

Case No. 10-1265

**IN THE UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT**

KATHLEEN CURRY, RICHARD MURDIE)
LINDA REES AND GARY HAUSLER)

Plaintiffs-Appellants)

v.)

BERNIE BUESCHER, in his official)
Capacity as Secretary of State of the State)
Of Colorado)

Defendant-Appellee)

On Appeal from the United States District Court for the District of Colorado
The Honorable Marcia S. Krieger, District Court Judge
District Court Case No. 09-cv-02680-MSK-CBS

APPELLANTS' OPENING BRIEF

Respectfully submitted,

William E. Zimsky
ABADIE & SCHILL, PC,
1099 Main Avenue, Suite 315
Durango, Colorado 81301
970-385-4401

Appellants do not request oral argument.
Digital submissions are included in their native PDF format.

July 6, 2010

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PRIOR OR RELATED APPEALS

None.

1. STATEMENT OF JURISDICTION.

This is a ballot access case in which Appellants Kathleen Curry, Richard Murdie, Linda Rees and Gary Hausler (collectively referred to herein as “the Voters”) are challenging the constitutionality of § 1-4-802(1)(g). This statute imposes an affiliation requirement on unaffiliated candidates seeking to have their names placed on the ballot. The Voters allege that this affiliation requirement violates their rights to freedom of speech and freedom of association guaranteed by the First Amendment of the United States Constitution, as incorporated into the Fourteenth Amendment, and that it violates their right to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

Thus, this lawsuit seeks to redress the deprivation under color of state law of rights secured by the United States Constitution. This lawsuit is authorized by 42 U.S.C. §§ 1983 and 1988. Jurisdiction was proper in the District Court pursuant to 28 U.S.C. §§ 1331 and 1343.

On June 23, 2010, the United States District Court for the District of Colorado issued its Opinion and Order Granting Judgment to Defendants. Aplt. App. at 248-71. On that same day, the District Court entered a Judgment in favor of the Defendants and against all of the plaintiffs. Aplt. App. at 273. The Voters timely filed a Notice of Appeal with the 10th Circuit Court of Appeals on June 25, 2010. Aplt. App. at pp. 273-74.

The Opinion and Order and the Judgment are final orders and judgments that dispose of all parties' claims. This Court has jurisdiction of appeals from all final decisions of the U.S. District Court. 28 U.S.C. § 1291.

2. STATEMENT OF THE ISSUES.

The goal of the State's affiliation requirements for ballot access is to promote political stability and protect the integrity of Colorado's political process. Section 1-4-802(1)(g), C.R.S., requires an unaffiliated candidate for the 2010 general election to have been registered as unaffiliated by June 15, 2009.

Representative Curry changed her affiliation from Democrat to unaffiliated on December 28, 2009. Colorado's statutory scheme authorizes major and minor political parties to set their own affiliation rules. All political parties have adopted less restrictive affiliation requirements. The Colorado General Assembly enacted HB 10-1271 in May 2010 to shorten the affiliation period for unaffiliated candidates for general elections starting in 2012 to the first business day of the year of the general election.

1. After the General Assembly determined in May 2010 that HB 10-1271's less burdensome affiliation requirement serves the State's goal of promoting political stability and protecting the integrity of Colorado's political process, is there sufficient constitutional justification for imposing the more burdensome affiliation requirement under the current iteration of § 1-4-802(1)(g) against Representative Curry in the 2010 general election?

2. Does a statutory scheme that makes it more difficult to gain ballot access for candidates based on their political beliefs violate the Voters' rights to freedom of speech and freedom of association?
3. Can the State's interests in imposing a strict affiliation requirement against unaffiliated candidates be considered strong enough to justify burdening the Voters' First Amendment rights when the State allows political parties to set their own affiliation requirements?
4. Do the specific interests identified by the State to justify imposing a strict affiliation period apply to Representative Curry who is running for re-election to her fourth term of office?
5. Does the imposition of a strict affiliation period against unaffiliated candidates violate the Voters' right to equal protection of the laws when candidates of political parties have access to the ballot under a less restrictive regime?
6. Are the Voters entitled to a permanent injunction enjoining Secretary Buescher from enforcing the strict affiliation period against Representative Curry?

3. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a ballot access case involving the upcoming November 2, 2010 general election. Under the current version of § 1-4-802(1)(g), C.R.S., in order to be eligible to be placed in nomination for a partisan office by petition as an unaffiliated candidate, the person has to have been registered as unaffiliated at least twelve months before the last date the nominating petition is due. For the

November 2, 2010 general election, the period of required non-affiliation began on June 15, 2009.

Kathleen Curry, the incumbent State Representative for Colorado House District 61, is seeking re-election to that office. Representative Curry changed her affiliation from Democrat to unaffiliated on December 28, 2009. Thus, pursuant to the challenged statutory scheme, Representative Curry is not eligible to have her name placed on the ballot as an unaffiliated candidate.

The Voters sued Bernie Buescher, the Colorado Secretary of State, requesting a declaratory judgment that the statutory scheme is unconstitutional and for an injunction enjoining Secretary Buescher from enforcing the affiliation provision in § 1-4-802(1)(g) against Representative Curry as a basis to deny her access to the November 2, 2010 general election ballot.

Voters assert that the statutory scheme is unconstitutional because it violates their rights of freedom of speech and freedom of association as guaranteed by the First Amendment, as applied to the States through the Fourteenth Amendment, and violates their right to equal protection of the laws as guaranteed by the Fourteenth Amendment.

B. Course of Proceedings Below

On November 16, 2009, Joelle Riddle, Carol Blatnick, Wayne Buck, Mandy Mikulencak filed a Complaint for Declaratory and Injunctive Relief against Linda

Daley, in her official capacity as Clerk and Recorder of La Plata County, Colorado. *See* Complaint for Declaratory and Injunctive Relief (Docket # 1). In that Complaint, these plaintiffs challenged the constitutionality of § 1-4-802(1)(g), C.R.S.

On March 1, 2010 Joelle Riddle, Carol Blatnick, Wayne Buck and Mandy Mikulencak filed a Second Amended Complaint for Declaratory and Injunctive Relief against Linda Daley, in her official capacity as Clerk and Recorder of La Plata County, Colorado and against Bernie Buescher, in his official capacity as Secretary of State for the State of Colorado. (Aplt. App. pp. 39-66). Kathleen Curry, Richard Murdie, Linda Rees and Gary Hausler joined the suit as plaintiffs against defendant Secretary Buescher. *Id.*

In the Second Amended Complaint, the plaintiffs challenge the constitutionality of § 1-4-802(1)(g), C.R.S. The plaintiffs allege that the statute was unconstitutional both facially and as applied to their particular circumstances. The Voters sought injunctive relief enjoining Secretary Buescher from enforcing the affiliation provision in § 1-4-802(1)(g) against Representative Curry as a basis to deny her access to the November 2, 2010 general election ballot. Aplt. App. at 62-65.

On March 3, 2010, the plaintiffs filed a Motion for Summary Judgment on all of their claims. Aplt. App. at 67 - 181.

On April 2, 2010, pursuant to a minute order of the District Court (Docket No. 41), the parties submitted the following documents with the District Court: Joint Submission of Stipulated Facts (Aplt. App. at 182-94); Supplemental Brief of Defendant Colorado Secretary of State Buescher (Aplt. App. at 195-204); and Defendant Linda Daley's Supplemental Brief (Aplt. App. at 205-12). Plaintiffs filed their Plaintiffs' Amended Supplemental Brief on April 7. Aplt. App. at 213-223.

C. DISPOSITION BELOW

On June 23, 2010, the District Court issued its Opinion and Order Granting Judgment to Defendants. (Aplt. App. at 248-71). In that same Opinion and Order, the District Court denied Plaintiffs' Motion for Summary Judgment. *Id.* The District Court issued a Judgment that same date. Aplt. App. at 272. The Voters filed a timely Notice of Appeal with the Tenth Circuit Court of Appeals on June 25, 2010. (Aplt. App. at 273-74).

5. STATEMENT OF THE FACTS

The parties agreed to the following stipulated facts in a Joint Submission of Stipulated Facts ("Stipulated Facts"). Aplt. App. at 182-94. The cites to the Stipulated Facts below retain the original paragraph number as set forth in the stipulated Facts.

STIPULATED FACTS:

18. Kathleen Curry is the State Representative for Colorado State House District 61. Aplt. App. at 186.

19. The voters of State House District 61 first elected Representative Curry to a two-year term in the November 2, 2004 general election, casting 20,398 votes in her favor, representing 60.7% of the votes cast in that election. The voters of State House District 61 reelected Representative Curry to a second two-year term in the November 7, 2006 general election, casting all of the 20,733 votes that were cast for this office in her favor. The voters of State House District 61 re-elected Representative Curry to a third two-year term in the November 4, 2008 general election, casting all of the 28,012 votes that were cast for this office in her favor. *Id.*

20. Representative Curry was a member of the Democratic Party of Colorado when she was nominated and elected to the office of State Representative for Colorado State House District 61 in 2004, 2006 and 2008. The Speaker of the Colorado House designated her as speaker pro tem in 2009. She was also selected as chair of the House Agriculture Committee. *Id.*

21. Representative Curry changed her party affiliation on December 28, 2009 from Democrat to unaffiliated. *Id.*

22. Representative Curry desires and intends to run for re-election as State

Representative for Colorado State House District 61 as an unaffiliated candidate by utilizing the petition process set forth at § 1-4-802, C.R.S. *Id.* at 187.

23. At the time that she changed her registration from Democrat to unaffiliated, Representative Curry did so because she came to the conclusion that her political philosophy and beliefs were such that she did not want continue to be a member of the Democrat party or join any other political party. Representative Curry became increasingly disenchanted with party politics over a period of five years. For several years, the Democratic leadership of the State House of Representatives has not supported Representative Curry's attempt to establish a "rainy day" fund for fiscal emergencies. In the 2009 legislative session, Representative Curry and Democratic leaders clashed over three issues: (a) her efforts to establish a two-percent across-the-board budget cuts; (b) her desire to amend certain oil and gas regulations; and (3) fees imposed upon certain types of transportation. . . . In December, 2009, Representative Curry stated that she intended to introduce a health insurance mandate bill that would have established a moratorium on certain health mandates . Democratic leadership would not support this effort. In addition, the leadership suggested certain political strategies for the 2010 with which she disagreed. *Id.*

24. Representative Curry concluded that the goals political philosophy and beliefs of the Democratic leadership and the interests of her and her

constituents in her district had diverged. For example, she came to the conclusion that she had a different fiscal philosophy than that of the Democrat Party. She believed that her beliefs were out of step with those of the Democratic Party and that her beliefs “did not fit in” with those of the Party leadership. *Id.* at 149-50.

26. Since she changed her registration to unaffiliated, Representative Curry has not wanted to change her affiliation to become a member of any major or minor political party. Instead, since the time Representative Curry changed her registration to unaffiliated, Representative Curry has continued to want to be unaffiliated with any political party and run for re-election as State Representative as an independent candidate, unaffiliated with any political party. Representative Curry views her constituency as all residents of House District 61. *Id.* at 188.

27. [Appellant] Richard Murdie is registered as a member of the Democrat Party and is an eligible elector for Colorado State House District 61. Sheriff Murdie is the elected sheriff of Gunnison County, Colorado and is serving his sixth four-year term as sheriff. He has run as the Democratic candidate for sheriff in each of the elections. *Id.*

29. [Appellant] Linda Rees is registered as a member of the Republican Party and is an eligible elector for Colorado State House District 61. *Id.*

31. [Appellant] Gary Hausler is registered as an unaffiliated voter and is an eligible elector for Colorado State House District 61. *Id.*

Murdie, Rees and Hausler voted for Representative Curry in the 2004, 2006 and 2008 general elections and presently intend to vote for Representative Curry in the 2010 general election. *Id.* at 188-89 (Stipulated Facts at ¶¶ 28, 30, 33).

34. Defendant Bernie Buescher is the Secretary of State of the State of Colorado. Defendant Buescher is the designated election official for primary, general, congressional vacancy and statewide ballot issues and enforces provisions of the election code applicable to such offices. Secretary Buescher is the election official who would review Representative Curry's petition for compliance with application state election laws. *Id.* at 189.

38. Pursuant to section 1-4-802(1)(g), C.R.S. (2009), a person who seeks nomination as an unaffiliated candidate for the November 2, 2010 general election must have been registered as unaffiliated on or before June 15, 2009. *Id.* at 190.

39. Pursuant to section 1-4-603, C.R.S. (2009), candidates for major political party nominations state and county offices to be made at the primary election may be placed on the primary election ballot by petition. Pursuant to section 1-4-801(3), a person cannot be placed in nomination by petition on behalf of any political party unless the person has been affiliated with the party for at least twelve months prior to the date for the filing of the petition. Petitions for party candidates for the 2010 must be filed on or before June 15, 2010. Candidates who seek a party's nomination by petition must have been registered as a member of the

party by June 15, 2009. *Id.*

40. Pursuant to section 1-4-601(4)(a), C.R.S.(2009), a person is not eligible for nomination by party assembly unless the person has been registered as a member of the party holding the assembly for at least twelve months prior to the date of the assembly unless otherwise provided by party rules. *Id.* at 190-91.

41. There are currently two major political parties in Colorado: the Democratic Party of Colorado and the Colorado Republican Party. Under existing rules of the Democratic Party, a person is eligible for designation by assembly as a candidate on behalf of the Democratic Party if the person is registered as a Democrat 12 months prior to the General election. For the 2010 election, a person may be designated as a candidate by assembly of the Democratic Party if person was registered as a Democrat by November 2, 2009. *Id.* at 191.

42. On August 8, 2009, the 6th Senate District Vacancy Committee of the Democratic Party of Colorado selected Bruce Whitehead to serve out the term of Jim Isgar, a Democrat who resigned his senate seat. *Id.*

43. Senator Whitehead changed his registration to the Democratic Party on June 30, 2009. *Id.*

44. Bruce Whitehead has filed a Candidate Affidavit with the Colorado Secretary of State declaring the he is running for the office of state Senator, District # 6 as a member of the Democratic Party. *Id.*

45. Under existing Colorado Republican Party rules, a candidate may not be designated by assembly unless the candidate has affiliated with the Republican Party at least two months prior to the date of the caucus. *Id.*

47. There are currently three minor political parties in Colorado: the Green Party, the Libertarian Party of Colorado, and the American Constitution Party. Under Green Party rules, a candidate must be registered as a member of the Green Party for at least six months prior to the general election or for two months prior to the Green Party's nominating convention. . . . *Id.* at 192.

48. Pursuant to the constitution of the Libertarian Party, a candidate must have been member of the party for at least ninety days prior to the last day that the party can file its certificate of designation. . . . In addition, each candidate must sign a statement that he or she supports the Statements of Principle of the Libertarian Party. *Id.*

On May 12, 2010, the Colorado General Assembly passed HB 10-1271. Aplt. App. at 227-235.¹ HOB 10-1271 amends § 1-4-802(1)(g), C.R.S., to shorten the affiliation requirement for minor party candidates and unaffiliated seeking nomination by petition from “at least twelve months prior to the last date the petition may be filed” (June 15, 2009 for this election cycle) to “no later than the

¹ The Supplement Notification of Pending Legislation (Docket # 53; Aplt. App. at 227-235) left off the last page of HB 10-1271. A full version of HB 10-1271 is found in the Addendum at 40-43.

first business day of the January immediately preceding the general election for which the person desires to be placed in nomination.” HB 10-1271 at Section 5, codified at C.R.S. § 1-4-802(1)(g)(II). HOB 10-1271 also reduces the affiliation requirements for minor and major political parties candidates seeking nomination by petition to the first business day in January. *Id.* at Sections 3, 4 and 6. HB 10-1271 is effective for the 2012 general election. *Id.* at Section 7.

On May 27, 2010, the Governor of Colorado signed HB 10-1271. Aplt. App. at 238-47; Addendum at 42-45.

4. SUMMARY OF THE ARGUMENT

1. Imposing the more restrictive affiliation set forth in § 1-4-802(1)(g) to deny Representative Curry access to the general election ballot instead of the less restrictive affiliation requirement, which the General Assembly has legislatively judged to serve the State’s interests by passage of HB 10-1271, is unconstitutional because it would unfairly or unnecessarily burden the Voters’ First Amendment rights. By definition, is not necessary to burden individual rights when that State has decided that the an restriction on ballot access does not serve any State interest.

2. The affiliation provision of § 1-4-802(1)(g) is facially unconstitutional because it imposes a stricter affiliation requirement on unaffiliated candidates than the State imposes on candidates for political parties resulting in a regime under which ballot access can be determined by political beliefs. It is unconstitutional as

applied to Representative Curry since it denies her access to the ballot based on her political beliefs and philosophy

3. Colorado has adopted a statutory scheme that allows political parties to set their own affiliation rules. The parties have all enacted affiliation requirements that are more liberal than the State imposes on unaffiliated candidates. Thus, the strength of the State's interests in imposing a strict affiliation requirement against unaffiliated candidates is insufficient to justify burdening the Voters' First Amendment rights.

4. The affiliation requirement that § 1-4-802(1)(g) imposes on unaffiliated candidates is designed to accomplish the State's policy of promoting political stability and protecting the integrity of Colorado's political process. The specific State interests are either inapplicable to Representative Curry, who is seeking re-election to her fourth term as State Representative, having run unopposed in the last two elections, and/or not strong enough to justify burdening the Voters' First Amendment rights.

5. The harsh affiliation requirement that Colorado imposes on independent candidates discriminates against them because the State does not uniformly impose a similar restriction on candidates running under the banner of a political party. While the statute attempts to achieve the state's interest in promoting political stability and political integrity, that goal cannot be attained

when the affiliation requirements are significant different between different types of candidates.

6. The Votes are entitled to a permanent injunction against Secretary Buescher from enforcing the affiliation provision in § 1-4-802(1)(g) against Representative Curry as a basis to deny her access to the November 2, 2010 general election ballot since the Voters will suffer irreparable harm if Representative Curry is not placed on the ballot and placing her on the ballot will not adversely affect the public interest.

5. ARGUMENT

A. STANDARD OF REVIEW AND BURDEN OF PROOF

“[R]eview of a district court's grant or denial of summary judgment is *de novo*, applying the same legal standard employed by the district court.” *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006). Moreover, as is the case herein, if there is no genuine issue of material fact in dispute, the appellate court determines if the district court correctly applied the substantive law. *Sundance Assoc. Inc. v. Reno*, 139 F.3d 804, 807 (10th Cir. 1998).

The legal standard employed by the District Court is found in FED.R.CIV.P. 56, which provides, in pertinent part, that a court may grant summary judgment where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Equal Employment Opportunity Comm. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). When applying this standard, courts must “examine the factual record and reasonable inferences therefrom in the light most favorable to . . . the party opposing summary judgment.” *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994).

The Voters have the burden of proving that §1-4-802(1)(g) is facially unconstitutional, *i.e.*, unconstitutional in all of its applications. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 1190 (2008).

An "as applied" challenge asserts that the statute is unconstitutional as applied to a particular plaintiff's activity, even though the statute may be valid as applied to other parties. An "as applied" challenge is subject to a case-by-case analysis to determine whether the statute as applied to the facts of the case abridges the First Amendment. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 647 (3rd Cir. 2003).

**B. SECTION 1-4-802(1)(G), C.R.S., VIOLATES THE PLAINTIFFS’
RIGHT TO FREEDOM OF SPEECH AND ASSOCIATION AS
GUARANTEED BY THE FOURTEENTH AND FIRST AMENDMENTS**

**i) THE LEGAL FRAMEWORK FOR ANALYZING THE
CONSTITUTIONALITY OF ELECTION LAWS UNDER THE
FIRST AMENDMENT**

This section of the Brief will (1) outline the legal framework for analyzing this ballot access case; (2) set forth the magnitude and character of the injuries to the Voters’ constitutionally protected interests cause by the affiliation requirement; and (3) identify the interests put forward by the State as justifications for the burden imposed by the affiliation requirement.

In *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the Supreme Court, noting that there was no “litmus paper test” to resolve constitutional challenges to specific provisions of state election laws, promulgated the following analytical framework for determining the constitutionality of state election laws and procedures:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then 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.

This test has been adopted by the Tenth Circuit. *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988).

If the burden on the plaintiff's rights is severe then the requirement needs to be "narrowly drawn to advance a state interest of compelling importance." *Burkick v. Takushi*, 504 U.S. 428, 434 (1992), quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992).

"[T]he State's important regulatory interests are generally sufficient to justify reasonable, **nondiscriminatory** restrictions." *Anderson*, 460 U.S. at 789 (emphasis supplied). The Court noted that it has "upheld **generally applicable and evenhanded restrictions** that protect the integrity and reliability of the electoral process itself." *Id.* at 789, n. 9 (emphasis supplied).

"The watchwords in balancing the state's interest against the interests of the citizen are whether the means adopted 'unfairly or unnecessarily' burden the citizens' political opportunity." *Baer v. Meyer*, 728 F.2d 471, 474 (10th Cir. 1984), quoting *Anderson*, 460 U.S. at 794.

At the conclusion of its analysis of the Ohio ballot access law that it struck down as being violative of the voters' freedom of choice and freedom of association rights, the *Anderson* Court, quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973), held that:

For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.

Dunn v. Blumstein, 405 U.S. [330,] 343 [(1970)]. “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NCAAP v. Button*, 371 U.S. [415], 438 [(1963)]. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

460 U.S. at 806.

In this case, the Voters’ injury is the denial of ballot access to Representative Curry based upon her change of affiliation from Democrat to unaffiliated in December 2009. The character and magnitude of that injury is significant.

In *Lubin v. Panish*, 415 U.S. 709, 715-16 (1973), an equal protection challenge to a filing fee requirement for ballot access,² the Supreme Court recognized the state’s legitimate interest in having a reasonably sized ballot limited to serious candidates with some prospects of public support. The Court, however, also recognized that this state interest “must be achieved by a means that does not unfairly or unnecessarily burden either a minority party’s or an individual candidate’s equally important interest in the continued availability of political activity.” *Id.* at 716. The Court also recognized that the rights of voters are implicated in balancing these interests. *Id.*

² The analysis set forth in equal protection jurisprudence challenging ballot access laws is applicable in determining the constitutionality of restrictions on the eligibility of voters and candidates under the First Amendment. *Anderson*, 680 U.S. at 786, n. 7.

Similarly, persons such as the Voters, who want to either run for political office as an unaffiliated candidate or vote for an unaffiliated candidate who changes affiliation closer to the general election than allowed by § 1-4-802(1)(g) have an interest in “the continued availability of political opportunity.” *Lubin*, 425 U.S. at 716.

“By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.” *Anderson*, 460 U.S. at 794.

Finally, as the *Anderson* Court held, “[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.” *Anderson*, 460 U.S. at 794.

In sum, the character and magnitude of the Voters’ asserted injury to their First Amendments rights include the continued availability of political opportunity, promoting the diversity and competition in the marketplace of ideas and preventing the impingement upon the Voters’ associational rights.

The State of Colorado instituted the affiliation statute, C.R.S. § 1-4-802(1)(g), specifically to prevent partisan candidates from entering races as unaffiliated candidates in order to circumvent the party primary process or to bleed

off votes from another candidate, and as part of a more general statewide policy intended to promote political stability and protect the integrity of Colorado's political process. Aplt. App at 193 (Stipulated Facts at ¶ 50).

Colorado intends the affiliation statute to serve the state's general interests articulated in Paragraph 50 of the Joint Stipulation, by thwarting frivolous or fraudulent candidates, avoiding voter confusion, preventing the clogging of election machinery required to administer an election, maintaining the integrity of the various routes to the ballot (i.e., preventing a potential candidate defeated in a primary from petitioning onto the ballot, thereby defeating the purpose of the primary system), presenting the people with understandable choices between candidates who have not previously competed against one another in a primary, refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot, working against independent candidacies prompted by short-range political goals, pique, or personal quarrel, providing a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party, ensuring that voters are not presented with a laundry list of candidates who have decided on the eve of a major election to seek public office, reserving the general election ballot for major struggles and not allowing it to be used as a forum for continuing intraparty feuds, and limiting the names on the ballot to those who

have won the primaries and those independents who have properly qualified. *Id.* at 194-95 (Stipulated Facts at ¶ 51).

As set forth below, there are a number reasons why the legitimacy and strength of the interests asserted by Colorado to justify denying ballot access to any unaffiliated candidate who fails to meet the affiliation requirements of § 1-4-802(1)(g), and with respect to Representative Curry in particular, are constitutionally insufficient to make it necessary to burden the rights of the Voters by denying Representative Curry a place on the ballot.³

ii) HAVING DETERMINED THAT THE LESS BURDENSOME AFFILIATION REQUIREMENTS IN HB 10-1271 SERVES THE STATE INTERESTS IN REGULATION ELECTIONS HELD IN 2012, IMPOSING THE MORE BURDENSOME AFFILIATION REQUIREMENT UNDER THE CURRENT ITERATION OF § 1-4-802(1)(G) AGAINST REPRESENTATIVE CURRY IN THE 2010 GENERAL ELECTION DOES NOT PASS CONSTITUTIONAL MUSTER

HB 10-1271 amends § 1-4-802(1)(g), C.R.S., to shorten the affiliation requirement for minor party and unaffiliated candidates seeking nomination by

³ In the Opinion and Order, the District Court held that the Voters did not make a facial challenge to the constitutionality of § 1-4-802(1)(g) with respect to the freedom of speech and association claims based on the Court's finding that "the Plaintiffs only offered the application of the statute to themselves as evidence of unconstitutionality." Opinion and Order at 19, n. 18 (Aplt. App. at 266). This finding is not supported by the text of the Plaintiffs Motion for Summary Judgment in which the Voters make the argument that the statute is facially unconstitutional as asserted as their Fourth Cause of Action in the Second Amended Complaint. *See* Aplt. App. at 115-118 and the incorporation of the analysis regarding the facially unconstitutionality of the statute (*id.* at 117) with respect to the equal protection argument found at Aplt. App. at 91-108.

petition from “at least twelve months prior to the last date the petition may be filed” (June 15, 2009 for this election) to “no later than the first business day of the January.” HB 10-1271 at Section 5. Addendum at 42.

As set forth above, part of the test for determining the constitutionality of election laws and procedures is to identify and evaluate the legitimacy and strength of the interests put forward by the State as justification for the burden imposed by its rule and to “consider the extent to which those interests make it necessary to burden the plaintiff's rights.” *Anderson*, 460 U.S. at 789. The state must use a “less drastic way” of serving state interests if one is available. *Anderson*, 460 U.S. at 806, citing *Kusper*, 414 U.S. at 58-59.

The General Assembly’s passage of HB 10-1271 acknowledges that the less burdensome affiliation period contained therein serves the “general statewide policy intended to promote political stability and protect the integrity of Colorado’s political process.” Aplt. App. at 193 (Stipulated Facts at ¶ 50). Passage of HB 10-1271 establishes that the state has an available and less drastic way of serving its asserted state interests that makes it unnecessary to burden the Voters’ rights to the extent that § 1-4-802(1)(g), C.R.S., currently does.

While HB 10-1271 does not become effective until the 2012 general election, there is no reasonable or rational basis to conclude that the less burdensome affiliation requirement in HB 10-1271 that the General Assembly has

concluded will serve the state interests in promoting political stability and protecting the integrity of Colorado's political process starting in 2012 but somehow the more burdensome affiliation requirement under the current iteration of § 1-4-802(1)(g) is a necessary and reasonable burden to impose on Voters' rights in order to serve the same state interests in the 2010 general election.

Because Representative Curry meets the less burdensome requirement the General Assembly approved in HB 10-1271, the affiliation requirement contained in § 1-4-802(1)(g) is unconstitutional as applied to her.

The Voters raised this issue below (Supplemental Authority; Aplt. App. 236-37) and the District Court this issue in its Opinion and Order. Aplt. App. at 269-71. The District Court held that it was the General Assembly's decision whether to apply the less restrictive affiliation requirement to the 2010 election, and not that of the District Court's. Aplt. App. at 270. While it is true that courts must defer to legislative judgment, such deference is not absolute and if a ballot access statute violates the constitutional rights of voters and candidates, the courts have a duty to strike it down as the Supreme Court did in *Anderson*. While the District Court is correct in that it cannot substitute its judgment for that of the General Assembly, in this case the General Assembly has already made a legislative judgment that the less restrictive affiliation period serves the State's interests of promoting political stability and protecting the integrity of Colorado's

election process. The judicial system now plays a vital role under *Anderson* to decide whether, in light of the General Assembly's May 2010 judgment in the form of HB 10-1271 that the States' interests are protected under a less restrictive affiliation period, the Voters' rights should be circumscribed by imposing a more burdensome requirement that would preclude Representative Curry from having her name placed on the ballot for re-election in the 2010 general election.

The District Court cites to *Rainbow Coalition, supra*, for the proposition that strict scrutiny test does not apply in ballot access cases and, therefore, Colorado is not obligated to use the less restrictive affiliation period that the General Assembly has judged to be sufficient to serve the State's interests. Opinion and Order at 23, n. 21 (Aplt. App. at 270). The District Court's analysis is in error for two reasons.

First, in *Rainbow Coalition*, the Tenth Circuit adopted the balancing test set forth in *Anderson*. 844 F.2d at 743. Under *Anderson*, in order to escape strict scrutiny, the restrictions imposed by state election law must be "nondiscriminatory" and "evenhanded." *Anderson*, 420 U.S. at 789 and at n. 9. In *Anderson*, the Court found that the state election laws unfairly impinged upon unaffiliated candidates and therefore found the challenged election law to be unconstitutional because Ohio did not use the less restrictive means available to it to serve the state interests the law was meant to protect. *Id.* at 806.

For this same reason, the District Court's reliance on *Storer v. Brown*, 415 U.S. 724 (1974), is misplaced.⁴ Opinion and Order at 23-24 (Aplt. App. at 270-71). In *Storer*, candidates were seeking to run for office as independents and their supporters challenged a California election code provision that required a person to terminate his affiliation with a political party twelve months before he can be a candidate for another political party or run as an independent candidate. The challenged affiliation provision applied more or less equally to candidates seeking the nomination of political parties and to unaffiliated or independent candidates. 415 U.S. 733-34.

In fact, the *Storer* Court specifically noted that the affiliation requirement was essentially the same for both independent candidates and candidates of political parties:

The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. *It involves no discrimination against independents.*

415 U.S. at 733 (emphasis supplied.).

In this case, Colorado has imposed affiliation requirements on unaffiliated candidates that are more strict than those imposed on candidates of major and

⁴ Similarly, *Thournir v. Meyer*, 909 F.2d 408 (10th Cir. 1990) is inapposite as it involved a challenge to the affiliation requirements applicable in the 1980 general election and the affiliation requirements at that time for independent candidates and candidates for political parties were essentially the same at that time.

minor political parties. Political parties can set their own affiliation rules for their candidates. § 1-4-601(4)(a), C.R.S. Because the election regulation at issue in this case is discriminatory against unaffiliated candidates and not evenhanded as in *Storer*, the State is required under *Anderson* to use a less restrictive means to achieve its State interests by applying the affiliation requirements the General Assembly approved in HB 10-1271.

Second, even if strict scrutiny does not apply in this case, because the General Assembly has decided that the less restrictive affiliation requirement serves the State's interests, there is no rational or reasonable basis for Colorado to impose the more restrictive affiliation requirement in the 2010 election and the less restrictive requirement in all elections going forward. Because the same state interests present for the 2010 election will be present in 2012, *viz.*, promoting political stability and protecting the integrity of Colorado's political process, there is no reasonable justification to impose the more restrictive affiliation requirement for the 2010 election.

The *Anderson* balancing test between the Voters' rights and the State's interests weighs heavily in favor of the Voters since the State's interests will be served no matter which affiliation period is applied to the 2010 general election while applying the more restrictive affiliation since it will cause injury to the Voters' freedom of choice and freedom of association rights protected by the First

Amendment. Imposing the more restrictive affiliation to deny Representative Curry access to the ballot where the General Assembly has decided that the less restrictive requirement serves the State's interests is unconstitutional because it would " 'unfairly or unnecessarily' burden the citizens' political opportunity."

Baer v. Meyer, 728 F.2d at 474 , quoting *Anderson*, 460 U.S. at 794. *See also*:

Opinion and Order at 20 (Aplt. App. at 267) (recognizing the "[t]he Court's role is only to determine whether the line drawn by the Colorado Assembly unreasonably and unnecessarily burdens the rights of persons like the plaintiffs).

iii) A STATUTORY SCHEME THAT MAKES IT MORE DIFFICULT TO GAIN BALLOT ACCESS FOR CANDIDATES BASED ON THEIR POLITICAL BELIEFS VIOLATES THE VOTERS' RIGHTS TO FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

Colorado's statutory scheme involving affiliation requirements violates the Voters' First Amendment rights of freedom of speech and freedom of association because a candidate whose political beliefs lead him to become unaffiliated with any political party faces a more restrictive path to the ballot.

Representative Curry changed her registration from Democrat to unaffiliated on December 28, 2009 because she concluded that her political philosophy and beliefs were such that she did not want to continue to be a member of the Democratic Party or join any other political party. Aplt. App. at 187-88. (Stipulated Facts at ¶¶ 23-24). As set forth in the Stipulated Facts:

Representative Curry concluded that the goals, political philosophy and beliefs of the Democratic leadership and the interests of her and her constituents in her district had diverged. For example, she concluded that she had a different fiscal philosophy than that of the Democrat Party. She believed that her beliefs were out of step with those of the Democratic Party and that her beliefs ‘did not fit in’ with those of the Party leadership. She also believed that she could not in good conscience maintain her roles as speaker pro tem and chair of the House Agriculture Committee and accept contributions as a Democrat and accept the benefits of being in the majority party when she could not fully support the Democratic leadership.

Aplt. App. at 187-88 (Stipulated Facts at ¶ 24).

Since the time she became unaffiliated, Representative Curry has not wanted to change her affiliation to any political party and wants to run for re-election as an unaffiliated candidate. *Id.* at 188 (Stipulated Facts at ¶ 26).

If Representative Curry believed in the political philosophy and beliefs of any of the other political parties she could have changed her affiliation to that party, or remained a Democrat, and would have been eligible to have her name placed on the ballot. She would have been eligible to be on the ballot if she had changed her affiliation from Democrat to Republican, Libertarian or Green Party instead of unaffiliated on December 28, 2009. Aplt. App. at 191-92 (Stipulated Facts at ¶¶ 45-48).

The candidacy of Bruce Whitehead for Colorado Senate District 6 provides an example of how a candidate’s political beliefs dictate whether he will eligible to have his name placed on the ballot under Colorado’s statutory scheme. Bruce

Whitehead changed his affiliation to Democrat in July 2009, after the statutory deadline for unaffiliated candidates. Aplt. App. at 191 (Stipulated Facts at ¶¶ 43). He was appointed to fill the vacancy in the 6th Senate District in August 2009 and intends to run to be elected as the State Senator for the 6th Senate District. *Id.* at 191 (Stipulated Facts at ¶¶ 42 and 44). Both Senator Whitehead and Representative Curry changed their affiliation after the deadline set forth in § 1-4-802(1)(g). The only reason that Senator Whitehead can have his name on the ballot to run for election to the seat to which he was appointed is that he opted to change his registration to Democrat. In stark contrast, Representative Curry cannot run for re-election to her fourth term in office because she decided to change from Democrat to unaffiliated.

A statutory scheme that imposes an affiliation requirement on unaffiliated candidates without an “evenhanded” requirement for political party candidates impermissibly impinges upon the First Amendment rights of the candidates and their supporters based on the candidate’s political beliefs. If after the affiliation period passes, a person decides that he no longer believes in the political platform, philosophy and/or policies of a political party and chooses to disaffiliate themselves from that party and, based on their political beliefs, he does not want to join another party, he will be not have access to the ballot. However, another person who no longer believes in the political platform, philosophy and/or policies

of a political party and chooses to disaffiliate themselves from that party after the affiliation period for unaffiliated candidates has passed and, based on her political beliefs, joins another party, she will have access to the ballot. In fact, a person can change political parties after the affiliation period for unaffiliated candidates has passed not based on any ideological basis, but merely for political expediency, and have access to the ballot.

If the affiliation requirements were somewhat similar for all candidates, “evenhanded” in the words of the *Anderson* Court, regardless of political affiliation, then the requirements would be content neutral and pass constitutional muster; Colorado’s statutory scheme fails this test.

It is axiomatic that ballot access restrictions that discriminate based upon the political beliefs of a candidate violates their right to freedom of speech and freedom of association. *Anderson*, 460 U.S. at 792-93 (holding, after finding that an early filing deadline placed a particular burden on “*an identifiable segment of Ohio's independent-minded voters*,” that “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status”).

The Supreme Court has consistently held that making ballot access dependent or less burdensome based on party affiliation is unconstitutional. For

example, in *Bullock v. Carter*, 405 U.S. 134, 145 (1972), candidates could avoid the challenged filing fee assessed against political party candidates seeking to run in a political party primary election by opting to access the general election ballot by petition as an unaffiliated candidate. The Court held that “we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees.” *Id.* at 145-46.

Similarly, it is not a reasonable alternative for a candidate who wants to be unaffiliated with any political party to retain their party affiliations or change their affiliation to another political party to avoid the affiliation requirement that the State imposes on unaffiliated candidates. *See also, Storer*, 415 U.S. at 745 (finding that forcing an unaffiliated candidate or voter to form or join a new political party and sacrifice their independent status was not a constitutionally acceptable substitute for avoiding the 1% signature requirement for ballot access for independent candidates).

The District Court recognizes that the “drawback to any objective standard is its inherent inflexibility.” Opinion and Order at 21 (Aplt. App. at 268). The District Court also recognizes that placing “uniform temporal limitation on changes in affiliation avoids inquiring into the particular motivations of each candidate, which, in turn could unduly entangling [sic] the State in assessments of

a candidate's constitutionally-protected political views or speech.” *Id.* at n. 20 (Aplt. App. at 268).

The District Court, however, fails to acknowledge that Colorado does not employ one objective standard to determine ballot access through a uniform affiliation requirement. Rather, there is an objective standard for unaffiliated candidates while political parties may set their own rules. The requirement that applies in a particular case depends on the candidate's political beliefs, an area that “unduly entangles the State” in determining ballot access based upon what the District Court recognizes to be “a candidate's constitutionally-protected political views or speech.”

Thus, the affiliation provision of § 1-4-802(1)(g) is facially unconstitutional because it imposes a stricter affiliation requirement on unaffiliated candidates, thereby limiting their ballot access, than the State imposes on candidates for political parties resulting in a regime under which ballot access can be determined by political beliefs. It is unconstitutional as applied to Representative Curry since it denies her access to the ballot based on her political beliefs and philosophy.

iv) THE STATE’S INTERESTS IN IMPOSING A STRICT AFFILIATION REQUIREMENT AGAINST UNAFFILIATED CANDIDATES CANNOT BE CONSIDERED STRONG ENOUGH TO JUSTIFY BURDENING THE VOTERS’ FIRST AMENDMENT RIGHTS WHEN THE STATE ALLOWS POLITICAL PARTIES TO SET THEIR OWN AFFILIATION REQUIREMENTS

The fact that that the statutory scheme adopted by Colorado allows political parties to set their own affiliation rules belies any suggestion by Secretary Buescher that the strength of the State’s interest in imposing a strict affiliation requirement against unaffiliated candidates justifies burdening the Voters’ First Amendment rights.

Secretary Buescher has stated that the affiliation provision imposed against unaffiliated candidates is “part of a more general statewide policy intended to promote political stability and protect the integrity of Colorado’s political process.” Aplt. App. at 193 (Stipulated Facts at ¶ 50). An affiliation requirement that is uniformly applied to unaffiliated candidates but is not applied uniformly to all political party candidates cannot, by definition, be a “general statewide policy.” Moreover, it is difficult to understand how such an uneven requirement can “promote political stability” or “protect political integrity” when significantly different rules governing ballot access apply to different types of candidates.

For example, one of the State’s purported interests is discouraging "independent candidacies prompted by short-range political goals, pique, or

personal quarrel." Aplt. App. at 193 (Stipulated Facts at ¶ 51). Under Colorado's statutory scheme, a member of a political party, "prompted by short-range political goals, pique, or personal quarrel" may disaffiliate from one party and affiliate with another party after the statutory affiliation period that applies to unaffiliated candidates and still be eligible to run in her new party's primary election. Such a system does not promote political stability or protect political integrity.

Another identified State interest is "refusing to recognize independent candidates who do not make early plans to leave the party and take the alternative course to the ballot." Aplt. App. at 193 (Stipulated Facts at ¶ 51). Again, because political party candidates do not face the same affiliation requirement, a political party candidate may change parties after the deadline that applies to unaffiliated candidates and be eligible to be placed on the ballot even though he did not make early plans to leave one party and join another party. The case of Senator Bruce Whitehead illustrates this point. *See* pp. 29-30, *supra*.

Given the authority to impose their own affiliation rules, political parties have uniformly set affiliation requirements that are much more liberal than that imposed by the state on unaffiliated candidates. Aplt. App. at 191-93 (Stipulated Facts at ¶¶ 41; 45-49). If the political parties believed that a strict affiliation period promoted political stability and protected the integrity of Colorado's political process, goals that inherently serve the interests of political parties, the parties

would have enacted affiliation requirements at least as strong of those the State imposes on unaffiliated candidates.

Since political parties are the targeted beneficiary of the so-called general statewide policy, their uniform decision to implement less restrictive affiliation periods is the best evidence that the severe restrictions imposed on unaffiliated candidates does not promote political stability or protect the integrity of Colorado's political process or, at the very least, that the strength of these interests are outweighed by the burden the affiliation requirement imposes on unaffiliated candidates. *Anderson*, 460 U.S. at 789 (holding that when passing judgment on the constitutionality of state election law provisions, court must determine the strength of the State's interests and "must consider the extent to which those interests make it necessary to burden the plaintiff's rights").

**v) THE AFFILIATION REQUIREMENT DOES NOT SERVE THE
STATE'S INTERESTS AS APPLIED TO REPRESENTATIVE CURRY
WHO IS RUNNING FOR RE-ELECTION TO HER FOURTH TERM OF
OFFICE**

The specific State interests the affiliation requirement supposedly serve are either inapplicable to Representative Curry, who is seeking re-election to her fourth term as State Representative, having run unopposed in the last two elections, and/or not strong enough to justify burdening the Voters' First Amendment rights.

Many of the state interests set forth in the Stipulated Facts are simply inapplicable to Representative Curry, who is seeking re-election to her fourth term as State Representative, having run unopposed in the last two elections. The specific interests, as set forth in Aplt. App. at 193, include: preventing partisan candidates from entering races as unaffiliated candidates in order to circumvent the party primary process or to bleed off votes from another candidate; thwarting frivolous or fraudulent candidates; avoiding voter confusion; preventing the clogging of election machinery required to administer an election; maintaining the integrity of the various routes to the ballot (*i.e.*, preventing a potential candidate defeated in a primary from petitioning onto the ballot, thereby defeating the purpose of the primary system); presenting the people with understandable choices between candidates who have not previously competed against one another in a primary; working against independent candidacies prompted by short-range political goals, pique or personal quarrel; providing a substantial barrier to a party fielding an “independent” candidate to capture and bleed off votes in the general election that might well go to another party; ensuring that voters are not presented with a laundry list of candidates who have decided on the eve of a major election to seek public office; and reserving the general election ballot for major struggles and not allowing it to be used as a forum for continuing intraparty feuds.

None of these interests is served by imposing the strict affiliation requirement against Representative Curry. When she changed her affiliation from Democrat to unaffiliated, she was in her third term of office, held a leadership position in the General Assembly and had run unopposed by any candidate in the past two elections. Aplt. App. at 186-88 (Stipulated Facts at ¶¶ 18-21). Her motivation for changing to unaffiliated was based on her political beliefs. *Id.* at 187-88 (Stipulated Facts at ¶¶ 23-24; 26). Thus, she did not change her affiliation to circumvent the party primary process or to bleed off votes from another candidate.

Having been elected three times, the last two times unopposed, Representative Curry is not a frivolous or fraudulent candidate. Her candidacy will not confuse the voters of House District 61 as she runs for re-election to her fourth term of office. A candidacy for re-election cannot be considered a contributing to the “clogging of election machinery required to administer an election.”

Keeping Representative Curry off the ballot will not function to maintain the integrity of the various routes to the ballot (*i.e.*, preventing a potential candidate defeated in a primary from petitioning onto the ballot, thereby defeating the purpose of the primary system), because she did not participate in the Democrat primary.

Her candidacy for re-election to her fourth term of office cannot be characterized as being prompted by short-range political goals, pique or personal quarrel. There is nothing short-range associated with running for re-election for a fourth term of office. Representative Curry's political beliefs caused her to decide to change affiliation, not pique or personal quarrel. Aplt. App. at 187-88 (Stipulated Facts at ¶ 23-24).

Placing Representative Curry on the ballot will present the people with understandable choices between candidates who have not previously competed against one another in a primary.

Representative Curry is seeking re-election to her fourth term of office. She cannot be characterized as part of "a laundry list of candidates who have decided on the eve of a major election to seek public office."

Representative Curry left the Democratic Party because she felt that "her beliefs were out of step with those of the Democrat Party and that her beliefs did not fit in with those of Party leadership." Aplt. App. at 187 (Stipulated Facts at ¶ 24). Her candidacy in the general election ballot is part of the major struggles for which general elections are reserved and is not being used as a forum for continuing intraparty feuds.

The two remaining specific State interests are not legitimate and/or strong enough to justify burdening the Voters' First Amendment rights.

The first remaining State interest “is refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot.” This language is taken from the *Storer* decision, 415 U.S. at 735, and is in reference to the statutory affiliation provision that applied to independent candidates. In *Storer*, unlike the present case, there was a similar affiliation provision also applied to members of the political parties. Because the plaintiffs in *Storer* were independent candidates, the *Storer* Court cited to that statute applicable to independents as well as the state’s interest vis-à-vis independent candidates. The state of Colorado cannot credibly assert that it has a strong State interest in refusing to recognize independent candidates who do not make early plans to leave a party while at the same time enacting a statutory scheme that empowers other candidates who do not make early plans to leave a party and take an alternative route to the ballot to switch political parties and run under the banner of a different political party.

The remaining State interest is “limiting the names on the ballot to those who have won the primaries and those independents who have properly qualified.” This purported interest is circular in nature since it merely reiterates that the State has an interest in assuring that candidates follow its ballot access qualification requirements. In this case, since one of those requirements is unconstitutional, the state has no interest in ensuring its enforcement. For example, if one requirement

for being placed on the ballot was paying an unconstitutionally large filing fee, as in *Bullock, supra*, asserting that the intended result of the State interest was “limiting the names on the ballot to those who have won the primaries and those independents who have properly qualified” could not be used as a justification for burdening a candidate’s First Amendment rights who did not have the financial resources to pay the fee to get on the ballot.

Moreover, alternative, less restrictive methods can serve many of the interests identified by the State. *See Anderson*, 460 U.S. at 806 (state must use a less drastic way of serving state interests if one is available); *Bullock*, 405 U.S. at 146 (striking down filing fee requirement that Texas justified as violation of equal protection clause that was purported to serve the state’s interest to ensure the seriousness of a candidate because, *inter alia*, “other means to protect those valid interests are available”).

Imposing signature requirements for petitioning onto the ballot is the obvious way to: thwart fraudulent or frivolous candidates; avoid vote confusion; prevent the clogging of election machinery; prevent partisan candidates from entering races as unaffiliated candidates to bleed off voters from another candidate; ensuring that voters are not presented with a laundry list of candidates who have decided on the eve of a major election to seek public office. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (holding that the requirement on minor political

parties to obtain the signatures of 5% of the number of persons who were eligible to vote at the last election for the office he is seeking an acceptable method to show that the party had sufficient support to justify a position on the ballot); *Lubin*, 415 U.S. at 718 (rejecting a filing fee requirement justified as a means of testing the “seriousness” of a candidate, holding that the “obvious and well-known means of testing the ‘seriousness’ of a candidate” include imposing a signature requirement for petitions for minor political parties to secure a place on the ballot); and *Swanson v. Worley*, 490 F.3d 894 (11th Cir.2007) (upholding Alabama’s requirement that petitions include the signatures of at least three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, city, district, or other political subdivision in which the political party seeks to qualify candidates for office); *Rainbow Coalition, supra*, (upholding requirement that political party obtain signatures from at least 5% of the number of voters from the last election to demonstrate sufficient support to be placed on the ballot).

Colorado has imposed such requirements on unaffiliated candidates who have to obtain ballot access through the petition process. *See* § 1-4-802(c), C.R.S. (imposing a sliding scale on the number of signatures needed based on the office sought).

In addition, Colorado already has in place a statutory scheme that serves the state's interests in: preventing persons running for office changing affiliation from a party to unaffiliated who are "prompted by short-range political goals, pique, or personal quarrel;" having general elections being used as a forum for continuing intraparty feuding; and for maintaining the integrity of the various routes to the ballot (i.e., preventing a potential candidate defeated in a primary from petitioning onto the ballot, thereby defeating the purpose of the primary system. See *Aplt. App.* at 193 (Stipulated Facts at ¶¶ 50-51).

In *Storer*, the Court recognized that one acceptable method to prevent intraparty feuding from spilling over into the general election is the adoption of a "sore loser" statute that prevents someone who loses a primary from running as an independent in the general election. 415 U.S. at 735. While Colorado does not have a sore loser statute *per se*, its primary election date is statutorily set for the second Tuesday in August. § 1-4-101(1), C.R.S. Because the deadline for filing a petition to run as an unaffiliated candidate under HB 10-1271 is the first business day of the year in which the election is held, a candidate cannot lose a party primary and then file to run as an unaffiliated candidate. Thus, because a less restrictive alternative is available to serve this state interest, Colorado must use that alternative and not the discriminatory requirement that is currently imposed only on persons seeking to run as unaffiliated candidates. *Anderson*, 460 U.S. at 806

In sum, all of the interests identified by the State do not apply to Representative Curry and/or can be served by less drastic methods that Courts have consistently recognized as being viable options to constitutionally infirm restrictions.

C) THE IMPOSITION OF THE STRICT AFFILIATION REQUIREMENTS SET FORTH IN SECTION 1-4-802(1)(G), C.R.S., VIOLATES THE VOTERS' RIGHT TO EQUAL PROTECTION UNDER THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT BECAUSE CANDIDATES OF POLITICAL PARTIES HAVE ACCESS TO THE BALLOT UNDER A LESS RESTRICTIVE REGIME

i) Legal standard for an equal protection analysis in ballot access cases

In the context of ballot access cases, the Supreme Court has set forth the following test to determine whether a challenged statute violates the equal protection clause of the Fourteenth Amendment:

In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

Williams v. Rhodes, 393 U.S. 23, 30 (1968).

This section of the Brief will first provide the facts and circumstances behind Colorado's statutory scheme of imposing affiliation requirements. Having already identified the interests which the State claims to be protecting and the interests of Voters who are disadvantaged by the classification, 20-21, *supra*, the

Brief will demonstrate that the State has selected a means to protect its interests that unfairly and unnecessarily burdens Representative Curry's equally important interest in the continued availability of political activity and that the affiliation requirement imposed on unaffiliated candidates is not precisely fashioned to meet the applicable state interest.

Before analyzing the equal protection issue in detail, it is necessary to address an assertion in the District Court's Opinion and Order, in which the District Court states that the Voters "did not clearly identify the 'similarly-situated' person or group that they contend receives more favorable treatment." Opinion and Order at 8 (Aplt. App. at 245). The District Court's statement is in error. In Plaintiffs' Motion for Summary Judgment, the Voters assert that "[t]he harsh disaffiliation requirement the state imposes on independent candidates that the state cannot impose on political party candidates discriminates invidiously against independent candidates." Aplt. App. at 93 (Plaintiffs' Motion for Summary Judgment at 27). The Voters also asserted that "In Colorado, persons seeking to run as unaffiliated candidates face harsher restrictions than those seeking to run under the banner of a political party." *Id.* at 95. The Voters also argued that "[i]n essence, having a disaffiliation statute imposed on unaffiliated candidates without a concomitant requirement for political party candidates impermissibly discriminates against independent candidates based on their political beliefs." *Id.* at 96. In

concluding their equal protection argument, the Voters asserted that “Because unaffiliated candidates cannot enjoy the benefits of the lenient affiliation requirements that political parties have adopted, pursuant to statute, to benefit their candidates, Plaintiffs are not afforded equal protection of the laws under Colorado’s statutory scheme.” *Id.* at 107-08. Thus, the Voters clearly stated that the similarly situated group that they contend receives more favorable treatment than unaffiliated candidates is political party candidates.

ii) The facts and circumstances behind Colorado’s statutory scheme regulating ballot access through affiliation requirements

In 1980, the Colorado Assembly repealed and re-enacted its statutory scheme involving elections, § 1-1-101, *et seq.*, C.R.S. As re-enacted, §§ 1-4-601(4), 1-4-603(5), and 1-4-801(1)(i), C.R.S. (1980), provided that in order to be qualified to be designated by assembly or by petition as a candidate for primary election for a major political party, or to be an unaffiliated candidate, a person had to have been affiliated with the major political party for twelve months before the date of the assembly or before the date their petition was due. *See Colo. Sess. Laws 1980, ch. 43, p. 326, 328, 330.*

On May 2, 1988, the Denver District Court, in a case styled *Colorado Democratic Party and Buie Seawell, State Chair of the Colorado Democratic Party v. Natalie Meyer, Secretary of State of Colorado*, Denver District Court,

Civil Action 88 CV 7646 (“*Seawell*”), citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), held that “only the Colorado Democratic Party has the right to determine who may be a candidate for public office under the banner of the Colorado Democratic Party within certain restrictions, of course.” Aplt. App. at 33. In *Tashjian* the Supreme Court held that the state of Connecticut could not bar the Republican Party from allowing unaffiliated voters to vote in the Republican primary elections.

Seawell involved a candidate who was seeking to be nominated by assembly in a congressional race. Aplt. App. at 15-20. On May 29, 1988, based on the decision in *Seawell*, the General Assembly amended § 1-4-601(4), C.R.S by adding subparagraph (b), which provided that if a political party has established its own affiliation rule for designation by assembly for primary election “for the offices of United States Senate or Representative in Congress, such party rule shall apply.” *See Colo. Sess. Laws 1988, ch. 30, p. 294.*

In 1989, the General Assembly amended § 1-4-601(2) by providing that a candidate seeking to be designated at a political party assembly for nomination on the primary election ballot must have “been a member of said political party for a period of time required by rule of the candidates political party or by law if the party has no such rule.” *See Colo. Sess. Laws 1989, ch. 39, p. 302.* The General

Assembly also repealed subparagraph § 1-4-601(4)(b). *See* Colo. Sess. Laws 1989, ch. 40, p. 314.

In 1994, the General Assembly amended § 1-4-601(4)(a), C.R.S., added the current opt-out language -"unless otherwise provided by party rules" - to the affiliation requirement applicable to candidates seeking designation by assembly for nomination on the primary election ballot. Colo. Sess. Laws 1992, ch. 118, p. 686.

In 2007, the General Assembly amended § 1-4-1304(2)(b) and (c), C.R.S., adding an opt out provision allowing minor political parties to set their own affiliation rules for candidates nominated under the provisions of Section 1304.

Finally, in May 2010, the General Assembly adopted HB 10-1271.

In sum, despite the *Seawell* decision, which prompted the amendment to the affiliation requirement in § 1-4-601(4), and the Supreme Court's decision in *Tashjian* in which the Court held that the state of Connecticut could not bar the Republican Party from allowing unaffiliated voters to vote in the Republican primary election, the General Assembly has amended the affiliation requirement for major and, belatedly, for minor political parties, only as it applies to designating candidates for the primary ballot by assembly.

Sections 1-4-601(4)(a) and 1-4-1304(2)(b) allow major and minor political parties to set their own affiliation requirements. All of the affiliation requirements

adopted by political parties are more lenient than the strict statutory requirements imposed upon unaffiliated candidates. Aplt. App. at 190-92 (Stipulated Facts at ¶¶ 40, 41, 45, 47 - 49).

- iii) **The state is attempting to promote its interest in political stability by an affiliation statute that not only discriminates invidiously against unaffiliated candidates and their supporters, but also unfairly or unnecessarily burdens their interest in the continued availability of political opportunity which is as equally important as the state's interests**

The challenged statute is facially unconstitutional because it denies the Voters equal protection of the laws. The harsh affiliation requirement the state imposes on independent candidates discriminates invidiously against them because the State does not uniformly apply a similar restriction to candidates running under the banner of a political party. In addition, the statute attempts to achieve the state's interest in promoting political stability by placing an unfair and unnecessary burden on independent candidates.

The starting point for the equal protection analysis for affiliation statutes is *Storer v. Brown*. As discussed above, 25-26, *supra*, while *Storer* may be the starting point in the equal protection analysis, it is not the end point since the affiliation requirement at issue in *Storer* that was imposed on unaffiliated candidates was mirrored by a similar requirement imposed on candidates of political parties.

In Colorado, persons seeking to run as unaffiliated candidates face harsher restrictions than those seeking to run under the banner of a political party. The eligibility status of Representative Curry versus that of Colorado State Senator Bruce Whitehead illustrates this disparate treatment. *See*, pp. 29-30, *supra*.

As discussed above, pp. 28-33, *supra*, having a affiliation statute imposed on unaffiliated candidates without a concomitant requirement for political party candidates impermissibly discriminates against independent candidates based on their political beliefs.

Given this well-established precedent militating against discriminatory practices, all of the courts that have addressed the equal protection issue related to affiliation requirements have, with one exception, considered whether the affiliation requirements for political party candidates is roughly similar to that imposed on independent candidates.

In *Van Susteren v. Jones*, 331 F.3d 1024 (9th Cir. 2003), the plaintiff was a candidate seeking to be listed as a Libertarian Party candidate for a California congressional race. He failed to meet California's statutory requirement of being disaffiliated with any other political party for twelve months before filing for primary ballot access. He brought an equal protection claim, arguing that the affiliation requirement for candidates for political parties effectively required them to be disaffiliated for twenty-three months before the general election while

independent candidates need only be disaffiliated for thirteen months before the general election. 331 F.3d at 1026-27.

The Ninth Circuit found that candidates of political parties had to proceed through the primary process while independent candidates did not and, indeed, could not proceed through the primary process. Thus, the court held that the “more appropriate comparison is therefore between the affiliation period before the prior election for partisan candidates and the affiliation period before the general election for independent candidates. *Id.* at 1027.

Because political party candidates had to disaffiliate one year before the primary and independent candidates had to disaffiliate thirteen months before the general election, the court held that the difference “is not significantly different” and, accordingly, “[t]here is no equal protection violation.” *Id.*

In *Anderson v. Hooper*, 632 F.2d 116, 119 (10th Cir. 1980), a candidate challenged New Mexico’s affiliation statute that required independent candidates to be unaffiliated as of January 1 of the year of the general election. The affiliation statute applicable to candidates of political parties required that they be affiliated with the political party as of the first Monday in February. The court held that this difference was “minor and is not ‘invidious’ in its nature or practical effect.” 632 F.2d at 119.

In *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), the Sixth Circuit upheld a deadline for independents to file a statement for candidacy for congressional elections on the day before the primary election. The court recognized that all candidates were burdened by the state’s decision to have an early primary date, “but there is no particular group which feels the additional burden of being placed at a disadvantage with respect to the rest of the field. . . . Here [as opposed to the circumstances in *Anderson*] the burden imposed by Ohio’s early deadline is *nondiscriminatory*.” 430 F.3d at 373 (emphasis supplied).

Finally, in *Davis v. The State Election Bd. of Oklahoma*, 762 P.2d 932 (OK 1988), a candidate challenged Oklahoma’s non-affiliation statute for independent candidates that required candidates to be registered as an independent for six months immediately proceeding the first day of the filing period. 762 P.2d at 933. The court noted that another Oklahoma statute imposes a similar affiliation requirement on political party candidates. *Id.* The Oklahoma Supreme Court, relying on *Storer*, ruled that the affiliation requirement imposed on independent candidates did not conflict with the Oklahoma Constitution. *Id.*

The Colorado Supreme Court decision in *Colorado Libertarian Party v. Secretary of State*, 817 P2d 998 (Colo. 1991) is inapposite. This action arose in reference to the 1990 Colorado gubernatorial election in which Robin Heid, one of

the plaintiffs, attempted to be nominated by the Colorado Libertarian Party as their candidate.

First, in 1990, the Colorado Libertarian Party was a “political organization” under Colorado law (817 P.2d at 1005) that could have nominated another candidate who met the affiliation requirements of § 1-4-801(1)(i), C.R.S. (1990). Thus, the affiliation statute did not preclude the Colorado Libertarian Party and voters who support the party from voting for a Libertarian gubernatorial candidate in the 1990 election. By contrast, precluding an independent candidate from the ballot based on the affiliation statute that applies only to independent candidates is an absolute bar to that candidacy burdening the rights of like-minded independent voters.

Second, the Colorado Supreme Court relied on the fact that Colorado statutes allow political organizations to become political parties. 817 P.2d at 1006. Thus, the Colorado Libertarian Party could avoid the affiliation requirement imposed on political organizations by obtaining the necessary support to become a political party. *Id.* In the case of an unaffiliated candidate and her supporters, the Supreme Court has held that it is not a constitutionally acceptable option to avoid a ballot access restriction by forcing an independent candidate to form a qualified political party and that it was a similarly unconstitutional option to force supporters of such candidates to sacrifice their independent status. *Storer*, 415 U.S. at 745-46.

Third, the Colorado Supreme Court's decision is the only affiliation case in which the Court did not give any weight to whether the affiliation requirement was the same for all affected parties. *See Storer*, 415 U.S. at 733 (in finding that the affiliation requirement passed constitutional muster noted that "[i]t involves no discrimination against independents) and cases cited at pp. 32-33, *supra*. *See also Timmons v Twin Cities Area New Party*, 520 U.S. 351, 368 (1996) (citing with approval the decision in *Storer* and specifically noting that "the provision did not discriminate against independent candidates").

If the issue of whether the affiliation requirements were significant disparate for independent candidates vis-à-vis candidates running under the banner of a political party is not a pertinent factor in conducting an equal protection analysis, none of the cited cases would have even discussed whether the affiliation requirement at issue was, in fact, discriminatory. In fact, in *Van Susteren v. Jones*, the only case that cites *Colorado Libertarian Party*, the court addressed the plaintiff's argument that the challenged affiliation requirement violated his right to equal protection because the affiliation requirement imposed on political party candidates such as the plaintiff was more stringent than an affiliation requirement imposed on independent candidates. 331 F.3d at 1027. The court found that the difference was not significant and, therefore, there was no violation of the equal protection clause. *Id.*

Fourth, ballot access restrictions for independent candidates cannot be more harsh or restrictive than those imposed on minor political parties. *Cromer v. State of S.C.*, 917 F.2d 819, 822-23 (4th Cir. 1990).

In sum, the decision in *Colorado Libertarian Party v. Colorado*, is inapplicable to the facts of this case. Assuming that it were applicable, it was wrongly decided since it runs afoul of the Supreme Court's decisions in both *Anderson* and *Storer* and is contrary to every other applicable affiliation case.

The District Court's decision to compare unaffiliated candidates with candidates seeking political party nomination through the petition process obviated the need to make any equal protection analysis since both of these groups of candidates face the same affiliation restrictions. *See* Opinion and Order at 13-19 (Aplt. App. at 260-228). The proper similarly situated group with which unaffiliated candidates must be compared against is the group consisting of candidates seeking election under the banner of a political party, including both those who seek to be ballot access by assembly and those who seek ballot access through the petition process. There is no reason not to compare unaffiliated candidates with all political party candidates since the goal of all candidates is to get elected and/or to participate in the political marketplace of ideas. Ballot access is the gateway to achieving that goal. The gateway must be somewhat similar for

all candidates, whether they seek ballot access through petitions or through assembly.

There are a number of other reasons the District Court's position is wrong. First, under the *Seawell* decision and under the Supreme Court's decision in *Tashjian*, the State of Colorado cannot impose any affiliation requirements on political parties, no matter which method a particular candidate seeks to obtain access to the primary ballot.

The District Court held that neither of these cases are persuasive since no political party or individual in Colorado has challenged the statutory imposition of the affiliation requirements on political party candidates seeking ballot access through the petition process. Opinion and Order at 16 (Aplt. App. at 263). The fact that no one has challenged this statutory provision does not mean that the Court cannot consider the argument that both *Seawell* and *Tashjian* render any such restriction nugatory.

Second, even if that were not the case and the State of Colorado had the constitutional authority to impose affiliation requirements on candidates seeking access to a political party's primary ballot through the petition process, unaffiliated candidates can only obtain ballot access through the petition process. Thus, unaffiliated candidates are subjected to the most stringent ballot access restriction faced by candidates of political parties and cannot avail themselves of the lenient

affiliation requirements that ***all*** candidates of political parties enjoy. Because unaffiliated candidates cannot enjoy the benefits of the lenient affiliation requirements that political parties have adopted, pursuant to statute, to benefit their candidates, Voters are not afforded equal protection of the laws under Colorado's statutory scheme.

D). VOTERS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR REQUEST FOR A PERMANENT INJUNCTION

The Voters are seeking an injunction to enjoin Secretary Buescher from enforcing the affiliation provision set forth in § 1-4-802(1)(g) against Representative Curry. Aplt. App. at 24-25. Because the District Court granted judgment in favor of the defendants, it was not necessary to address this issue in the District Court's Opinion and Order.

a) LEGAL STANDARD FOR GRANTING PERMANENT INJUNCTION

In order to obtain a permanent injunction, the Voters have the burden of proving the following elements: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band of Potawatomi Nation*

v. Wagnon, 476 F.3d 818, 822 (10th Cir.2007), quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir.2003).

**b) THE VOTERS ARE ENTITLED TO A PERMANENT
INJUNCTION AGAINST SECRETARY BUESCHER**

As set forth herein, the Voters have established that they are entitled to summary judgment on the merits of their claims.

A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.2001) (citing *Tri-State Generation & Transmission Assoc., Inc., v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1354 (10th Cir.1989)). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Id.* (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995)); *see also Suster v. Marshall*, 149 F.3d 523, 533 (1998) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

In this case, the Voters will suffer irreparable harm unless the Court issues an injunction because, absent such an injunction, Representative Curry's name will not be placed on the ballot and Appellants Sheriff Murdie, Linda Rees and Gary

Hausler will not be able to vote to re-elect Representative Curry in a constitutionally meaningful way.⁵

Secretary Buescher will not be harmed by granting the requested relief since the injunction will prevent them from enforcing an unconstitutional ballot access restriction that violates the Plaintiffs' First Amendment rights of free speech and freedom of association and their right to equal protection under the laws.

Thus, the threatened injuries to Voters outweigh any harm that the Secretary Buescher could suffer by having to include the name of Representative Curry the 2010 general election ballot.

Issuance of the injunction will not harm the public. The injunction will prohibit Secretary Buescher from enforcing an unconstitutional statute that violates the Votes' First Amendment rights of free speech and freedom of association and their right to equal protection under the laws. The public cannot be harmed by an injunction enjoining the enforcement of a statute that violates fundamental rights such as the right of freedom of speech through the exercise of voting rights.

⁵ The Supreme Court has held that being a write-in candidate "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson*, 460 U.S. at 799, n. 26, citing *Lubin*, 415 U.S. at 719, n. 5.

7. CONCLUSION

For the reasons set forth above, the Voters respectfully submit that the District Court's Opinion and Order and Judgment were in error. The Voters seek a reversal of the District Court's decision and a decision granting the Voters' Motion for Summary Judgment declaring that § 1-4-802(1)(g) is unconstitutional as an unnecessary infringement upon the Voters' First Amendment rights of free speech and freedom of association and that it violates the Voters' rights to equal protection of the laws as guaranteed by the Fourteenth Amendment.

The Voters further request that the Court grant the Voters' Motion for Summary Judgment on their request for injunctive relief to enjoin Secretary Buescher from enforcing the affiliation provision in § 1-4-802(1)(g) against Representative Curry with respect to the upcoming 2010 general election.

Respectfully submitted this 6th day of July, 2010.

ABADIE & SCHILL, PC

/s/ William E. Zimsky

William E. Zimsky
1099 Main Avenue, Suite 315
Durango, Colorado 81301
970.385.4401
zimsky@durangolaw.biz

Attorney for Kathleen Curry, Richard
Murdie, Linda Rees and Gary Hausler

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 (A)(7)(B)

Pursuant to F.R.A.P. 32(a)(7)(c), counsel for Appellants hereby certifies that the foregoing brief complies with the volume limitations of F.R.A.P. 32(a)(7) (B) and that the brief contains 13,600 words as measured by the word processing system (Microsoft Word 2008 for Mac, Version 12.2.5) used to prepare this brief.

/s/ William E. Zimsky

DIGITAL CERTIFICATION

I do hereby certify that these digital submissions have been scanned with the most recent version of AVG Anti-Virus, Version 9.0.839, updated on July 6, 2010 and, according to the program, are free of viruses; and all required privacy redactions have been made.

/s/ William E. Zimsky

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2010, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was filed and served via CM/ECF and that a true and correct copy was sent via the Court's CM/ECF system to the following and that one hard copy of this Brief and the Appellants' Appendix will be sent via First Class, U.S. Mail, postage prepaid on or before July 8, 2010 addressed as follows:

Maurice G. Knazier, Esq.
Deputy Attorney General
1525 Sherman Street
Denver, CO 80203

maurie.knaizer@state.co.us

/s/ William E. Zimsky
