No. 21A408

In the Supreme Court of the United States

LIBERTARIAN PARTY OF ALABAMA,
Petitioner,

v.

JOHN HAROLD MERRILL,
Secretary of State for the State of Alabama,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For over fifty years, since this Court's summary affirmance in *Socialist Workers Party v. Rockefeller,* 314 F. Supp. 984 (S.D.N.Y.) (three judge court), *summarily affirmed,* 400 U.S. 806 (1970), every federal court in the nation that has considered the question, has held unequivocally that if a state provides a voter registration list free of charge to major political parties, it cannot, consistent with the First and Fourteenth Amendments to the United States Constitution, charge a fee to minor political parties for the list. The lower court's decision in this case has now created a split of authority on this important constitutional question and was wrongly decided. This case squarely presents the following question:

Does it violate the First and Fourteenth Amendments to the United States Constitution for a State to discriminate against minor political parties by providing copies of a legally required, computerized, taxpayer-funded, state voter registration list free of charge to major political parties, while requiring minor political parties to pay an exorbitant fee ($35,912.76) to obtain a copy?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Libertarian Party of Alabama ("LPA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported at published at 2021 U.S. App. LEXIS 34383; 2021 WL 5407456 (11th Cir., November 19, 2021) (unpublished). The district court's memorandum opinion and order (Pet. App. 27a) is published at 476 F. Supp. 3d 1200 (M.D. Ala. 2021).

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2021. (Pet. App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I to the United States Constitution provides in pertinent part: "Congress shall make no law … abridging the freedom of speech, … or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV to the United States Constitution provides in pertinent part: "… No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State … deny to any person within its jurisdiction the equal protection of the laws."

§ 17-4-33, Code of Alabama (1975) (as amended). Computerized statewide voter registration list.

(a) The State of Alabama shall provide, through the Secretary of State, a nondiscriminatory, single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered by the Secretary of State, with advice from the Voter Registration Advisory Board and the President of the Alabama Probate Judges Association, which contains the name and registration information of every legally registered voter in the state. The computerized list shall comply with the following requirements:

(1) It shall serve as the single system for storing and managing the official list of registered voters throughout the state.

(2) It shall contain the name, address, and voting location, as well as other information deemed necessary by the Voter Registration Advisory Board or the Secretary of State, of every legally registered voter in the state.

(3) A unique identifier shall be assigned to each legally registered voter in the state.

(4) It shall contain the voting history of each registered voter.

(5) It shall be coordinated with the driver's license database of the Alabama State Law Enforcement Agency and the appropriate state agency to assist in the removal of deceased voters.

(6) Any election official in the state, including any local election official, may obtain immediate

electronic access to the information contained in the computerized list.

(7) All voter registration information obtained by any registrar in the state shall be electronically entered into the computerized list on an expedited basis at the time information is provided to the registrar.

(8) The Secretary of State shall provide such support as may be required so that registrars are able to enter voter registration information.

(9) It shall serve as the official voter registration list for the conduct of all elections.

(10) Following each state and county election, the Secretary of State shall provide one electronic copy of the computerized voter list free of charge to each political party that satisfied the ballot access requirements for that election. The electronic copy of the computerized voter list shall be provided within 30 days of the certification of the election or upon the completion of the election vote history update following the election, whichever comes first. In addition, upon written request from the chair of a political party, the Secretary of State shall furnish up to two additional electronic copies of the computerized voter file during each calendar year to each political party that satisfied the ballot access requirements during the last statewide election held prior to that calendar year. The electronic copies provided pursuant to this section shall contain the full, editable data as it exists in the computerized voter list maintained by the Secretary of State. …

INTRODUCTION

In an unbroken line of authority, going back over fifty years, prior to the decision by the Eleventh Circuit in the instant case, every single decision from every single court in the country, without exception, that ever has considered whether it is constitutional for a State to provide voter registration lists for free to major political parties, while charging a fee to minor political parties - the exact issue presented here - has struck down such a system as unlawfully discriminatory and unconstitutional.

This fundamental constitutional principle has been established for over 50 years by every case that ever has considered the question, including this Court, and under every fact pattern that raises the issue.

It has been firmly established as a fundamental principle under the First and Fourteenth Amendment to the United States Constitution. *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.) (Three-judge court), *summarily affirmed*, 400 U.S. 806 (1970) (providing the voter list free of charge to major parties, while requiring minor parties to pay denies minor parties "an equal opportunity to win the votes of the electorate" and rejecting claim of heavy administrative burden); *Schultz v. Williams*, 44 F.3d 48, 60 (2d Cir. 1994) (reiterating the principle and language used in *Socialist Workers Party* 24 years earlier and finding the question needs no further consideration, as it is well settled on this precise issue); *Fusaro v. Cogan*, 930 F.3d 241, 256, n.8 (4th Cir. 2019) quoting from and reaffirming this fundamental principle from *Socialist Workers Party); Libertarian Party of Indiana v. Marion County Bd. of*

Voter Registration, 778 F. Supp. 1458 (S.D. Ind. 1991) (giving the voter registration list free of charge to major parties while charging minor parties a fee unconstitutionally discriminates against minor parties, giving a significant and unwarranted advantage to major political parties and "... impinges not only upon the members freedom to associate as a party but also upon an individual voter's ability to assert her preferences" and creates other severe burdens; discrimination of this nature with the voter lists, like ballot access discrimination violates the minor party members' freedom to associate to express their views to the voters and the voters' ability to express preferences in light of the political views being advanced; rejecting claim of financial or administrative burden for the State).

The Eleventh Circuit's decision in the instant case is not only fundamentally wrong, and demonstrably so; it has created a split of authority on a vitally important issue for every minor political party seeking to put forth its political views and grow, for every candidate who subscribes to a minor party's political ideas, and for American voter who wishes to cast his or her vote for a third party candidate and associate with others support the minor party and its ideas. Indeed, even the Eleventh Circuit acknowledged that "[T]he voter list is an important tool for effectively locating voters, petitioning for ballot access, and campaigning for elected office." [*Pet.'s App. 3A*].

Only review by this Court can resolve the split of authority now created by the Eleventh Circuit's decision in this case, which ignores this Court's summary affirmance on this exact issue over fifty years ago and which directly threatens the ability of

Americans who wish to have their political views that might not be in sync with the two major parties heard and fostered through participation in the political process.

Given the importance of the issue in this case to the ability of minor political parties, their candidates and supporting voters to grow and to gain access to the ballot, and its broader importance to the political process, it is vital that this Court provide guidance to the States and lower courts. This Court must send a clear message with this case, expressly endorsing the position reflected in this heretofore unbroken line of authority – that if a State provides its taxpayer generated voter registration list free of charge to major political parties, it cannot discriminate against smaller political parties by charging them an exorbitant fee for access to the list.

STATEMENT OF THE CASE

1. Alabama's Secretary of State is required by Alabama law to compile and maintain a current statewide voter registration list at public expense and to maintain it in electronic/digital format. *See e.g.,* §17-4-38.1, Code of Alabama (1975).

The voter registration list compiled and maintained by the Secretary is used as the official list at voting locations to determine who is eligible to cast a vote in any given election and officials at each local election location have full access to all statewide voter registration information. §17-4-33(9); [ECF# 12 at ¶7].

The voter registration list must contain, *inter alia*, the name, address, and voting location for each registered voter and each voter's voting history. §17-4-33(2)&(4).

The major political parties - in Alabama, historically this means the Republican and Democratic parties - get copies of the statewide voter registration list for free under §17-4-33(10). The list is provided for free to many others as well:

The Administrative Office of the Courts gets a free statewide voter registration list each year. §17-4-38(f). Any chief elections officer of any one or of all 50 states, can have a free copy of Alabama's statewide voter registration list, simply by asking for it and agreeing to reciprocate with a free copy of their state's list and the Secretary is free to enter into any agreement he likes with any other state regarding the exchange of voter registration lists. §17-4-38(g). [ECF# 12 at ¶18]

The Secretary also provides the computerized statewide voter registration list or "immediate electronic access to the information in it" free of charge to any election official in the state under 52 U.S.C. §21083(a)(1)(A)(v) and (viii) and coordinates the computerized list with and provides it for free to a whole host of other state agencies, including the head of the state motor vehicle authority. [ECF# 28-2 at 143].

The Secretary also provides a free copy of the list to members of the legislature "to facilitat[e] communication between Members of the Alabama Legislature and the constituents whom they have been elected to represent." [ECF# 28-2 at 144]. The Secretary also disingenuously claims that he provides the list to other parties in litigation, when he deems it to have been properly demanded. [ECF# 28-2 at 144; 148].

Perhaps most significantly, notwithstanding his claims of hardship or burden in having to produce the statewide voter registration list for free to Alabama's own minor political parties [ECF# 5-1 at ¶¶33-34], the Secretary acknowledged that he joined the Electronic Registration Information Center, Inc "ERIC" in October of 2015. Since then, the Secretary has provided and continues to provide a free copy of a "data file containing the statewide voter registration list to ERIC **on a monthly basis** ...." [ECF# 28-2 at 149](Emphasis added). The Secretary also agreed to provide Alabama's statewide voter registration list to other states' Secretary of State's offices through a Memorandum of Understanding for Interstate Voter Registration Data Comparison into which the Appellee entered. [ECF# 28-2 at 149].

In discovery, the Secretary acknowledged that all that would be required to provide the LPA with a copy of the state voter registration list would be to send an email. All of this rather sharply undercuts the lower courts' findings that the state's claimed "administrative interests" justify the discriminatory fee imposed on minor parties [*Pet.'s App. 49a-52a*] or that each request for the list "takes about fifty minutes to compile [*Pet.'s App. 5a*]. That is just plain nonsense. All that would be required would be to add a single email address for the Party to any of the monthly emails with the list already going out to all of the other entities that get it for free.

2. The Statewide Voter Registration List is vitally important to a political Party seeking ballot access and the election of its candidates.

It is indisputable that the voter registration list in Alabama is very valuable to a political party. The

evidence is uncontroverted and, indeed, the Eleventh Circuit acknowledged as much. It wrote, "The voter list is an important tool for effectively locating voters, petitioning for ballot access, and campaigning for elected office." [*Pet.'s App 3a*].

Having the list gives a political party a distinct advantage in seeking to gain ballot access and get votes, along with other major benefits. This undeniable fact is supported by the relevant case law cited, by political researchers, by the testimony of all deposed witnesses, by experienced fact witness and Party leader William Redpath [ECF# 38-5 Pages 2-3] and by nationally renowned expert witness Richard Winger [ECF# 38-6, ¶¶6-8].

The following are just some of the ways the list is important to a minor political party seeking ballot access, seeking to grow and bring its message to a larger audience of Alabama citizens, and seeking to get candidates, voters, and to win elections - the goals of the Libertarian Party of Alabama ("LPA"), all as established in the unrebutted testimony of these key witnesses:

A. The voter registration list allows a political party to know the number of voters in a political voting location so as to know what voting locations the political party might want to prioritize in its efforts to gain support among the electorate.

B. The voter registration list allows a political party, among other advantages, to reach out directly to registered voters by name and at their home, to solicit their support at the ballot box and with the party's platform, to communicate political speech directly to voters to whom the political speech on specific political issues might most directly apply and

to introduce specific voters to prospective or active candidates most relevant to such voters.

C. The voter registration list is vitally important to a party's ability to grow and disseminate its political message and to seek out and have its members associate with politically like-minded voters in order to solicit and obtain ballot access signatures and to win elections for party candidates.

A political party which does not have copy of the voter registration list is placed at a distinct disadvantage in its efforts to gain ballot access and to solicit and win votes. [ECF## 38-5; 38-6].

3. The LPA is Bona Fide Minor Political Party.

As the Secretary acknowledged, the LPA has had unique success among minor parties in Alabama, achieving statewide access in 2000 and putting candidates on the ballot following that achievement. [ECF# 12 at ¶3]. That alone establishes its bona fides as a vibrant minor party.

Indeed, its bona fides are indisputable. Expert Witness Richard Winger is an expert witness in this area who has been found qualified as such, without exception, in federal courts across the country. His testimony on the subject, found at ECF# 38-6, ¶¶10-19, was as follows:

The Alabama Libertarian Party has been continuously organized since 1976. It has always had party officers, has always sent a delegation to the national Libertarian convention (the party has national conventions in all even years), has had a webpage since webpages became widespread.

In addition to appearing on the Alabama ballot by party name, the LPA also has nominated write-in

candidates. In 2006, for example, it nominated Loretta Nall for Governor. She was credited by the state with 235 write-in votes. The true total was probably higher, but not all counties broke down all the write-ins. Also in 2006 it had a write-in candidate for US House, District One, Dick Coffee. Also in 2006 it had a candidate for State House, 79th district, on the ballot, Dick Clark, who got 396 votes, 3.12%. In 2004, the party ran Richard Coffee as a write-in for US House, 1st District. In 2014 the party had 5 write-in candidates for state legislature. St Sen 18 Laura Pate; St Sen 20 Leigh LaChine; Rep 44 Rebecca Joy Kallies; Rep 48 Emily Green; Rep 52 Christopher Allen. Also in 2014 it had a write-in US House candidate, Dist. 6, Aimee Love. In 2018 the party got two candidates on the ballot for legislature, Rep 10 Elijah Boyd; Rep 96 J. Matthew Shelby. They both got over 5%. So, including President, the party has nominated candidates in every single election year in this century except 2010.

Among other national accomplishments, Libertarian Presidential candidates in recent years have received a significant amount of votes nationally. Compare, e.g., Libertarian Ed Clark in 1980 got over 1% of the popular vote at 921,128 votes and then Libertarian Gary Johnson got 1,275,923 votes in 2012, and 4,489,233 votes (3.27%) in 2016.

In the year 2000, the Libertarian Party of Alabama made a strong showing in terms of ballot access and, in one particular statewide race, in terms of votes (over 20%).

Over the past decade Libertarians got over 20% of the vote for statewide office in races in Arkansas,

Georgia, and Texas. And, of course, as mentioned, the LPA did so in a 2000 race.

The Libertarian Party has over 600,000 registered voters in the nation (and only 31 states have registration by party; Alabama does not). Also the Libertarian Party has elected partisan office-holders in about half the states. Notably, the Libertarian Party has elected state legislators in Alaska, New Hampshire, and Vermont, and has had sitting state legislators (who switched to the Libertarian Party after they were elected) in Nebraska and Nevada. The Libertarian Party has polled over 1,000,000 votes for its US House candidates in most congressional elections in this century. It is the only third party that has run candidates for US House in a majority of districts, since 1918.

At its national convention the Libertarian Party has delegates participating from all 50 states, including 13 from Alabama for 2016, who attended the convention in Orlando, Florida. The LPA also chooses a national committee representative.

The relationship between the national Libertarian Party and the Alabama Libertarian Party is the same kind of relationship as between the national Republican Party and the Alabama Republican Party, or between the Alabama Democratic Party and the national Democratic Party.

Votes for the Libertarian Party candidate for President of the United States (appearing on Alabama's ballot as an Independent, because of Alabama's prohibitively onerous ballot access requirements to appear under a third-party label) appear to be rising: 2000: 5,893 votes; 2004: 3,512 votes; 2008: 4,991 votes; 2012: 12,328 votes; 2016:

44,467 votes. See also Mr. Redpath's Declaration [ECF# 38-5]

The following information linked to online sites further advances the point:

The LPA's by-laws and other information, easily accessed through the LPA's website further make the point.[1] Finally, the Libertarian Party has fielded a candidate for President in every Presidential election since 1976. In 2016, the Libertarian Party candidate, Gary Johnson and his running mate, William Weld were on the ballot in all 50 states and received almost 4.5 million votes, including over 44,000 in Alabama.[2]

4. On January 23, 2019, the LPA filed a Complaint in the Middle District of Alabama seeking to have the statutory provision that discriminates against minor parties by providing the voter registration list free of charge to major political parties, while charging an exorbitant fee to minor political parties declared unconstitutional and to have its enforcement enjoined. [ECF# 1]. On February 19, 2019, the Secretary filed a motion to dismiss, [ECF# 7], and that motion was denied on August 28, 2019. [ECF# 10]. Over the course of the next year, the Secretary filed a motion for summary judgment, the LPA responded, and full briefing ensued, with supplemental litigation over expert reports and additional relevant authority. [ECF## 28-52]. On

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[1] https://lpalabama.org/about/bylaws/.

[2] https://www.newyorker.com/magazine/2016/07/25/gary-johnson-the-third-party-candidate. https://en.wikipedia.org/wiki/Gary_Johnson_2016_presidential_campaign#cite_note-139

See also, LNC2020.com.

August 5, 2020, the district court entered its Order and Judgment granting summary judgment to the Secretary. [ECF## 52-54].

5. The district court granted summary judgment based on findings that, notwithstanding the fact that every other court that ever has considered this question has found it unconstitutional to charge a fee to minor parties for a voter registration list that is provided for free to major parties, those cases were either distinguishable or not "binding authority" on this district court. [*Pet. App. 36a-38a*]. It found that the discriminatory statute did not create an "insurmountable" burden since the LPA had qualified for statewide ballot access once twenty years earlier [*Pet. App. 41a*], and achieved ballot access in some local elections since then, [*Pet. App. 32a*], a factor that is completely irrelevant to the issue. The district court found that it is constitutionally permissible to require a "modicum of support" and, notwithstanding the undisputed evidence that Alabama's ballot access requirement in this regard is the most stringent in the country, the modicum of support requirement here in order to get free access to the state voter registration list (which the Eleventh Circuit acknowledged is an important tool for gaining that modicum of support) is constitutional. [*Pet. App. 45a-52a*].

6. On November 19, 2021, The Eleventh Circuit affirmed in a decision with instructions that it was not to be published. [*Pet. App. 26a*]. The court purported to apply that *Anderson-Burdick* balancing

test to conclude that the discriminatory statute is constitutional. [*Pet. App. 10a*].[3]

Again, the court found, contrary all every single other decision on this subject, that, on balance, it is constitutional for a state to require a minor party to attain major party status – i.e., under the Alabama statute – to achieve twenty percent of the vote in a statewide election (without the benefit of a registration list) - in order to qualify for a free copy of the voter registration list that is provided for free to the major parties, notwithstanding its acknowledgment that access to the voter registration list is an "important tool" in achieving ballot access and in growing the minor party [*Pet. App. 1a-26a*] With all due respect, the Eleventh Circuit's decision is based on mistaken premises and is contrary to every other decision on this subject from every other court that ever has considered it.

REASONS FOR GRANTING THE WRIT

I. This Court must grant review because the Eleventh Circuit's decision ignored a directly on point summary affirmance by this Court on the precise issue and because it has created an irreconcilable split of authority on this issue of fundamental constitutional significance for minor political parties and their supporter and voters.

Prior to the Eleventh Circuit's decision in the instant case, the law was completely settled, with over fifty years of jurisprudence, affirmed by every court in the country that considered the issue,

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[3] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

supporting the principle if a state provides a voter registration list free of charge to a major political party, it must provide it free of charge to minor political parties as well.

A. Notwithstanding its best efforts at distinguishing or dismissing all of those other cases, including this Court's summary affirmance in the landmark decision in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (Three-judge court), *judgment aff'd,* 400 U.S. 806 (1970), the Eleventh Circuit's decision in the instant case simply cannot be reconciled with any other authority on the subject or with the fundamental underlying constitutional principle. Review must therefore be granted. The following reflects the relevant authority on the subject from every other court in the country that has considered the issue and considered it well settled for decades.

The leading case that demonstrates that the Alabama statutes and practice complained of herein violate the LPA's constitutional rights is *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 997 (S.D.N.Y.)(three-judge court), *summarily affirmed*, 400 U.S. 806 (1970). The issue presented in that case is precisely the issue presented in the instant case and it must be given binding precedential effect as a matter of law.[4] *See also, Schulz v. Williams*, 44 F.3d

[4] "A summary affirmance of this Court has binding precedential effect." *Hicks v. Miranda*, 422 U.S. 332, 344, While it is true that the precedential effect of summary affirmances extends only to "the precise issues presented and necessarily decided by those actions" this Court repeatedly has made clear that they are, nevertheless, to that extent, binding decisions on the merits. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 400,

48, 60 (2d Cir. 1994). In these cases, the courts expressly held that a New York law which provided for the state's major political parties to get free copies of the voter registration list, but charged the minor parties a fee for the list, violated the Fourteenth Amendment's Equal Protection Clause, even though the State also made copies available for viewing at polling places free of charge. 314 F. Supp. at 995. These courts made clear in no uncertain terms that while a State is not required to provide free lists to anyone, when it provides it free of charge to some, it cannot do so by providing them "only for the large political parties and deny(ing) them to those parties which can least afford to purchase them." 314 F. Supp. at 996.[5]

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499 (1981). They prevent "... lower courts from coming to opposite positions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The district court in the instant case simply dismissed the summary affirmance in *Socialist Workers Party v. Rockefeller* and all voter registration cases since then out of hand, summarily finding that "those cases are not binding on this Court" and that it did not find them "persuasive ...." [*Pet. App. at 36a-38a*]ECF# 53 at 9-10]. As for the summary affirmance, it dismissed the effect with a footnote to the general principle that its effect only extends to the precise issues presented and decided; but it never explains how the issue in this case is in any way distinguishable from the "precise issue" in *Socialist Workers Party v. Rockefeller*. [*Pet. App. 36a,* n.4]. The Eleventh Circuit dismissed the decision based on a completely erroneous reading of the case and its factual underpinning. [*Pet. App. 24a-26a*]. The issues absolutely are precisely the same in every material regard.

[5] Every other court that has considered this issue has understood *Socialist Workers Party v. Rockefeller* to have settled the precise issue before this Court. Consider the court's

B. Every Other Voter List Case Supports the LPA

The analysis in each of the voter registration list cases from around the country on the precise issue raised in the instant case is compelling and makes clear the lower court's error in this case fifty years after the question was definitively settled.

In *McCarthy v. Kopel*, No. C 76-45 (N.D. Iowa, February 6, (1978) (unpublished) [Copy provided at ECF# 7-1], Plaintiffs were independent candidates for president and vice-president, seeking Iowa's voter registration lists. The relevant statute in Iowa provided that the two parties receiving the highest number of votes in the last general election got free copies of the voter registration list, while all others had to pay for the list. Plaintiffs sought a declaratory judgment that this discrimination in favor of major parties with respect to the voter registration lists violates the Equal Protection Clause of the Fourteenth Amendment and a permanent injunction

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characterization of the case in *Fusaro v. Cogan*, 930 F.3d 241, 256, n.8 (4th Cir. 2019):

"Nearly fifty years ago, the Supreme Court expressed support for constitutional limits on the government's ability to restrict access to voter registration lists in a summary affirmance of an Equal Protection claim. *See Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), *judgment aff'd*, 400 U.S. 806, 91 S. Ct. 65, 27 L. Ed. 2d 38 (1970). In that case, a three-judge district court panel struck a New York regulation that provided free copies of the state's voter list only to major political parties. The court ruled that the restriction violated the Equal Protection Clause and explained: "The State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them." *Id.* at 996.

prohibiting enforcement of the statute that so provided. The Court granted Plaintiffs' summary judgment motion, declared the statute to be void for its violation of the Equal Protection Clause, and permanently enjoined its enforcement.

The Court noted at the outset of its analysis that without question the distinction between providing the voter registration list free of charge to major parties while charging minor parties and non-party candidates, discriminates against minor party and non-party candidates. *Id.*, at 3.

It posited the question as whether the purported state interests claimed to support the statute were "sufficiently important" to "warrant the obvious burden" or whether the statute "unfairly and unnecessarily burdens the political opportunity of a non-party candidate." *Id.*

The Court declined to decide whether strict scrutiny/compelling interests analysis or a slightly less stringent standard should apply to this circumstance (finding the circumstances presented to be somewhere between campaign financing cases and ballot access cases); but it noted that "when the state moves to regulate the electoral process which is inextricably linked to fundamental constitutional rights, its purposes must be important and its methods narrowly tailored to fostering those interests." *Id.* at 6. It also required the use of least restrictive means to further any proffered state interest and found that missing in such a statutory scheme as well. *Id.* at 7.

The Court ultimately found that a statute which discriminates in favor of major parties and against minor parties and independents with respect to the

cost of voter registration lists, unconstitutionally favored the two party system and a "rigid status quo" and created an "unfair burden" on those who try to use a political system that is meant to foster their interests in articulating "political choice." *Id.* It struck down the Iowa statute as a violation of the Equal Protection Clause. *Id.* at 7-8.

In *Libertarian Party of Oregon v. Paulus*, Civil No. 82-521FR (D. Oregon, September 3, 1982) (unpublished)[Relevant Excerpts at ECF# 7-2], the court again considered a state statute that discriminated between major and minor parties with respect to its voter registration lists, providing them for free to the major parties, while charging a fee to the minor parties.

The court's analysis speaks for itself and is fully consistent with the cases previously described herein. Additionally, the court in this case expressly rejected the purported "administrative interest" the Secretary speculated might arise if, in his straw man argument, the list were to be provided free of charge to anyone. *See Paulus*, at 17.[6] The court in *Paulus* struck down

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[6] The sole purported state interest the Secretary claimed initially in this case to attempt to justify the burden on Plaintiff's fundamental constitutional rights is the purely speculative "administrative interest" in possibly being overburdened with requests if Alabama broadens who gets the list for free. [ECF# 5-1 at ¶¶33-35]. This is completely unavailing. Based on its agreement to expansive list of free recipients other than its own State's minor political parties, if a representative from all other 49 states requested a free copy of the voter registration list and agreed to provide their own list in return, the Secretary would have to satisfy every one of the 49 requests. No one has asserted that there are 50 parties that hold the status of this Plaintiff in Alabama. And of course, even if there were, there has been no

this same kind of discrimination with the voter registration lists as unconstitutional.

In *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991), the court again was confronted with a similarly discriminatory scheme with respect to voter registration lists and again struck the same down as unconstitutional. The decision was cited with approval earlier by the Eleventh Circuit and others. this Court, including on the issue presented in the instant case. *See Fulani v. Krivanek*, 973 F.2d 1539, 1545 (11th Cir. 1992)[7]; *See also, Green Party v. Land*,

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showing either that all would request the list or that sending an email to 50 or more recipients is a full-time overly burdensome task. The Secretary certainly made no such showing. In his motion for summary judgment, Appellee has somehow discovered additional purported state interests to justify the discrimination. They are all at least as equally unavailing and will be addressed.

[7] In *Fulani*, the Eleventh Circuit struck down on Equal Protection grounds a state law that discriminated against minor parties with respect to a fee-waiver provision. Parties for elective office had to pay a fee of 10 cents per signature to have each signature verified. The law provided for a waiver of the fee upon a showing of undue hardship. However, the fee-waiver only applied to major parties. The fee could not be waived for undue hardship for a minor party. *Fulani*, 973 F.2d at 1540 & n.4. The court held that while it might be permissible to charge a verification fee to all parties, *Id.* at 1542; applying the fee-waiver in a manner that discriminated against minor parties and in favor of major parties could not pass Equal Protection analysis. *Id.* at 1544-1547. *See also, Clean-up '84 v. Heinrich*, 590 F. Supp. 928, 932-33 (M.D. Fla. 1984), *aff'd on other grounds,* 759 F.2d 1511 (11th Cir. 1985) (striking down the same kind of fee-waiver provision as applied to organizations proposing ballot initiatives).

541 F. Supp. 2d 912, 919 (E.D. Mich. 2008) (citing with approval).

In *Libertarian Party of Indiana*, the court noted the unconstitutional effect such discrimination with voter registration lists has on a Party's ability to seek equal access to voters, giving a significant and unwarranted advantage to major political parties in this regard. *Id*. at 1463. This, in turn "... impinges not only upon the members' freedom to associate as a party but also upon an individual voter's ability to assert her preferences." *Id*. The court went on to consider other severe burdens such discrimination places on those situated like this Plaintiff.

The court suggested that perhaps a "stricter standard of review" than that used in *Anderson* should be used to deal with voter registration list discrimination of this kind specifically because it is by definition discriminatory by favoring the larger parties, but ultimately, it found it unnecessary to answer that question because the discrimination was

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This Court's discussion in *Fulani* of the particular harm such discrimination causes for minor parties and their vulnerability to discrimination because they are not "well represented" in state legislatures deserves this Court's attention in considering the issue before it in the instant case. *See Fulani* at 1544-1547. Tellingly, this Court considered and rejected the notion that discriminating in the application of fees between major and minor parties was permissible in furthering the state's interest in requiring a modicum of support. *Id*. at 1546-47 ("Economic status is not a measure of a prospective candidate's qualifications to hold elective office, and a filing fee alone is an inadequate measure of whether a candidacy is serious or spurious.") (citation omitted). *See also*, *Libertarian Party v. Lamont*, 977 F.3d 173, 2020 U.S. App. LEXIS 31315, *18 (2d Cir., October 2, 2020) (signature requirements are the appropriate means of demonstrating support for ballot access).

clearly unconstitutional even under the *Anderson* ("important" state interests level of scrutiny). *Id.*

In considering the same kind of discriminatory scheme at issue in Alabama in the instant case, the court in *Libertarian Party of Indiana* wrote the following:

"The plaintiffs in this case seek equal access to voters, meaning that significant advantages may not be accorded to two major political parties and arbitrarily denied to others. Restricting a political party's ability to reach voters impinges upon not only the members' freedom to associate as a party but also upon an individual voter's ability to assert her preferences. In the context of a case involving restrictions on access to the ballot, the Supreme Court ruled:

The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 1320, 39 L. Ed. 2d 702 (1974). By limiting the choices available to voters, the State. impairs the voters' ability to express their political preferences." *Illinois State Bd. of Elections*, 440 U.S. at 184, 99 S. Ct. at 990. Like a restriction on access to the ballot, restrictions on the ability of some political parties to use Registration Lists impinges upon both the members' freedom to associate to express their views to the voters and the voters' ability to express preferences in light of the political views being advanced. Although the plaintiffs have

access to the Registration List, their undisputed contention is that they would have to expend significant amounts of labor and money to have the list in a usable form, a burden not imposed on the major political parties.

In support of their position, the plaintiffs cite *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970), *judgment aff'd*, 400 U.S. 806, 91 S. Ct. 65, 27 L. Ed. 2d 38 (1970). In *Socialist Workers Party*, the court examined provisions of a state statute that "provide[d] that lists of registered voters be delivered free of charge to the county chairmen of each political party polling at least 50,000 votes for governor in the last gubernatorial election." *Id.*, 314 F. Supp. at 995. The court ruled: "The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have the least need therefor." *Id.* (citation omitted)....[8]

The court ordered the voter registration lists to be provided to the New Alliance Party and the Libertarian Party under the same terms as they were provided to the major parties, based on the Equal Protection violation it found to arise from the discrimination at issue. *Id.* at 1464-1465. *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458, 1463-1464

[8] The court then considered and rejected the idea that the administrative burden of financial cost of distributing the voter registration lists to minor parties could outweigh the clear violation of the plaintiff's constitutional rights arising from providing the list for free to only the major political parties. *Id.*

(S.D. Ind. 1991)[9]; *See also Spencer v. Hardesty*, 571 F. Supp. 444 (S.D. Ohio 1983)(First Amendment rights violated by preferential treatment in postage rates for large political parties over local political action committee); *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980)(First Amendment and Equal Protection violation of minor political party's rights by giving preferential bulk mailing rates to major parties and not minor parties).

The decision in *Green Party v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008) is important for several reasons, including, but not limited to, its emphasis that for these purposes "all political parties are similarly situated ...", *Id.* at 917, thereby squarely raising the Equal Protection concern, (2) its use of ballot access analysis, and (3) its comprehensive consideration of purported state interests far greater in number and significance than the single purported interest earlier proffered here and still listed as one of his fabricated interests.

Finally, the decision rests not only on traditional ballot access burden vs. interests analysis under *Anderson* and its progeny; it draws directly on the decisions in *Socialist Workers Party* and *Libertarian Party of Indiana* and their analysis specific to voter registration lists as well. *Id.* at 918-920. *See also, Fusaro v. Cogan*, 980 F.3d 241, 258 & 264 (4th Cir. 2019) (relying on *Libertarian Party of Indiana*).

The court found a clear Equal Protection violation, struck down the law at issue and found it therefore

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[9] The district court's attempt to distinguish this case, [*Pet. App. 36a-37a*], reflects a complete misreading of the facts of the case.

unnecessary to address the First Amendment arguments. *Id*. at 924.[10]

The LPA also provided the district court with the bare bones decisions in two other cases in which the courts involved ordered that non-major party requesters be provided with voter registration lists after bringing challenges to similarly discriminatory laws. The only documents from those cases obtained so far do not provide much in the way of analysis; but their holdings are clearly consistent with the principles in these other cases. *See Bloom v. EU*, No. 368805 (Cal. Superior Ct., unsigned order of December 4, 1991); *Goetzke v. Boyd*, Case No. 280289 (Ariz. Superior Ct., Pima Co., Order of July 22, 1991)[ECF# 7-3 & 7-4].

The decision in *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 419-422 (2d Cir. 2004) is also instructive on the fundamental constitutional prohibition on discriminating against minor parties in favor of major parties with respect to voter registration lists. The court considered a New York statute that provided for the removal of the political party affiliation identifier on voter registration lists for any political party that did not receive a certain level of support in the previous New York gubernatorial election. The court wrote the following in pertinent part:

"Plaintiffs also contend that the statutory classification scheme violates the Equal Protection Clause of the Fourteenth Amendment because the state's enrollment list policy gives established Parties

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[10] The district court's attempt to distinguish this case, [*Pet. App. 37a*], reflects a basic misreading of the decision.

an advantage over minor or developing parties. The Supreme Court has said that if state law grants "established parties a decided advantage over any new parties struggling for existence and thus place[s] substantially unequal burdens on both the right to vote and the right to associate" the Constitution has been violated, absent a showing of a compelling state interest. *Williams v. Rhodes*, 393 U.S. 23, 31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). Hence, a court has a duty to "examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979). Where the state's classification "limit[s] the access of new parties" and inhibits this development, the state must prove that its classification is necessary to serve a compelling government interest. *See Norman v. Reed*, 502 U.S. 279, 288-89, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992); *Schulz*, 44 F.3d at 60. Even if a state is pursuing a compelling interest, it must show that the means it adopted to achieve that goal are the least restrictive means available. *Ill. State Bd. of Elections*, 440 U.S. at 185.

The laws at issue in this case, according to plaintiffs, place discriminatory burdens on minor political parties. The alleged unequal burdens are those that affect claimants' ability to exercise their First Amendment rights. *See Anderson*, 460 U.S. at 793-94 ("A burden that falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment."). As the alleged violations of the plaintiffs' First Amendment rights form the basis of

both the First Amendment and Fourteenth Amendment claims, we are faced with a situation where the plaintiffs' First Amendment claims substantially overlap with their equal protection claims. Accordingly, the analyses of plaintiffs' claims under the two amendments also substantially overlap.

We think the burdens imposed on plaintiffs' associational rights are severe. In *Schulz* we struck down a New York state law that required local boards of election automatically to supply two copies of enrollment lists, free of charge, to the county chairmen of Parties, but allowed the boards to charge independent bodies for access to such lists stating, "'it is clear that the effect of these provisions . . . is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate.'" 44 F.3d at 60 (*quoting Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y. 1970)). Similarly, while the enrollment lists at issue here may have originally been intended solely for use in facilitating closed primary elections, we are required to look at the totality of the voter enrollment scheme in its present form. Currently, Parties use these lists for a number of different activities essential to their exercise of First Amendment rights.

Based on the proof produced at the hearing on the preliminary injunction, the district court determined that "the Green Party's ability to identify, appeal to, inform, organize, mobilize and raise money from its supporters will be severely damaged" as a result of the current enrollment scheme. *Green Party I*, 267 F. Supp. 2d at 353. It ruled in this fashion based on Supreme Court and Second Circuit precedent. *See, e.g., Anderson*, 460 U.S. at 794 ("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 the diversity and competition in the marketplace of ideas."); *Lerman*, 232 F.3d at 147-48 (noting that a "statute need not [ban association altogether] in order to substantially burden the right to political association" if it prevents a candidate from accessing voters or conveying a political message).

In a case similar to the one now before us, the Tenth Circuit ruled that in today's political landscape, "access to minimal information about political party affiliation is the key to successful political organization and campaigning." *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984). If an independent body does not have access to other information concerning who is affiliated with its party, it will be unable to determine from the word "unaffiliated" whether a particular unaffiliated voter is or is not a supporter of its organization. It burdens all the plaintiff parties if they cannot determine who would like to associate with them. That they are smaller, less developed -- and hence less financially established parties makes their situation even more difficult. As *Anderson* instructs, such limitation of opportunity for independent voters reduces diversity and competition in the marketplace of ideas. 460 U.S. at 794."

C. This case is the right vehicle to address this question and put a stop to any further spreading of the split of authority. There is no reason to await further percolation. The decision below is contrary to well settled jurisprudence soundly developed over more than fifty years. There is no way to constitutionally reconcile the decision below with the

decisions from every other court that has considered the issue or with the obvious constitutional principles on which those other decisions and this Court's summary affirmance are based. The issue is outcome determinative in this case and it affects all third parties trying to grow and obtain ballot access and votes in Alabama and elsewhere if this decision is followed.

Only this Court can clarify the law and set the matter straight once and for all. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29, 21 (1997).

II. This Court should resolve the important question presented in this case.

Resolving the question presented is critical to the orderly and consistent treatment of minor political parties, their candidates, and supporters and to important political discourse. In short this case involves rights that "rank among our most precious freedoms," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).[11]

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[11] There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past**.** *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)

In our political life, third parties are often important channels through which political dissent is aired: "All political ideas cannot and should not be channeled into the programs of

Every state imposes a variety of restrictions on access to the electoral process. *See Ballot Access for Major and Minor Party Candidates*, Ballotpedia, https://bit.ly/2ryJ8op (last visited Feb. 27, 2019). These include signature-gathering requirements and restrictions, filing fees, time limitations, affiliation provisions, and the like. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Statutes Governing "Minor Political Parties,"* 120 A.L.R.5th 1 (2004).

These restrictions can impair the ability of citizens to vote for the candidates of their choice and to associate for the advancement of political beliefs—rights that "mean[] little if a party [or candidate] can be kept off the election ballot and thus denied an equal opportunity to win votes," *Williams*, 393 U.S. at 31. And unconstitutionally severe ballot-access restrictions do not just harm candidates and voters; they can threaten democracy more broadly by "reduc[ing] diversity and competition in the marketplace of ideas," *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

Independent and third-party candidates serve at least two critical functions. First, they often reflect the will of the voters. There have been 77 Senators elected as independent or third-party candidates. And an independent or third-party candidate has won

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our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society." *Id*. 393 U.S. at 39 (Douglas, J., Concurring), *quoting from, Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957).

election to the U.S. House of Representatives nearly 700 times.[12]

Second, even when these candidates have not prevailed, they have been "fertile sources of new ideas and new programs," *Anderson*, 460 U.S. at 794—from abolition to women's suffrage—that later have "made their way into the political mainstream," *id.*

The Eleventh Circuit and the lay and expert witnesses in this case expressly acknowledged the importance of the voter registration list to the ability of minor political parties to organize, identify voters, spread their message, associate with others on political issues, obtain ballot access and win elections. If the decision below is allowed to stand, the exact kind of discrimination in violation of the First and Fourteenth Amendments that every other case on this issue has identified and held unconstitutional will be permitted with impunity to detriment of the third party members and followers and all other Americans who will never know their message.

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[12] *See Senators Representing Third or Minor Parties*, U.S. Senate, https://bit.ly/2PcceTT (last visited Feb. 27, 2019); *Party Divisions of the House of Representatives*, History, Art & Archives, U.S. House of Representatives, https://bit.ly/2GrTNeX (last visited Feb. 27, 2019).

Moreover, hundreds of third-party and independent office-holders serve at the state and local level. *See Current Third-Party and Independent State Officeholders*, Ballotpedia, https://bit.ly/2qNkJuB (last visited Feb. 27, 2019); *see also Elected Officials*, Libertarian Party, https://bit.ly/2AJVIVK (last visited Feb. 27, 2019) (177 officeholders); *Officeholders*, Green Party, https://bit.ly/2amhdjn (last visited Feb. 27, 2019) (161 officeholders); *Current Officeholders*, Constitution Party, https://bit.ly/2BNM4TN (last visited Feb. 27, 2019) (25 officeholders).

III. The Eleventh Circuit's decision is wrong.

The Eleventh Circuit's decision contravenes decades of precedent and effectively licenses Alabama to employ yet one more tool designed to stifle the development of any third-party political movement. Alabama (along with one other state) has the most difficult requirements of any state in the nation for getting and maintaining statewide ballot access and with the decision in this case allows the state to make it virtually impossible for a third party who cannot yet meet that most difficult requirement to ever achieve it, by putting the voter registration list – the most important tool to allow the party to grow and gain ballot access – financially out of reach.

There are many specific ways in which the Eleventh Circuit's decision is demonstrably wrong. For example, the court found it significant with respect to the burden the discriminatory practice causes that the LPA achieved statewide ballot access once twenty years ago through a single race that had only one major party candidate in it and that local candidates have gotten on the ballot for local races. [*Pet App. 13a; 41a*] But the law is well settled that in order to demonstrate a severe burden, a third party need not show that no third party ever qualified. *Mandel v. Bradley*, 432 U.S. 173, 177 (1977); *Storer v. Brown*, 415 U.S. 724, 742 (1974); *Williams v. Rhodes*, 393 U.S. 23, 47 n.10 (1968). It impermissibly ignores the cumulative effect of this discriminatory statute along with its other most stringent ballot access restrictions. *See Clingman v. Beaver*, 544 U.S. 581, 607-608 (2005). It bafflingly finds it somehow relevant that the statute does not use the terms "minor" or "major" party, while acknowledging, as it must, that only two parties historically have

generally qualified for the free list, based on the extraordinarily high statewide ballot access requirement to which the free list is tied. [*Pet App. 11a*]. It virtually omits Equal Protection analysis – the heart of every other decision that has considered this issue. It completely misapprehends the relevant facts in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.) (Three judge court), *summarily affirmed*, 400 U.S. 806 (1970) to avoid the binding effect of this Court's summary affirmance. [*Pet. App. 24a-26a*]. It is wrong and contrary to every other court by allowing the state to tie a fee for the voter registration list to achieving a "modicum of support." [*Pet App. 19a-20a*] *See Independent Party of Fla. v. Sec'y, State of Florida*, 967 F.3d 1277, 1284 (11th Cir. 2020); *Fulani v. Krivanek*, 973 F.2d 1539, 1544-47 (11th Cir. 1992); *Clean-up '84 v. Heinrich*, 590 F. Supp. 928, 932-33 (M.D. Fla. 1984), *aff'd on other grounds*, 759 F.2d 1511 (11th Cir. 1985). And it is wrong for every way in which it disagrees with every other decision on this subject from other court in the country for over fifty years – reasons those cases excerpted above make clear.

Finally, it is wrong it is wrong for broader reasons as well:

Smaller or minor political parties have played a significant role in the American political system through our nation's history. As this Court wrote over 30 years ago, in striking down, on Equal Protection grounds, a provision of Illinois law that discriminated against minor parties and independents:

"The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the

political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office."

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979). *See also*, *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1352-53 (N.D. Ga. 2016), *affirmed by Green Party of Ga. v. Kemp,* 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017); *See also*, J. David Gillespie, *Challengers to Duopoly, Why Third Parties Matter in American Two-Party Politics* (University of South Carolina Press 2012 ed.). Adams, James, and Samuel Merrill. "Why Small, Centrist Third Parties Motivate Policy Divergence by Major Parties." The American Political Science Review, vol. 100, no. 3, 2006, pp. 403–417.

Based on all of the foregoing and the decisions cited herein, representing fifty years of jurisprudence recognizing that a claim challenging the discriminatory practice of providing voter registration lists for free to major political parties while charging minor political parties a high fee for the same list violates the minor party's fundamental constitutional rights (and the rights of its supporters) under the First Amendment and the Equal Protection Clause of the United States Constitution, the decision below must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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