No. _____

In the
Supreme Court of the United States

CAROL WILDING, ET AL.,
Petitioners,
v.

DNC SERVICES CORPORATION AND DEBORAH WASSERMAN SCHULTZ, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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March 26, 2020

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QUESTIONS PRESENTED

1. Does the Democratic National Committee ("DNC"), a not-for-profit corporation charged with general responsibility for the affairs of the Democratic Party between national conventions, have, along with its chairperson, a legally binding, fiduciary duty to Democratic Party members to maintain impartiality and evenhandedness as among the presidential candidates and campaigns during the Democratic Party presidential nominating process, as the DNC's own charter states?

2. Did the dismissal of state-law breach-of-fiduciary-duty and fraud-related claims brought by Democratic Party members and donors that the DNC and its chairperson favored one candidate in the 2016 Democratic Party Presidential nominating process — which was based on lack of specificity in the complaint, did not find amendment would be futile, but denied Plaintiffs leave to amend — transgress Federal Rule of Civil Procedure 15(a)'s dictate that leave to amend "shall be freely given when justice so requires?"

3. Under Federal Rule of Civil Procedure 12(g)(2), does a defendant who initially moves to dismiss a complaint for insufficient service of process under Rule 12(b)(5) thereby waive any right to file a successive motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted?

4. Should the Court grant the petitioners leave to file the attached amended complaint pursuant to 28 U.S.C. § 1653 in order to correct any defective allegations of jurisdiction?

LIST OF PARTIES

Petitioners, who were Plaintiffs and Appellants below, are Carol Wilding, Stanley Rifken, Sharon Crawford, William Scott Franz, David Pulaski, Mary Jasmine Welch, Jose Alberto Gonzalez, Jane Ellen Plattner, Kim Marie Houle, Timothy Bingen, Susan Reed, Angela Monson, Aimee R. Coleman, Elesha Snyder, Matthew Shaw, Zachary James Haney, Estrella Gonzalez, Catherine G. Cyko, Laura Genna, Marianne Blair, Tamara L. Johnston, Valerie Elyse Rasch, Brett Teegardin, Daniel O'Meara, Peggy Lew, Daniel J. Reynolds, Brenda Lee Smith, Marlowe St. Cloud Primack, Patricia D. Cassidy, Brittany R. Musick, Harris Bierhoff, Felicia Michelle Taylor, Kyle G. Braund, Lauren Hale, William Crandall, Kirsten Hurst, Duffy Robert Weiss, Connie Anderson, Gregory Witkowski, Elizabeth Figueroa, Brandy Kincaid, Kimberly Alberts, Rachel Roderick, Laura Michelle Vaughn, Lisa Gale, Tammy Deitch-Coulter, Kayite Ashcraft, Alecia R. Davis, Dominic Ronzani, Luke Grim, Rosalie Consiglio, Edwin Lugo, Heather Dade, Michael S. Reed, Rhiannon Crandall, Ryan Ghan, Lisa Settle, Yalonda Dye Cooper, Daniel S. Cooper, Matthew Joseph Brady, Andrew Rousseau, Susan Catterall, Julie Hampton, Chris Bubb, Erik Furreboe, Zeke Shaw, Benjamin Ilarraza, Lucille Grooms, Christine Maiurano, Lewis L. Humiston, IV, John Lynch, James Simon, Lester John Bates, III, Jeffrey Goldberg, Rick Washik, Richard Booker, Karlie Cole, Erich Sparks, Prabu Gopalakrishnan, Carlos Villamar, Carolyn Jacobson, Dan Ellis Dudley, Lisa Anne Meneely, D.J. Buschini, Raymond D. Maxwell, David L. Meuli, Kenneth E. Puckett, David N. Pyles, Cynthia T. Chan,

Stefanie Birdsong, Amber Rae Knowlton, Timo A. Johann, Jeff Rogers, Heather Jordan, Rana Kangaskent, Susan Frisbie, Bakh Inamov, Theda Larson-Wright, Kirsten Hoffman, Anthony Grudin, Bruce Busto, Suzanne M. Cork, Emma L. Young, Sean Lynch, Sherry Davis, Nancy Berners-Lee, Phyllis Criddle, Melissa Liang, Joseph Gleason, Greta Mickey, Diane Emily Dreyfus, Kathleen L. Dodge, Catherine Willott, Tristan Burgener, Erik Michael Ferragut, Vincent Cauchi, Joseph Callan, Mark Bedard, Barbara Bowen, Steve Philipp, Susan Phillips, Richard J. Boylan, Teri Monaco, Tukoi Jarrett, Annmarie Wilson, Andrew Orrino, Craig Currier, Jarath Hemphill, George Thomas, Rebecca White-Hayes, Alaina Talboy, Sarah Lopez, Eliza Feero, Rebecca Hohm, Gayle A. Harrod, Erika Sitzer, Stephen Houseknecht, Diane Robinson, Jen Betterley, Amalie Duvall, John Crowe, Carl Miller, Susan Roppel, Diana Flores, Julianna Seymour, Melissa Marcotte, Alette Prichett, and Torsha Childs.

Respondents are DNC Services Corporation and U.S. Representative Deborah Wasserman Schultz, who were the Defendants and Appellees below.

RULE 14.1 RELATED PROCEEDINGS STATEMENT

- *Carol Wilding et al. v. DNC Services Corp. d/b/a Democratic National Committee et al.*, No. 16-61511-CIV-WJZ, U.S. District Court for the Southern District of Florida, final order of dismissal entered August 25, 2017.
- *Carol Wilding et al. v. DNC Services Corp. d/b/a Democratic National Committee et al.*, No. 17-14194, U.S. Court of Appeals for the Eleventh Circuit, order affirming dismissal entered October 28, 2019.

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The October 28, 2019 opinion of the court of appeals, which is reported at 941 F.3d 1116 (11th Cir. 2019), is reproduced in Appendix A. The January 10, 2018 order of the court of appeals, which is not reported, is reproduced in Appendix B. The August 25, 2017 order of the district court, which is unofficially reported at 2017 WL 6345492 (S.D. Fla. Aug. 25, 2017), is reproduced in Appendix C. The August 30, 2016 order of the district court, which is unofficially reported at 2016 WL 10516025 (S.D. Fla. Aug. 30, 2016), is reproduced in Appendix D.

JURISDICTION

The circuit court entered its order affirming the district court's final order of dismissal on October 28, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

REGULATION AND STATUTORY PROVISIONS INVOLVED

Democratic Party Charter, Art. 1, § 4; Art. 5, § 4

Article 1, Section 4 of the Charter of Democratic Party of the United States provides:

> The Democratic Party of the United States of America shall . . . [e]stablish standards and rules of procedure to afford all members of the Democratic Party full, timely and equal opportunities to participate in decisions concerning the selection of candidates, the formulation of policy, and the conduct of other

> Party affairs, without prejudice on the basis of sex, race, age (if of voting age), color, creed, national origin, religion, economic status, gender identity, sexual orientation, gender identity, ethnic identity or physical disability, and further, to promote fair campaign practices and the fair adjudication of disputes. Accordingly, the scheduling of Democratic Party affairs at all levels shall consider the presence of any religious minorities of significant numbers of concentration whose level of participation would be affected [.]

Article 5, Section 4 of the Charter of the Democratic Party of the United States provides:

> The National Chairperson shall serve full time and shall receive such compensation as may be determined by agreement between the Chairperson and the Democratic National Committee. In the conduct and management of the affairs and procedures of the Democratic National Committee, particularly as they apply to the preparation and conduct of the Presidential nomination process, the Chairperson shall exercise impartiality and evenhandedness as between the Presidential candidates and campaigns. The Chairperson shall be responsible for ensuring that the national officers and staff of the Democratic National Committee maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process.

The full text of the Charter & the Bylaws of the Democratic Party of the United States, as amended by the Democratic National Committee, August 28, 2015, is reproduced at Appendix E.

Fed. R. Civ. P. 15(a)

Federal Rule of Civil Procedure 15(a) states:

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party" written consent or the court" leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Fed. R. Civ. P. 12(g)(2)

Federal Rule of Civil Procedure 12(g)(2) provides:

> (2) *Limitation on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

28 U.S.C. § 1653

Section 1653, 28 U.S.C., titled "Amendment of pleadings to show jurisdiction," states:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT OF THE CASE

I. Factual Background

According to U.S. Department of Justice Special Counsel Robert S. Mueller III's Report on the Investigation Into Russian Interference in the 2016 Presidential Election (March 2019) (commonly known as and referred to herein as the "Mueller Report"), "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." Mueller Report Vol. 1 at 1. The Mueller Report identifies two principal channels through which Russia targeted the election, both commencing in early 2016: (1) a social media campaign that favored candidate Donald J. Trump and disparaged candidate Hillary Clinton; and (2) hacking operations against

email accounts and computer networks of the Clinton campaign, Democratic Congressional Campaign Committee, and the Democratic National Committee. *Id.* at 4. In testimony before Congress, Mueller characterized these operations as "among the most serious" challenges to U.S. democracy and demanding "the attention of every American."[1] As a result of the special counsel investigation, federal criminal charges were brought against more than 30 defendants; eight convictions or guilty pleas have been secured thus far.[2]

The Mueller Report notes that the Russian hacking operations – especially those directed at obtaining and releasing internal DNC files – sought to exploit conflict between supporters of Clinton and those of her competitor for the Democratic Party nomination, Bernie Sanders. *See* Mueller Report Vol. 1 at 45. This goal was achieved. The eventual publication of the DNC documents revealed that the DNC and its leadership actively favored and advanced Clinton's campaign while undermining Sanders's.[3] DNC chair

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[1] Robert Mueller's Opening Statements Before Congressional Hearings, NPR (July 24, 2019), *available at* https://www.npr.org/2019/07/24/744174570/read-robert-muellers-opening-statement-before-congressional-hearings?utm_term=nprnews&utm_medium=social&utm_campaign=npr&utm_source=twitter.com

[2] *Id.*; *see also* Ryan Teague Beckwith, Here Are All of the Indictments, Guilty Pleas and Convictions from Robert Mueller's Investigation, Time (Nov. 15, 2019), *available at* https://time.com/5556331/mueller-investigation-indictments-guilty-pleas/

[3] Jonathan Martin & Alan Rappeport, Debbie Wasserman Schultz to Resign D.N.C. Post, N.Y. Times (July 24, 2016), *available at* https://www.nytimes.com/2016/07/25/us/politics/debbie-wasserman-schultz-dnc-wikileaks-emails.html?_r=1

Debbie Wasserman Schultz announced her resignation in the immediate wake of the leaks, and the DNC issued a written apology to Sanders and his supporters "for the inexcusable remarks made over email" that "do not reflect the values of the DNC or its steadfast commitment to neutrality during the nominating process."[4] Clinton went on to claim the nomination, but three additional DNC officers stepped down in the days following the convention.[5]

Despite the fact that Russia's ability to interfere in a U.S. presidential election depended on the DNC's blatant violation of its own charter obligation to run the Democratic primaries with "impartiality and evenhandedness,"[6] the lack of legal accountability for this violation stands in stark contrast to the fruits of the Mueller Report. No official investigations or criminal proceedings have been undertaken as a result of the DNC's failure to maintain neutrality during the 2016 Democratic primaries; no one has gone to prison or been held accountable in a court of law or any other forum. Indeed, the instant civil action embodies the lone significant attempt to hold the DNC accountable for its biased conduct, and it was brought in the name of Sanders supporters who, as a class, contributed over

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[4] DNC Apologizes to Bernie Sanders, The Daily Beast (July 25, 2016), *available at* https://www.thedailybeast.com/cheats/2016/07/25/dnc-apologizes-to-bernie-sanders

[5] Jeff Zeleny & Tal Kopan, DNC CEO resigns in wake of email controversy, CNN (Aug. 2, 2016), *available at* https://edition.cnn.com/2016/08/02/politics/dnc-ceo-resigns-in-wake-of-email-scandal/index.html

[6] Democratic Party Charter, Art. V § 4.

$228 million to a campaign that the DNC was secretly working to undermine all along.

II. Proceedings Below

This case was filed on June 28, 2016 – just under a month before the start of the Democratic National Convention, and less than two weeks after files taken from the DNC's servers began to be released into the public domain under the moniker "Guccifer 2.0."[7] Initially, there were 120 named plaintiffs divided into three putative classes: (1) donors to the Sanders campaign; (2) donors to the DNC; and (3) registered members of the Democratic Party. The complaint pled state-law claims against the DNC and Wasserman Schultz for fraud, negligent misrepresentation, statutory deceptive conduct, unjust enrichment (collectively, the "fraud type claims") as well as breach of fiduciary duty, and negligent failure to safeguard personal and financial information. In support of its core allegation that the DNC improperly tipped the scales for Clinton in the course of the nominating process, the complaint cited (a) the language of the Democratic Party charter binding the DNC and its leadership to "impartiality and evenhandedness" during the nominating process; (b) five instances where DNC representatives, including Wasserman Schultz, publicly reiterated the DNC's commitment to neutrality; (c) an internal DNC memorandum dated May 26, 2015 showing that during the nominating process, the DNC consciously pursued a strategy of

[7] WikiLeaks did not begin releasing its more extensive trove of files from the DNC and Clinton campaign until October 7, 2016. *See* Mueller Report Vol. I at 48.

advancing and defending Clinton's campaign in the mainstream and social medias; and (d) other internal materials including research memoranda demonstrating the DNC's commitment of considerable resources to furthering the Clinton campaign.

Shortly after the complaint was filed, delegates to the upcoming convention in Philadelphia were threatened with de-credentialing if they participated in the lawsuit as plaintiffs. The complaint was amended on July 13, 2016, to drop four delegates from the caption and name an additional 34 plaintiffs for a new total of 150 named plaintiffs.

On July 22, 2016, the defendants moved to dismiss the action based on insufficient service of process under Federal Rule of Civil Procedure 12(b)(5). Before the plaintiffs could obtain a declaration from their process server to oppose the motion, he unexpectedly passed away. The district court then issued an order setting an evidentiary hearing on the motion and construing the motion to dismiss as a motion to quash service of process on the basis that "dismissal is not appropriate at this stage of the proceedings." After the hearing, the district court issued an order quashing service of process as to both defendants and requiring the plaintiffs to re-serve them within the time prescribed by law. *Wilding v. DNC Servs. Corp.*, 2016 WL 10516025 (S.D. Fla. Aug. 30, 2016).

After the new service of process, the defendants filed a second motion to dismiss based on lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a cause of action under Rule 12(b)(6). The district court dismissed for

lack of subject-matter jurisdiction, finding that the plaintiffs lacked Article III standing to assert any of the claims. *Wilding v. DNC Servs. Corp.*, 2017 WL 6345492 (S.D. Fla. Aug. 25, 2017).[8] According to the district court, the fraud-type claims brought by the donor plaintiffs did not allege a causal link between any plaintiff's donations and any statements of the DNC about neutrality, meaning there was no "causal connection between the injury and the conduct complained of." *Id.* at *4 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The district court also found the plaintiffs who were registered members of the Democratic Party lacked standing to bring a breach-of-fiduciary-duty claim because the asserted injury was only a "generalized grievance," and the court harbored "serious doubts about whether it could redress the harm" as a judicial award of injunctive relief, declaratory relief, or damages based on the failure of the DNC to abide by its charter would create "[g]rave questions regarding the DNC's right of association." *Id.* at *5-*6.[9] In dismissing all of the

[8] Whereas the district court also deemed the allegations insufficient for purposes of bringing the case within 28 U.S.C. § 1332(a) or § 1332(d) jurisdiction, the court of appeals allowed a limited amendment to the complaint under 28 U.S.C. § 1653 to correct the allegations of citizenship of the parties. The court of appeals then found the complaint "sufficient to establish minimal diversity under the Class Action Fairness Act." *Wilding v. DNC Services Corp.*, Case No. 17-14194 (11th Cir. Jan. 10, 2018).

[9] The district court also found lack of standing to pursue the claim for negligent failure to safeguard personal and financial information, which the plaintiffs elected not to continue with on appeal. *See Wilding*, 941 F.3d at 1124 n.1

claims, the district court labeled its order "final" and did not afford any opportunity to amend.

On appeal, the Eleventh Circuit upheld the dismissal of the breach of fiduciary duty claim for lack of standing, but found the DNC donor plaintiffs (although not the Sanders donors) did satisfy the elements of Article III standing for the fraud-type claims. *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126-27, 1130-32 (11th Cir. 2019). The court of appeals then dismissed the DNC donor plaintiffs' fraud-type claims on the "alternative basis" of failure to state a cause of action under Rule 12(b)(6). It held the fraud and negligent misrepresentation claims failed to satisfy Rule 9(b)'s specificity requirement because they did not identify the precise statements on which each of the plaintiffs relied, that the DNC donor plaintiffs could not state a statutory deceptive conduct claim because they were not acting as purchasers of consumer services, and that the unjust enrichment claim failed to state a plausible claim under Rule 8 because there were no allegations upon which the law could imply a contract between the DNC and its donors. *See id.* at 1127-30. In contrast to the DNC donor plaintiffs' claims, the Eleventh Circuit dismissed all of the Sanders donor plaintiffs' claims for lack of standing because the Sanders donor plaintiffs did not include the dates of their donations in the complaint, creating "just too many unknowns" regarding whether their injuries are "fairly traceable to the defendants' allegedly false statements." *Id.* at 1126.

The court of appeals also upheld the lack of opportunity to amend in the district court's order on

the basis that the plaintiffs "had already amended their complaint once as of right" and "[t]he plaintiffs did not seek to amend their complaint a second time to cure any standing or substantive deficiencies, and they did not explain 'how the complaint could be amended to save the[ir] claim[s].'" *Id.* at 1132 (quoting *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006)).

REASONS FOR GRANTING THE PETITION

I. Both Major Political Parties Are Custodians Of Our Most Precious Right – The Right To Vote

In no uncertain terms, this Court has endorsed the notion that, "American politics has been, for the most part, organized around two parties since the time of Andrew Jackson." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). Adopting this view of U.S. political history[10] along with the propositions that the two-party system engenders a perceived "stability" and governments possess a "strong interest in the stability of their political systems," the Court has laid the groundwork for the Democratic and Republican parties to control U.S. politics as a *de facto* duopoly, upholding the legality of "all of the many hurdles third parties face in the American political arena today." *Id.* at 366-67. Inhering in the view of democracy promoted by the Court is the proposition that "a strong and stable two-party system" yields "sound and effective

[10] For a competing view, see Lisa Jane Disch, *The Tyranny of the Two-Party System* 35-37 (Columbia Univ. Press 2002) (discussing the vigorous competition posed by third parties during the latter half of the 19th century).

government"; thus, government must, in turn, be free to nurture and protect the political party duopoly in order to keep at bay the "destabilizing effects of party-splintering and excessive factionalism." *Id.* at 367.

To this day, the Court's jurisprudence structures a political system in which the preferences of voters – rather than gaining expression in a free market of parties, candidates, and ideas – are mediated through the twin apparatuses of the Democratic and Republican parties, which conduct primaries and caucuses to determine the nominees who will ultimately square off in the general election for federal office. As such, the two parties are now custodians of what the Court has identified as the most "precious" of rights: "that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *see also U.S. v. Gradwell,* 243 U.S. 476, 480 (1917) ("the people of the United States . . . have an interest in and a right to honest and fair elections").

Notwithstanding the critical and undeniable importance of the Democratic and Republican parties to the operation of our democratic republic, the judicial understanding of these entities has been fraught with uncertainty and contradiction. On the one hand, the Court has readily characterized the parties as private associations protected by the First and Fourteenth Amendments in the exercise of freedom of speech and freedom of association. *See Eu v. S.F. Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 224 (1989) (striking down as

unconstitutional state ban on primary endorsements by party governing bodies and state's attempt to regulate internal party governance). On the other hand, the Court has also recognized the governmental function of parties, holding that the Fifteenth Amendment prevents them from excluding citizens from participating in primary elections on account of race. *See Smith v. Allwright*, 321 U.S. 649, 661-62 (1944). In justifying this latter treatment of political parties, *Smith* noted:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nulified [sic] by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 665.

The tension between these two radically divergent views of political parties has permeated the instant litigation from its inception. Petitioners' complaint quoted the Democratic Party's Charter and Bylaws to claim the DNC and its chair have a legally enforceable, fiduciary duty to Democratic Party members to maintain neutrality during the presidential nominating process that they oversee. *See Wilding*, 2017 WL 634592, at *1, *5. Before the district court, however, the respondents repudiated the charter obligation and

asserted that notwithstanding the commitment of the DNC's governing document to "maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process," the DNC has every right to permit its delegates to "go into back rooms like they used to and smoke cigars and pick the candidate that way." *Id.*

In its order dismissing the petitioners' claims, the district court refused to accept what it labeled the respondents' "trivialization of the DNC's governing principles." *Id.* at *5. It found "the DNC, through its charter, has committed itself to a higher principle." *Id.* Nonetheless, the court decided the DNC had no enforceable duty to be neutral in the nominating process but did have the prerogative to engage in "Tammany Hall politics" should it choose to do so. *Id.* at *6. No matter the nature or significance of the "higher principle" set forth in the charter, the district court dismissed the legal action of registered Democratic Party members to enforce that principle based on "standing deficiency." *Id.* According to the district court, the petitioners presented a "generalized grievance," not a concrete injury-in-fact sufficient to invoke federal subject-matter jurisdiction; given that the Democratic Party is a custodian of a "fair and impartial election process," any injury to Democratic Party members is, per the court, "undifferentiated from the voting public at large." *Id.* at *5-*6. Furthermore, the DNC's right of association gave the district court "serious doubts" about whether it could redress any injury incurred by the petitioners from the failure to conduct a fair and impartial election process,

notwithstanding the concreteness of the injury asserted. *Id.* at *6.

On appeal, the circuit court upheld the dismissal of the breach-of-fiduciary-duty claim, but concluded only that the petitioners lacked injury-in-fact, and therefore Article III standing, because of "the complaint's complete failure to say anything at all about the source, nature, or scope of the alleged fiduciary duty." *Wilding*, 941 F.3d at 1131. In contrast to the district court, the circuit court's analysis omits to consider the impact of the Democratic Party charter, which is quoted and cited throughout the complaint. This omission enabled the circuit court to evade the district court's bind – that of declaring the DNC to have "committed itself to a higher principle" while deeming the beneficiaries of this higher principle to be powerless to enforce it – a bind that would seem to spurn the time-honored maxim, *ubi jus ibi remedium*.[11] But at the same time, for the circuit court to dismiss the claim based on "the complaint's complete failure to say anything at all about the source, nature, or scope of the alleged fiduciary duty," while totally ignoring the complaint's quotation and citation of the charter's express obligation for the DNC to run a neutral nominating process, renders its legal analysis substantially underdetermined.

This case now presents a much-needed, golden opportunity for the Court to clarify the role of parties in the U.S. political system while addressing the

[11] *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

question of whether the DNC has a legally enforceable duty to run the nominating process in a fair and evenhanded manner – as its charter says it does. Indeed, commentators on both sides of the question agree on this salient point: the events of the 2016 primaries are fueling a crisis of confidence in the nation's political system. *Compare* John Baglia*, Legal Solutions to a Political Party National Committee Undermining U.S. Democracy,* 51 John Marshall L. Rev. 107, 108–09, 118–19, 133-34 (2017) *with* Anthony J. Gaughan, *Was the Democratic Nomination Rigged? A Reexamination of the Clinton-Sanders Presidential Race*, 29 U. Fla. J.L. & Pub. Pol'y 309, 355-56 (2019) (noting surveys from 2018 which found 37% of Americans have "lost faith in American democracy," 55% believe the state of American democracy is "weak," and 68% believe it is "in decline"; "By any measure, the 2016 campaign left American democracy in a state of crisis[.]"). The corrosive effect of Americans' growing disenchantment on democracy itself is self-evident. Much of this disenchantment stems from the disconnect between what the DNC says it will do publicly and in governing documents, and how it behaves in reality. Only this Court can conclusively pass on the legality of the DNC's conduct, situate it within the larger framework of the nation's political institutions, and thereby provide a judicious response to the widespread and growing perception that the DNC and its leadership have robbed – and will continue to rob – citizens of their voice in government with impunity.

In short, the restoration of faith in American democracy requires this Court to act.

What is more, the record of this litigation reveals serious violations of due process rights, as codified in the Federal Rules of Civil Procedure, encountered by the petitioners trying to vindicate their claims. In a case of "this magnitude,"[12] every procedural right and protection due should have been afforded to them. Instead, the petitioners were denied the opportunity to amend the complaint in response to the lower court rulings on standing – even though neither court made any finding that amendment would be futile, and the circuit court order even explicitly identifies areas where amendment would be fruitful. And in upholding dismissal of the complaint without leave to amend, the circuit court relied on alternative grounds not considered by district court and improperly raised by the respondents in violation of Federal Rule of Civil Procedure 12(g)(2). This procedural error on its own warrants reversal.

Finally, either in the alternative to or in conjunction with addressing the foregoing issues, the Court should grant this petition for purpose of ruling on petitioners' motion to amend the complaint pursuant to 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). Petitioners' motion is attached as Appendix F.

[12] Transcript of proceedings in district court at 57:11 (Aug. 23, 2016) (quoting Zloch, J.).

II. In Order To Fulfill Its Role In Our Democratic Republic, The DNC Owes Democratic Voters A Fair And Evenhanded Primary Election Process

Between 1927 and 1953, this Court decided the White Primary Cases – a series of challenges to the Jim Crow-era practice of forbidding blacks from voting in Democratic primaries in certain Southern states. These decisions "inaugurated a political revolution in the urban South" by removing the major obstacles hindering blacks from exercising the right to vote. Michael L. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. St. U. L. Rev. 55, 56, 102-07 (2001). The Court's opinions are critical to understanding the source and nature of the duties owed by political parties to their constituents, and why the DNC – contrary to what it has maintained throughout this litigation – cannot be free to "go into back rooms . . . and smoke cigars and pick the candidate that way."

In the first of the White Primary Cases, *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court ruled in favor of a black member of the Democratic Party who was prohibited from voting in the Texas Democratic primary. At issue was a Texas statute that provided, "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas"; the Court wasted little space in holding that the statute constituted a "direct and obvious infringement" of the equal protection clause in the Fourteenth Amendment. *Id.* at 539-41.

Five years later, the same African-American Democrat[13] appeared before this Court in *Nixon v. Condon*, 286 U.S. 73 (1932). This time, while Texas law no longer expressly excluded blacks from voting in the Democratic primary, it provided that, "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party[.]" *Id.* at 81-82 (internal quotation marks omitted). Under this grant of authority, the Texas state executive committee of the Democratic Party adopted a resolution excluding blacks from voting in the primary. *Id.* at 82. But once again, the Court found in favor of petitioner Nixon. Even though the exclusion of blacks was now mandated by the party's executive committee instead of the state, the Court found the same equal protection violation present in *Nixon v. Herndon*. As the Court held, "Delegates of the state's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. . . . The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." *Nixon v. Condon*, 286 U.S. at 89 (citations omitted).

Unfortunately, Nixon's victories on behalf of black Democratic primary voters proved to be short-lived.

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[13] For a brief life of Dr. Lawrence A Nixon, see "91 years since El Paso physician tried to vote and then changed history," El Paso Times (July 24, 2015), available at https://www.elpasotimes.com/story/life/2015/07/24/dr-nixons-story/71968244/

Three weeks after *Condon*, the Texas state Democratic Party's annual convention adopted a resolution excluding African-Americans from membership in the party. *See* Klarman, at 59. Once again, a black resident of Texas brought suit based on the denial of his right to vote in the primary. *See Grovey v. Townsend*, 295 U.S. 45, 46-47 (1935). This time, however, the Court denied the petitioner any relief. In the absence of a state law either expressly excluding blacks from voting or delegating the power to exclude to a party executive committee, the Court was unwilling to find that the party convention's action excluding blacks comprised "state action" that could run afoul of constitutional rights. *See id.* at 48. In justifying its decision, the Court paraphrased the Texas Supreme Court's holding in *Bell v. Hill*, 74 S.W.2d 113 (Tex. 1934) with approval, in language that substantially mirrors the DNC's "smoke-filled rooms" defense in this case, with its overriding focus on protecting the associational rights of political parties:

> [S]uch parties in the state of Texas arise from the exercise of the free will and liberty of the citizens composing them; . . . they are voluntary associations for political action, and are not the creatures of the state; . . . the Democratic Party in that state is a voluntary political association and, by its representatives assembled in convention, has the power to determine who shall be eligible for membership and, as such, eligible to participate in the party's primaries.

Grovey, 295 U.S. at 52.

With *Grovey* the law of the land, it was not until 1944, and the Court's opinion in *Smith v. Allwright*,[14] that the specter of white primaries would face the prospect of extinction from the political landscape – notwithstanding the Court's earlier pronouncements in *Nixon v. Herndon* and *Nixon v. Condon*. In *Smith*, another action brought by a black Democrat denied the opportunity to cast a ballot in the Texas primary on the basis of the convention's resolution excluding blacks from membership in the party, the Court took the opportunity to overrule *Grovey*. Relying on its intervening opinion in *U.S. v. Classic*,[15] which held that primaries constitute "elections" under section 4, Article I of the Constitution,[16] the Court roundly rejected the distinction between voluntary political associations and state action it had so sharply drawn in *Grovey*. As the *Smith* Court held, "[T]he recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." *Smith*, 321 U.S. at 660. Because *Classic* had conclusively established "the postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured

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[14] 321 U.S. 649 (1944).

[15] 313 U.S. 299 (1941)

[16] "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. Art. I § 4.

by the Constitution," (*id.* at 661-62), *Grovey*'s allowance of the white primary could no longer be squared with the Constitution, and the Fifteenth Amendment[17] in particular. In overruling *Grovey*, the *Smith* Court recognized that for the right to vote to have meaning, it could not be "nulified [sic] by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. **Constitutional rights would be of little value if they could be thus indirectly denied**." *Id.* at 664 (emphasis added).[18]

Contained within the line of White Primary Cases are teachings critical for the matter sub judice. Because political parties have been made de facto custodians of the right to vote through their control over primary elections, protection of voter rights requires political parties to relate to their members in a way that necessarily encroaches upon the parties' associational rights. Political parties cannot be allowed to skirt the constitutional rights of their members simply because they are private associations; otherwise, the result is *Grovey* and legalized discrimination. As the Court made clear in *Smith*, the role of political parties and primary elections in our democratic republic necessitates that freedom of

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[17] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[18] Compare *Smith* with the Court's subsequent holding in *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations").

association give way to the right to vote. In other words, political parties are not unfettered in their right to associate precisely because, as political parties in the American democratic system, they are duty-bound to respect the voting rights of their constituents.

Since the White Primary Cases, the Court's jurisprudence in the area of protection of voter rights has expanded from outright vote denial to cases of vote dilution, including malapportionment and gerrymandering. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 340 (1960); *Gray v. Sanders*, 372 U.S. 368 (1963). The common thread is the concept of "one person, one vote," what the Court has characterized as the principle that "those qualified to vote have the right to an equally effective voice in the election process." *Avery v. Midland Cty.*, 390 U.S. 474, 480 (1968); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system").

Where election officials or procedures manifest bias towards or against a candidate, courts, including this one, have stepped in to prevent or correct impairment in the voting process. In *Anderson v. Celebrezze*,[19] this Court struck down an Ohio statute requiring independent candidates for president to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November, holding that the early filing deadline placed an unequal burden on independent candidates and discriminated against "voters whose political preferences lie outside the existing political parties."

[19] 460 U.S. 780 (1983).

Id. at 793-94. Just last year, in *Jacobson v. Lee*,[20] the Northern District of Florida invalidated Florida's ballot-ordering statute requiring that candidates affiliated with the political party of last-elected governor be listed first, holding that it unconstitutionally put a "thumb on the scale and award[ed] an electoral advantage to the party in power." *Id.* at 1255. And in *Barr v. Gainer*,[21] the West Virginia Supreme Court affirmed the disallowance of all votes cast in a county commissioner election in a precinct where the incumbent's sister served as a poll worker, finding that the poll worker's presence "had a chilling effect on the free expression of the will of the voters." *Id.* at 101.

What the foregoing cases show is that the voter has an unqualified right to participate in elections conducted without systematic bias for or against any of the candidates – otherwise, the "one person, one vote" principle is infringed, just as it is in cases of vote denial and vote dilution. A corollary to this proposition is that those who conduct elections are duty-bound to do so in a bias-free manner. Because *Smith* and the other White Primary Cases established that primary elections implicate voter rights, it also follows that the DNC is duty-bound, to Democratic voters, to conduct the Democratic primaries in a bias-free manner. This is not just a result of constitutional law that the Court should grant the instant petition in order to uphold; it is also an explicit function of the DNC's own charter, which states:

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[20] 411 F. Supp. 3d 1249 (N.D. Fla. 2019).

[21] 508 S.E. 2d 96 (W.V. Va. 1998).

> In the conduct and management of the affairs and procedures of the Democratic National Committee, particularly as they apply to the preparation and conduct of the Presidential nominating process, the Chairperson shall exercise impartiality and evenhandedness as between the Presidential candidates and campaigns. The Chairperson shall be responsible for ensuring that the national officers and staff of the Democratic National Committee maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process.

Charter of the Democratic Party, art. V; § 4.

While the district court recognized this duty of the DNC as a "higher principle," it declined to find the duty to be enforceable by registered members of the Democratic Party. *Wilding*, 2017 WL 6345492, at *5-*6. It raised two problems under the rubric of standing. First, any harm incurred by Democratic voters from the lack of an impartial primary process is "too abstract and generalized" to constitute a concrete injury under Article III. *See id.* at *5 (citing *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193 (2d Cir. 2001); *Becker v. Fed. Election Comm'n*, 230 F.3d 381 (1st Cir. 2000); *Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618 (D.C. Cir. 1998)). Second, the district court had "serious doubts" about whether it could redress their harm, owing to the DNC's associational rights *qua* political party. *See Wilding*, 2017 WL 6345492, at *6 (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of*

Conn., 479 U.S. 208 (1986); *O'Brien v. Brown*, 409 U.S. 1 (1972)).

But neither of the district court's objections can be squared with the White Primary Cases. For one, if members of the Democratic Party cannot have standing to sue the DNC based on their right to vote in a fair election, then the plaintiffs in *Nixon v. Herndon*, *Nixon v. Condon*, and *Smith v. Allwright* would not have had standing to sue based on their exclusion from the Texas Democratic primary. Plainly, the disenfranchised black voters in those cases did not suffer harm "too abstract and generalized" to confer Article III standing or else this Court could not have granted them relief.[22] Furthermore, if the DNC's associational rights take precedence over Democratic voters' right to vote in a fair election, then *Smith v. Allwright* was either wrongly decided or is no longer good law, and the DNC

[22] The three circuit court cases cited in the district court's opinion regarding the concrete injury prong of Article III rejected attempts to assert voter standing in instances far removed from the direct impairment of voter rights by the DNC in this case. *See Crist*, 262 F.3d at 194 (voter challenged Commission on Presidential Debates policy of limiting participation in presidential debates to certain candidates on the basis it restricted the information he could hear); *Becker*, 230 F.3d at 389-90 (voters challenged corporate sponsorship of presidential debates on the basis it "corrupt[ed] the political process); *Gottlieb*, 143 F.3d at 621-22 (voters challenged legality of presidential candidate's use of campaign funds on the basis it diminished their influence on political process). *But see Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1997) (holding that voters had standing to challenge organization's failure to register as a "political committee" under federal election law on the basis it restricted their access to information).

is free to disenfranchise any segment of the population without repercussion.[23]

In short, the petitioners alleged that the DNC and its chair failed to provide them with a fair primary election to vote in. This Court has recognized the existence of this duty and the standing of voters to sue when their right to vote in a fair primary is infringed. The district court's order dismissing the petitioners' breach of fiduciary duty claim for lack of standing was in error.

III. Petitioners' Claims Were Dismissed Based On Non-Existent Pleading Deficiencies And Correctible Pleading Deficiencies Without An Opportunity To Amend

A. The Circuit Court Overlooked The Complaint's Core Allegation Regarding The Source, Nature, And Scope Of The Duty Owed Democratic Party Members By Respondents

If only to ultimately dispense with it, the district court succinctly and accurately discerned the elements of petitioners' duty-based claim. *See Wilding*, 2017 WL 6345492, at *5 ("The Plaintiffs who assert the breach of duty cause of action in Count V of the First Amended Complaint. . . are registered voters who have publically

[23] None of the three Supreme Court cases cited by the district court in connection with redressability involved actions by or against voters. *See Eu*, 489 U.S. at 219 (party central committees versus state election officials); *Tashjian*, 479 U.S. at 546 (party, its federal officeholders, and state chairman versus state election official); *O'Brien*, 409 U.S. at 1 (excluded national convention delegates versus DNC).

declared allegiance with their state's Democratic Party, which in turn follows guidelines established by the DNC. . . . They contend that the DNC owes (and Wasserman Schultz owed) all registered Democrats a fiduciary duty to comply with the DNC's charter, which the DNC and Wasserman Schultz breached by favoring Hillary Clinton during the Democratic primaries." (citation omitted)).

Perplexingly, the circuit court was unable to perceive what was readily apparent to the district court. It dismissed the breach of fiduciary duty claim based on "the complaint's complete failure to say anything at all about the source, nature or scope of the alleged fiduciary duty." *Wilding*, 941 F.3d at 1131. But in light of the complaint's verbatim quotation of the Democratic Party charter at article V, section 4 – which the circuit court's opinion acknowledges in its introduction (*id.* at 1122) and the district court unhesitatingly understood to be a plain statement of the DNC's fiduciary duty – this misconstrues the pleading. Indeed, the circuit court's assertion that the petitioners initially articulated "the DNC and Ms. Wasserman Schultz owed them a duty to ensure a fair and equitable nomination process and not to secretly conspire against Senator Sanders' presidential campaign" in their reply brief on appeal simply does not square with the plain language of the complaint, the district court's order, or the circuit court's introduction to its order. *Compare id.* at 1132 n.5 *with id.* at 1122 *and Wilding*, 2017 WL 6345492, at *5.

B. The Circuit Court Misapplied Eleventh Circuit Precedent In Denying Leave To Amend

In addition to overlooking the core factual allegation of the complaint, the circuit court misapplied Eleventh Circuit precedent in upholding dismissal of the breach-of-fiduciary-duty claim without leave to amend. Despite dismissing the claim on grounds of pleading deficiency, the circuit court's opinion rejects the possibility of amendment based not on futility but because the petitioners did not request leave to amend before the district court. *See Wilding,* 941 F.3d at 1132 (citing *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002)). But the Eleventh Circuit has clarified that the *Wagner* rule does not apply where the district court's order of dismissal itself forecloses the possibility of amendment. *Brisson v. Ford Motor Co.*, 349 Fed. Appx. 433, 435 (11th Cir. Oct. 16, 2009). Here, the district court dismissed all of the petitioners' claims through a "Final Order of Dismissal" that also dismissed the action. *Wilding*, 2017 WL 6345492. Accordingly, as a matter of law, the district court's dismissal order cut off any right that petitioners may have had to amend their claims under Rule 15. *See Czeremcha v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Nonetheless, the circuit court applied the *Wagner* rule and insisted that the petitioners were required to seek leave to amend in the district court as a predicate to challenging the lack of opportunity to amend on appeal – even though the district court's order foreclosed the possibility of amendment and any pleading deficiencies were first identified in the circuit

court's order (as the district court found the breach of fiduciary duty claim to be lacking in standing, not adequate pleading).

Left to stand, the circuit court's reasoning creates an intractable bind that the Eleventh Circuit has elsewhere taken pains to avoid. To wit, the circuit court's opinion mandates that in order to claim a right to amend, a plaintiff must first file a motion seeking amendment in the district court, even where the district court already adjudicated the availability of amendment by issuing a final order and dismissing the entire action. This ruling "hold[s] against the plaintiffs their failure to defy the district court's order telling them, in effect, not to file a motion to amend." *Brisson*, 349 Fed. Appx. at 435. Furthermore, because a motion to amend the complaint is not a motion that tolls the time to file a notice of appeal from final judgment, the plaintiff wishing to appeal an order denying leave to amend by way of final judgment now faces a Hobson's choice: appeal straight to the circuit court and be deemed to have waived the right to seek amend, or file a motion to amend in the district court and risk running out of time to appeal. *See* Fed. R. App. P. 4(a)(4)(A); *Allen v. Schnuckle*, 253 F.2d 195, 196 (9th Cir. 1958).

C. The Circuit Court's Decision Exacerbates An Important Pre-Existing Circuit Conflict Regarding When Leave To Amend Must Be Granted Under Rule 15(a)

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is

to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Three circuits have construed Rule 15(a) to require orders of dismissal afford leave to amend unless there is an express finding of futility or other grounds that could justify denial. *Stoller v. Walworth Cty.*, 770 Fed. Appx. 762, 764 (7th Cir. May 30, 2019); *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102-03 (9th Cir. 2018); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999). These precedents are in direct conflict with the Eleventh Circuit's holding in *Wagner*, as well as the erroneous application of *Wagner* in this case.[24]

The circuit court's opinion plants a procedural thicket impeding plaintiffs from amending their claims where potentially correctible pleading deficiencies are identified for the first time on appeal. But it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman*, 371 U.S. at 181. The Court

[24] Three circuits hold that leave to amend may only be afforded where the plaintiff makes a formal motion to amend before the district court. *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252-53 (3d Cir. 2007); *Royal Bus. Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1066 (1st Cir. 1991); *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989). Meanwhile, six circuits (including the Eleventh Circuit in *Wagner*) hold that the district court harbors complete discretion to permit or deny the opportunity to amend in the absence of a formal motion. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 76 (2d Cir. 1998); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 551 (8th Cir. 1997); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994); *Confederate Memorial Ass'n v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991).

should grant this petition to resolve the foregoing circuit split.

IV. The Circuit Court Upheld Dismissal Of Petitioners' Claims Based On Grounds The District Court Did Not Consider In Its Order And Was Barred From Considering Under Federal Rule Of Civil Procedure 12(g)(2)

A. The Circuit Court Also Dismissed Petitioners' Fraud-Related Claims Based On Very Minor, Correctible Pleading Deficiencies But Without Leave To Amend

In addition to upholding dismissal of the duty-based claim, the circuit court dismissed fraud-related claims of petitioners – also based on identified and very minor correctible pleading deficiencies but without affording petitioners an opportunity to amend. *Wilding*, 941 F.3d at 1126 (dismissing all of the fraud-related claims of Sanders donor plaintiffs because the complaint omits dates of donations to Sanders campaign); *id.* at 1128 (dismissing fraud and negligent misrepresentation claims of DNC donor plaintiffs because complaint omits to specify which of the identified false and misleading statements of neutrality by the DNC are statements on which they relied). Such deficiencies are readily correctible; this is demonstrated by the proposed amended complaint submitted concurrently (Appendix F) pursuant to 28 U.S.C. § 1653 and discussed in Section V, *infra*.

B. Respondents' Failure-To-State-A-Claim Objections Were Improperly Raised In A Successive Motion To Dismiss In Violation Of Rule 12(g)(2)

The circuit court's opinion was also erroneous in its dismissal of the DNC donor plaintiffs' claims based on grounds that the DNC and Wasserman Schultz were procedurally barred from advancing in the district court. The Federal Rules of Civil Procedure "impose restrictions on the filing of successive motions to dismiss." *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015). "Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under [Rule 12] must not make another motion under [Rule 12] raising a defense or objection that was available to the party but omitted from its earlier motion." *Id.* (quoting Fed. R. Civ. P. 12(g)(2)) (textual alterations in original)). *See also In re Apple IPhone Litig.*, 846 F.3d 313, 318-19 (9th Cir. 2017); *Albers v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 771 F.3d 697, 701-04 (10th Cir. 2014).[25]

Here, the respondents initially filed a Motion To Dismiss For Insufficient Service Of Process Or, In The Alternative, Extend Time To Answer Or Respond To Complaint, expressly citing Rule 12(b)(5). *Wilding*, 2016 WL 10516025, at *1.[26] They were therefore

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[25] *But see Ennega v. Starns*, 677 F.3d 766, 772-73 (7th Cir. 2012) (holding, contra the Third, Ninth, and Tenth Circuits, that Rule 12(g)(2) does not prohibit failure-to-state-a-claim defenses from being raised in a successive motion to dismiss).

[26] In footnote two of its opinion, the circuit court found Rule 12(b)(2) inapplicable because the district court construed the

barred from making a successive motion to dismiss under Rule 12, including Rule 12(b)(6) for failure to state a cause of action, except to raise lack of subject-matter jurisdiction. *Leyse*, 804 F.3d at 320. Thus, the circuit court's dismissal of the DNC donor plaintiffs' claims based on failure to state a cause of action was in error.[27] And while the failure to enforce Rule 12(b)(2) may only be reversible error when it "affects the substantial rights of the parties," *id.* at 321 (quoting 28 U.S.C. § 2111 (internal quotation marks omitted)), here the harm to petitioners is readily apparent. Without the failure-to-state-a-claim grounds asserted in violation of Rule 12(b)(2), the circuit court would have had no choice but to remand the DNC donor plaintiffs' claims to the district court. Accordingly, the petitioners would have had a window to move to amend their claims under Rule 15(a) before the district court to respond to the pleading deficiencies identified in the circuit court's order, thus vitiating the circuit court's ability to (mis)apply *Wagner* and deny them this right.

12(b)(5) motion as a motion to quash service of process. This reasoning is specious because in plain terms, Rule 12(b)(2) limits the "**filing** of successive motions to dismiss"; the subsequent judicial construction of the motions is irrelevant. *Leyse*, 804 F.3d at 320 (emphasis added).

[27] Because the circuit court disagreed with the district court's finding that the DNC donor plaintiffs lacked standing and therefore found subject-matter jurisdiction present, it could only dismiss these petitioners' claims by ruling on objections raised in violation of Rule 12(g)(2).

V. The Court Should Grant The Petition In Order To Rule On Petitioners' Application To Amend The Complaint Pursuant To 28 U.S.C. § 1653

Finally, and as alternative grounds, the Court should grant the petition in order to rule on petitioners' concurrently filed application to amend the complaint under 28 U.S.C. § 1653. This statutory provision provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" and permits amendment of jurisdictional allegations "even in the United States Supreme Court." *Molnar v. Nat'l Broadcasting Co.*, 231 F.2d 684, 686 (9th Cir. 1956) (citing *Norton v. Larney*, 266 U.S. 511, 516 (1925)).

Amendment is appropriate at this stage in order to address the defective allegations pertaining to standing as identified by the circuit court. *See Williams v. Lew*, 819 F.3d 466, 470-76 (D.C. Cir. 2016) (ruling on appellant's motion to amend complaint under 28 U.S.C. § 1653 in order to determine whether he could correct deficient allegations of standing). As set forth in further detail in petitioners' motion to amend and the attached proposed amended complaint (Appendix F), the proposed amendment sets forth allegations that the circuit court deemed necessary to determine petitioners' standing, including the dates of donations made by Sanders donor plaintiffs as well as precise false statements and omissions relied upon by the plaintiffs.

CONCLUSION

Rigging primary elections impairs voting rights as much as excluding voters based on race, gender, or other demographic characteristics. The Court must act to address the simmering crisis of confidence in American democracy before it reaches the boiling point – and not any later. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

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