UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES *et al.*,

Plaintiffs,

v. Case No.4:19cv300-RH/MJF

RON DeSANTIS *et al.*,

Defendants.
_____/

GOVERNOR AND SECRETARY'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. Introduction

Redressability is a constitutional minimum. The Plaintiffs cannot carry *their* burden of satisfying this constitutional minimum because, even if they succeed in challenging the constitutionality of § 98.0751(2)(a) of the Florida Statutes, the plain language of Article VI, § 4(a) of the Florida Constitution still bars *any* relief. Yet none of the Plaintiffs challenge the constitutionality of Article VI, § 4(a).

Abstention is appropriate because of the Plaintiffs' position on what Article VI, § (4)(a) means when it conditions felon re-enfranchisement on the "completion of all terms of sentence including parole and probation." Although some of the Plaintiffs and their lawyers thought the phrase included satisfaction of financial obligations as recently as December 2018, the Plaintiffs now boldly assume that the

provision automatically re-enfranchises felons after satisfaction of some of the terms of their criminal sentence. At the Governor's request, the Florida Supreme Court has agreed to issue an advisory opinion concerning the phrase. Abstaining and allowing the Florida Supreme Court to address this question of state law would promote federal-state comity and might avoid federal constitutional questions. After all, the Plaintiffs' arguments on the merits begin with the assumption that Article VI, § (4)(a) does not mean what it says—that "all terms" really means some terms. *See* ECF 98-1; 13–14.

Finally, *if* the Plaintiffs have Article III standing, *if* abstention is inappropriate, and *if* the state constitutional provision *not* currently being challenged is found to violate the U.S. Constitution, then this Court must assess whether "all terms of sentence" in Article VI, § 4(a) is severable from remaining provisions of Article VI, § 4 of the Florida Constitution. It is not. The phrase "all terms of sentence" is one of two intertwined conditions for felon re-enfranchisement added through Amendment 4; a conviction for a felony other than murder or sexual offense is the other. To sever one of the two conditions and then assume Florida voters would have approved Amendment 4 is to engage in revisionist history and to place courts—not Florida voters—at the heart of the citizen initiative process. To agree with the Plaintiffs' more radical suggestion that all of § 4(a) be severed is to invite the absurd—to allow felons to vote and run for office from prison.

Dismissal for lack of Article III standing is required; abstention is appropriate.

II. Redressability

To reiterate, there is no pending challenge to the phrase "completion of all terms of sentence," as presented to Florida voters through Amendment 4, and as now codified in Article VI, § 4(a) of the Florida Constitution. The Plaintiffs challenge only a state statute that tracks the constitutional text. Therein lies the problem with redressability and the Plaintiffs' Article III standing.

If Article VI, § 4(a)'s plain language requires satisfaction of all financial obligations included within a sentence as a condition for re-enfranchisement, then an order from this Court enjoining the enforcement of § 98.0751(2)(a) of the Florida Statutes would not redress the Plaintiffs' alleged injury. *See* ECF 97, at 8–11. That is because the Florida Constitution would "require the same thing" and still preclude the Plaintiffs' re-enfranchisement until all financial obligations of their sentences are satisfied. *See Fla. Family Policy Council v. Freeman*, 561 F. 3d 1246, 1256 (11th Cir. 2009). As in *Florida Family*, the "chill wind [would] still blow in from" Article VI, § 4 (a), and the relief the Plaintiffs seek in this lawsuit — invalidation of a state statute — would not result in their re-enfranchisement. *Id.* at 1258.

Thus, like the plaintiff in *Florida Family*, the Plaintiffs here lack Article III standing; they can obtain no redress, none whatsoever, until they challenge the state constitutional provision that requires "completion of all terms of sentence."

The Plaintiffs respond by noting the obvious: federal courts have the power to enjoin state officials from enforcing unconstitutional laws. *See* ECF 121, at 6, 9 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). But the exercise of federal judicial power presupposes that *this* Court has jurisdiction in *this* case to issue an order that would redress the Plaintiffs' alleged injury. There can be no action absent jurisdiction. There can be no jurisdiction until the Plaintiffs carry *their* burden of satisfying all three requisites for Article III standing, including redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568–71 (1992).

The Plaintiffs further respond that there is no redressability concern because the Secretary could choose to interpret Article VI, § 4(a) in the manner now being advocated by the Plaintiffs and thereby clear the path to the Plaintiffs challenging a state statute. That too misses the point. The constitutional text's plain language stands as a bar to the interpretation the Plaintiffs seek—not the Secretary's interpretation. And under Florida's strict separation of powers, *see* Art. II, § 3, Fla. Const., the power to interpret the constitutional text is vested in the Florida Supreme Court, not the Secretary. *See* Art. V, §1, Fla. Const. *See, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 631–32 (Fla. 2012) ("[A]s is universally recognized, it is the exclusive province of the judiciary to interpret terms in a constitution and to define those terms."); *Lawnwood Med. Ctr.*,

Inc. v. Seeger, 990 So. 2d 503, 510 (Fla. 2008) ("[I]t is the duty of [the Florida Supreme] Court to determine the meaning of [a] constitutional provision.").

Finally, the Plaintiffs argue that they satisfy the requisites for Article III standing because the phrase "completion of all terms of sentence" in Article VI, § 4(a) may be susceptible to an interpretation that does not include financial obligation requirements. *See* ECF 121, at 7. Ignore for a moment the plain language of the constitutional text. Ignore also that the constitutional text is susceptible to two interpretations only because the Plaintiffs have *now* chosen to disavow the meaning espoused before the Florida Supreme Court prior to the amendment's adoption and that same meaning advanced in a letter to the Secretary after adoption. *See* ECF 97, at 4–5. The Plaintiffs' standing then is contingent upon the meaning of the state constitutional text—a matter of state law. That is the very reason why this Court should abstain until the Florida Supreme Court decides which interpretation gives proper meaning to the constitutional text.

III. Abstention

In arguing against abstention, the Plaintiffs claim that this is a "voting rights case." *See* ECF 121 at 9. Not so. This case concerns the standards for felon re-enfranchisement—not burdens on the right to vote. Felons forfeit their right to vote under Florida law when they choose to commit their crimes. *See* Fla. Const. art. VI, § 4(a); Fla. Stat. § 97.041(2)(b) (2019). "Having lost their voting rights, [felons]

lack any fundamental interest to assert." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010). Case after case thus makes clear that felon disenfranchisement and any subsequent felon re-enfranchisement schemes are distinct from restrictions on the fundamental right to vote. *Id*.; *see also* ECF 132 at 3 (collecting cases). Contrary to the Plaintiffs' unsupported suggestion, ECF 121 at 9–14, there is no categorical bar on abstaining in the re-enfranchisement context.

Importantly, *Siegel v. LePore*, 234 F.3d 1163, 1173–74 (11th Cir. 2000), does not preclude abstention in this case either. *Siegel* concerned the standard used for recounts after a closely contested presidential election. *Id*. at 1168. The exigency of moment—the need to resolve a national, presidential election—favored the exercise of federal jurisdiction. *Id*. *Siegel* also concerned the use of different voting standards, and whether those different standards complied with the federal constitution's equal protection clause. *Id*. at 1169. By contrast, the cases now before this Court concern felon re-enfranchisement and whether Florida's standard is consistent with the federal constitution, which allows for permanent disenfranchisement but which Florida does not do. The outcome of a presidential election with approaching federal constitutional deadlines is also not at stake here. And, unlike *Siegel*, the need for a quick resolution favors abstention so that the Florida Supreme Court can definitively say what state law means.

Since the filing of the motion to dismiss, the Florida Supreme Court has also accepted jurisdiction to determine what the state constitution means. Briefing ends October 3, 2019. Abstention is appropriate under the circumstances. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) (granting a federal court discretion to abstain where there are ongoing state court proceedings).

III. Severability

Severance of the phrase "all terms of sentence" from the remainder of Article VI, § 4 of the Florida Constitution is an issue this Court need not address. The severability analysis presupposes that the Plaintiffs are challenging the constitutionality of the constitutional phrase, which they are not; and the severability analysis presupposes that the phrase used in the state constitution violates the federal constitution, which it does not. To the extent severance becomes necessary, it provides a separate basis for abstention because Florida law governs. When applied to the phrase "all terms of sentence," Florida's severability test cannot be met.

A. Question of State Law

"Severability is a question of state law." *Jones v. Bates*, 127 F.3d 839, 863 (9th Cir. 1997) (citing *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 506 (1985)). In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 785 n.1 (1995), the U.S. Supreme Court did not disturb the Arkansas Supreme Court's severability analysis concerning a constitutional amendment that voters added to the Arkansas

Constitution. In *Gralike v. Cook*, 191 F.3d 911, 926 n.12 (8th Cir. 1999), the Eighth Circuit "refuse[d]" to undertake a severability analysis when reviewing a provision of the Missouri Constitution. The Eighth Circuit explained that "[s]uch micro-management of the Missouri Constitution would entangle [the court] too much in State law issues." *Id*. The court "opt[ed] instead to abstain from such action." *Id.*

Thus, if a severability analysis becomes necessary, a separate reason for abstention becomes apparent.

B. Florida's Severability Test

The Florida Supreme Court outlined the test for severability in *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999). The Florida Supreme Court emphasized that the concept of severability "is derived from the respect of the judiciary for the separation of powers." *Id.* at 1280. The Florida Supreme Court also emphasized that while "the purpose underlying severability [is] to preserve the constitutionality of enactments," severance is only appropriate when "it is possible to do so." *Id*. Severance is possible when four factors are met:

> (1) [T]he unconstitutional provisions can be separated from the remaining valid provisions, (2) the [voter] purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the [voters] would have passed the one without the other and, (4) a [constitutional provision] complete in itself remains after the invalid provisions are stricken.

Ray, 742 So. 2d at 1281 (citiation omitted). In other words, courts look to voter intent (factor three), the purpose of the citizens' initiative (factor two), and whether the constitutional amendments are independent or intertwined (factors one and four). *Id.* "[T]he key determination is whether the overall [voter] intent is still accomplished without the invalid provisions." *State v. Catalano*, 104 So. 3d 1069, 1080–81 (Fla. 2012). "Court[s] will not legislate and sever provisions that would effectively expand the scope of the [provision]'s intended breadth." *Id.* at 1081.

C. Voter Intent and Purpose

"[T]he words employed" are the clearest expression of intent and purpose. *Ervin v. Collins*, 85 So. 2d 852, 855 (Fla. 1956). This is especially so "when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996). "[I]t must be presumed that those who drafted the Constitution had a clear conception of the principles they intended to express, that they knew the English language and that they knew how to use it, that they gave careful consideration to the practical application of the Constitution and arranged its provisions in the order that would most accurately express their intention." *Lawnwood Med. Ctr.*, 990 So. 2d at 510 (quoting *Ervin*, 85 So. 2d at 855).

The language in Article VI, § 4(a) is clear and, together with § 4(b), imposes two conditions for felon re-enfranchisement. With text added through Amendment 4 underlined, Article VI, § 4 provides:

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

Section 4(b) imposes the currently undisputed condition limiting re-enfranchisement to those convicted of a felony other than "murder or a felony sexual offense." Those with murder or felony sexual offense convictions may seek re-enfranchisement through Florida's clemency process. Art. IV, § 8, Fla. Const.

Section 4(a) requires "completion of all terms of sentence" for re-enfranchisement. This condition must include financial obligations imposed as part of a criminal sentence because:

Section 4(a) uses the word "all," not some. "All means all." *Kennedy v. Lynd*, 306 F.2d 222, 230 (5th Cir. 1962). There is no exclusion for financial obligations imposed as part of the sentence and so there is no reason to think the framers meant something less than "all." *See Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) ("[The statute] affords 'all relief necessary to make the employee

whole' . . . and we think Congress meant what it said. 'All means all.'") (quoting *Kennedy*, 306 F.2d at 230).

Section 4(a) uses the plural "terms." This signals that the word "sentence" includes more than just the term (singular) of confinement. Again, there is no exclusion for financial obligations imposed as part of the criminal sentence.

Section 4(a) uses the participial phrase "including parole and probation," signaling not a limitation but "an illustrative application of general principal," offering examples, not "an exhaustive description . . . ." *Pro-Art Dental Lab v. V-Strategic Grp.*, 986 So. 2d 1244, 1257 (Fla. 2008) (citing *Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941)).[1]

And the same voters who approved Amendment 4 also approved another citizen initiative that appeared on the ballot as Amendment 6. Commonly known as "Marsy's Law," Amendment 6 provides a crime victim's bill of rights now codified in Article I, § 16(b) of the Florida Constitution. This new constitutional provision grants the "right to *full and timely restitution* in every case and from *each convicted offender* for all losses suffered, both directly and indirectly, by the victim as a result

[1] The dictionary definition of "include" further supports the point. The word means "[t]o contain as a part of something." Include, *Black's Law Dictionary* 777 (8th ed. 2004). "The participle *including* typically indicates a partial list." *Id.*; *see also White v. Mederi Caretenders Visiting Servs. of Sec. Fla., LLC*, 226 So. 3d 774, 783 (Fla. 2017) ("Commonly, the term 'include' suggests that a list is non-exhaustive . . . . The law confirms this usage in a similar fashion.").

of the criminal conduct." Art. I, § 16(b)(9), Fla. Const. (emphasis added). The texts of Amendments 4 and 6—approved by same voters through the same ballot—make it difficult for one to conclude that Florida voters intended to explicitly give crime victims a right to *full* and *timely* restitution, while at the same time voting to re-enfranchise felons who have *not* made full restitution required under the terms of their sentences.

Thus, Article VI, § 4 allows for felon-enfranchisement only when two conditions are satisfied: commission of a crime other than "murder or a felony sexual offense," *and* completion of "all terms of sentence," including financial obligations imposed as part of the criminal sentence. Art. VI, § 4(a)–(b), Fla. Const. That is the intent and purpose of Article VI, § 4, as modified through Amendment 4. Reading-out or altering one condition would frustrate the intent and purpose of millions of Florida voters; uproot the concept of severability from the principle of separation of powers in which it is grounded; and "expand the scope" of the constitutional text contrary to the intent as expressed through the language now before this Court. *See Catalano*, 104 So. 3d at 1081 (refusing to sever provisions of a statute since "severing the [unconstitutional] provision from the statute would expand the statute's reach beyond what the Legislature contemplated," even though "[a]t first glance, the broad purpose of the statute could be accomplished absent the invalid provisions").

Tellingly, the Plaintiffs can point to no specific words in Article VI, § 4 that this Court could strike to remove financial obligations while still preserving the voters' intent that a felon must complete "all terms of sentence" prior to re-enfranchisement. Although dressed as an argument about severance, the Plaintiffs' position is nothing more than a second attempt to invite this Court to erroneously interpret Article VI, § 4 as requiring the completion of some, but not all terms of sentence. This again would frustrate the voters' intent, not to mention the Sponsor's intent. ECF 97, at 3–5. Severance is inappropriate.

D. Intertwined, Not Independent

Severance is also inappropriate because Article VI, § 4 imposes two intertwined conditions for re-enfranchisement. Article VI, § 4 does not allow a felon convicted of "murder or a felony sexual offense" to vote even if that felon has satisfied "all terms of sentence," although the separate clemency process is available for that felon. Article VI, § 4 similarly precludes someone convicted of a felony other than "murder or a felony sexual offense" from being re-enfranchised until "all terms of sentence" are complete. The two conditions operate together—not independently—to affect the rights of one group; the conditions are intertwined.

The Florida Supreme Court's decision in *Ray* provides a ready contrast. At issue was a state constitutional provision that imposed term limits on state and federal officials. 742 So. 2d at 1279. After the U.S. Supreme Court held that state-

imposed federal term limits were unconstitutional, the Florida Supreme Court severed the unconstitutional federal term limits from the otherwise valid state term limits. *Id.* at 1286. Severance was appropriate because the federal limits and the state limits were independent from one another, not intertwined conditions that *together* triggered a result; the imposition of federal term limits in no way affected the imposition of state term limits, and vice versa. *See id.* at 1278 n.2.

The Eleventh Circuit's decision in *Wollschlaeger v. Governor*, 848 F.3d 1293, 1317–19 (11th Cir. 2017) also presented independent statutory provisions that could be severed. While the "record-keeping, inquiry, and anti-harassment provisions" of the state's so-called "docs vs. glocks" statute violated the First Amendment rights of medical professionals, the remaining provisions concerned a firearm owner's right to decline to answer questions and be free from discrimination. *Id.* The valid provisions could be severed because they concerned the rights of a different group and did not depend on the invalid provisions to further these rights. *Id.*

Similarly, in *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1238 (11th Cir. 2004), provisions of a municipal sign ordinance that violated the First Amendment could be severed from otherwise valid and independent provisions relating to regulations on the size, height, landscaping, and the application process. Severability was appropriate because the sign code "still ma[de] perfect sense when stripped of the suspect provisions . . . ." *Id.* "[E]liminating th[e]

[invalid] portions *d[id] not in any way affect the other parts*, which [were] indisputably designed to facilitate clear communication, reduce traffic and structural hazards, and enhance the City's aesthetic appearance." *Id.* (emphasis added); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n. 16 (11th Cir. 2005) (finding the unconstitutional provisions of a sign ordinance to be "discrete" but refusing to sever because "[i]t [was] not clear that the legislature would have enacted the sign code . . . even without the exemptions").

Unlike *Ray*, *Wollschlaeger*, and *Coral Springs*, Article VI, § 4 imposes two conditions for re-enfranchisement that affect a single group. Felons (the only affected group) must satisfy both conditions (not just one) before being re-enfranchised. Eliminating one or the other condition affects the results—it broadens the scope of the constitutional language. The conditions are thus intertwined and so the phrase "all terms of sentence," used in Article VI, § 4(a), cannot be severed.

E. An Absurd Alternative

The Plaintiffs still argue for a more radical alternative. The Plaintiffs state that if "the Court finds that an implicit [financial obligations requirement] cannot otherwise be severed from" the requirements pertaining to the completion of all terms of sentence, then this Court should "*sever all of Article § 4(a)* [with the

exception of the provision addressing those who are mentally incompetent][2] and leave only the [newly adopted] provision in § 4(b) permanently disenfranchising individuals convicted of the enumerated offenses." ECF 121 at 27, 31 (emphasis added). Under this approach, Article VI, § 4 would read in pertinent part:

> (a) No person adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

The Plaintiffs alternative suffers from three defects. Each defect is more severe than the one that precedes it.

First, the Plaintiffs ask to strike language that pre-dates the approval of Amendment 4, even when Amendment 4 did not itself strike that language. They can muster no precedent to support an approach that explicitly contravenes voter intent expressed through the language actually approved on November 6, 2018.

Second, the Plaintiffs ask us to *assume* that Florida voters would have approved an amendment that allows all felons—except for murderers and sexual offenders—to vote and run for political office. But that choice was never presented to Florida voters at the ballot box.

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[2] In a footnote, the Plaintiffs state that "persons adjudicated mentally incompetent [are] not at issue in this litigation." ECF 121 at 28 n.16.

Third, as a practical matter, if felons are eligible to vote for and run from office even while in prison, the Plaintiffs have set up a scenario where the Mayor of the City of Raiford (non-prison population of approximately 200 people) might be elected while residing and campaigning at the Raiford Prison (population of approximately 2,000 inmates).[3] Florida voters did not vote for such a scenario.

IV. Conclusion

This Court should dismiss all five pending cases for the reasons outlined in the Motion to Dismiss, ECF 97, and this Reply. The Plaintiffs lack Article III standing because they can obtain no relief until they challenge the constitutionality of Article VI, § 4(a) of the Florida Constitution. The Plaintiffs' assumptions about the meaning of Article VI, § 4(a) beg for abstention. And even if the Plaintiffs did successfully challenge the constitutionality of Article VI, § 4(a), severing the phrase "all terms of sentence" from the remainder of Article VI, § 4 is impossible. The Plaintiffs' approach to severability proves as much.

[3] Data is available through the Census Bureau at https://www.census.gov/en.html (last viewed Sept. 23, 2019) and https://factfinder.census.gov (last visited Sept. 23, 2019). District courts may judicially notice such data at the motion to dismiss stage. 2 Moore's Fed. Prac.—Civil § 12.34 (2018) (appropriateness at this stage); *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (website).

Respectfully submitted by:

JOSEPH W. JACQUOT
(FBN 189715)
General Counsel
joe.jacquot@eog.myflorida.com
NICHOLAS A. PRIMROSE
(FBN 104804)
Deputy General Counsel
nicholas.primrose@eog.myflorida.com
COLLEN M. ERNST (FBN 112903)
Deputy General Counsel
colleen.ernst@eog.myflorida.com
EXECUTIVE OFFICE OF THE GOVERNOR
400 S. Monroe St., PL-5
Tallahassee, Florida 32399
Phone: (850)717-9310
Fax: (850) 488-9810

Counsel for Governor Ron DeSantis

BRADLEY R. MCVAY (FBN 79034)
General Counsel
brad.mcvay@dos.myflorida.com
ASHLEY E. DAVIS (FBN 48032)
Deputy General Counsel
ashley.davis@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building Suite, 100
500 South Bronough Street
Tallahassee, Florida 32399-0250
Phone: (850) 245-6536
Fax: (850) 245-6127

/s/ Mohammad O. Jazil
MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
GARY V. PERKO (FBN 855898)
gperko@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Phone: (850) 222-7500
Fax: (850) 224-8551

GEORGE N. MEROS, JR. (FBN 263321)
George.meros@hklaw.com
TARA R. PRICE (FBN 98073)
Tara.price@hklaw.com
HOLLAND & KNIGHT LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

Counsel for the Florida Secretary of State, Laurel M. Lee

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this filing complies with the size, font, and formatting requirements of Local Rule 5.1(C). While at 3,993 words this filing exceeds the word limitations imposed through Local Rule 7.1(I), the Governor and Secretary have filed an Unopposed Motion to Exceed Word Limit.

/s/ Mohammad O. Jazil
Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 23d day of September, 2019.

/s/ Mohammad O. Jazil
Attorney