No. 13-11816-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREEN PARTY OF GEORGIA and
CONSTITUTION PARTY OF GEORGIA,

Plaintiffs-Appellants,

v.

STATE OF GEORGIA and
BRIAN KEMP, GEORGIA SECRETARY OF STATE

Defendants-Appellees.

On Appeal from the United States District Court
For The Northern District of Georgia, Atlanta Division

BRIEF OF APPELLEES

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NO. 13-11816-EE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1-1 of the Rules of this Court, the State Appellate certifies that the below listed persons and entities have interests in the outcome of this case:

Campanella, Kelly – counsel for Defendant Appellees

Constitution Party of Georgia – Plaintiff Appellants

Dunn, Dennis – counsel for Defendant Appellees

Green Party of Georgia (a/k/a Georgia Green Party) – Plaintiff Appellants

Georgia, State of - Defendant Appellee

Kemp, Brian – Defendant Appellee, Secretary of State

Olens, Samuel S. - Attorney General and counsel for Defendant Appellees

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Ritter, Stefan – counsel for Defendant-Appellees

Story, Richard W. – District Judge, Northern District of Georgia

Whitney, Richard – counsel for Plaintiff Appellants

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary regarding this appeal due to the straight-forward and well-established nature of the law involved in this case.

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STANDARD OF REVIEW

Appellants have, first, appealed the district court's order granting a motion to dismiss. The reasonable well pled facts of the complaint are accepted as true for consideration of the motion, and the district court's ruling (Dkt. 10)is considered *de novo*.

Appellants are also appealing the district court's denial (Dkt. 14) of their motion for reconsideration pursuant to Fed. R. Civ. P 60(b). An appeal of a ruling on a Rule 60(b) motion is narrow in scope, addressing only the propriety of the denial or grant of relief and does not raise issues in the underlying judgment for review. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999); *see also Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978). Moreover, a district court's order under Rule 60(b) is reviewable only for abuse of discretion. *Browder*, 434 U.S. at 263, 98 S. Ct. 556; *Gulf Coast Fans*, 740 F.2d at 1510. While Appellants claim their motion for reconsideration should be treated as a Rule 59(e) motion, such motions are likewise reviewed for abuse of discretion. *See Pequeno v. Schmidt*, 240 Fed. Appx. 634, 636 (5th Cir. 2007) (internal citations omitted) ("'Under this standard of review, the district court's decision and decision-making process need only be reasonable.'").

SUMMARY OF THE ARGUMENT

The district court properly granted Appellees Brian Kemp and the State of Georgia's motion to dismiss because established precedent from the Supreme Court and the Eleventh Circuit show Appellants claims on their face to be meritless. *See Jenness v. Fortson*, 403 U.S. 431 (1971); *Coffield v. Handel*, 599 F.3d 1276, 77 (11th Cir. 2010); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002). Just three years ago in *Coffield*, this Court analyzed the precise law imposing a minimum signature requirement Appellants challenge here and upheld it as constitutional. Further, the *Coffield* decision validated the even more burdensome 5% rule for non-statewide elections, whereas Appellants seek to void the 1% rule for statewide elections in this case. If the 5% rule is constitutional, surely the 1% rule is as well. Thus, established precedent suggests that State of Georgia's compelling interest in regulating the time, place, and manner of its elections remains unchanged from those cases; the compelling interests supporting the minimum signature requirement as well as the operation in fact of this requirement have not changed in any meaningful way from that which existed 29 years ago when *Jenness* was decided or 3 years ago when *Coffield* was decided. The district court should therefore be affirmed.

ARGUMENT AND CITATION OF AUTHORITY

A. THE DISTRICT COURT PROPERLY GRANTED APPELLEES' MOTION TO DISMISS BASED ON THE OVERWHELMING AUTHORITY OF *JENNESS V. FORTSON*, 403 U.S. 431 (1971) AND ITS PROGENY

This case presents yet another attempt in a long line of challenges to Georgia's requirement for independent or political body candidates to demonstrate a modicum of support in order to obtain ballot access for particular candidates. Like many similar cases, the Green Party of Georgia and the Constitution Party of Georgia (collectively, "Appellants") seek to have this Court reverse the legislative decisions of the Georgia General Assembly regarding what is the sufficient level of support required to obtain ballot access, notwithstanding the fact that the United States Supreme Court[1], the Fifth and Eleventh Circuit[2] Courts of Appeal have repeatedly heard and rejected these same arguments while upholding the Georgia statutes in question.

In this case, Appellants challenge the constitutionality of the signature requirement set forth in O.C.G.A. § 21-2-170. (Complaint, Dkt. 1 ¶ 20.) That law

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[1] *See e.g. Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971).

[2] *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002)

provides that independent or political body[3] candidates for statewide office may obtain ballot access by a presenting a nominating petition containing a number of voter signatures equivalent to one percent (1%) of the persons eligible to vote at the time of the preceding election for the particular office being sought.[4] O.C.G.A. § 21-2-170(b). The law provides that these signatures may be gathered over a

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[3] A political "body" is different than a political "party." A political body becomes a "party" (and its candidates are entitled to be placed on a ballot) if the body's gubernatorial or presidential candidate draws at least twenty percent (20%) of the votes cast in the state or in the nation respectively in the previous election. O.C.G.A. § 21-2-2(21). Also, political bodies are qualified to nominate candidates for statewide public office if the body had a candidate on a ballot for statewide office in the preceding election who received votes equal to one percent (1%) of the total number of registered voters eligible to vote in that election. O.C.G.A. § 21-2-180. The Libertarian Party has achieved such status. Georgia Secretary of State, Elections Division, *available at* http://sos.georgia.gov/elections.

[4] That subsection provides:

> A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

O.C.G.A. § 21-2-170(b).

period beginning 180 days prior to the deadline for filing such petitions. O.C.G.A. § 21-2-170(e).

The law, however, has been repeatedly upheld against challenge after challenge. Indeed, the ballot access rule at issue is the same one this Court upheld just three years ago in *Coffield v. Handel*, 599 F.3d 1276, 1277 (11th Cir. 2010). In that case, an independent political candidate challenged the requirement in O.C.G.A. § 21-2-170(b) that independent candidates for non-statewide office must present a petition with signatures equaling five percent (5%) of the number of registered voters eligible to vote in the preceding election for that office. This Court rejected that argument, explaining that "[o]ur Court and the Supreme Court have upheld [O.C.G.A. 21-2-170(b)] before . . . [and] [t]he pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made." *Coffield*, 599 F.3d at 1277. Further, the *Coffield* decision validated the even more burdensome 5% rule for non-statewide elections. *Id.* In the present case, Plaintiffs seek to void the 1% rule for statewide elections. (Complaint, Dkt. 1, ¶ 20.) If the 5% rule is constitutional, surely the 1% rule is as well. Accordingly, the district court properly concluded that Plaintiffs could prove no set of facts that would entitle them to relief and dismissed their Complaint. *In re Johannessen,* 76 F.3d 341, 349 (11th Cir. 1996).

Coffield follows a long line of cases and well-established law. In 1971, the U.S. Supreme Court reviewed claims that this very same provision of Georgia law (then designated Ga. Code Ann.§ 34-1010) unconstitutionally restricted non-political party candidates' access to the ballot by abridging the freedoms of speech guaranteed to a candidate and his supporters by the First and Fourteenth Amendments and by denying the nonparty candidate the Fourteenth Amendment equal protection of the law. *Jenness v. Fortson*, 403 U.S 431 (1971), *aff'g sub nom. Ga. Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. 1970) (Three-Judge Court). The Court rejected these claims. *Id.*

In *Jenness*, the Court noted that Georgia freely provides for write-in votes. *Id.* at 438; See O.C.G.A. § 21-2-133. Georgia recognizes independent candidates. *Jenness* at 438; *see* O.C.G.A. § 21-2-170. The State does not provide an unreasonably early filing deadline for candidates not otherwise endorsed by established parties. *Jenness* at 438; O.C.G.A. § 21-2-132(h)(4). There is no elaborate requirement for establishing a primary election system for a small or new party. *Jenness* at 438; *See* O.C.G.A. § 21-2-110, 21-2-150 et seq. "[I]n sum, Georgia's election laws . . . do not operate to freeze the political status quo." *Jenness* at 438.

Instead, the Court noted:

> Anyone who wishes, and who is otherwise eligible, may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months' period, the signatures of 5% of the eligible electorate for the office in question.

Jenness at 438.

The Court noted that a voter may sign multiple petitions while still voting in a party primary or voting for another candidate at the actual election. *Id.* at 438-39. Additionally, once a political body obtains at least 20% of the vote at an election, it becomes a "party" rather than a political body; and once a party fails to maintain a 20% level of voter support, it reverts to the status of a political body. *Id.* at 439. Given all of this, the Court concluded, "We can find in this system nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments." *Id.* at 440.

The Supreme Court also rejected the claims that the 5% petition requirement infringed on the Fourteenth Amendment right to equal protection of the laws. *Id.* This claim was based on the premise that the gathering of signatures was

"inherently more burdensome for a candidate to gather" than it is to win votes of a majority in a party primary. *Id.* However, the Court noted, Georgia does provide this petitioning process as an alternative method to the primary system for gaining access to the ballot. *Id.* The Court concluded, "We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." *Id.*

Instead, the Court recognized that Georgia had a strong and appropriate interest in having such ballot access regulation.

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders.

Jenness at 442 (Footnote omitted).

Subsequently, the U.S. Supreme Court has reiterated its continuing approval of its decision in *Jenness*. In *Ill. State Board of Elections v. Socialist Workers Party, et al.,* 440 U.S. 173 (1979), the Court noted that in *Jenness* they had "upheld properly drawn statutes that require a preliminary showing of a 'significant modicum of support' before a candidate or party may appear on the ballot." *Id.* at 185. In *Norman v. Reed*, 502 U.S. 279, 295 (1992), the Court again noted that it had upheld the Georgia 5% petition requirement. *See also Morse v. Republican Party of Va.*, 517 U.S. 186, 198 (1996); *Burdick v. Takushi*, 504 U.S. 428, 435 (1992); *N.Y. State Bd. of Elections v. Margarita Lopez Torres,* 128 S. Ct. 791 (2008); *Crawford v. Marion County Election Bd.*, 553 U.S. 196, 128 S.Ct. 1610 (2008)(Scalia, J. concurring). In fact, the Supreme Court in *Lopez Torres* again reaffirmed the correctness of the *Jenness* decision, noting:

> Just as States may require persons to demonstrate "a significant modicum of support" before allowing them access to the general-election ballot, lest it become unmanageable, *Jenness v. Fortson* [Citation omitted], they may similarly demand a minimum degree of support for candidate access to a primary ballot. The signature requirement here is far from excessive. *Norman v. Reed* [Citation omitted] (approving requirement of 25,000 signatures, or approximately two percent of the electorate); [*American Party of Texas v. White,* 415 U.S. 767, 783 (1974)](approving requirement of one percent of the vote cast for governor in the preceding general election, which was about 22,000 signatures.)

Lopez Torres, 128 S. Ct. at 798-99.

Jenness has, of course, long been accepted as the law of this Circuit as well. In *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981), this Court specifically adopted *Jenness'* holdings and applied them to claims raised by a political body, rather than an individual, that the 5% petition requirement violated the rights of free speech and association under the First and Fourteenth Amendments or the right to equal protection as guaranteed under the Fourteenth Amendment. *McCrary* at 1312. This Court rejected these claims and once again upheld the 5% requirement – which, again, is even higher than the 1% requirement at issue here. *Id.*

The crux of the Appellants' argument, however, is that the present case has some unspecified new impact that was not recognized in *Jenness* or since then and that this case should be decided under strict scrutiny and reject the State's interest. (Brief of Appellants ("Brf.") 10-11.) *Jenness* itself, however, noted the success that independent candidates in Georgia have historically had. *Jenness*, 403 U.S. at 439 ("The open quality of the Georgia system is far from merely theoretical … ."). The

5% requirement analyzed there remains the same now as then; Georgia's system is now not more "closed" to independent candidates. [5]

Strict scrutiny has also been rejected repeatedly in cases such as the present. As noted by the district court below, as recently as 2007 in *Swanson v. Worley*, the Eleventh Circuit has reaffirmed that strict scrutiny does not apply. 490 F.3d 894, 902-04 (11th Cir. 2007). The sliding standard of *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) – of which *Jenness* was a basis – does apply. But that standard expressly recognizes the great deference to the State and its interest in regulating its election process. *See, e.g., Burdick*, 504 U.S. at 433; 460 U.S. at 788. The Constitution itself gives the States authority over "the Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art I, § 4, cl. 1. The States' interests include maintaining fairness, honesty, and order, *Burdick*, 504 U.S. at 433, minimizing frivolous candidacies, *Lubin v. Panish,* 415 U.S. 709, 715 (1974), and "avoiding confusion, deception, and even frustration of the democratic process," *Jenness*, 403 U.S. at 442. All of these have been found in this Circuit to be compelling interests. *See, e.g., Swanson*, 490 F.3d at 902; *Green v. Mortham*, 155 F.3d 1335-36.

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[5] As Appellants themselves note, Libertarian Party presidential candidate Gary Johnson achieved ballot status in Georgia just last year in 2012. (Brf. at 14 n. 3.)

B. THE DISTRICT COURT PROPERLY REJECTED THE SPECIOUS ARGUMENTS ADVANCED IN APPELLANTS' MOTION FOR RECONSIDERATION

Faced with the district court's well-reasoned order, which, in dismissing the Complaint, relied on the established law of *Jenness*, *Cartwright*, and *Coffield*, Appellants felt compelled to distinguish *Jenness* and its progeny for the first time only on its Motion for Reconsideration.[6] The district court, however, properly identified the flaws in Appellants' claim that *Jenness* is "inapposite" because the instant case involves a challenge in the context of a presidential election as opposed to a congressional or gubernatorial election . (Brf. At 7, 9.) Accordingly, the district court's decision to deny the Motion for Reconsideration premised on this argument was entirely proper and should be affirmed.

Jenness, *Cartwright*, and *Coffield* are controlling and on-point in this case because they interpreted the exact Georgia code section challenged here: O.C.G.A. § 21-2-170(b) and its predecessor, Ga. Code Ann. 34-1010, which applies to candidates seeking any office voted upon statewide, including state and federal

[6] In its Order denying reconsideration (Dkt. 14 at 11, n. 3) , the district court aptly noted that Appellees-Defendants relied extensively upon *Jenness*, *Cartwright*, and *Coffield* in their Motion to Dismiss (Dkt. [4-1] at 6-7), but that Applellants-Plaintiffs chose not to respond to these arguments in their Response to that motion (Dkt. 5). Moreover, the district court noted that "Plaintiffs have not provided a reason why they failed to respond to Defendants arguments before this Court issued its Order" dismissing the Complaint. (Dkt. 14 at 11, n. 3.)

offices. Neither the face of the law nor the numerous cases upholding it make any meaningful distinction based on the type of office for which a candidate is running – whether presidential, gubernatorial, or congressional.

In *Jenness*, the Supreme Court considered a Georgia law that required "a candidate for elective public office who does not enter and win a political primary's election" to "file a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." 403 U.S. 432, 432 (1971) (citing Ga Code Ann. § 34-1010 (1970)). While the candidates in *Jenness* were seeking congressional and gubernatorial offices, the Supreme Court analyzed the law in light of a previous decision invalidating Ohio election laws which resulted in "very small numbers of members to be placed on the state ballot in the 1968 presidential election." *Jenness*, 403 U.S. at 434-35 (citing *Williams v. Rhodes*, 393 U.S. 23 (1968)). In distinguishing Georgia's statutory scheme from Ohio's the Court noted that:

> The open quality of the Georgia system is far from merely theoretical. For the stipulation of facts in the record informs us that a candidate for Governor in 1966 and a candidate for President in 1968 gained ballot designation by nominating petitions, and each went on to win a plurality of the votes cast at the general election.

Jenness, 403 U.S. at 439. Accordingly, the *Jenness* Court found no meaningful distinction between gubernatorial and presidential candidates in its analysis and approval of Georgia's 5% rule.

Similarly, *Cartwright* involved a challenge to the 5% signature requirement brought by members of the Libertarian party who wished to run for congressional office. 304 F.3d 1138, 39 (11th Cir. 2002). Again, in concluding that the constitutional rights of " one who aspires to elective public office" were not violated, the Eleventh Circuit made no suggestion that the type of elective office would impact its analysis. Nor does *Coffield*, which affirmed the district court's dismissal of a congressional candidate's challenge to the 5% requirement in O.C.G.A. § 21-2-170(b), support the conclusion that presidential elections should be treated differently, instead noting that "the pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made." *Id.* at 1277.

In the face of this well-settled law, Appellants claim that *Jenness* and its progeny are "inapposite" and that a special interest balancing test must apply to presidential election contests. (Brf. At 19.) To support their arguments, Appellants cite to *Anderson v. Celebrezze*, 460 U.S. 780, 794-795 (1983) and

Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985),[7] but neither supports the contention that *Jenness* must be eschewed in favor of a new analysis that addresses the purportedly "unique considerations" underlying presidential elections. (Brf. at 17). In *Anderson*, the Supreme Court held unconstitutional an Ohio statute that required independent candidates for president to declare their candidacy in March "without mandating comparable action by the nominee of a political party." 460 U.S. at 783, 806. While the Court concluded that the burdens imposed by that particular law outweighed the "minimal interest in imposing a March deadline," it recognized that "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens." *Id.* at 788. Moreover, Anderson specifically recognized that "the state's important regulatory interests are generally sufficient to justify reasonable nondiscriminatory restrictions such as the requirement that candidates "make a preliminary showing of substantial support in

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[7] The Court properly noted that *Bergland*, a twenty-five year old case decided by a three-judge panel, had not been cited in any of Plaintiff-Appellants' filings prior to the Motion for Reconsideration. As such, the case did not present "an intervening development in controlling law" such that it formed a proper basis for reconsideration. (Dkt. 14 at 7.) Notwithstanding that the case was improperly raised on reconsideration, *Bergland* does not change the controlling force of *Jenness*s and its progeny to this case. Relying on *Anderson*, that case simply applies a three-part analysis for state statutes restricting ballot access and remanded the case for further consideration after concluding that the district court had not sufficiently considered the burdens imposed on the congressional and presidential candidate plaintiffs in that particular case.

order to qualify for a place on the ballot." *Id.* at 788, 788 n. 9 (citing *Jenness*, 403 U.S. 431).

The other two cases relied upon by Appellants – *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) and *Shugart v. Chapman*, 366 Fed. App. 4, No. 09-14250 (11th Cir. Feb. 10, 2010) – were not cited in the Motion for Reconsideration and are raised here for the first time on appeal. Regardless, neither of these cases stands for the proposition that the well-established law in *Jenness* must be disregarded because the current challenge involves a presidential candidate. In *Swanson* and *Shugart* , the Eleventh Circuit **upheld** challenges to Alabama's 3% signature requirement brought by a candidate for state senate and two congressional candidates, respectively. These cases do nothing to diminish the "important interests in avoiding voter confusion and promoting political stability" that a minimum signature requirement serves in the context of any election. *See Swanson*, 490 F.3d at 912. Both Swanson and Shugart recognize that a "'signature requirement by itself does not impose a severe burden on plaintiffs' rights but is a reasonable, nondiscriminatory restriction.' " *Shugart* , 366 Fed. Appx. at 6 (quoting *Swanson*, 490 F.3d at 903-05); *see also* Shugart, 366 Fed. Appx. at 6 ("Alabama's legislative choice to have a modest requirement for independent Presidential candidates does not defeat its decision to impose a higher requirement

on independent candidates for offices elected only by Alabama voters.") Moreover, *Swanson* further undermines Appellants arguments in that it holds that strict scrutiny does not apply when evaluating the state's interest in imposing a signature requirement. *Id.* at 902-04

In sum, the district court's order granting Appellees' motion to dismiss was directed by previously decided law – *Jenness* et al. – and is consonant with the overwhelming authority and undisputed facts that establish the compelling State interest and non-oppressive and constitutional burden on Appellants in meeting the signature requirement. The district court should be affirmed.

CONCLUSION

For the foregoing reasons the district court's order granting Appellees' motion to dismiss should be affirmed.

Respectfully submitted,

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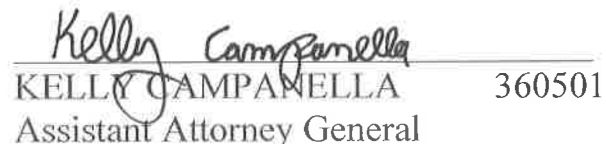

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,052 words according to the word processing system utilized by the Office of the Attorney General.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

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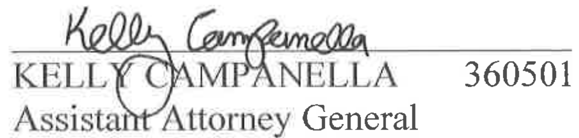
This 16th day of September, 2013.



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