No. 22-12451

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE PEOPLE'S PARTY OF FLORIDA; ELISE MYSELS; CAROLYN WOLFE; & VICTOR NIETO,
Plaintiffs-Appellants

v.

THE FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS; CORD BYRD, SECRETARY OF STATE; & BRIAN CORLEY, PASCO COUNTY SUPERVISOR OF ELECTIONS,
Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
No. 8:22-cv-1274 TPB-MRM (Hon. Thomas Barber)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Challenge to the Constitutionality of Fla. Stat. § 99.021

/s/ Christopher Kruger

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People's Party of Florida v. Florida Department of State, Division of Elections
22-12451

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Honorable Thomas Barber, *District Court Judge*
2. Andy Bardos, *Attorney for Defendants/Appellees*
3. Austin Brownfield, Defendant in *Ogden v. Brownfield,* 22-2307, Florida 6th Judicial Circuit (July 15, 2022).
4. Cord Bryd, *Defendant*
5. Brian Corely, *Defendant*
6. Ashley E. Davis, *Attorney for Defendants/Appellees*
7. Rebekah Jones, Defendant in *Schiller v. Jones*, 22 CA Florida 2nd Judicial Cir. Open case.
8. Christopher Kruger, *Attorney for Plaintiffs/Appellants*
9. Honorable Mac R. McCoy, *Magistrate Judge*
10. Bradley Robert McVay, *Attorney for Defendants/Appellees*
11. Elise Mysels, *Plaintiff*

12. Victor Nieto, *Plaintiff*

13. Ron Ogden, Plaintiff in *Ogden v. Brownfield,* 22-2307, Florida 6th Judicial Cir. (July 15, 2022).

14. Honorable Anthony Porcelli, *Magistrate Judge*

15. Vanessa Reichel, *Attorney for Defendants/Appellees*

16. Peggy Schiller, Plaintiff in *Schiller v. Jones*, 22 CA Florida 2nd Judicial Cir.

17. Carolyn Wolfe, *Plaintiff*

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

Dated: August 4, 2022

s/Christopher Kruger
Christopher Kruger
Counsel for Plaintiffs-Appellants

Statement Regarding Oral Argument

Oral argument is requested in this case, and may assist the Court in apprehending the nuances of ballot access cases, a comparatively specialized area of First Amendment law, particularly as to the First Amendment associational freedoms applied to citizens desiring to form new political parties in "recogni[tion of] the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)

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Jurisdictional Statement

The District Court's jurisdiction over this matter is predicted on 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4), because this case concerns the Constitution of the United States and 42 U.S.C. §§ 1983 & 1988.

This Court of Appeals' jurisdiction arises from 28 U.S.C. § 1292(a)(1):

> (a)Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1)Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court

On June 22, 2022, the District Court denied Plaintiffs' Emergency Motion for a Preliminary Injunction, filed with their complaint on June 3. ECF 3 & ECF 25. Plaintiffs filed a Rule 59(e) motion on June 30, 2022, which the District Court denied on July 25. ECF 26 & 32. Plaintiffs-Appellants filed their Notice of Appeal July 26. ECF 34.

Statement of the Issues

1. Whether the district court erred in denying Plaintiffs' Emergency Motion for a Preliminary Injunction, as well as denying Plaintiffs' Motion for Leave to Reply, and Plaintiffs' Emergency Motion for Reconsideration. Docs. 3, 5, 11, 14, 22, 24, 25 & 32.
2. Whether, under the *Anderson-Burdick*[1] "balancing of the harms" analysis, a seventeen-month affiliation requirement, as applied to a newly-formed party, constitutes a severe burden on Plaintiffs-Appellants' First Amendment right of association.
3. Whether Florida Statute § 99.021 is unconstitutional.
4. Whether this appeal is moot, and, if so, whether the constitutional exception to mootness applies, pursuant to *Storer v. Brown*, 415 U.S. 724 at fn. 8 (1974); *Rosario v. Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969);
5. Whether *Purcell v. Gonzalez* 549 U.S. 1 (2006) (per curium), and Justice Kavanaugh's concurrence in *Merrill v. Milligan*, 509 U.S. ___(2022) (February 7, 2022) militate in favor of or against Plaintiffs-Appellants Request for Injunctive Relief.

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

Statement of the Case

A. Nature of the Case.

Plaintiffs-Appellants are a newly-formed minor political party, its voters and a candidate challenging the constitutionality of § 99.021 *F.S.* ("the Statute"). They sought to run Plaintiff Elise Mysels as candidate for the office of Pasco County Commissioner. See generally Docs. 26-1, 2, 3, & 4. (Affidavit of Elise Mysels with Exhibits) (hereinafter, "*Mysels* affidavit").

They now seek a determination that § 99.021 is unconstitutional, as they contend it is repugnant to the First Amendment, and ask for an Order placing Mysels on the ballot for Pasco County Commissioner.

B. The Proceedings Below.

On June 3, 2022, the Plaintiffs-Appellants complaint was filed, by mail, and simultaneously filed their Emergency Motion for a Preliminary Injunction. Docs. 1 & 3. Owing to the district court's admission procedures, counsel for Plaintiffs had to mail the documents to the Clerk overnight on June 1. Docs. 1-3. The undersigned had in fact contacted the Defendants on May 31, informed them of the gist of the complaint, and sent unstamped copies on June 3. Docs. 11, 11-1. The undersigned was not granted e-filing privileges until June 8. Id.

By that time, the district court had already entered an Order on June 6, 2022 denying the Emergency Motion in part, "to the extent that Plaintiffs seek a

temporary restraining order. Plaintiffs are directed to immediately serve on Defendants a copy of the complaint, a copy of Plaintiffs' 'Emergency Motion and Memorandum of Law in Support of Preliminary Injunction and/or Temporary Restraining Order,' and a copy of this Order." The Order also directed Defendants to file one consolidated response on or before June 16, 2022. Doc. 5.

Plaintiffs-Appellants, through counsel, had neglected to inform the district court of the fact that Defendants had known about the suit since May 31st. The Plaintiffs moved for reconsideration in an explanatory motion styled, "Plaintiffs' Motion for Reconsideration of the Court's June 6, 2022 Order, and for Entry of a Revised Expedited Briefing Schedule on their Emergency Motion for a Preliminary Injunction." Doc. 11.

The district court denied Plaintiffs' Motion for Reconsideration and for a Revised, Expedited Briefing on June 9, stating in part: "The Court maintains the ability to rule on that [emergency] motion and grant a preliminary injunction, if appropriate, prior to the June 17, 2022, [candidate] filing deadline" referring to the end of the qualifying period. Doc. 14.

The June 17 deadline passed, and the district court denied Plaintiffs' Motion for Leave to Reply with an Order issued June 21, 2022. Doc. 24. That Motion was filed in inadvertent violation of local rules to a) confer and b) to not attach a Proposed Reply. Id. The next day, June 22, the District Court denied the

Emergency Motion for Preliminary Injunction in a six-page Order. Doc. 25. Following a Motion for Reconsideration under rule 59(e) (Doc. 26), that was denied on July 25 (Doc. 32), Plaintiffs filed this appeal, July 26, 2022. Doc. 34.

C. **Statement of the Facts**.

The Statute, § 99.021 *F.S.* became effective on May 6, 2021. Doc. 26-1, pg. 8. The People's Party of Florida (PPF[2]) has been recognized by the Defendant Florida Department of State, Division of Elections ("DOE") since September 1, 2021. Doc. 1-2, pg. 11. Plaintiffs-Appellants first filed their papers, consisting of By-Laws, Charter and list of Officers with the DOE on July 15, 2021, in part because of their awareness of the Statute. Id; *Mysels* affidavit. The final documents were not approved for forty-seven days, until September 1, 2021, only after subsequent documents were tendered to the State on August 19, 2021, to clarify the name of the party, its relationship with the national party, and additions required by the State to establish a political party. Id.

Thus, only after September 1, 2021 could Mysels register as a voter with the PPF, and she did register, effective September 13, 2021. Doc. 26-3, pg. 4; *Mysels* affidavit. The Plaintiffs have made efforts to publicize the PPF and promote various political causes; they have garnered over 6000 internet email recipients.

[2] DOE assigns identifiers to political parties at their prerogative based on the first three letters of the name; thus People's Part of Florida = "PEO." Plaintiffs-Appellants prefer to be recognized by their acronym PPF.

Doc. 26-2. Despite the uncertainty concerning ballot access, the PPF has 427 registered voters in the State of Florida. Doc. 26-1 at pg. 5.

By September of 2021, it became apparent to the PPF Executive Committee that, because of the 365-day rule, they were locked out of the entire 2022 election cycle, because a voter registered with the PPF or, for that matter, any voter who wished to run for public office representing the values of the People's Party as an NPA candidate could not run so in the 2022 election. *Mysels* affidavit. They had at first supposed they could run as independents or "NPA" in Florida election parlance (No Party Affiliation); Mysels had changed her registration to NPA on June 21, 2021 based on the mistaken supposition. Doc. 26-1.

This was admittedly based on a mistake of law, as the Statute similarly constrains independent candidates, requiring them also to have been registered NPA for a year, as of the first day of the filing period, i.e., the "qualifying period." The Plaintiffs-Appellants are laypersons, non-attorneys. Doc. 26-1.

On December 29, 2021, PPF submitted amended By-Laws to the Defendant DOE that moved forward their first State Convention Assembly to compensate for the Florida election law; a convention assembly is typically designed to nominate candidates. Doc. 1-2, pg. 11; *Mysels* affidavit. Those By-Laws were accepted January 7, 2022. Id. While Plaintiffs-Appellants had limited help of counsel in drafting By-Laws, he was not interested in litigation or filing suit. Plaintiffs-

Appellants began to question the legal validity of the 365-day candidate party affiliation law and the subsequent 365-day NPA law. Id. As the PPF understood the Statute to forbid them from running, they could not fund raise or petition for a speculative (and ostensibly unlawful) candidacy. Doc. 26-1.

Plaintiff Mysels is a resident and registered voter in Lutz, Pasco County, Florida, and is the People's Party candidate for the Pasco County Board of County Commissioners. Plaintiff Victor Nieto is a resident and registered voter of Bay Harbor Islands in Miami-Dade County, and is the current Chairperson of the PPF. Plaintiff Carolyn Wolfe is a resident and voter in of St. Augustine, St. John's County, and is a member of the Executive Committee. Doc. 1 pg. 4.

Plaintiffs-Appellants did not connect with any attorney who could help them challenge the Statute until they cultivated an acquaintance with the undersigned, an attorney based in Illinois and licensed in Illinois and Wisconsin. As a result, any in-earnest discussion about representation did not begin until late April of 2022.

On May 10, 2022, Mysels sent email correspondence to Defendant Pasco County Supervisor of Elections ("Supervisor") trying to educate herself further about the application of Florida election law, including § 99.021. *Mysels* affidavit; Doc. 26-3. Due diligence and pre-filing investigation followed, and the suit and preliminary injunction were filed June 3, 2022. Doc. 1 & 3.

Since filing suit, Plaintiffs-Appellants have become aware of at least three establishment party candidates also negatively affected by the Statute; one has been removed from the ballot by the state court. See *Ron Ogden v. Austin Brownfield*, 22-3207, Florida 6th Judicial Cir. (July 15, 2022). Another case, *Peggy Schiller v. Rebekah Jones*, 22 CA 1243, Florida 2nd Judicial Cir., has a hearing is scheduled for August 5, 2022. A third major party candidate, Kristopher Stark, has not yet been sued but is being scrutinized in the media.

The facts in this case are thus entirely established by a rather short record.

D. Statement of the Standard or Scope of Review

In the Eleventh Circuit, "We review the grant of a preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions *de novo* and any findings of fact for clear error." *Netchoice LLC, et al v. Attorney General, State of Florida*, et al, 21-12355, No. 011012299487 (11th Cir. May. 23, 2022); *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020). Ordinarily, "[a] district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Likelihood of

success on the merits "is generally the most important" factor. *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted).

While federal courts should generally avoid reaching constitutional questions if there are other grounds upon which a case can be decided, that rule applies only when "a dispositive nonconstitutional ground is available." *Netchoice LLC, et al v. Attorney General, State of Florida,* supra, at pg. 17, fn 4.

Summary of Argument[3]

Thus, Plaintiffs-Appellants will argue, that this Court should conclude that the Statute's restrictions are substantially likely to violate the First Amendment, and that the preliminary-injunction factors as set forth in *Netchoice, LLC*, weigh in favor of enjoining the likely unconstitutional provision of the Statute.

It is beyond cavil that an "ongoing violation of the First Amendment constitutes an irreparable injury", and "[n]either the government nor the public has any legitimate interest in enforcing an unconstitutional [law]." *Netchoice LLC*, supra at pg. 66; *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); see also *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020).

The Statute is clearly unconstitutional as applied to new parties. Because *Tashjian v. Republican Party's*[4] guidance has been raised, argued, briefed and incorporated into numerous rulings on party rights, it compels a conclusion that a state cannot bar a political party from running non-members as candidates. Portions of *Storer v. Brown*[5], an outdated and oft-misunderstood case, are effectively displaced, if not explicitly overruled, by *Tashjian.*

[3] Almost every ballot access case presented to this Appellate Court was presented and briefed below in Docs. 3, 11, 15, 22, 26 & 29. Here, Appellants have tried not to reinvent the wheel.
[4] *Tashjian v Republican Party of Connecticut*, 479 U.S. 208, 215 (1986)
[5] *Storer v. Brown*, 415 U.S. 724 (1974)

While *Storer* concerns independent candidacies, not newly-formed parties, and *thus has no direct implication for this case*, it still helps Plaintiffs-Appellants, as it evinces the solicitude that federal courts have for political parties, who have greater rights than individuals as voters and candidates.

Temporal restrictions, i.e. affiliation and disaffiliation laws, are disfavored when they effectively freeze voters into affiliation for more than a single two-year election cycle. They go beyond the pale, and are unconstitutional when they effectively ban new-party formation, as § 99.021 does. To be rendered constitutional, they must have exceptions for newly-formed parties, as new parties must of necessity run non-tenured candidates, at least initially. See *Barrie and the Independent American Party of New Mexico v. Duran*, No. 33,755 (N.M. 2012); *Woodruff v. Herrera*, 09-cv-0449 (D.N.M.) (March 31st, 2011); *Woodruff v. Herrera*, 623 F.3d 1103 (10th Cir. 2010)[6]; see also *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000) (non-registered voters must be permitted to run as candidates, if otherwise qualified).

Purcell, supra[7] in no way bars Plaintiffs' relief, as it applies to the "rules of the road" concerning the electorate generally: voter ID laws, early voting, mail-in

6 New Mexico's amended law now states: "Except in the case of a political party certified in the year of the election, persons certified as candidates shall be members of that party on the day the governor issues the primary election proclamation." See NM Stat § 1-8-2 (2021) (Emphasis supplied).

7 *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curium)

voting, COVID restrictions, and redistricting, to protect the general electorate from confusion. *Purcell* should not be invoked to countenance preventable constitutional deprivations, which is why Justice Kavanaugh recently cited *McCarthy v. Briscoe*, 429 U. S. 1317 (1976) (Powell, J., in chambers), as well as *Lucas v. Townsend*, 486 U. S. 1301 (1988) (Kennedy, J., in chambers), as potential exceptions to *Purcell* analysis in his concurrence in *Merrill v. Milligan*[8]. *McCarthy v. Briscoe* and a host of other ballot access cases evince federal courts' willingness to put candidates on the ballot as late as 36 days prior to an election.

8 *Merrill v. Milligan* 595 U. S. ____ (2022) (J. Kavanaugh, concurrence) (February 7, 2022)

ARGUMENT

I. The Statute effectively bars formation of new parties

a. "[A] court's job is to ensure that the State in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Internal quotation omitted).

A visitor to America, like a twenty-first century Tocqueville, might well think that the Republican and Democratic parties were a creature of law or somehow codified. But they would be mistaken, as the Republican and Democratic parties were formed by ordinary citizens of both high and lessor rank. The Republican Party was formed because of citizens' dissatisfaction with an Act of Congress. On February 28, 1854, at a meeting held at the Congregational Church in Ripon, Wisconsin, it was agreed, that in the event that the Kansas-Nebraska Bill was adopted, old political parties should be cast aside, and an entirely new organization should be established. At a subsequent meeting at the "Little White Schoolhouse" on March 20, 1854, the Republican Party was formed.

The modern Democratic Party was formed as a result of the disputed election of 1824. The former Democratic-Republican Party split over the choice of a successor to President James Monroe, after the House of Representatives elected John Quincy Adams over his rival Andrew Jackson. This was in spite of the fact that Jackson had received the most votes. The "corrupt bargain" that placed

Adams in the White House led citizens to form a new party, the Democratic Party of today.

Both modern parties were thus formed as a consequence of a political exigency. A state law therefore, constraining a newly-formed party from running candidates for well over a year, for over 513 days in fact, and requiring its registered voters to similarly wait, foregoing primary voting in the interim, would defy historical precedent and offend the constitutional rights of citizens to form new parties. The Constitution does not permit states to restrict access to the ballot in a manner that "favors two particular parties – the Republicans and the Democrats – and in effect tends to give them a complete monopoly." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

b. A state cannot "provide that only Party members might be selected as the Party's chosen nominees" *Tashjian*, 479 U.S. at 215

However, 99.021 *F.S.*, *Form of Candidate Oath*, explicitly does exactly that. It requires a party's candidate to be 1) registered with that party; this first requirement should be enough to summarily overturn the Statute. But the Statute goes beyond that, it requires a candidate to have been registered 2) for a least a year prior to first day to file qualifying papers. In this cycle, that was Monday, June 13, 2022, a full 148 days before the November 8, 2022 General Election. The

same "affiliation law" applies to citizens seeking to run as independent, *i.e*., "no party affiliation" candidates). § 99.021 *et seq*[9].

This 513-day exclusion from participation, a "lockout" which impacts the rights of citizens to vote in primaries as well as to form parties and run as candidates, constitutes a "severe burden" on the First Amendment rights of citizens under the *Anderson-Burdick* "balancing of harms" framework.

A court is required by *Anderson* to review a ballot access challenge-

"…by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."

Anderson, supra 460 U.S. at 789, citing *Williams*, supra, at 393 U. S. 30-31; *Bullock v. Carter*, 405 U.S. 134 at 142-143 (1972); *American Party of Texas v. White*, 415 U. S. 767, 780-781 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U. S. 173, 183 (1979).

Instead of setting forth the State's interests with precision, ballot access defendants tend to file the same brief: portrayals of chaos, disorder, and disruption

[9] See also instructions to candidates at https://dos.myflorida.com/elections/candidates-committees/qualifying/. Doc. 1, pg. 2

are the norm. It is difficult for ballot access defendants to set forth precise interests, because of their real partisan interest: to maintain the *status quo*, that being the usual, and yet forbidden, monopoly of the establishment parties denounced in *Williams.*

The duration of 513 days prior to the general election, approximately, is the minimum; for if a party were to be formed and acknowledged by the DOE precisely one year prior to the first day to file qualifying papers, that would be 7 weeks, i.e., "noon of the 71st day prior to the primary election, but not later than noon of the 67th day" before the primary elections, see 99.061 *F.S.* (2021); the qualifying date is the same for the general election. See discussion in Doc. 26, pgs. 2-5

Now, in the real world, add to this burden the time required to submit and perfect a newly-formed party's by-laws, and the burden becomes even more severe. In this case, the party formed and submitted its papers on July 15, 2021. The state reviewed and rejected the first draft. Thus, the party was not acknowledged until September 1st, 2021, 48 days later. The date of a newly-formed party's inception is determined at the state's prerogative through the state issuing an "Acknowledgement letter." Doc. 1-2, pg. 11.

Independent of the lockout effect, the requirement also constitutes an impermissible constraint on a party's selection of candidates by confining its pool

of potential candidates to its own members, contrary to the Supreme Court's pronouncements in *Tashjian*, supra, 479 U.S. 208, 215.

Tashjian's central holding: that the State of Connecticut could not forbid the Republican Party from allowing independent voters to vote in its primaries. This was because the party's right to freely associate with independent voters trumped the State's right to regulate elections. A plethora of state and federal courts have relied on *Tashjian*. Most recently the Democratic Party of Alaska argued, and the Supreme Court of Alaska agreed, that *Tashjian* was persuasive in overturning a state "party affiliation" law like the statute implicated in this case. *State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018)[10]. *Alaska Democratic Party* therefore demonstrates the continued vitality of *Tashjian*.

Tashjian's Page 215 states, without qualification:

"Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals."

§ 99.021, forbidding parties from selecting non-members, openly defies *Tashjian.* Or perhaps the Defendants believe *Tashjian's* forbidding a state from controlling whom a political party may nominate is simply permissive and

[10] The *Alaska Democratic Party* decision, as well as the briefing and portions of the record, may be found at https://courts.alaska.gov/media/scl-materials.htm

advisory. However, the First Amendment's freedoms of speech, assembly, and petition require that such freedom of association be zealously defended by the courts.

c. "…a State, or a court, may not constitutionally substitute its own judgment for that of the Party."[11]

Cases following *Tashjian* are legion. In addition to the *Alaska Democratic Party*, *Woodruff v. Herrera*, supra, (09-cv-0449) a procedurally messy case which involved the Libertarian and Green Parties of New Mexico, explicitly follows *Tashjian*. The *Woodruff* district court relied on *Tashjian* in agreeing with the plaintiffs that the laws violated the rights of political parties to free association by restricting their right to nominate as candidates those persons of their choosing. The law precluded, at the time of proclamation, non-residents and non-voters from being nominees, and precluded political parties from nominating otherwise qualified candidates who were not registered voters, a practice already held to be invalid, as well as requiring political parties to nominate only candidates identified on their voter registration as party members.

In *Colorado Democratic Party v. Meyer*, 88 cv 7646 Denver District Court (May 5, 1988) (Unreported), the Colorado Democratic Party amended their rules to shorten the "lockout" time period, moving the deadline from the date of the

[11] *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 at 123-124 (1981), quoted in *Tashjian* at 479 U. S. 224.

election to the date of the (nominating) assembly, stating "a person [would] be eligible for designation by assembly as a candidate if that person has been a registered Democrat for at least twelve months immediately preceding the date of the general election next following such primary election." Id. The Denver District, in enforcing the party rule, regarded *Tashjian* as "key" to the case. Id.

II. Courts will not hesitate to enjoin preventable constitutional deprivations, even close to elections.

a. Early party rights cases, pre-*Tashjian*

There is nothing new under the sun. In *Crussel v. Oklahoma State Election Bd.*, 497 F. Supp. 646 (W.D. Okla. 1980), the Libertarian Party became recognized as a political party under the laws of Oklahoma on June 13, 1980. On June 16, 1980, plaintiff executed a voter registration designating the Libertarian Party as her party affiliation. Prior to that transaction, Plaintiff was registered as an "Independent" voter. The incumbent candidate filed a contest of Plaintiff's candidacy, because she had not been a registered member of the Libertarian Party for the six months immediately preceding the filing period under state law. The defendants relied heavily upon "party swapping" cases and cited *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974) and *Lippitt v. Cipollone*, 337 F.Supp. 1405 (N.D. Ohio 1971), much like the Defendants-Appellees in this case. The more things change, the more they stay the same.

Receiving the case after the Oklahoma Supreme Court declined jurisdiction, the *Crussel* court, relying on *Williams* and other Supreme Court precedent, noted that "[t]he six-month party registration requirement does in fact place a restriction on access to the ballot" and held, *inter alia,* that the six-month affiliation requirement was overly broad in that it not only prevented candidates from improperly changing parties, but also prevented unaffiliated potential candidates (such as Mysels) from moving from an unaffiliated status to party affiliation during the six-month period prior to the filing period. The court enjoined the state from removing the candidate's name from the ballot. 497 F. Supp. 652.

In *Long v. Swackhamer*, 538 P.2d 587, 91 Nev. 498 (Nev. 1975), the plaintiff, Long, who had been a Republican, had changed his party affiliation after September 1, 1973. Since the Independent American Party had not become qualified as a political party in Nevada until June 25, 1974, the Nevada Supreme Court, applying logic, simply found the statute "inapposite," and concluded that the Secretary of State erred in refusing to accept Long's candidacy for that reason. "We believe, and so hold, that [the Nevada statute] has no application at all to a new political party coming into existence after September 1 [deadline] of the preceding year." 538 P.2d at 589. The Nevada Supreme Court cited a single case – *Williams,* supra, 393 U.S. 23, 30.

b. Ballot access injunctions have been granted well after the opinion in *Purcell v. Gonzales*-

In *Graveline v. Johnson*, a District Court in Michigan enjoined a statewide independent candidate 30,000 signature requirement, and the 6th Circuit affirmed, 36 F. Supp. 3d 801 (E.D. Mich. 2018); *Graveline v. Johnson*, No. 18-1992 (6th Cir. 2018). In *Libertarian Party of Maine v Dunlap*, a party-rights case, the District Court enjoined the deadline for a new party to have obtained 5,000 registered members to be a qualified party. Case 2:16 cv-0002, (May 27, 2016) (Granting reconsideration). In *Arizona Green Party v Reagan*, a party-rights case, the District Court enjoined the Arizona deadline to submit the names of presidential elector candidates, on July 19, 2016. 16 cv-2027. In *Libertarian Party of Arkansas v Martin*, a party-rights case, the Eastern District of Arkansas enjoined the deadline for a new party to hold a nominating convention. 4:15cv-635, July 15, 2016.

Also in *Libertarian Party of New Hampshire v Sununu*, a party-rights case, the district court enjoined the New Hampshire law requiring 3,000 signatures for independent statewide candidates due to the COVID crisis. 1:20cv-688, dated July 28, 2020.

See also *Myers v Gant*, 4:14cv-4121, in which the District of South Dakota enjoined a law that wouldn't let an independent candidate substitute a new nominee for Lieutenant Governor, on August 18, 2014.

On August 22, 2012, the New Mexico Supreme Court put Jon Barrie on the November ballot as the nominee of the Independent American Party, even though

he hadn't been a member of that party early in the year. *Barrie v Duran*, 33755 N.M. (2012). While the Order is only two pages, Barrie's Petition is attached to Plaintiffs-Appellants' (forthcoming) Addendum.

c. The *Purcell* exemplars in *Merrill v. Milligan* exclude ballot access cases.

The application of *Purcell*-like[12], rules of the road concerns do not apply to ballot access cases, as Justice Kavanaugh's recent concurrence in *Merrill v. Milligan* 595 U. S. ____ (2022) (February 7, 2022) illustrates. Justice Kavanaugh consciously and deliberately listed seven exemplars where, he deemed *Purcell* considerations to apply; he just as consciously and with similar deliberation potentially exempted a ballot access case, *McCarthy v. Briscoe*, 429 U. S. 1317 (1976) (Powell, J., in chambers), as well as *Lucas v. Townsend*, 486 U. S. 1301 (1988) (Kennedy, J., in chambers).

Lucas, supra, was a case enjoining a school bond referendum which was postponed until after the Super-Tuesday primary election, allegedly to suppress minority turnout. *Briscoe* was, of course, a ballot access case placing Eugene McCarthy on the ballot only days before a presidential elections.

[12] In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curium), the U.S. Supreme Court reversed the 9th Circuit, 15 days before an election, and allowed an Arizona voter ID law to take effect, as "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion" and voters without IDs were not disenfranchised, as they were allowed to cast provisional ballots.

This Appellate Court's predecessor, the Fifth Circuit, did exactly that same thing in *McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (per curiam), as back then Florida was in the 5th Circuit. Plaintiffs-Appellants cited both the *Briscoe* and *Askew* cases to the District Court below, but to no avail.

In contrast, Justice Kavanaugh, in concurrence with *Merrill v. Milligan*, supra, set forth seven exemplars that typified *Purcell* principles. Justice Kavanaugh cited no less than seven cases in support for what he called a "bedrock tenet of election law" in *Purcell*, and not a single case had anything to do with ballot access for new parties or new party candidates. Those cases included: *Merrill v. People First of Ala*., 592 U. S. ___ (2020) (Ban on curbside voting); *Andino v. Middleton*, 592 U. S. ___ (2020) (Witness requirement for absentee ballots); *Merrill v. People First of Ala*., 591 U. S. ___ (2020) (ADA access and COVID risk at polls); *Clarno v. People Not Politicians*, 591 U. S. ___ (2020) (Laws concerning ballot initiatives); *Little v. Reclaim Idaho*, 591 U. S. ___ (2020) (Laws concerning ballot initiatives); *Republican National Committee v. Democratic National Committee*, 589 U. S. ___ (2020) (per curiam) (Deadline for absentee ballots); *Democratic National Committee v. Wisconsin State Legislature*, 592 U. S. ___ (2020) (Deadline for absentee ballots).

The reason is pretty clear why *Purcell* should not apply in this case: *Purcell* applies to what Justice Kavanaugh called "the rules of the road": election rules

involving conditions that effect entire jurisdictions, voting procedures generally, and/or the entire electorate; redistricting, absentee balloting, the COVID emergency; it has nothing to do with a new party's freedom of association guaranteed by the First Amendment. Further, Justice Kavanaugh agreed that Purcell was "a principle that is not absolute…" and that "the Court has not yet had occasion to fully spell out all of its contours..." Justice Kavanaugh agreed that "the Purcell principle thus might be overcome even with respect to an injunction issued close to an election…" and cited two exceptional cases; so what the concurrence really distinguishes are rules-based cases and rights-based cases. *Merrill v. Milligan*, supra 595 U. S. ____ ; see also SCOTUS Merrill docket.

Under *Anderson-Burdick*, a law severely burdens a new party's right, and requires strict scrutiny from a court, when that law absolutely excludes the party from the ballot; see *Kishore v. Whitmer*, 972 F.3d 745 (6th Cir. 2020), erroneously relied on by the Plaintiffs as "invoking *Purcell* in a ballot-access case." Doc. 23, Pg. 1. But Defendants-Appellees had to comb through many ballot access cases to find a single *Purcell* reference*;* in fact, the actual gist and core holding in *Kishore* is that, after a thorough *Anderson-Burdick* analysis, the court concluded that challenged circumstance in that case (a combination of petitioning requirements and COVID stay-at-home order) amounted to an intermediate, not a strict burden on the party's rights.

Kishore only mentions *Purcell* as an afterthought; it is thoroughly grounded in *Anderson-Burdick* balancing. In fact, in *Kishore's* Roman II, sections A-D, there are pages of exhaustive *Anderson-Burdick* analysis, and it favors the Plaintiffs-Appellants in the case at bar. In contrast, *Purcell* is mentioned in *Kishore* in one sentence in section E, "Other Preliminary-Injunction Factors," as a "belt and suspenders" toss-in. 972 F.3d 745 at 750.

d. Other adverse authority distinguished

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) while often cited to conflict with *Tashjian*, does nothing of the sort. *Timmons* merely holds that bans on "fusion" candidacies are not unconstitutional per se, so that a state may require that a candidate cannot be listed as the nominee of more than one party on the ballot. Timmons was viewed under intermediate scrutiny, because the fusion ban did not impose a severe burden; thus, the state was not required show that the ban was narrowly tailored to serve compelling state interests, unlike the case here. Instead, the state's asserted regulatory interests only had to be "sufficiently weighty to justify the limitation" *Timmons*, supra, 520 U.S. at 364, citing *Norman v. Reed*, 502 U. S. 279, 288-289.

Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by

ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. *Timmons*, supra, 520 U.S. at 363 (Emphasis supplied).

One could write an entire brief on *Storer v. Brown*, (415 U.S. 724 (1974)). *Storer* concerned a challenge to the combined effect of California's entire electoral scheme; the legislative scheme was upheld as applied to the two truly independent candidates, and remanded as to the candidates for the Communist Party USA, Gus Hall and Jarvis Tyner, who ran in California as independents as a tactic. So, while *Storer* concerns independent candidacies, not newly-formed parties, and thus has no immediate implication for this case, it still helps Plaintiffs-Appellants, because it evinces the respect that the federal courts historically have for political parties, who have greater rights than individual voters and candidates. *Storer* protected the *de facto* party candidates by remanding the case to determine the size of the "pool" of potential petition signers, to see if the law worked an unconstitutional burden on the Communists.

As to the "true" independents, the *Storer* court held: "neither Storer nor Frommhagen is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary. As applied to them [the statute] is valid." 415 U. S. 734 (emphasis supplied). *Storer* is thus limited to the facts of that case, decided well before *Tashjian*'s page 215, and has nothing at all to do with newly-formed parties.

Storer, in its Footnote 16, rejected the idea that the California law added to the qualifications for people to run for Congress. However, as further evidence of *Storer's* waning influence, it was more recently scrutinized in *U.S. Term Limits v Thornton*, 514 US 779 (1995). In *U.S. Term Limits*, the Supreme Court rejected an effort to justify term limits based on *Storer*, Footnote 16, when the petitioners attempted to "support their restrictive definition of qualifications with language from *Storer*." Id.

In any event, the legislative scheme in *Storer* is now long gone. California utilizes a "top-two" primary system. This system establishes a single primary election for all candidates running for office. The primary is open to all registered voters. The top two vote-getters in this primary election then move on to the general election, regardless of party affiliation. The system was established with the Top Two Primaries Act, which appeared as Proposition 14 on the June 8, 2010, ballot.

Storer is further antiquated because of the very different role of primary elections in 2022 than as in 1972, when, according to the *Storer* Court "[t]he State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." *Storer* 415 U. S. at 735, quoted in *Anderson* at 460 U. S. 812. A decade later, in 1983, when Illinois congressman John Anderson, a moderate Republican, made a

presidential bid as an independent, the Court's attitude had evolved towards Ohio's early filing deadline's impact on emerging candidacies.

Primary elections now stir up more differences than they settle. See, e.g., the Brookings Institute "The Primary Project" concerning the demographics and ideologies of 2018 primary voters. https://www.brookings.edu/project/the-primaries-project/ (last visited August 4, 2022). (Investigation continues for a paper, hard copy and a citation to the article). "[M]any members of Congress know that the only place they can be defeated is in a primary. Thus, members of Congress are finely attuned to that electorate—in some instances, more so than to their general election electorate." Id.

III. Mootness, Futility, Injunctive Relief.

a. Ballot access cases are almost never moot, especially in states that have made significant changes to their laws.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), in the State of New York, the Supreme Court upheld an early enrollment scheme, the purpose which was to inhibit party "raiding," whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary. As such, *Rosario* was a voting rights case, the petitioners were younger voters who were tardy in registering, and the case did not concern new party formation.

At Footnote 4, *Rosario* states: "Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is capable of repetition, yet evading review." Id at fn 4. *Accord Dunn v. Blumstein*, 405 U. S. 330, 405 U. S. 333 n. 2 (1972) (voters' residency requirement); *Moore v. Ogilvie*, 394 U. S. 814, 394 U. S. 816 (1969) (ballot access petitioning). The term "capable of repetition, yet evading review" and the constitutional exception to the mootness doctrine originates in *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911) (railroad regulated by the ICC).

b. Futility – a minor party need not attempt the impossible

Defendants' mootness argument also fails, because a party need not begin petitioning under the cloud of an unconstitutional provision. It is common sense to acknowledge that the PPF could not ask voters to sign ballot petitions with full knowledge that they were absolutely barred from running candidates, and few persons would sign such speculative and suspect papers. Mysels affidavit, Docs. 26, 26-1, 2, 3, 4.

Candidates don't have to attempt the impossible, and the Supreme Court has acknowledged that twice already. This was true in *Storer*, 415 U.S. 724, allowing challenge to California's requirement that independent candidates must submit a petition containing the signatures of at least five percent of the last vote cast, even

though the candidate, Gus Hall, had not begun gathering; also in *Williams v. Rhodes*, supra, 393 U.S. 23, allowing the Socialist Labor Party, which had not attempted to gather signatures, to proceed all the way to the Supreme Court, as well as George Wallace's American Independent Party, which was unable to gather enough signatures, to challenge Ohio's early ballot access law. See also *Lee v Keith*, 463 F 3d 763 (7th Cir. 2006), which struck down an Illinois early petition deadline even though the candidate had yet to begin gathering signatures – "When it became clear to Lee that he could not muster the required number of signatures by the deadline so distant from the general election, he abandoned his campaign bid and filed this lawsuit." See also *Libertarian Party v. Ehrler*, 776 F. Supp. 1200 (E.D. Ky. 1991), which held that a political party need not initiate the process of gathering signatures in order to challenge a restrictive ballot access law. See also *Mysels* affidavit, Docs. 26, 26-1, 2, 3, 4.

c. Injunctive relief is especially appropriate where, as here, there is a probable First Amendment deprivation

In light of the above, this Court of Appeals should conclude that the Statute, § 99.021, is substantially likely to violate the First Amendment. That would effectively determine the result of this appeal because likelihood of success on the merits "is generally the most important of the four factors." *Netchoice LLC, et al*, supra, 21-12355, No. 011012299487; *Gonzalez*, 978 F.3d at 1271 n.12 (quotation marks omitted). It is axiomatic that "an ongoing violation of the First Amendment

constitutes an irreparable injury." *F Cosms. FL, Inc.* supra, 866 F.3d 1290, 1298; *Otto*, 981 F.3d 854, 870 (11th Cir. 2020). The nonmovant is indeed the government, and neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance. *Otto*, 981 F.3d at 870. Therefore, the preliminary-injunction factors weigh in favor of enjoining the likely unconstitutional provision of § 99.021 *F.S.*, as it works a severe burden on the right to form new political parties and to associate with like-minded citizens in support of common political goals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this Appellants' Opening Brief contains 6,800 words, excluding the parts of the motion exempted by FED. R. APP. P. 32(f).

This motion complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this motion has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: August 4, 2022

s/ Christopher Kruger
Christopher Kruger
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 4, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 4, 2022

s/ Christopher Kruger
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