with a Joint Appendix.

## II. Statement of the Facts Relative to the Issues Submitted for Review.

Ark. Code Ann. §§ 7-7-101, 7-7-103, and 7-7-203(c)(1) as those provisions apply to the Plaintiff Whitfield below for the current 2020 Arkansas general election cycle, and all subsequent Arkansas general election cycles, set a petition signature

requirement of three percent of the qualified voters in the state or 10,000 registered Arkansas voters that can only be collected during a fixed 90-day petitioning period (February 1 through April 30, 2020—which this year coincided for the most part with the COVID-19 pandemic) and an unnecessarily early and vague deadline of Noon on May 1, 2020, during election years for Independent candidates and their supporters. Ark. Code Ann., § 7-7-103(b)(1)(A) was amended in 2019 to move the petition filing deadline for independent candidates from March 1 of an election year to Noon on May 1 of an election year. *See* 2019 Ark. Acts 68, codified as Ark. Code § 7-7-103. The foregoing change in the ballot access law for independent candidates appeared to make petitioning easier by setting a petitioning deadline and 90-day petitioning period closer to the final selection of political party candidates which is done by party primary on March 3, 2020, with a run-off general primary election on March 31, 2020, Ark. Code Ann., §7-7-203(a), rather than the old deadline of March 1 of the election year which required petitioning when political interest among the voting public is less and placing the 90-day petitioning time in December, January, and February. However, the unexpected occurred with the COVID-19 pandemic and the new 90-day fixed petitioning period in the months of February, March, and April were severely impacted by the coronavirus—which ironically would not have had such a severe impact under the old March 1st deadline because petitioning would have been done in December of

2019 and January and February of 2020 before the significant negative impact of the COVID-19 pandemic had struck (JA 149-150, 153-155, 156-157). While the District Court found the foregoing effects of COVID-19 to have burdened Plaintiff, the District Court did not find the burden to be severe (JA 159).

Plaintiff Dan Whitfield, while he did not successfully comply with the petition signature requirement by getting 10,000 petition signatures, did manage to turn in over 6,500 petition signatures of registered Arkansas voters by Noon on May 1, 2020 (JA 98-99, 260 [Tr. p. 83, lines 21-23]). Further, Plaintiff Whitfield complied with the November 12, 2019, deadline for submitting a political practices pledge, an affidavit of eligibility, and a notice of a candidacy nearly a year before the general election and when the major party candidates are not yet known and with an Independent candidate facing no primary opponent (JA 139). Significantly in 2020, while only two Independent candidates for State Representative who only needed signatures in the low two hundreds were successful in petitioning in 2020 (JA 121, ¶32, 136-137), other independent candidates for State Representative who needed 286 and 436 or 438 petition signatures were unsuccessful (JA 119, ¶25, 121, ¶35), and no independent candidates were successful for the larger and more populated districts for State Senate, U.S. Congress, or statewide office. Between 1891 and 1955, Independent candidates in Arkansas only needed 50 signatures no matter what office they were running for, and the petition signature deadline for

Independent candidates was 20 days before the State's general election (JA 144). In the past 42 years there have only been three successful Independent candidates for a statewide office in Arkansas to turn in the necessary petition signatures on time (JA 136) and no successful statewide Independent candidates in Arkansas has petitioned in the last ten years (JA 136, 144).

## SUMMARY OF THE ARGUMENT

Currently, an Independent candidate for the 2020 general election in Arkansas had to file a political practices pledge, an affidavit of eligibility, and a notice of candidacy stating the name and title the candidate proposes to appear on the ballot and identifying the elective office sought during the party filing period. Ark. Code Ann., §§ 7-7-103(a)(1) and (2)(A). The party filing period (which for the Republican and Democratic parties determines who has chosen to submit themselves to be party candidates in the preferential primary election) was set for the 2020 election cycle for a one-week period beginning at noon on the first Monday in November preceding the general primary election (viz.: November 4, 2019) and ending at noon on the 7th day thereafter (viz.: November 11, 2019). The new petition deadline for Independent candidates in Arkansas has been moved several times in recent years, and is now May 1, 2020, at 12:00 noon. See *Moore v. Martin*, No. 4:14-cv-00065-JM, 2018 WL 10320761 (E.D. Ark., W.Div., Jan. 31, 2018)(declaring the Independent petition deadline of March 1 unconstitutional after remand); and *Moore v. Thurston*, 928

F.3d 753, 758-759 (8th Cir. 2019) (dismissing appeal as moot because of amended law but allowing the District Court judgment to stand and not vacating it because of the public interest being best served by a substantial body of judicial precedents). The May 1 deadline requires independent candidates to conduct a petition drive slightly more than nine to six months before the general election, not to mention that an Independent candidate will have to decide which office to run for in early November of 2019, almost one year before the general election. There is no reason or necessity for independent candidates in Arkansas to have to decide approximately one year before the general election what office they are going to run for and then petition before the nominees of political parties are even known.

Besides the foregoing considerations, this Court should note that in order to respect social distancing guidelines implemented in response to the COVID-19 pandemic, numerous state and federal courts--but not all--have reduced the number of signatures required for a candidate to be placed on the ballot or taken other steps. See, e.g., *Libertarian Party of Illinois v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4-5 (N.D. Ill., E.Div., Apr. 23, 2020)(reducing the statutory requirement to 10% of the normal requirement because the Plaintiffs could not rely on their usual signature-gathering methods); *Esshaki v. Whitmer*, No. 2:20-CV-1083-TGB, 2020 WL 1910154, at *12 (E.D. Mich. Apr. 20, 2020) (reducing the statutory signature requirement by 50 percent); *Goldstein v. Sec'y of*

*Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *9 (Mass. Apr. 17, 2020) (same); N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing the statutory signature requirement to 30 percent of normal); H. 681, 2019-2020 Gen. Assemb., Adjourned Sess. (Vt. 2020) (suspending the statutory signature requirement entirely; and *In re: State Question No. 805, Initiative Petition No. 421*, *Manning v. Rogers*, Case No. 118,719 (Sup. Ct. Okla., March 18, 2020) (tolling the 90-day circulation period for initiative petitions during the declaration of emergency by the Oklahoma Governor until he lifts the declared state of emergency and the Secretary of State calculates a new deadline).

Because the Plaintiff would suffer irreparable injury if he is not allowed to conduct petition drives for independent candidates with a reasonable signature requirement for the general election of November 3, 2020, there is no possible constitutionally recognized injury to the Defendant which would be greater than the grave injury to the fundamental rights which would be suffered by the Plaintiffs if they are not allowed a constitutional petition signature requirement, greater petitioning time and a later petitioning deadline. Further, issuance of a preliminary injunction would be in the public interest rather than adverse to the public interest. Particularly, the harm to voters and the public is the damage to "political dialogue and free expression" that is done when candidates and their supporters are unnecessarily restricted from participating in the public discourse. *Libertarian Party*

*of Ohio v. Blackwell*, 462 F.3d 579, at 594 (6th Cir. 2006). As the Eighth Circuit Court of Appeals has stated in reviewing election laws: "our primary concern is not the interest of [the] candidate . . . but rather, the interest of the voters who choose to associate together to express their support for [that] candidacy and the views . . . espoused." *Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

Also, the Court in deciding whether to grant Plaintiff's request for a preliminary injunction should concentrate primarily on the issue of whether or not the Plaintiff is likely to prevail on the merits in the instant case. Therefore, the Court should next look to the standard of review in judging ballot access and election laws which affect independent candidates and their supporters and potential voters--particularly as same relate to the excessively high and unnecessary number of petition signatures required this year because of the effect of the coronavirus, the unnecessarily early petition signature deadline, the limitation as to petitioning time, the relationship of the aforesaid requirements to the time period in which the major political parties are selecting their candidates, and the date of the general election, as well as the particular facts in the instant case. The unique effect of the coronavirus on petitioning this year is made worse by the 90-day petitioning period. Just as inclement weather and its effect on petitioning has been recognized to call into question the constitutionality of a 90-day petitioning period, see *Libertarian Party*

*of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118, 121-122 (W.D. Okla. 1984); cited with approval in *Citizens to Establish A Reform Party in Arkansas v. Priest*, 970 F.Supp. 690, 698 (E.D. Ark. 1996), also see, *Libertarian Party of Arkansas v. Thurston*, 394 F. Supp.3d 882, at 894, ¶ 29, 897, ¶ 49 and ¶ 53 (E.D. Ark. 2019), a deadly disease such as the coronavirus has an even greater and more damaging effect on petitioning. As the Eighth Circuit said in the 1980 *McLain* case, the ". . . Constitution requires that the access requirements as to both party-backed and independent candidates be reasonable." *McLain v. Meier*, 637 F.2d 1159, at 1165 (8th Cir. 1980). Restrictions on ballot access "may not go beyond what the state's compelling interests actually require," *McLain v. Meier*, 637 F.2d at 1163, and must be "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, at 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d 1045, at 1049 (8th Cir. 1988)). "In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest." *Moore v. Martin*, 854 F.3d at 1026.

In this case the negative impact of having such an early petition deadline and short fixed petitioning period of 90 days, when interfered with by the coronavirus, kept Plaintiff from obtaining the 10,000 petition signatures needed. Of course, under the 10,000 petition signature requirement for a statewide Independent candidate in Arkansas, many more petition signatures have to be gathered in order

to ensure that there will be sufficient valid petition signatures. See Plaintiff's Exhibit "1", Declaration of Dan Whitfield, ¶ 8 (JA 25).

Injunctive relief is necessary because of the unnecessarily early petition signature deadline, limitation of petitioning time to a fixed 90-days, and a petition signature requirement of 10,000 petition signatures for a statewide Independent candidate—which has been successfully complied with only three times by a statewide Independent candidate. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d 882, at 892, ¶ 15 (E.D. Ark. 2019). As demonstrated in the Declaration of Dan Whitfield (Plaintiffs' Exhibit "1"), there is harm just in having a petition drive well before the general election in Arkansas. Many of the political issues for the next election are not yet well formed or known. Not only are new political developments constantly occurring, but there is no necessity to have Independent candidate's petitions so early in the political season and collected during a 90-day period. Further, even under good conditions, the evidence showed that Arkansas has never been plagued by an overcrowded ballot—particularly as to Independent candidates. As has been previously noted, collecting 10,000 petition signatures is a "challenging endeavor." *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 893-894, ¶ 25. However, Plaintiff Whitfield tried to comply with the law under difficult circumstances and turned in over 6,500 petition signatures collected to Defendant's office by noon on May 1, 2020.

Therefore, the first consideration this Court must look to is the character and magnitude of the asserted injury to the Plaintiffs' First and Fourteenth Amendment rights. Since in the instant case the injury to the rights of the Plaintiff impacted his candidacy and his supporters in their petitioning for ballot access for the Arkansas ballot, there cannot be a dispute in the least that the damage would be substantial and of a fundamental nature. When election deadlines are far in advance of an election, they force independent candidates or minor parties to recruit candidates at a time when major party candidates are not known and when voters are not politically engaged. See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th Cir. 2006) and *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 879-881 (3rd Cir. 1997). As the U.S. Court of Appeals for the Eighth Circuit has stated: ". . . it is important that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary." *McLain v. Meier*, 637 F.2d 1159, at 1164. The COVID-19 pandemic and its effects on petitioning transformed the burden on Plaintiff to a severe burden because of the timing of the fixed 90-day petitioning period this year.

## ARGUMENT

## STANDARD OF REVIEW

The standard of appellate review as to the District Court's judgment, after a bench trial, as to the issues in question herein is *de novo* as to conclusions of law. On appeal, a District Court's rulings on issues of law are reviewed *de novo*. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005); (citing *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001)). Findings of Fact are subject to review under Fed. R. Civ. P. 52(a) and, in the context of a constitutional challenge to State election laws, require the Appellate Court to weight "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate" against "the precise interests put forth by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the Plaintiff's rights." *Burdick v. Takushi*, 504 U.S. at 434, quoting *Anderson v. Celebrezze*, 460 U.S. at 789.

In reviewing a district court's decision on a motion for preliminary injunction, the Eighth Circuit Court of Appeals has stated that: "A district court has broad discretion in ruling on requests for preliminary injunctions; 'we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion.'" *Kroupa v. Nielsen*, 731 F.3d 831, 818 (8th Cir. 2013) (quoting

*Medicine Shoppe Int'l., Inc. v. S.B.S. Pill Dr., Inc*., 336 F.3d 801, 803 (8th Cir. 2003). As to the standard which the District Court should apply when determining whether to grant a motion for preliminary injunction, the District Court should consider: (1) the threat of irreparable harm to the movant; (2) the movant's likelihood of success on the merits; (3) the balance between the harm to the movant and the injury that granting an injunction would cause other interested parties; and (4) the public interest. *Kroupa v. Neilsen*, 731 F.3d at 818 (quoting *Dataphase Sys. Inc. v. CL Sys*., 640 F.2d 109, 114 (8th Cir. 1981)). Under the *Dataphase* case, no one factor is determinative. *Id*. at 113. The focus is on "whether the balance of the equities so favor the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). After the Eighth Circuit revised the *Dataphase* test when applied to challenges to laws passed through the democratic process, it was determined that those laws are entitled to a "higher degree of deference" and the moving party must meet a threshold of showing that the movant is "likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 725, 732 (8th Cir. 2008). Only if the movants have demonstrated that they are likely to prevail on the merits should the Court consider the remaining factors set forth in the *Dataphase* case. *Id***.**

As to the standard of review in a ballot access case, the analytical test applied by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1968), is appropriate. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by litmus-paper tests that will separate valid from invalid restrictions, but rather that the trial court " ... must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze*, 406 U.S., at 789. In doing so, the Supreme Court has set forth a three-pronged test, *Id*., to which the Eighth Circuit has stated:

> [W]e review the statute under a form of strict scrutiny referred to as the "compelling state interest test" by first determining whether the challenged statute causes a burden of some substance on a plaintiff's rights, and if so, upholding the statute only if it is "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988)). In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest. See *Eu v. S.F. Cty. Democratic Cent. Comm*., 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); and *Moore v. Martin*, 854 F.3d at 1025-1026.

The U.S. Supreme Court's three-prong balancing test is that the Trial Court must

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

whether the challenged provisions is unconstitutional. *Anderson v. Celebrezze,* 460 U.S. at 789.

When the law places "severe" burdens on the rights of political parties, candidates or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, at 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). In fact, " . . . because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny." *Anderson v. Celebrezze*, 460 U.S., at 793, n.16. After all, "the State may not be a 'wholly independent or neutral arbiter' as it is controlled by the political parties in power, 'which presumably have an incentive to shape the rules of the electoral game to their own benefit.'" *Libertarian Party of Ohio v. Blackwell***,** 462 F.3d 579, at 587 (6th Cir. 2006) (quoting from *Clingman v. Beaver*, 544 U.S. 581 (2005) (O'Conner, J., concurring).

In identifying and evaluating the precise interests put forth by the State as justifications for the burden imposed by the laws in question, while Arkansas does have a right to properly supervise elections, election restrictions which impact independent candidates and their supporters must be necessary to serve a compelling state interest so that:

"even when pursuing a legitimate interest, a state may not choose means that

> **unnecessarily restrict** constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that states adopt the **least drastic means** to achieve their ends. *Lubin v. Panish*, 415 U.S. 709, 716 . . .; *Williams v. Rhodes*, 393 U.S. at 31-33 . . .. **This requirement is particularly important where restrictions on access to the ballot are involved**. The states' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the development of the nation. [emphasis added]. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 185 (1979).

## I. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION AND GRANTING JUDGMENT TO THE DEFENDANT SECRETARY OF STATE BECAUSE THE NOON, MAY 1 PETITION DEADLINE REQUIREMENT, COUPLED WITH THE 90-DAY FIXED AND NON-ROLLING PETITIONING PERIOD, AND THE 10,000 PETITION SIGNATURE REQUIREMENT FOR A STATEWIDE INDEPENDENT CANDIDATES IN ARKANSAS OF ARK. CODE ANN., §§ 7-7-101, 7-7-103, AND 7-7-203(C)(1) IS UNCONSTITUTIONAL, AS APPLIED TO PLAINTIFF WHITFIELD AS AN INDEPENDENT CANDIDATE FOR U.S. SENATOR FROM ARKANSAS, UNDER STRICT SCRUTINY AND THE AUTHORITY OF PREVIOUS DECISIONS AND THE PARTICULAR FACTS IN THIS CASE CONCERNING THE EFFECTS OF THE COVID-19 PANDEMIC ON PETITIONING IN 2020 BECAUSE UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE THE BURDEN IMPOSED BY THE LAWS IN QUESTION ON PLAINTIFF'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TITLE 42, UNITED STATES CODE, § 1983 ARE SEVERE.

The election laws in question and the District Court's ruling below (JA 263-275) is contrary to what the Eighth Circuit held in emphasizing the importance ". . . that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary." *McLain v. Meier*, 637 F.2d at

1164. Previous decisions of Courts have held petition signature deadlines for Independent Arkansas candidates of April or earlier as unconstitutional, viz.: *Lendall v. Bryant*, 387 F.Supp. 397 (E.D. Ark., 1975) (*Lendall I*); *Lendall v. Jernigan*, Case No. LR-76-CV-184, *aff'd mem*., 433 U.S. 901 (1977) (*Lendall II*); *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D. Ark., 1977) (*Lendall III*); and *Rock v. Bryant*, 459 F. Supp. 64 (E.D. Ark., W.D. 1978), *aff'd.*, 590 F.2d 340 (8th Cir. 1978); *Moore v. Martin, Id*. A Constitutional petition deadline for Independent candidates (e.g., the May 1 petition deadline of an election year) can be made unconstitutional by having too many signatures required, by only allowing a very small petitioning time, and because the petitioning time in question is fixed and is affected negatively by bad weather and/or a COVID-19 pandemic.

The problem with the District Court's decision below was that the District Court found that the burden of the election laws in question coupled with the effects of the COVID-19 pandemic was non-severe. However, in reaching this decision, the District Court made several errors. First, the District Court indicated that the major party candidates in Arkansas would be selected at the primary election on March 3, 2020, when, in fact, many party candidates are not finally determined until the run-off general primary election on March 31, 2020, see Ark. Code Ann., § 7-7-203(a), (JA 142-143), thus leaving only the last 30 days of petitioning in April after the major parties have finally selected all of their

candidates. Second, the District Court mistakenly thought the Eighth Circuit had approved the constitutionality of a May 1 at Noon petition turn-in deadline, when the Eighth Circuit, in fact, declined to rule on an objection raised after the old law had been amended and the appellate briefs filed. *Moore v. Thurston*, 928 F.3d 753, 757, n.5 (8th Cir. 2019). Finally, the District Court did not consider that if heightened scrutiny was applied to a March 1 deadline for Independent candidate petitions in this Court's and the District Court's decisions in *Moore v. Martin*, *Id.*, and *Moore v. Martin* case, Case No. 4:14-cv-00065-JM, 2018 WL 10320761 when the 90-day petitioning period was not impacted by a COVID-19 pandemic, then it should follow that a later deadline of May 1 with the new 90-day fixed petitioning period being impacted by the coronavirus, should be considered a severe burden so as to justify the application of strict scrutiny.

II. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION AND GRANTING JUDGMENT TO THE DEFENDANT SECRETARY OF STATE BECASUE THE NOON, MAY 1 PETITION DEADLINE REQUIREMENT, COUPLED WITH THE 90-DAY FIXED AND NON-ROLLING PETITIONING PERIOD, AND THE 10,000 PETITION SIGNATURE REQUIREMENT FOR STATEWIDE INDEPENDENT CANDIDATES IN ARKANSAS OF ARK. CODE ANN., §§ 7-7-101, 7-7-103, AND 7-7-203(C)(1) IS UNCONSTITUTIONAL, PARTICULARLY CONSIDERING THE EFFECTS OF THE COVID-19 PANDEMIC ON PETITIONING IN 2020, UNDER THE EQUAL PROTECTION CLAUSE BECAUSE INDEPENDENT PRESIDENTIAL CANDIDATES IN ARKANSAS NEED ONLY SUBMIT BY AUGUST 3, 2020, 1,000 PETITION SIGNATURES WHICH CAN BE COLLECTED IN AN UNLIMITED PETITIONING PERIOD, AND IS NOT NECESSARY TO SERVE ANY COMPELLING STATE INTEREST IN VIOLATION OF PLAINTIFF'S EQUAL PROTECTION RIGHTS UNDER

THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TITLE 42, UNITED STATES CODE, § 1983.

The decision of the District Court of June 24, 2020 is contrary to the U.S. Supreme Court decisions in *Anderson v. Celebrezze*, *Id*., and the Eighth Circuit's decision in *McLain v. Meier*, 637 F.2d at 1164, because Plaintiff's equal protection claim is partly based upon the effects of the Arkansas election laws in question and the fact that Independent presidential candidates in Arkansas need only turn in 1,000 petition signatures with a petition deadline this year of August 3, 2020. As the U.S. Supreme Court stated in an election controversy: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification". *Williams v. Rhodes*, 393 U.S. 23, at 31 (1968). Why is it that a statewide Independent candidate must turn in ten times the number of signatures required by an Independent presidential candidate in Arkansas who has an extra three months to collect signatures and with no 90-day limitation on the petitioning time.

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

*Brown*, 415 U.S. at 743. Certainly the comparison of 10,000 petition signatures versus 1,000 petition signatures, a 90-day petitioning time which is fixed versus an unlimited petitioning time, a petition deadline of Noon on May 1 versus an August 3 petition deadline, coupled with the effects of the COVID-19 pandemic on the limited petitioning time, constitute a significant burden as well as a violation of equal protection for statewide Independent nonpresidential candidates in Arkansas. The final part of the *Anderson* test is that the Court must consider the extent to which legitimate state interests make it necessary to burden the rights of the Plaintiff. *Anderson v. Celebrezze, Id*. Herein, there could be no justification or even rational state interest for such unequal treatment under the circumstances in this case.

In the U.S. Supreme Court's decision in *Anderson v. Celebrezze*, the Supreme Court recognized that while only 5,000 petition signatures were required in the State of Ohio to achieve ballot access for independent candidates in statewide Ohio elections, *Anderson v. Celebrezze*, 460 U.S., at 783 n.1; see also, *Anderson v. Celebrezze*, 499 F.Supp. 121 (S.D. Ohio 1980), (Ohio having a considerably larger population than Arkansas—which requires 10,000 petition signatures for independent candidates in statewide elections in Arkansas), this did not make a March 20 deadline in the election year in Ohio constitutional simply

because of the low number of petition signatures required. *Anderson v. Celebrezze,* 460 U.S., at 786-794. The U.S. Supreme Court held that:

> Neither the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate. Ohio does not suggest that the March deadline is necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed. In addition, the early deadline does not correspond to a potential benefit for the independent, as it does for the party candidate. After filing his statement of candidacy, the independent does not participate in a structured intraparty contest to determine who will receive organizational support; he must develop support by other means. In short, "equal treatment" of partisan and independent candidates simply is not achieved by imposing the March filing deadline on both. As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. *Anderson v. Celebrezze*, 460 U.S., at 800-801, quoting *Jenness v. Fortsen*, 403 U.S. 431, 442 (1971).

Ballot access requirements impose a tremendous burden on individuals that seek to field candidates for election, but may have fewer resources than the two major parties. *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000) (which noted that "courts have subjected to searching scrutiny state laws requiring both party primary candidates and independent candidates to announce their candidacies by the same March deadline, well prior to the primary elections"); and *Stoddard v. Quinn*, 593 F.Supp. 300, 302, 304, 306 (D. Maine 1984) (which found that administrative necessity did not require an early deadline of April 1 for independent candidates for statewide office, with 4,000 petition signatures required to be collected in the months of January, February, and March—"at a time of year when election issues are undefined and the voters are apathetic."). As the District

Court wrote in *Stoddard*: "Equality is not achieved by applying the same deadline to substantially different types of candidacies." *Stoddard v. Quinn*, 593 F.Supp., at 307. In the case at bar, equality should require that statewide Independent candidates, whether for U.S. Senator or President of the United States, should have an equal petition signature requirement, an equal petitioning time period, and an equal petition signature deadline for turning in petition signatures. This is not the case in Arkansas. Further, the COVID-19 pandemic has had a greater negative effect on the Plaintiff as a statewide Independent candidate than on any potential Independent presidential candidate in Arkansas.

## III. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION AND GRANTING JUDGMENT TO THE DEFENDANT SECRETARY OF STATE BECAUSE THE 6,622 PETITION SIGNATURES (6,514 OF WHICH WERE TURNED IN BEFORE NOON ON MAY 1, 2020, ALONG WITH AN ADDITIONAL 108 PETITION SIGNATURES SIGNED BEFORE MAY 1, 2020, BUT NOT RECEIVED BACK IN THE MAIL UNTIL AFTER THE 6,514 PETITION SIGNATURES HAD BEEN TURNED IN), IS A SUFFICIENT MODICUM OF SUPPORT TO PLACE PLAINTIFF DAN WHITFIELD'S NAME ON THE 2020 ARKANSAS GENERAL ELECTION BALLOT AS A CANDIDATE FOR U.S. SENATOR.

While Arkansas does have a right to properly supervise elections, election restrictions which impact independent candidates and their supporters must be necessary to serve a compelling state interest. The questions as to necessity are: (1) Why is it necessary for Arkansas independent candidates to file their political practices pledge, affidavit of eligibility, and notice of candidacy during the one-

week party filing period in early November (November 4, 2019 and ending at noon on November 11, 2019) of the year before the general election even though Independent candidates do not participate in primary elections, runoff primary elections, or new political party nominating conventions? (2) Why is it necessary for Arkansas independent candidates other than for President to collect their signatures in only 90 days? (3) Why is it necessary for the 90-day petitioning period to be not earlier than 90 calendar days before the deadline for filing petitions to qualify as an Independent candidate unless the number of days is reduced by a proclamation, ordinance, resolution, order, or other authorized document for a special election? (4) Why is it necessary for Arkansas independent candidates to file their petition signatures by noon on May 1, 2020, when they will not appear on the general election ballot until the November general election and ballots are not even printed until late August or early September 2020? (5) Why is it necessary for the non-Presidential Arkansas Independent candidate petitions to be filed by noon on May 1 of the general election year after only a 90-day petitioning period and a petition signature requirement that is the fourteenth highest among the states even though there are very few Independent candidates in Arkansas during normal times and the Arkansas general election ballot is not overcrowded? (JA 145). Also see Plaintiffs' Exhibit "3", Declaration of Richard Winger, ¶7 (JA 73-74); and Plaintiffs' Exhibit "5", 2020 Ballot Access for a New

Party or Independent Candidate, U.S. Senate (JA 87-88). The foregoing ranking for Arkansas does not even consider ". . . that the 90 day petitioning period is a relatively small petitioning period compared to most States and is particularly dangerous because of the reduction of effective petitioning time that can be caused by bad weather and/or a disease like COVID-19." Further, it has been noted previously that a 10,000 petition signature requirement statewide in Arkansas is a "challenging endeavor" which requires significant manpower to collect 10,000 signatures in 90 days. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d 882, 893-894, ¶25 (E.D. Ark. W.Div. 2019). Under the standard of review set forth by the U.S. Supreme Court and the U.S. Court of Appeals for the Eighth Circuit, the Defendant has failed to show that there is a compelling state interest that would be served by a ballot access law that is both narrowly drawn and necessary. As has been stated by the Eighth Circuit:

> [W]e review the statute under a form of strict scrutiny referred to as the "compelling state interest test" by first determining whether the challenged statute causes a burden of some substance on a plaintiff's rights, and if so, upholding the statute only if it is "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988)). In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest. See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)." *Moore v. Martin*, 854 F.3d 1021, 1026 (8th Cir. 2017).

All the foregoing indicates why the trial court failed to fully appreciate the harm in having a petition drive well before the general election in Arkansas when

many of the political issues for the next election are not yet well formed or known, new political developments, deadly diseases, and bad weather are constantly occurring, and there is no necessity to have independent candidate petitions so early in the political election cycle and with candidate declaration dates in early November of the year before the general election, a petition signature deadline of noon on May 1 of the general election year, a fixed 90-day petitioning period directly before May 1, and a relatively high signature requirement. Combined and considered together with the effects of COVID-19, the laws in question are unnecessary and unconstitutional—particularly this year. Further, Arkansas has never been plagued by an overcrowded ballot as to Independent candidates or even Republicans, Democrats, or Libertarians.

Several cases and laws have crafted certain responses in regard to petitioning and ballot access in various states because of the advent of COVID-19 and various remedies which have reduced the number of signatures required for a candidate to be placed on the ballot or taken other steps. See, *Libertarian Party of Illinois v. Pritzker*, *Id.* (reducing the statutory requirement to 10% of the normal requirement because the Plaintiffs could not rely on their usual signature-gathering methods); *Esshaki v. Whitmer*, *Id.* (reducing the statutory signature requirement by 50 percent); *Goldstein v. Sec'y of Commonwealth*, *Id.* (same); N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing the statutory signature requirement to 30 percent

of normal); H. 681, 2019-2020 Gen. Assemb., Adjourned Sess. (Vt. 2020) (suspending the statutory signature requirement entirely; and *In re: State Question No. 805, Initiative Petition No. 421*, *Manning v. Rogers*, *Id*. (tolling the 90-day circulation period for initiative petitions during the declaration of emergency by the Oklahoma Governor until he lifts the declared state of emergency and the Secretary of State calculates a new deadline). The fear that has been engendered in Arkansas voters from the COVID-19 and the fact that the worst effects according to testimony by the Plaintiffs who were actually trying to petition in Arkansas occurred after February of 2020. See Plaintiffs' Exhibits "1", "2", "8", and "9", Declarations of Dan Whitfield and Gary Fults and Supplemental Declarations of Dan Whitfield and Gary Fults, respectively, (JA 22-31, 94-100). The period of petitioning time that was most damaged by the COVID-19 was the last couple of months which normally would have been more productive because at least they were closer to the general election when political interest normally starts to pick up.

Therefore, the 6,622 petition signatures gathered by Plaintiff Whitfield and his supporters to place him on the Arkansas ballot this year as an independent candidate for United States Senator are a sufficient modicum of support to place Plaintiff Whitfield's name on the 2020 Arkansas general election ballot as a candidate for U.S. Senator. It should be considered in that COVID-19 has had a

far greater impact on petitioning than was the effect of bad weather. Of further consideration, the Court should consider the Tenth Circuit's decision in *Blomquist v. Thomson*, 739 F.2d 525, 528-529 (10th Cir. 1984), wherein the Tenth Circuit Court reversed the District Court's refusal to accept a partial compromise agreed to by the parties wherein a petition signature requirement of 8,000 signatures in Wyoming due by June 1 of the general election year would be reduced to 1,333 due to the shortened time for obtaining signatures because of a newly passed law by the Wyoming legislature which, in effect, reduced the normal petitioning time from one year to only two months. *Blomquist v. Thomson*, 739 F.2d at 526, 528-529. Thus, the 6,622 petition signatures (6,514 of which were turned in before Noon on May 1, 2020, along with an additional 108 petition signatures signed before May 1, 2020, but not received back in the mail until after the 6,514 petition signatures had been turned in) is a sufficient modicum of support justifying placing Plaintiff's name on the Arkansas election ballot as an independent candidate for U.S. Senator.

## CONCLUSION

WHEREFORE, premises considered, the Plaintiff Whitfield requests that, upon full consideration of this appeal, the Court of Appeals reverse the decision of the United States District Court for the Eastern District of Arkansas, Central Division, in the case below, declare the relief prayed for herein by instructing the

District Court upon remand to grant Plaintiff Whitfield's motion for preliminary injunction and place him on the Arkansas ballot as an independent candidate for U.S. Senator, and grant such other and further relief as to which Plaintiff Whitfield may be entitled, and which this Court may deem equitable and just.

Respectfully submitted this 20th day of July, 2020.

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## CERTIFICATE OF COMPLIANCE

Pursuant to pursuant to Fed. R. App. P. 28 (a) (10), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B).

1. EXCLUSIE OF THE EXEMPTED PORTIONS IN Fed. R. App. P. 32(a)(7)(B)(i) and (f), THE BRIEF CONTAINS:

A. 8,224 words, OR

B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

A. Software Name and Version: Word for Office 365

In (Typeface and Font Size): Times New Roman 14, OR

B. In proportionally spaced typeface using: _____; Typeface name and number of characters per inch: _____ cpi.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED. R. APP. P. 32 (a) (7) (B), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

4. Pursuant to Eighth Circuit Rule 28A(h)(2), the electronic version of this Brief and Addendum have been scanned for viruses and are virus-free.

/s/ James C. Linger
James C. Linger