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' PETITION FOR REHEARING *EN BANC* – UNDER F.R.A.P 35, IOP 2

Challenge to the Constitutionality of Fla. Stat. § 99.021

/s/ Christopher Kruger Dated: September 14, 2022

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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, *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: September 14, 2022

s/Christopher Kruger
Christopher Kruger
Counsel for Plaintiffs-Appellants

Statement of Counsel Pursuant to 11th Cir. R. 35-5(c)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and at least one precedent of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

United States Supreme Court Cases -

Moore v. Ogilvie, 394 U. S. 814, 816 (1969);

Dunn v. Blumstein, 405 U. S. 330, 333 fn. 2 (1972);

Rosario v. Rockefeller, 410 U.S. 752 fn. 5 (1973);

Kusper v. Pontikes, 414 U.S. 51 (1973)

Storer v. Brown, 415 U.S. 724 fn. 8 (1974);

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 at 215, (1986) (in *dicta*);

Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988);

Norman v. Reed, 502 U.S. 279, 287–88 (1992);

Fed. Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449 (2007);

Davis v. Federal Election Comm'n, 554 U.S. 724 (2008).

Eleventh Circuit Case -

Citizens for Police Accountability v. Browning, 572 F.3d 1213, fn. 5 (11th Cir. 2009).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

(CONCERNING MOOTNESS)

1. ***"Is the case at bar moot, notwithstanding that one of the Plaintiffs is a newly-formed political party, that may be reasonably expected to be subjected to the same action again, as in Norman v. Reed, 502 U.S. 279 at 288 (1992)?"***

If the answer to Question 1 is yes, then-

2. ***"Does the Exception to the Mootness Doctrine, 'Capable of Repetition, yet Evading Review' apply to the case at bar?"***

If the case at bar is not moot, or is excepted from mootness, then-

(CONCERNING THE CONSTITUTIONALITY OF FLORIDA STATUTE § 99.021)

3. ***"May a State restrict a political party's pool of candidates to those persons who are registered members of that party?"***

If the answer to Question 3 is "Yes," then-

4. ***"May that State further restrict a political party's pool of candidates to its members, who have been registered voters and affiliated with that party for at least 365 days prior to the first day of that State's***

period to file candidacies, a time period totaling approximately seventeen months (513 days) prior to the General Election?"

If the answers to Questions 3 & 4 are "Yes," then-

5. ***"Do First Amendment principles of freedom of association require that the State create an exception to (3) & (4) so that newly-formed political parties may run candidates?"***

/s/ Christopher Kruger
Attorney of Record for Plaintiffs-Appellants

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Factual Issues

The Opinion may have overlooked the fact that Document 26-1, at page 7, the Affidavit of Elise Mysels, Exhibit A, actually identified eight aspiring candidates, when the Opinion stated:

"Tellingly, the Appellants have failed to identify any other People's Party member in Mysels' predicament or any other aspiring-candidates at all— even in response to Florida's motion to dismiss." Opinion, pages 5-6.

The Affidavit was cited 8 times in the Opening Brief, 4 times in the Reply, and once in the Response to the Motion to Dismiss.

The Opinion may have overlooked the fact that Florida Statute § 99.021 sets a 365-day affiliation "deadline" prior to the *start*, not the *finish*, of the filing period for candidates ("Qualifying Period").

The Qualifying Period (in this cycle) consisted of one week, June 13-17, 2022. The Opinion of the Court repeatedly refers to June 17, 2022 (the Friday), as *the* "deadline" to file candidacies, which is correct; but it is less clear whether the Opinion apprehends that a candidate had to be registered as party-affiliated for 365 days before the first date for qualifying, the prior Monday. (The People's Party was not acknowledged by DOE until September 1, 2021.) June 13, 2021 was 513 days before the general election. Thus, to form a new party, one would have had to register and be acknowledged (which took 48 days in this case) prior to June 13,

2021. Adding 48 days would make a 661 days' minimum required to form a new political party, a date of April 27, 2021, preceding the May 6th effective date of the Statute.

Legal Issues

The Opinion contradicts this Circuit's precedent in *Citizens for Police Accountability v. Browning*, 572 F.3d 1213 (11th Cir. 2009), fn. 5.

The Opinion contradicts sixty-one years of United States Supreme Court jurisprudence concerning mootness in election cases, spanning from *Moore v. Ogilvie*, 394 U. S. 814 at 816 (1969) to *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), including *Storer v. Brown*, 415 U. S. 724, 737, n. 8 (1974) and *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2007), both cited with approval by this Circuit in *Citizens for Police Accountability*, supra, fn. 5.

The Opinion, in not reaching the gist of the case, i.e., the constitutionality of *Florida Statute.* 99.021, countenances a state election law openly challenging oft-cited judicial *dicta* in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 at 215 (1986), which plainly states:

"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." *Tashjian*, supra, 479 U.S. at 215. (Emphasis supplied).

Statement of the Course of Proceedings

Plaintiffs-Appellants ("Appellants") are the People's Party of Florida, a newly-formed political party, and three of its members; all three are registered voters; one is a candidate for Commissioner in Pasco County, Florida. On June 3, 2022, the Appellants filed suit for injunctive and declaratory relief, challenging Fla. Stat. § 99.021 as unconstitutionally burdensome. The newly-formed political party was recognized by the State on September 1, 2021.

The district court denied the Appellants' motion for a preliminary injunction on June 22, and denied reconsideration on July 25. The District Court based its decision largely on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curium).

Appellants filed their Notice of Appeal July 26. The Panel granted the Appellants' motion for expedited proceedings. On August 25, 2022, the Panel issued its unpublished Opinion, per curiam, denying the appeal as moot pursuant to, inter alia, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

Statement of Facts "Necessary to Argument of the Issues" 11th Cir. R. 35-5(g)

The lawsuit was filed by four plaintiffs- the People's Party of Florida, and three of its registered voters and officers, Elise Mysels, Carolyn Wolfe and Victor Nieto. The new party submitted by-laws, its list of officers and other paperwork to the state election authority, Defendant Florida Department of State, Division of Elections, on July 15, 2021, 333 days before the first day of the Qualifying Period and 481 days before the 2022 General Election. The Party, after perfecting its paperwork, was subsequently recognized by Defendant DOE on September 1, 2021. *See* Docs. 26-1 through 26-5, Affidavit of Elise Mysels, with Exhibits.

Mysels sent an email to Defendant Pasco County Supervisor of Elections in May of 2022 inquiring as to the application of the new law, Florida Statute §99.021. Doc. 26-3. In response, she was told she could not run as either an independent nor as a candidate for the People's Party. Mysels had changed her registration to No Party Affiliation ("NPA") a year earlier on June 21, 2021, because she mistakenly thought that the 365 day lockout period pursuant to the Statute only applied to party-candidates, when in fact the Statute also locks out NPA voters from running as independent candidates, unless they are registered as NPA for 365 days prior to the first day of filing candidacies. Doc. 26-1.

Mysels could not have registered as a People's Party voter on that June 21, 2021 date, because the State did not recognize the party until September 1, 2021. Mysels subsequently registered as People's Party, effective September 13. It took the State 48 days to recognize the newly-formed party. Id.

There are over 400 voters in the State of Florida registered with the People's Party. Doc. 26-3. There are over 6000 Floridians who receive the party's emails. Doc. 26-2. While the Opinion states that the Appellants failed to identify any other People's Party member in Mysels' predicament or any other aspiring-candidates at all, there are in fact eight aspiring candidates listed in the table appearing at Doc. 26-1, page 7, who were dissuaded by the Statute from running. Mysels attested "we did not encourage potential candidates to pursue qualifying for public office for the 2022 election cycle, because under the 365-day rule, it was against the law." Doc. 26-1.

ARGUMENT & AUTHORITIES

Introduction

On August 25th, the Panel dismissed the Appeal in response to a motion to dismiss for mootness; a motion so rote, that every ballot access defendant since *Williams v. Rhodes* has filed the same motion, or otherwise argued. The argument was incorrect then, and remains incorrect now, because it misconceives the injury being grieved in a ballot access case. That class of cases, including this case, are not about a single campaign or candidacy: "We began our inquiry by noting that our primary concern is not the interest of [a] candidate … but rather, the interests of the voters who chose to associate together to express their support…", and "the 'extent and nature' of the burdens [the state] has placed on the voters' freedom of choice and freedom of association," *Anderson v. Celebrezze*, 460 U.S. 780 at 806 (1983).

I. The Opinion conflicts with this Court's and the Supreme Court's application of the Mootness Doctrine in Election Cases

This Court of Appeals should hear the case at bar, concerning an unpublished Opinion, notwithstanding 11th Cir. R. 35-4, Matters Not Considered En Banc, section (b), because the Opinion conflicts with precedent and raises questions of exceptional importance. In addition, the Appeal was not dismissed for

failure to prosecute or because the Appeal was frivolous, and the Appeal "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) Most importantly, the challenged Statute is likely unconstitutional in one or more aspects.

Mills v. Green, an election case, was the first Supreme Court opinion that directly addressed the mootness doctrine. 159 U.S. 651 (1895). Mootness was then regarded as a self-imposed prudential doctrine of restraint. It was not until 1964, in *Liner v. Jafco, Inc.* that the Court discussed the doctrine's constitutional dimensions. 375 U.S. 301. However, in the separate but related context of abstention doctrine, it has been urged, in what is known as the "*Cohen's* dicta," that a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. ed. 257, 291 (1821).

In this case, the Court of Appeals clearly has jurisdiction and should exercise jurisdiction over the appeal because the continuing controversy is real, immediate and direct, as between the Party and its adherents and the State. To view the controversy as limited to one candidate in one race would be taking too narrow a view and be giving short shrift to the associational rights of the more than six thousand interested persons which Appellants have identified.

The Supreme Court has recognized, more than once, that a case challenging a statute regulating ballot access is never really moot until the statute is ruled upon, because the development of new political parties effects all voters, in that it: "enlarg[es] the opportunities of all voters to express their own political preferences." *Norman v Reed*, 502 U.S. 279 at 288-289.

To the extent that the controversy could be cognized in such a limited context, and thus as mooted, the Supreme Court has repeatedly recognized challenges to election statutes as typical of the "capable of repetition yet evading review" principles established in *Southern Pacific Terminal Co. v. ICC.*, 219 U.S. 498 (1911).

Moving past the semantics of whether the case at bar is a real, immediate and direct controversy with ongoing injury; or simply one capable of repetition, yet evading review, it is known that the Statute has already spawned two state court lawsuits, with inconsistent results, and with one state appellate concurrence wondering aloud why it is the State, and not the political parties themselves determining the qualifications for Florida's political party candidates. See *Ogden v. Brownfield*, 22-2307, Florida 6th Judicial Circuit (July 15, 2022); *Jones v. Schiller, et al.,* 1D22-2465 CA Florida 1st Dist. (August 22, 2022) (Makar concurrence)

The Opinion, with its singular focus on the candidacy, declines to recognize

that the case at bar is a party-rights case necessitating a comparative analysis of important associational freedoms as addressed in *Tashjian*, *Clingman*, and *Timmons*, infra.

Assuming, without conceding, that, as of this writing, 57 days before the general election, placing Mysels on the ballot would not grant relief, the case should nevertheless be decided, because the Statute, affecting both state and federal candidacies, will give rise to "continuing controversy in the federal-state area." *Moore v. Ogilvie*, 394 U.S. 814 (1969). The Statute applies to candidates for U.S. House and Senate, and all state candidates. The Statute is sweeping, and is an outlier, both in terms of its temporal restriction and its limitation on associational freedoms, the only Statute to contradict *Tashjian's* judicial *dicta,* found at page 215 of the Opinion.

The Opinion adopts the Defendants' argument that Mysels was not qualified since she did not perform the other three conditions precedent of candidacy: 1) pay the filing fee (or gather signatures as provided under Florida law); 2) appoint a campaign treasurer, 3) and file a financial disclosure.

One could quibble that these acts are more akin to the performance of conditions precedent more than "qualifications," as Mysels is a citizen, a resident, of age, etc. to qualify her as a candidate. But the Supreme Court has already opined on similar circumstances in *Williams v. Rhodes* 393 U.S. 23 at 26 (1968).

The Ohio American Independent Party was formed in January, 1968, by Ohio partisans of former Governor George C. Wallace. On October 15, 1968, less than 288 days later, the Supreme Court upheld placing the American Independent Party on the ballot, but denied injunctive relief to the Socialist Workers Party. The Socialist Workers' motion to stay the District Court's judgment was presented to Justice Stewart several days after he had ordered similar relief in the Independent Party case. Thus, Florida Statute 99.021 would have hypothetically summarily denied ballot access to either of the plaintiffs in *Williams*. *Williams v. Rhodes*, 393 U.S. 23 at 26 (1968).

The Opinion conflicts with *Williams*, because in *Williams* the Socialist Workers Party and its 108 members obtained declaratory relief despite "not even attempt[ing] to comply with the statutory command." From Justice Harlan's concurrence, 393 U.S. 23 at 46:

"[W]e can only properly reach this [number of signatures] issue in the Socialist Labor Party -- case for this Party did not even attempt to comply with the statutory command. While the Court's opinion, striking down Ohio's statutory scheme in its entirety, does, as I read it, afford the Socialist Labor Party declaratory relief from the 15% provision…" *Williams v. Rhodes*, 393 U.S. 23 (1968) (Harlan concurrence) (Emphasis supplied).

Thus, the Socialist Workers obtained declaratory relief despite begin denied injunctive relief and despite not attempting compliance. See also *Lee v Keith,* 463

F 3d 763, 765 (7th Cir. 2006) (candidate "abandoned his campaign bid and filed this lawsuit...').

The Opinion also conflicts with *Storer's* mootness holding. *Storer* concerned two sets of plaintiffs: two independents and two minor party candidates running as independents for sake of expediency, which is what Mysels initially thought of doing in this case, when she believed that §99.021 only applied to party nominations, not to independents.

While the one-year disaffiliation period in *Storer* has been cited as justification for the more than one-year affiliation period sought by the challenged Statute in the case at bar, *Storer* and this case are apples and oranges, because *Storer,* as it concerns independents, had nothing to do with new party formation. In fact, *Storer* supports the Appellants' argument in this case.

In the first place, *Storer* was limited to the facts of that case and never gave a blanket endorsement of a one-year disaffiliation period, stating that "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." Emphasis supplied. Also, *Storer* further supports the Appellants' case when one considers that *Storer,* in its part II, granted relief to the minor party candidates in the form of a remand despite the case being mooted.

Storer dealt with the mootness issue summarily in its Footnote 8, citing the same authorities the Appellants cite here.

II. Florida Statute § 99.021 is Likely Unconstitutional in One or More Aspects.

a. The Statute is likely unconstitutional as to its temporal restriction, discussed above, as requiring over 513 days' affiliation prior to the date of the General Election is a severe burden on any candidacy, and requiring, realistically, 700 days to form a new party is even more severe. At this point, the temporal restrictions of the Statute take on the scope of the temporal restrictions challenged in *Rosario v. Rockefeller* (410 U. S. 752 (1973) and *Kusper v. Pontikes,* 414 U.S. 51 (1973), bearing in mind that both of the cases concerned *voters*, not *candidates*, and neither of those cases, nor *Storer,* concerned new party formation.

Hearing *en banc* is appropriate, because such a requirement cannot be said to accommodate the potential fluidity of American political life. "[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) (Citing *Jenness v. Fortson*, 403 U.S. 431 (1971)).

b. The Statute is likely unconstitutional in its limiting party candidates to party members. Hearing *en banc* in this matter is warranted to resolve confusion between the holdings in *Tashjian* and supposed inconsistencies between *Tashjian* and the

Clingman[1] and *Timmons*[2] cases, and their application to the case at bar. Appellants would argue that the Florida Statute crosses over from being one of the rational restraints on associational freedoms articulated in those cases, to a Statute whereby a State unconstitutionally substitutes its own judgment for that of the party, by prohibiting all "potential association with non-members" and not merely those members of established parties. See *Tashjian* 479 U.S. at 215.

In *Timmons*, a state (Minnesota) was constitutionally permitted to bar a minor party (the Twin Cities Area New Party) from nominating and running an individual who had already accepted the nomination of an established party (the Minnesota Democratic Party, or "DFL"). The Minnesota law prohibited a candidate from appearing on the ballot as the candidate of more than one party.

In *Clingman*, a state (Oklahoma) was constitutionally permitted to bar a minor party (the Libertarian Party of Oklahoma, or "LPO") from soliciting registered voters affiliated with establishment parties, and bar establishment party voters from voting in the minor party's primary.

Both cases held that the statutes did not impose severe burdens on the First Amendment freedom of association, because the affected candidates in Minnesota and/or affected voters in Oklahoma had already freely-associated with their extant

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[1] *Clingman v. Beaver*, 544 U.S. 581 (2005);
[2] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)

party by their voluntary act. "[A] voter who is unwilling to disaffiliate from another party to vote in the LPO's primary forms little 'association' with the LPO—nor the LPO with him." *Clingman v. Beaver*, supra, 544 U.S. 581.

Clingman "present[ed] a question that *Tashjian* left open: whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary." *Clingman* answered that question in the affirmative. While *Clingman* appears critical when it states that *Tashjian* "applied strict scrutiny without carefully examining the burden on associational rights" (544 U.S. 582), the two cases are distinguishable. Limiting minor parties' attempts to acquire major party candidates (*Timmons*) and major party voters (*Clingman*) does not equate to prohibiting any potential association with nonmembers. Thus, there is no real conflict between the three cases.

Neither *Clingman* nor *Timmons* prohibit all "potential association with nonmembers" as decried in *Tashjian,* 479 U.S. at 215. Instead, *Clingman* and *Timmons* selectively restrain association with persons with pre-existing, voluntary and contemporaneous (party) affiliations.

Recently the Democratic Party of Alaska, based on the Alaskan constitution, relied on *Tashjian* to overturn a state law barring non-party members from becoming candidates in that state. *State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018). The Alaska Democratic Party had amended its bylaws to allow

registered independent voters to run as candidates in its primary elections. Alaska's Division of Elections refused to allow independent voter candidates on the Democratic Party primary election ballot, taking the position that Alaska election law — specifically the "party affiliation rule" — prevented anyone not registered as a Democrat from being a candidate in the Democratic Party's primary elections. In overturning the state law, the Alaska Supreme Court cited *Tashjian* no less than eleven times.

The Alaska Supreme Court avoided addressing the supposed conflict between *Clingman*, *Timmons*, and *Tashjian* by holding that "the Alaska Constitution is more protective of political parties' associational interests than is the federal constitution." 426 P.3d at 909. But that was unnecessary, as pointed out above.

Florida now openly seeks to repeal Page 215, and this Court of Appeals needs to explicate whether *Tashjian's* judicial *dicta* applies in this Circuit.

c. The Statute is likely unconstitutional in that it provides no exception for newly-formed parties. There are no divided loyalties concerned when a group of citizens decide to leave their former affiliations and attempt to form a new party and run candidates. The People's Party of Florida is not seeking fusion candidacies nor seeking to allow established party members to vote in its primary, were it ever

to hold one. The People's Party is simply seeking to form a new party. The problems in *Clingman* and *Timmons* are not present here.

Compared to the established party voters and candidates in Timmons and Clingman therefore, NPAs have no affiliation to desert. The same may be said for qualified, yet unregistered voters, see, e.g., *Woodruff v. Herrera*, 623 F.3d 1103 (10th Cir. 2010). In the context of new-party formation, allowing independents, which the State of Florida itself deems to be unaffiliated or "NPA" to become party candidates does not infringe on the rights of established parties nor their candidates or voters. That was contemplated and anticipated by *Tashjian*, and is explicitly barred by § 99.021. Because independent/NPA voters have eschewed party membership and chosen to avoid the constraints of party membership, by their free and voluntary acts, they should be free to choose to be nominated, and parties should be free to choose whether to nominate them.

Conclusion

While a state can constitutionally restrain "disqualified defeated candidates and recent defectors" from running as independents (*Storer*, 415 U.S. at 743) it cannot create nor sustain the two-party monopoly decried in *Williams*, 393 U.S. at 32, because "[t]here is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them." Id. The Florida Statute, §99.021 severely burdens new party formation by its temporal

restriction and by severely restricting a new party's pool of candidates, thus sustaining the monopoly.

Therefore, Appellants respectfully Petition this Court of Appeals for All Available Relief under F.R.A.P. 35 and IOP 2.

Respectfully submitted,

/s/ Christopher Kruger

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this Appellants' Petition for Rehearing *En Banc* contains 3573 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: September 14, 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 September 13, 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: September 14, 2022

s/ Christopher Kruger
Christopher Kruger
Counsel for Plaintiffs-Appellants