No. 15-1983

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

KENT BERNBECK

Plaintiff-Appellee

v.

JOHN A. GALE,

Defendant-Appellant

BRIEF OF APPELLEE KENT BERNBECK

Submitted on July 13, 2015 by:

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Summary of Case; Request for Oral Argument

A provision of the Nebraska State Constitution limiting initiative petition efforts was declared unconstitutional below. The provision requires that signatures gathered a) equal 10% of the total vote cast for the office of Governor at the last general election, and b) that votes be gathered so they include at least 5% of the registered voters in each of at least 40% of Nebraska's 93 counties, or 38 counties. Unless these levels are met, even if 20% of the voters in the last general election petition, the measure will not be placed on the ballot for a vote.

Mr. Bernbeck claims the geographic distribution requirement a) dilutes his and other urban initiative petition signatures in favor of rural ones contrary to the Fourteenth Amendment, b) chills his First Amendment right to core political speech, and c) infringes on the "one person, one vote" principle.

The district court invalidated the constitutional provision, agreeing with Mr. Bernbeck that it chills his Fourteenth Amendment rights by dilution, but it rejected Mr. Bernbeck's First Amendment claims. Fees were awarded under 42 USC § 1988. Appellee challenges both rulings on appeal. There is no cross-appeal.

Mr. Bernbeck agrees that 20 minutes – 10 per side – is sufficient if oral argument is ordered. Mr. Bernbeck does request oral argument.

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Jurisdictional Statement

The district court's federal question jurisdiction was invoked in this federal constitutional challenge to a state law limiting the rights of citizens in the initiative and referendum process. 28 USC §1331.

The case was decided on November 10, 2014. Attorney's fees were considered and decided on April 8, 2015. Judgment on both orders was entered on April 8, 2015. The Notice of Appeal was filed by the Appellant, and necessary docketing steps were completed on May 5, 2015, invoking this Court's appellate jurisdiction under 28 USC §1291.

Statement of Issues

1. Did the district court err when it declared *Neb Const* Art III, §§ 2 & 4 unconstitutional under the Fourteenth Amendment and enjoined enforcement of the invalid state constitutional provision's geographic distribution of registered voters requirements for an initiative or referendum petition?

   Moore v Ogilvie, 394 US 814 (1969)

   Meyer v Grant, 486 US 414 (1988)

   Idaho Coal'n United for Bears v Cenarrusa, 342 F3d 1073 (9th Cir 2003)

   American Civil Liberties Union v Lomax, 471 F3d 1010 (9th Cir 2006)

2. Did the district court err because the amount of the attorney's fees awarded is excessive?

Hensley v Eckerhart, 461 U.S. 424, 429 (1983)

Hendrickson v Branstad, 934 F2d 158, 164 (8th Cir 1991)

Snider v City of Cape Girardeau, 752 F3d 1149 (8th Cir 2014)

Statement of the Case

Plaintiff-Appellee Kent Bernbeck sued to a) declare the geographic distribution requirements for initiative and referendum petitions under Nebraska State law unconstitutional, and b) to invalidate the state prohibition against payment of petition circulators on a per signature basis. Bernbeck prevailed on the former, but lost on the latter, claim.

Bernbeck has a long history of activism in support of the initiative process. He does not appeal the adverse decision on the pay-per-signature issue.

Relief was granted under 42 USC §1983. Fees were awarded under §1988. The State appeals, complaining that the district court a) erred when it found a Fourteenth Amendment violation in Nebraska law that skewed the initiative process in favor of rural voters, and b) awarded excessive attorney's fees.

Summary of Argument

Bernbeck challenged the geographic distribution requirements governing initiative and referendum petitions as well as Nebraska statute regarding the payment of petition circulators. The district court declared that *Neb Const* Art III,

§§ 2 & 4 unconstitutional under the Fourteenth Amendment. It rejected Bernbeck's pay per signature ban claim. No cross appeal is filed.

The district court was correct. *Neb Const* Art III, § 2, implemented by Art III § 4, requires a petition circulator obtain signatures from at least 5% of the voting population in at least 40% of (38 of 93) Nebraska counties. Nebraska's counties are extremely disparate. Compare Douglas County, home to 28.68% of the state's total population and 321,247 electors with Arthur County, home to 486 people, and only 325 electors. 16,062 electors' signatures are needed in Douglas County to qualify it as one of the 38 required counties for a successful initiative. But Arthur County needs only 17 electors' signatures to do so. This means the signature of a voter in Arthur County is 945 more powerful than a voter in Douglas County. The math proves violation of the one person-one vote principle because urban votes and voices are diluted. Urban voters are not equally protected. The Fourteenth Amendment is violated. *Meyer v Grant*, 486 US 414, 425 (1988).

The District Court did not find a First Amendment infirmity. Bernbeck contends the decision below correctly declared *Neb Const* Art III, §§ 2 & 4 for a reason rejected below: the State Constitution also violates the First Amendment. It imposes impermissible restrictions on core political speech rights, and petition rights. Affirmance is in order even if the district court was right for the wrong reason. Helvering v Gowran, 302 US 238, 245 (1937).

Political speech is the most protected speech category under the First Amendment. Laws challenged as unduly burdening political speech are subject to strict judicial scrutiny. The challenged state law's geographic distribution requirements make rural political voices count for more than urban ones.

Bernbeck's access to the ballot with an initiative petition is impaired. In turn, Bernbeck's right to speak on issues at election time is chilled because he was effectively blocked at getting his initiative onto the ballot. No successful petition—no election. No election -- no speech. The petition relates to petition-originated political speech like the larynx to physical speech.

Appellee's contention that the attorney's fees award is excessive also lacks merit. Bernbeck prevailed on the key issue in his case, though not on all issues. He was successful on geographic distribution; he did not win on a pay-per-signature claim…an issue not cross-appealed.

Bernbeck's fees and expenses request were thoroughly reviewed. The district court did not award the full amount requested. It made, and explained its reductions. Bernbeck does not complain in a cross appeal. Gale did not offer evidence in opposition to the invoices; he did refer to filings in a different case in the U.S. District Court in Nebraska – a case affirmed by this Court, and one in which the evidence cited by Mr. Gale was not cited as supportive of the decision made.

Judicial discretion in awarding fees and costs was not abused.

Argument

I. Geographic Distribution Requirements in the Nebraska State Constitution Limiting Initiative & Referendum Petitions Violate the Fourteenth Amendment.

Standard of Review

Challenges to the constitutionality of state law are reviewed, generally, *de novo*. *US v Billiot*, 785 F3d 1266 (8th Cir 2015). This Court reviews district court findings of fact for clear error; its conclusions of law are examined *de novo*. *Plunk v Hobbs*, 766 F3d 760 (8th Cir 2014) (*habeas corpus* case).

II. The district court found that Kent Bernbeck is a Nebraskan who lives in Douglas County. John Gale is the Secretary of State and the chief election official. JA178. Mr. Gale conducts primary and general elections and is responsible for duties related to statewide initiative and referendum petition processes. JA178. *Neb Rev Stat* §§32-1401 to 32-1416. JA1431.

Some basic facts were stipulated. JA1371. Bernbeck has been active in the initiative process. JA1372. He sought to participate in the process specifically to lower the signature threshold for such petitions by amending *Neb Const* Art III, §§ 2 & 3. JA1422; JA1451. Appellee Gale does not assail the district court's findings of fact. He contends the lower court should not have declared provisions of the Nebraska Constitution invalid on Fourteenth Amendment grounds.

The Nebraska Constitution imposes these challenged limits on the initiative process:

Neb Const Art III, § 2. First power reserved; initiative

> The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed…..

Neb Const Art III § 3, Second power reserved; referendum, provides:

> The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. Each such petition shall set out the title of the act

> against which the referendum is invoked and, in addition thereto, when only a portion of the act is sought to be referred, the number of the section or sections or portion of sections of the act designating such portion. No more than one act or portion of an act of the Legislature shall be the subject of each referendum petition. When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition….

Neb Const Art III § 2 is implemented, in part, by Art III § 4. This provision defines the total number of signatures required for an initiative or referendum petition to be sufficient to be placed before the people for a vote. Art III § 4 requires that "the whole number of votes cast for Governor at the general election next preceding the filing of an initiative or a referendum petition shall be the basis on which the number of signatures to such petition shall be computed."

Neb Const Art III § 4, Initiative or referendum; signatures required; veto; election returns; constitutional amendments; non-partisan ballot, provides:

> The whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition shall be the basis on which the number of signatures to such petition shall be computed. The veto power of the Governor shall not extend to measures initiated by or referred to the people. A measure initiated shall become a law or part of the Constitution, as the case may be, when a majority of the votes cast thereon, and not less than thirty-five per cent of the total vote cast at the election at which the same was submitted, are cast in favor thereof, and shall take effect upon proclamation by the Governor which shall be made within ten days after the official canvass of such votes. The vote upon initiative

> and referendum measures shall be returned and canvassed in the manner prescribed for the canvass of votes for president. The method of submitting and adopting amendments to the Constitution provided by this section shall be supplementary to the method prescribed in the article of this Constitution, entitled, "Amendments" and the latter shall in no case be construed to conflict herewith. The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation. All propositions submitted in pursuance hereof shall be submitted in a non-partisan manner and without any indication or suggestion on the ballot that they have been approved or endorsed by any political party or organization. Only the title or proper descriptive words of measures shall be printed on the ballot and when two or more measures have the same title they shall be numbered consecutively in the order of filing with the Secretary of State and the number shall be followed by the name of the first petitioner on the corresponding petition.

Nebraska's Configuration and Population Distribution

Nebraska has 93 counties. Douglas County, where Bernbeck lives, accounts for 28.68 % of the State's population. Adjacent Sarpy County is home to 8.93% and Dodge County, also adjacent, 21.963%. Washington, another county adjacent to Douglas, has 1.1%. Finally, Saunders County also has 1.1%, bringing the population of Douglas and its contiguous four counties to a total of 41.77% of the total population of all 93 counties. JA1388-1392.

Sixty-six Nebraska counties have populations under 10,000 persons each. Twelve have fewer than 1000 persons each. JA1373. The distance on Interstate 80

from Exit 1 near the Wyoming border, to the Iowa border, is 454.15 miles. *Id.* North-to-South, the State measures 217.5 miles. JA1373; JA1434.

The district court found these facts were all true. JA1430. The court below declared Nebraska's Constitution's geographic distribution limits on the petitioning process unconstitutional and enjoined their enforcement because they violate the Fourteenth Amendment. JA1430; JA1444. The district court did not adopt Mr. Bernbeck's contention that the First Amendment is also violated by the geographic distribution limits. JA1430; JA1437-1440.

The Fourteenth Amendment is Violated.

It is impossible for the voters in five counties, where more than 40% of Nebraskans live, to put a measure on the ballot by initiative – even if they are unanimous. But it is possible for the voters in thirty-eight counties, where as few as about 10% of Nebraskans live, to do so. This basic mathematics points out the Fourteenth Amendment violation imposed on urban voters, including Mr. Bernbeck, when they seek to exercise their power as a citizen through the initiative or referendum process. Douglas County has 321,247 total electors; Arthur County has 325 while McPherson County has 363 and Blaine County has 380. Twelve counties have fewer than 1,000 electors. JA1420-1422. Seventeen (17) Arthur County electors can qualify the entire county for inclusion in the 40% of counties geographic distribution requirement attacked in this case. But, it would take 16,062

Douglas County electors to do so. This is a ratio of 1/945, making the Arthur County elector 945 times more effectual than the Douglas County voter.

This math requires that the geographic distribution restrictions of *Neb Const* Art III §§ 2-4 be stricken and that the district court Judgment doing so be affirmed. Once the geographical unit for which a representative [here, petition] is designated, all who participate must have an equal vote [voice]. Gray v Sanders, 372 US 368, 379, 83 SCt 801, 9 LEd2d 821 (1963). This is required by the Equal Protection Clause of the Fourteenth Amendment. Id. And, this is why Moore v Ogilvie, 394 US 814, 819, 89 SCt 1493, 23 LEd2d 1 (1969)(overruling in part, *MacDougall v Green,* 335 US 281 (1948)), struck down an Illinois requirement for signature distribution of 200 signatures from at least 50 of the state's 102 counties for independent presidential candidate nominating petitions. The requirement violated the Equal Protection Clause. Where state law discriminates against residents of populous counties in favor of rural counties, it violates the equality to which exercise of political rights is entitled. Id.

"Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment." Idaho Coalition, 342 F3d 1073, 1076 (9th Cir 2003). A state "may decline to grant a right to legislate through ballot initiatives." Id. at 1077 n 7. "All procedures used by a State as an integral part of the election process," however, "must pass muster against the charges of discrimination or of

abridgment of the right to vote." Moore v Ogilvie, 394 US 814, 818, 89 SCt 1493, 23 LEd2d 1 (1969). Thus, when a state chooses to give its citizens the right to enact laws by initiative, "it subjects itself to the requirements of the Equal Protection Clause." Idaho Coalition, 342 F3d at 1077 n. 7. *Angle v Miller,* 673 F3d 1122, 1127-28 (9th Cir 2012)(Nevada congressional district distribution requirement). Initiative or referendum petitioning to put issues on the ballot impacts voting. If a petition is sufficient, an election is held, but if the hurdles to success defeat the petition, no voting occurs. States are not required to provide processes for initiative or referendum. Doe v Reed, 561 US 186, 130 SCt 2811, 2817, 177 LEd2d 493 (2010) (Sotomayor, J., concurring)(direct democracy not compelled by Constitution); *Kendall v Balcerzak*, 650 F3d 515,521 (4th Cir 2011).

Where states do so, however, their process must pass constitutional criteria and may not offend the First or Fourteenth Amendments. And, one court has squarely held state regulations of the petitioning process do "implicate the fundamental right to vote", and initiative and referendum powers serve as "basic instruments of democratic government." *Lemons v Bradbury,* 538 F3d 1098, 1102-03 (9th Cir 2008). Voting dilution, for example, is not permissible. *Reynolds v Sims*, 373 US 533,565-66, 84 SCt 1362, 12 LEd2d 506 (1964). *Bush v Gore*, 531 US 98, 104-05, 121 SCt 525, 148 LEd2d 388 (2000). Mr. Gale does not contend

otherwise. JA1440. Class based dilution is the subject of a statutory claim. 28 USC § 1973(a) (transferred to 52 USC § 10301).

Where limitations on the right to participate in the initiative process severely burden "core political speech" they are unconstitutional. *Meyer v Grant*, 486 US 414, 422 (1988). These limits can occur in two (2) ways:

1. Regulations can restrict one-on-one communication between circulators and voters. *Id.* at 422-23.
2. Regulations can make it less likely that proponents will be able to garner necessary signatures to place an initiative on the ballot, thus limiting ability to achieve a statewide discussion of an issue. *Id*. at 423.

The geographic distribution requirement in *Neb Const* Art III §2 burdens core political speech in both ways because it dilutes urban votes and imposes significant human resource and travel expenses to obtain requisite signatures in low population per capita counties in efforts to submit petitions from at least 40% of the Nebraska counties. It also elevates the hurdle one must clear to be able to have a ballot issue to discuss at election time… the time when political speech is especially important. JA1422.

The Nebraska county populations vary greatly from county to county. The US Census Bureau's studies indicate that Nebraska's 2012 estimated population is 1,855,350 persons. JA1374; JA1386. Lancaster County, for

example, had an estimated population of 293,407 with 180,878 registered voters in 2012, while Arthur County's 2012 estimated population was 486, or 0.16 percent of Lancaster County's population. 326 registered voters resided in Arthur County in 2012. A circulator in Arthur County only needed to obtain 17 valid signatures to satisfy *Neb Const* Art III §2, as compared to the 9044 signatures needed in Lancaster County. JA1422, ¶3; JA1430-33. Mathematically, again, this makes one (1) Arthur County signature have the impact of 532 Lancaster County residents; the Arthur County elector is 532 times as powerful as the Lancaster County elector.

"The right of suffrage can be denied by debasement or delusion of the weight of a citizen's vote just as effectively by wholly prohibiting the free exercise of the franchise." *Reynolds v Sims*, 377 US 533 at 555 (1964). Consistent with this principle, the Supreme Court invalidated geographic distribution requirements that allocate equal political power to geographical units with unequal populations. *Moore v Ogilvie*, 394 US at 818-819 (1969). *Moore* invalidated an Illinois law requiring presidential candidates seeking a place on the ballot to obtain 200 signatures from each of at least 50 of the State's 102 counties. The law violated the one-person-one-vote principle. See Reynolds v. Sims, 377 US at 555.

Neb Const Art III § 2 mirrors the statute at issue in *Moore* in that it requires a variance of signatures be obtained from a specific number of counties, which

dilutes the voices and votes of those living in more densely populated counties. It deprives an urban citizen, such as Bernbeck, of an equal voice, and it makes his vote less meaningful than the vote of any other Nebraska voter in any other Nebraska county. The distinction between *Moore* and the present case, that of using county population percentages as opposed to a specific number, does not cure the defect. The county unit system is defective even if unit votes are allocated in proportion to population. *Gordon v Lance*, 403 US 1, 4-5 (1971). The reason geographic distribution limits are stricken is simple. "'[M]ajority rule' is one of the 'ideals' that drives American democracy." *Reynolds v Sims*, 377 US at 566.

The government may remove the right to initiative entirely, and they may impose limitations upon the right to the people to obtain an initiative, but in doing so the government may not impose restrictions amounting to violations of the one person-one vote principle or limiting availability of core political speech. *Meyer v Grant*, 486 US 414, 425 (1988), held that a state statute (*Colo Rev Stat Ann* § 1-40-110) that allowed a proposed state constitutional amendment to be placed on a general election ballot if its proponents could obtain the signatures of at least 5% of the total number of qualified voters on an "initiative petition" within a six-month period, but made it a felony to pay petition circulators, was void.

The *Meyer* Court rejected the argument that even if the statute imposed some limitation on First Amendment expression, the burden was permissible

because other avenues of expression remained open to the proponents and because the state has the authority to impose limitations on the scope of the state-created right to legislate by initiative. The statutory burden was not rendered acceptable by the state's claimed authority to impose limitations on the scope of the state-created right to legislate by initiative, since the power to ban initiatives entirely does not include the power to limit discussion of political issues raised in initiative petitions.

The "First Amendment protects the right of corporations to petition legislative and administrative bodies." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 355, 130 S. Ct. 876, 907, 175 L. Ed. 2d 753 (2010). Surely the First Amendment also protects the right of a citizen to have an equal voice on a one person, one vote basis, in the petitioning process.

The geographic distribution requirement presently before this Court violates the principal of one-person-one-vote because it prevents an initiative petition issue from reaching the voters of Nebraska, notwithstanding the fact that Plaintiff might successfully gather signatures in support of an initiative or referendum issue from as many as fifty percent (50%) of all the voters in the contiguous counties of Douglas, Sarpy, Saunders, Dodge, and Washington, where more than forty percent (40%) of the population of Nebraska resides, thus surpassing, by 200% to 300% the minimum numerical requirements of *Neb Const* Art III § 2 for a valid initiative

or referendum petition. This restriction dilutes, cheapens and debilitates a plaintiff's individual voice and vote as a petition circulator.

Ballot-access regulations burden two different but "overlapping" constitutional rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. 23, 31, 89 SCt 5, 21 L Ed2d 24 (1968). Restrictive ballot-access laws burden the right to associate because voters may view a political party, or in this context a proposed ballot measure, that cannot qualify for the ballot as an "[in]effective device for advancing the ideas or political aspirations of its adherents" or, in the context of initiatives, is a bad idea because it could not get on the ballot (even if a majority of voters all from urban areas favor it). Socialist Workers Party v Sec'y of State, 412 Mich 571, 588, 317 NW2d 1, 6 (1982). Restrictive ballot-access requirements burden voting rights because "[v]oters, faced with statutorily limited ballot choices, may find exercise of the right to vote a Hobson's choice and not an expression of political preference." Id.

States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," *U.S. Const* art I, § 4, cl 1. The Supreme Court "has recognized that States retain the power to regulate their own elections." Burdick, 504 US at 433. The Court observed that "[c]ommon sense, as well as

constitutional law, compels government to play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " Burdick, 504 US at 433 (quoting Storer v Brown, 415 US 724, 730, 94 SCt 1274, 39 LEd2d 714 (1974)).

Not every ballot-access regulation is subject to strict scrutiny. Burdick, 504 US at 433. Instead, "a more flexible standard applies." Burdick, 504 US at 433 (citing Anderson, 460 US at 788-89 and 460 US at 808, 817 (Rehnquist, J., dissenting)). A court must weigh "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" Id. at 434 (quoting Anderson, 460 US at 789; Tashjian v Republican Party of Connecticut, 479 US 208, 213–14, 107 SCt 544, 93 LEd2d 514 (1986)). In performing this balancing test, "the rigorousness of [this Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Id. If the ballot-access scheme places "severe" burdens on the right to associate and vote, the Constitution demands that the state's regulations be " 'narrowly drawn'" to advance a state

interest of " 'compelling importance.'" Id. (quoting Norman v. Reed, 502 U.S. 279, 289, 112 SCt 698, 116 L Ed2d 711 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. (citing Anderson, 460 US at 788; Id. at 788–89, n 9).

The task is not simple. There is "no bright line separating severe from lesser burdens." Buckley v Am Constitutional Law Found, Inc., 525 US 182, 207, 119 SCt 636, 142 LEd2d 599 (1999) (Thomas, J., concurring). "Constitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." Anderson, 460 US at 789. Ultimately, there "is no substitute for the hard judgments that must be made," and "decision in this context, as in others, is very much a matter of degree." Storer, 415 US at 730 (internal quotation marks omitted).

Appellant relies, almost exclusively, on *Burdick v Takushi*, 504 US 428, 112 SCt 2059, 119 LEd2d 245 (1992), to support its position that the Fourteenth Amendment is not violated. In *Burdick,* a registered voter sued the Hawaii Director of Elections claiming that State's prohibition on write-in voting violated the First and Fourteenth Amendments. The Supreme Court upheld the restriction, finding that the burden imposed on write-in voting did not burden free choices by voters so

as to offend the US Constitution's First or Fourteenth Amendments. *Burdick* is a much different case than this one. Its sole value here is to help identify a circumstance in which the level of scrutiny by the judiciary might vary.

But, in this case Mr. Bernbeck prevails regardless of the level of scrutiny. Even if the burden imposed by Nebraska's constitutional restrictions is seen as limited, and not requiring strict scrutiny, the challenged constitutional provision fails under Fourteenth Amendment standards because it imposes such dramatically disparate outcomes. Geographic requirements based on congressional districts have survived constitutional challenges because they do not create such disparities. *Angle v Miller,* 673 F3d 1122, 1127-28 (9th Cir 2012)(upholding Nevada law requiring geographic distribution of signatures among congressional districts).

Mr. Gale asserts this is a ballot access case and not a right to vote case – while ignoring the fact that denial of ballot access inherently denies the right to vote. One who cannot get in the ballot box cannot mark the ballot. Mr. Gale concedes (Br 7) that voting "is clearly a fundamental right." *Kramer v Union Free School District,* 395 US 533 (1969). The right includes the one-person, one-vote concept that every vote must be worth the same as every other.

Certainly, a State can impose mechanical processes to accommodate voting. But it cannot do so in a way that makes the vote of one voter greater than that of

another. Nothing in the *Burdick* decision suggests otherwise, and Mr. Gale identifies no language in the decision so stating or bearing such an inference.

The State's argument is intended to impact the level of scrutiny required of the judiciary when examining the challenge to *Neb Const* Art III's initiative and referendum machinery. If those provisions did not cause disparate treatment or result in disparate value between and among the votes and voting related efforts of Nebraskans regardless of where they live, perhaps the provisions might be seen as valid. But they obviously achieve the opposite outcome. These provisions of the Nebraska State Constitution make it impossible for four times as many Nebraskans living in five counties to achieve what one-fourth as many Nebraskans could accomplish merely because they live in thirty-eight counties.

This burden denies equal protection to electors in Nebraska's urban regions and enhances the power of Nebraskans living in rural areas to invoke the initiative and referendum processes. Through those processes, Nebraskans can make laws – they can decide what to vote on, and then vote. A strict scrutiny standard of review is appropriate, but even without strict scrutiny, as the district court concluded, the disparate provisions of the Nebraska Constitution governing initiative and referendum denied equal protection of the law and violated the Fourteenth Amendment. These provisions were properly invalidated the Judgment below. The Judgment should be affirmed on Fourteenth Amendment grounds.

Neb Const Art III § 4.

Appellant argues there is no present controversy about *Neb Const* Art III, § 4. It contends decision about §4 should await a controversy. (Br 4-5) But Appellant ignores the fact that Bernbeck suffered chilled rights and was denied equal protection of the law because he was harmed in his efforts to petition successfully given the geographic distribution requirements. This finding of the district court, is not challenged. The constitutional provisions in Art III §§ 2-4 are interdependent. They work their inequality by their tandem structure in initiative and referendum settings, respectively. A controversy is present. The decision below was correct.

III. Geographic Distribution Requirements in the Nebraska State Constitution Limiting Initiative & Referendum Petitions Also Violate the First Amendment.

Mr. Bernbeck believes there is an additional reason why the district court reached the correct conclusion on the invalidity of Nebraska's geographic distribution requirements for initiative petitions. He contends the geography requirement chills his First Amendment rights as an urban voice to engage in speech by gaining access to the ballot, and to associate with others in law-making at election time.

Though the district court rejected this additional ground, it should be affirmed where the result is correct even if the reason is not. Helvering v Gowran, 302 US 238, 245, 58 SCt 154, 82 LEd 224 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."). *Jackson v City of Hot Springs,* 751 F3d 855 (8th Cir 2014) (quoting *Helvering*.) Also, Zirinsky v Sheehan, 413 F2d 481, 484 n 5 (8th Cir 1969)("if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.")

The issue Mr. Bernbeck presents is a ballot access issue. It affects, directly, the fundamental right to vote. Idaho Coalition United for Bears v Cenarrusa, 342 F3d 1073, 1076 (9th Cir 2003). In Anderson v Celebrezze, 460 US 780, 103 SCt 1564, 75 LEd2d 547 (1983) and Burdick v Takushi, 504 US 428, 112 SCt 2059, 119 LEd2d 245 (1992) the Supreme Court established the structure for analyzing a claim that state election laws burden First and Fourteenth Amendment rights. It did so in the context of a political party, its candidates, or its supporters.

The Right to Engage In Political Speech Is Chilled.

The district court decided this case in Mr. Bernbeck's favor on Fourteenth Amendment grounds. He submits the case should be affirmed on First Amendment grounds as well. Mr. Bernbeck contends political speech is at issue. By chilling

access to the ballot, Nebraska chills the right to speak about an issue at election time. It is not sufficient that the issue can be discussed at ballot circulation time. This inhibits debate.

First Amendment jurisprudence recognizes a hierarchy of constitutionally protected speech, with "political speech" at the top of the hierarchy. *Buckley v Valeo*, 424 US 1, 14 (1976), citing *Roth v US*, 354 US 476, 484 (1957). As *New York Times Co v Sullivan*, 376 US 254, 270 (1964) held:

> Debate on public issues should be uninhibited, robust, and wide-open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Accord, *Connick v Myers*, 461 US 138, 145 (1983). "Political speech has always been considered that form of expression most protected by the First Amendment." Melvin I. Urofsky, *A Symposium On Campaign Finance Reform: Past, Present, And Future*: *Article:* Melvin I. Urofsky, Campaign Finance Reform Before 1971, 1 Alb. Gov't L. Rev. 1, 13 (2008). But, it is hard to define. "The simplest – and most useful – definition is that political speech is any speech having to do with public affairs." *Id.* Petition circulation is such speech.

Petition circulation involves “both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182, 186 (1999) (quoting

Meyer v Grant, 486 US 414, 425 (1988)). Petition circulation is "core political speech." *Meyer* at 422. Exacting or strict scrutiny applies to a review of a requirement that burdens core political speech. *Id*. at 420-422. In order for the law to pass constitutional muster, the Government must prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v Federal Election Com'n*, 130 S Ct 876, 898 (2010) (*quoting FEC v Wisconsin Right to Life, Inc.*, 551 US 449, 464, 127 S Ct 2652 (2007)).

Mr. Bernbeck circulated initiative petitions throughout Nebraska in 2012 in an attempt to collect enough signatures in the requisite counties to place his proposed amendment to *Neb Const* Art III §2 on the ballot. This action by Plaintiff constituted core political speech. Mr. Gale's enforcement of the requirements of the statutes challenged imposed severe burdens on Mr. Bernbeck's First Amendment rights because the voices of urban Nebraskans were diluted as compared to those of rural Nebraskans. Bernbeck's First Amendment expression was thwarted, his right to exercise the elective franchise was thwarted and his effort to petition government for an election was declared invalid and thwarted. These impositions on his well-established First Amendment rights provide a firm basis for a decision in Mr. Bernbeck's favor on grounds different from those found by the district court.

The Right to Petition is Chilled

Presenting a petition for redress to one's government (including the people, when acting in their sovereign capacity as law-makers) is an exercise of sovereignty and is precisely what the Petition Clause of the First Amendment protects.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const, Amend I.

Petitioning is said to have given birth to the Magna Carta and led to Supremacy of the Law (The Petition of Right, Sir Edward Coke, 1626), The English Bill of Rights (Declaration of Indulgence, Petition of 7 Bishops, 1689), the U.S. Declaration of Independence (Townshend Tax Petition of Samuel Adams, 1768), and Women's Suffrage (Suffragettes' Petitions). It is no small thing.

The Petition Clause was derived from the English right of petitioning, a right which originated with petitions from the people to the King, then petitions from the Parliament to the King, then petitions from the people to the Parliament and to the King. *See* **Blackstone's Commentaries**, bk. 1, ch.1, sec. 3. The essence of the American right was not petitioning to "one's representatives," *but petitioning to the government*, as the plain language of the First Amendment makes clear.

As originally proposed by James Madison on June 8, 1789, "The people shall not be restrained from . . . *applying to the legislature* by petitions, or remonstrances for redress of their grievances;" and as later amended on July 28, 1789, in the House Committee of Eleven Report, "The freedom of speech . . . and the right of the people . . . *to apply to the government for redress of grievances*, shall not be infringed." *The Complete Bill of Rights*, Cogan (New York 1997), pp. 129-130. The final version, of course, protects the right to *petition the government*.

Petitioning is a fundamental right, and well established. *Meyer v Grant*, 486 US 414, 422 (1988); *Citizens United*, 558 US 310 at 355. Diluting the power of one elector over that of another fundamentally offends both Fourteenth and First Amendment rights. The right to petition to get an issue on the ballot so more political speech can occur at election time is a link involving one form of speech through voting and petitioning to a second – speech before an election about an election issue. No successful petition—no election. No election -- no speech. The petition process relates to petition-originated political speech like the larynx relates to physical speech.

Though the district court did not decide the case for Bernbeck on First Amendment grounds, the court below was right for one reason it adopted (Fourteenth Amendment) and it was right despite being wrong for other reasons

under the First Amendment. Affirmance is proper if the court below was right for any reason. *Jackson v City of Hot Springs,* 751 F3d 855 (8th Cir 2014).

IV. The Attorneys' Fees Award Is A Proper Product of the District Court's Discretion

Standard of Review:

> "We review *de novo* the legal issues related to the award of attorney's fees and costs and review for abuse of discretion the actual award of attorney's fees and costs." *Sturgill v United Parcel Serv, Inc,* 512 F3d 1024, 1036 (8th Cir 2008).

Ludlow v. BNSF Ry. Co., No. 14-2486, 2015 WL 3499859, at *7 (8th Cir June 4, 2015); *Nassar v Jackson*, 779 F3d 547 (8th Cir 2015).

Bernbeck's motion for attorney's fees and expenses (JA01445) was supported by Bernbeck's declaration (JA01451) and the declarations of his two (2) principal lawyers, Domina (JA01453) and Mikolajczyk (JA01488) and detailed invoices. Mr. Gale briefed opposition to the motion (JA01503) and calculation. But, Gale did not contest the reasonableness of the rate charged for services, except by referring the court to affidavits filed in other cases (JA1537-79), including *Ludlow v BNSF Ry Co*, affirmed by this Court on June 8, 2015 (2015 WL3499859).

The State offered its own analysis of Bernbeck's lawyers' invoices (JA1523). However, the reconstruction of Mr. Bernbeck's lawyers' invoices does not take issue with the actual invoices, it simply reconstructs them. *Id*. Mr.

Bernbeck testified concerning fees in a declaration (JA1451). Bernbeck identified his concern as "my ability to petition to change state law" (JA1451 ¶ 3). Bernbeck "was not able to pay Mr. Domina or his law firm for services associated" with his case. According to Mr. Bernbeck:

> I made this clear at our first meeting. Mr. Domina knew this would mean that in order to be paid in any amount for this services, he would incur the risk of handling the litigation on a contingent compensation basis. He knew his law firm would not be paid unless a) it prevailed in court, and b) attorney's fees were awarded to me as the prevailing party. Mr. Domina and I have a long history of personal and professional acquaintance. My family has known Mr. Domina professionally for more thirty (30) years, though we have had only occasional and relatively rare business dealings with him and his firm.

(JA1451 ¶ 4).

Mr. Bernbeck described his lawyer's reputation in the legal community, and his reasons for selecting the Domina firm (JA1452 ¶ 7). He concluded:

> I do not know of another law firm in Nebraska that was willing to handle this case for me under the fee arrangements required. I do not know another law firm that was willing to undertake the risks involved in handling the litigation without compensation, or hope for compensation, except to prevail in a case in which there is no financial fund created by the outcome from which a contingent fee can be taken.

(JA1452 ¶ 7)

Mr. Domina's affidavit (JA1453) describes his history with Bernbeck and his family, acknowledges the relationship is purely professional, and describes a history of previous services in 2011 of a case prosecuted successfully and resulting

in a declaration that certain Nebraska statutes were unconstitutional. Bernbeck approached Domina in late 2011 about the potential of the litigation now before this court (AA1453 ¶ 6). Bernbeck made it clear he lacked funds to pay the Domina firm and asked the firm to proceed on the condition that any compensation would come from a court order awarding fees if Mr. Bernbeck prevailed (JA1454 ¶ 7). Domina described his work on the case to include considering expert witnesses on the pay-per-signature issue which was unsuccessful, conducting extensive conferences, considering Mr. Bernbeck's volume of initiative petitions in municipalities, and assisting Bernbeck while minimizing his own involvement as a lawyer to the extent possible (JA1455-56). Domina's experience (JA1456) is described in his professional resume (JA1461). Domina described and detailed the work. He requested a fifty percent (50%) enhancement in the compensation for the favorable results achieved. Details identifying services by service provider were included, as were specific invoices setting forth itemized sums (JA1478-1487).

Megan Mikolajczyk's work on the case with Domina is described in her declaration (JA1488) and her experience is detailed in Ms. Mikolajczyk's resume (JA1489). Ms. Mikolajczyk and Mr. Domina confirm the fees for their services are reasonable in the marketplace in which they practice, given the kind of litigation they were called upon to handle. This evidence is substantially unrebutted.

Mr. Bernbeck's lawsuit's principal objective was to lower burdens imposed by Nebraska law, including the State Constitution, on the efforts of initiative petition sponsors and circulators to achieve their objective. Mr. Bernbeck prevailed. He sought attorney's fees pursuant to 42 USC. §§1973*l*(e) & 1988. These two sections of law contained nearly identical language and serve the same congressional purposes. They have been construed as meaning the same things for fee purposes. *Hensley v. Eckerhart,* 461 US 424, 433 (1983).

The fees sought, without expenses, based on reasonable hourly rates and reasonable, necessarily invested time, amounted to $93,175 for attorneys' fees in detailed billings. JA1478-1487. Expenses of $2,373.43 were also sought. *Id.* An upward adjustment of 50%, to $139,762.50 was requested. JA1458-59.

The district court concluded Mr. Bernbeck is the prevailing party (JA1594). It considered itemized time records, qualifications of counsel, and affidavits attesting to the reasonableness of fees sought. The Defendant's opposition was based on a claim that Plaintiff lacked success on some issues and that rates for two (2) junior lawyers were unreasonable given the level of their experience (JA1593).

The court considered and reached its conclusion that there should be no enhancement due to lack of success on all claims, but that fees sought should be awarded. JA1595-1597.

The court determined the rate that the fees for the associate lawyers, charged by Bernbeck's counsel at $300 per hour, should be reduced to $250 per hour. (JA1598). This was based on the court's experience with the community. After making these adjustments, the district court concluded that a lodestar of $87,915 was reasonable, but that the amount would not be enhanced. JA1600. An adjustment was made for computerized legal research. JA1601-02. The adjustment in costs and fees resulted in an award for attorney fees of $87,915 in fees and $561.54 in costs. JA1602.

The district court's award is not cross-appealed. Mr. Bernbeck has not cross appealed the fee awarded, even without its enhancement, and with no recognition that, unlike usual hourly fees certain to be paid, this case included the risk of uncertainty about the outcome and about fees. The acceptance of risks to accomplish an objective must produce a reward or citizens and lawyers will not undertake cases of this kind. The very purpose for the fee shifting provisions in the statutes will be lost unless the standard practice is to enhance the hourly fee in cases like this, and not simply maintain it. *Casey v City of Cabool Mo*, *infra.* The trial court's decision on this issue details familiarity with the marketplace, observations made, and reaches an appropriate determination about the amounts.

In litigation before the same district court below involving issues no more complex than those in this case, attorney's fees of $278,961.25 were sought and

were substantially all awarded with Mr. Gale's consent. *Citizens in the Charge v Gale*, 4:09-CV-03, 255-JFB-TDT.

Fees are requested by Bernbeck for the services of two principal lawyers, and two minor assistants, and one principal paraprofessional, with minor assistance from a second. JA1478.

Attorney's fees are awarded in cases where deprivations of constitutional rights by state actors are established. 42 USC §1988. Prominent public policy supports the underlying fee shifting provision for a successful litigant of claims brought under 42 USC §1983. *Casey v City of Cabool MO*, 12 F3d at 799, 805(8th Cir 1983) (purpose – promote diffuse private enforcement of civil rights by allowing the citizenry to monitor violations at their source. To fully implement this policy, Congress "felt it appropriate to shift the true full cost of enforcement to the guilty parties").

The United States Supreme Court recognized that this approach ensures effective access to the judiciary by litigants with meritorious claims. *Hensley v Eckerhart*, 461 US 424, 429 (1983). The Eighth Circuit recognizes the important public purpose of civil rights litigation as providing protection and clarification for important constitutional rights. *Milton v Des Moines, Iowa*, 47 F3d 944, 946 (1995); *Snider v City of Cape Girardeau*, 752 F3d 1149 (8th Cir 2014).

Mr. Bernbeck is a prevailing party because he "succeed[ed] on [a] significant issue in litigation which achieve[d] some of the benefit [Bernbeck] sought in bringing suit. *Hensley*, 461 US, at 433. Prevailing parties are entitled to awards of full compensatory fees. This is true even where the trial court does not adopt every contention raised by the plaintiff. *Catlett v Mo Hwy & Transp Comm'n*, 828 F2d 1260, 1270 (8th Cir 1987). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee…[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley*, 461 US, at 435. A lawsuit "… which includes several related legal theories based on a common core of facts should not be viewed as a series of discrete causes of action, and compensation should not be awarded on a claim-by-claim basis. In such a case, counsel's time is devoted to the litigation as a whole… and compensation should be based on all hours reasonably expended to achieve a successful result." Hendrickson, 934 F.2d 158, 16 4 (8th Cir 1991). See also, *Jenkins v Missouri*, 127 F3d 709-716-17 (8th Cir 1997) (en banc).

The Appellant, Mr. Gale, identified no special circumstance that would render an award of fees unjust. *Hensley v Eckerhart*, 461 US, at 429. The special exceptions circumstance that can defeat an award of attorney's fees is narrow and rarely found. It is not to be used to interfere with the congressional purpose of awarding fees. *Jenkins*, 127 F3d at 716. A defendant opposing fees must "make a

strong showing" to justify denial of §1988 fees for prevailing plaintiffs. *Martin v Heckler*, 773 F2d 1145, 150 (8th Cir 1985). Mr. Gale has hinted at no such showing, to date. *Johnson v State of Mississippi*, 606 F2d 635, 637 (5th Cir 1979) (fact fee will fall on taxpayers is of no significance.)

Fees are not precluded by the fact that the defendant was "merely performing a duty." Uncertainty in the law does not allow Mr. Gale to avoid responsibility for fees either. *Northcross v Board of Educ of Memphis City Schools*, 611 F2d 624, 635 (6th Cir 1979). "Good faith" makes no difference. *Hutto v Finney*, 437 US 678,693 (1978). The likelihood for success also does not matter. *Cooper v Singer*, 719 F2d 1496, 1503 (10th Cir 1983). Simply, neither Mr. Gale's brief nor the law suggests why fees should not be allowed.

The fees awarded are reasonable. A reasonable hourly rate is generally the prevailing market rate in the locale—i.e., the "ordinary rate for similar work in the community where the case has been litigated." Moysis v. DTG Datanet, 278 F.3d 819, 828 (8th Cir. 2002)–29 (8th Cir 2002) (quoting *Emery v Hunt*, 272 F3d 1042, 1047 (8th Cir 2001)). The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. *Blum v Stenson*, 465 US 886, 895 n. 11 (1984). "A rate determined in

this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate." *Id.*

The factors set forth in *Johnson v Georgia Highway Express, Inc*, 488 F2d 714, 717–19 (5th Cir 1974) provide thorough guidance in this area. *Johnson* called for consideration of twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the Circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 1459 n. 4.

This list of factors compares favorably with *Neb R Prof Cond* § 3-501.5 discussed below. This Rule of Professional Conduct governs attorney fees.

"[T]he most critical factor" in determining the reasonableness of an attorneys' fee award in civil rights litigation is "the degree of success obtained." *Hensley*, 461 US at 436. *McDonald v Armontrout*, 860 F2d 1456, 1459 (8th Cir 1988).

To decide on a reasonable fee, a court should consider the party's "overall success; the necessity and usefulness of [the party's] activity in the particular matter for which fees are requested; and the efficiency with which [the party's] attorneys conducted that activity." *Jenkins v Missouri*, 127 F3d 709, 718 (8th Cir 1997) (en banc). The court need not address exhaustively every *Johnson* factor. *Emery*, 272 F3d at 1048. It should consider what factors, "in the context of the present case, deserve explicit consideration." *Griffin v Jim Jamison, Inc.*, 188 F3d 996, 997 (8th Cir 1999). The district court should use its own knowledge, experience and expertise in determining the amount of the fee to be awarded. Gilbert v. City of Little Rock, Ark., 867 F.2d 1063, 1066 (8th Cir. 1989)–67 (8th Cir 1989).

The district court considered these factors. It weighed the evidence, applied its own knowledge and familiarity with fees and the community, and concluded that a reduction in fees from $300 to $250 per hour was in order for the associate lawyers in the Domina practice. It found other aspects of the fee request to be in order. An adjustment was made in the requests for expenses to eliminate computer-assisted research. An enhancement was denied. While Mr. Bernbeck and his counsel are disappointed that the fee request was not enhanced, the issue is not addressed in a cross-appeal.

The United States Supreme Court cautioned that "[t]he determination of fees 'should not result in a second major litigation.'" *Fox*, 131 S Ct at 2216 (quoting *Hensley*, 461 US at 437). Mr. Bernbeck is mindful of this caution; he considered it when deciding not to request review of the fee award in a cross-appeal.

Though courts must apply the correct standards, they need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do justice, not to achieve auditing perfection. Trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. *Id.; see also Kline v City of Kan. City, Mo, Fire Dep't*, 245 F3d 707, 709 (8th Cir 2001) (upholding the court's "reasonable estimate" of attorneys' fees).

The district court's decision on fees and expenses correctly applies the law, and reflects no abuse of judicial discretion. It should be affirmed.

Conclusion

Appellant Kent Bernbeck respectfully requests that this Court affirm the district court Judgment declaring *Neb Const* Art III, §§ 2-4 unconstitutional, and enjoined their enforcement. He requests that the district court award of attorney's fees be affirmed, and he asks that this Court award fees for his attorneys' services and expenses on appeal. Finally, Mr. Bernbeck seeks judgment for his costs.

July 13, 2015

Kent Bernbeck, Plaintiff-Appellee

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Certificate of Compliance

I hereby certify that this brief complies with the requirements of F R App P 32(a)(5) & (6) because it has been prepared with 14 point Times New Roman, a proportionately spaced typeface or font.

I further certify that this brief complies with the type volume limitations of Fed R App P 32(a)(7)(B)(i); it contains 8,897 words excluding the parts of the brief exempted under Rule 32 (a) (7) (B) (iii), according to Microsoft Word.

Finally, I certify pursuant to Eighth Cir R 28A(h), that this brief has been tested, and is virus-free.

David A Domina

Certificate of Service

I certify that on July13, 2015, I electronically filed the foregoing Appellee's Brief with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of the filing to be served on Appellant's counsel of record.

David A Domina