No. 15,2088

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES T. PARKER,

Plaintiff-Appellant,

vs.

DIANNA J. DURAN, in her official
Capacity as New Mexico Secretary of State,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable Judge Martha Vazquez
No. 1:14-CV-00617-MV-GBW

APPELLANT'S BRIEF-IN-CHIEF

Oral Argument Requested

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STATEMENT OF PRIOR OR RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to the First and Fourteenth Amendments of the United States Constitution, 28 U.S.C. §§ 1343(a)(4) and 42 U.S.C. §§ 1983 and 1988. On August 7, 2014, the district court entered an order denying plaintiff's motion for temporary restraining order and Preliminary and Permanent Injunctive Relief. On November 5, 2014, the parties filed a Joint Stipulation and Motion to Consolidate Hearing on the Merits with the Hearing and Consideration of the TRO and Preliminary Injunction ("Joint Stipulation"). On April 30, 2015, the district court entered a Memorandum Opinion and Order and a Judgment accepting the Stipulation, granting the Motion, and dismissing the Complaint. Plaintiff-Appellant James T. Parker filed a timely notice of appeal from that order and judgment on May 29, 2015. This Court has jurisdiction over the appeal of this final judgment pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a district court's findings of constitutional fact and its ultimate conclusions regarding a First Amendment and Fourteenth Amendment challenge. *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236, 1240-41 (10th Cir. 2002)

ISSUE PRESENTED

New Mexico's Election Code requires that independent candidates for the Public Education Commission ("PEC") obtain nominating petition signatures not less than 3% of the votes cast for governor in that PEC district in the last general election. The Election Code requires that minor party candidates for the same position obtain only one percent of the votes for president in the preceding election. Intending to get a place on the 2012 ballot as a candidate for PEC District 4, Plaintiff Parker, an independent candidate, was able to obtain signatures equal in number to more than one percent but not the required three percent and was denied a place on the ballot. A major party candidate was the only candidate on the ballot for District 4 PEC Commissioner.

By imposing a signature requirement on independent candidate Parker that was three times greater than the signature requirement for a minor party candidate, did New Mexico's Election Code violate plaintiff's First and Fourteenth Amendment rights to ballot access and equal protection of law?

INTRODUCTION

This case arises from plaintiff James T. Parker's exclusion from the ballot for PEC District 4 because of his failure to obtain the required number of signatures to be placed on the ballot for District 4 of New Mexico's Public Education Commission ("PEC"). The number he needed under NMSA 1978 § 1-8-

51.E of New Mexico's Election Code was 3% of the votes cast for governor in the preceding general election, or 2,196. Aplt. App. 000009. He was able to obtain only 1,379. Under NMSA §§ 1-8-2.B and 1-8-3.C, a minor party candidate for the same position would have been required to obtain only one percent of the votes cast for president in that district in the preceding election, or 732 signatures. *Id.* Because plaintiff was denied a place on the ballot for failure to obtain the number of signatures required, only one candidate appeared on the ballot. Despite the disparity between the signature requirements imposed by the statutes, the District Court ruled that it would not apply heightened scrutiny to consider whether NMSA 1978 § 1-8-51.E infringed Parker's and his supporters' First and Fourteenth Amendment rights by requiring triple the amount of signatures on qualifying petitions for ballot access than are required of a minor party candidate for the same office. Aplt. App. 000118, 000142. The Court held that heightened scrutiny was unnecessary because the the additional burden the law imposed on Parker was balanced by other, unrelated burdens placed on minor parties and their candidates and that, accordingly, the Election Code provisions were not discriminatory. Aplt. App. 000138-139.

The additional requirements the District Court found were imposed on minor party candidates were 1) that a minor party also had to submit a petition of one half of one percent of the total votes for governor at the last preceding general election

to gain access to the ballot, and 2) minor parties had to submit rules and hold a nominating convention. Aplt. App. 000138. In coming to this conclusion, the District Court erred.

The question of whether the different requirements imposed on minor parties were sufficient to excuse the facially discriminatory statute was one of fact and law, but the defendant submitted no evidence to the Court as to the weight of these comparatively minor burdens. In contrast, James Parker submitted expert witness and factual declarations supporting Parker's assertion that the additional signature requirement imposed a severe and discriminatory burden on him. Aplt. App. 000014-15. The District Court's error was caused, in part, by its misreading of the minor party statutes. The burdens on minor parties are in fact minimal and sometimes nonexistent and are not a justifiable basis for a conclusion that there was no discriminatory treatment of Parker as an independent candidate. Contrary to the District Court's assumptions, a minor party doesn't need to submit a qualifying petition to get on the ballot for every general election. Minor parties remain on the New Mexico ballot without submitting qualifying petitions before every election and could potentially remain on the ballot forever if the party did not run candidates for governor or president or if it received a modest amount of votes. As to the second "burden," the requirements for a minor party's nominating convention are trivial: a minor party nominating convention can be a normal

business meeting; no minimum number of attendees is required, and no fee is involved for getting nominated.

In fact, under the New Mexico minor party ballot access requirements, Parker could have organized his own party, written and submitted his own rules, been the only registered member of his party, held a one person meeting, given himself the nomination and obtained a place on the ballot by gathering a third of the number of signatures he was required to obtain as an independent candidate. He could have obtained voter signatures on his qualifying petition and his nominating petition at the same time and thereby gained a ballot position with signatures equal to one per cent of the total number of votes cast at the last preceding general election in District 4 instead of three times that amount. *See* Argument below.

In 44 other states, even though minor parties have additional organizational requirements under their state's election laws, the states don't discriminate against independent party candidates by requiring a higher number of signatures for ballot access. The number of signatures they require for nominating petitions for independent candidates ***are equal to or less than*** the number of signatures required of minor party candidates. Precedent the District Court ignored identifies compelling reasons that independent candidates should be accorded even more constitutional protection than third party candidates. The Court below analyzed

the New Mexico statutes inaccurately, rejected Parker's evidence by incorrectly understanding the kind of past experience in the state that the Supreme Court says lower courts should consider, made factual determinations about the requirements imposed on minor parties without evidence in the record about the weight of these as burdens, misinterpreted the statutes, relied on cases from states in which the treatment of minor parties and independents was in fact even handed, and wrongly ignored how a large majority of states do not discriminate against independent candidates as New Mexico does. Because of the statute the District Court approved, voters in District 4 could not vote for a popular incumbent who had four years of experience on the PEC; in fact, they had no choice at all in that election. Section 1-8-51.E is discriminatory on its face, heightened scrutiny should have been applied, and the decision below should be reversed.

STATEMENT OF THE CASE

I. Facts

James T. Parker is a registered New Mexico voter who declined to state a party affiliation on his voter registration and is an independent voter. Complaint, ¶ 4, Aplt. App. 000007. In 2014 he was an incumbent representing District 4 on the Public Education Commission ("PEC"); Governor Martinez had appointed him to fill a vacancy caused by the absence of any candidate seeking that position in the 2010 and 2012 elections. *Id.*

Parker intended to be a candidate for the PEC in the 2014 election. *Id.* He submitted nominating petitions containing 1,379 signatures, and Secretary of State Duran denied him a place on the ballot pursuant to NMSA 1978 § 1-8-51.E, under whose formula he was required to submit 2,196. *Id.*, ¶¶ 13 16, and 24, Aplt. App. 000009-000012. Had he been the candidate of a minor party, the signatures he submitted would have been more than enough. *Id.*, ¶13, Aplt. App. 000009.

II. Statutory Scheme for Candidates' Access to the Ballot for PEC Commissioner in New Mexico.

The New Mexico Election Code has different requirements for candidates to gain a place on the ballot for district offices such as PEC Commissioner. Major party candidates for the PEC are required to submit nominating petitions with a number of signatures equal to or greater than three per cent of the votes cast for all of the major party's candidates for governor in the candidate's district in the last primary election involving a gubernatorial election, with a 25 signature minimum. NMSA 1978 §§1-8-17.A and 1-8-33.C. A minor party candidate for the PEC has to submit nominating petitions signed by a number of voters "totaling not less than one per cent of the total number of votes cast at the last preceding general election for the office of….president of the United States" in that candidate's district. NMSA §§1-8-2.B and 1-8-3.C. An Independent candidate like James Parker is required to submit a number of signatures equal to or greater than three per cent of the 2010 general election gubernatorial vote in his PEC district. NMSA 1978 1-8-

51.E. The undisputed facts are that a Democratic candidate for the District 4 PEC position needed 272 signatures to gain a place on the ballot; a minor party candidate needed 732 signatures; James Parker needed three times that amount: 2,196 signatures. Motion for Temporary Restraining Order and Preliminary and Permanent Injunctive Relief ("Parker's Motion"), Aplt. App. 000037.

Although he submitted almost twice as many signatures as New Mexico's election law requires a minor party candidate to submit to gain access to the ballot for the same District 4 PEC position, Section 1-8-51.E required Parker to submit 1,464 more. As a consequence, only one candidate was on the ballot for the District 4 PEC position in 2014. *Id.*

III. Procedural History

Parker filed suit against Secretary of State Duran seeking a declaratory judgment that NMSA 1978 § 1-8-51.E violated his and his supporters' rights under the First and Fourteenth Amendments to the United States Constitution and under Article 2, § 18 of the New Mexico Constitution. Complaint, Aplt. App. 000006-000035. He also sought a preliminary and permanent injunction ordering Duran to put his name on the 2014 general election ballot as a candidate for the PEC, District 4. *Id.,* Aplt. App. 000012. Attached to the complaint as exhibits were Declarations by Parker and by Richard Winger, a national authority on ballot access issues for minor parties and independent candidates. Aplt. App. 000017-

000035. Contemporaneously, Parker filed a Motion for Temporary Restraining Order and Preliminary and Permanent Injunctive Relief. Parker's Motion, Aplt. App. 000036-000047. The Court denied Parker's TRO motion because it did not provide any basis for it to provide emergency relief on an *ex parte* basis. Aplt. App. 000048-000049.

Secretary Duran submitted no evidence in support of her Response to the Motion for Preliminary Injunction. Aplt. App. 000082-000096. After the briefing cycle was complete, the District Court entered a Memorandum Opinion and Order Denying Parker's Motion. Aplt. App. 000104-000123. The parties filed a Joint Stipulation and Motion to Consolidate Hearing on the Merits with the Hearing and Consideration of the TRO and Preliminary Injunction Motion. Aplt. App. 000125-000127. The District Court issued a Memorandum Opinion and Order that granted this motion, dismissed the Complaint, and entered a Judgment in favor of the Secretary of State. Aplt. App. 000128-000147. Parker appealed. Aplt. App. 000148-000149.

SUMMARY OF ARGUMENT

The New Mexico Election Code is discriminatory on its face: pursuant to NMSA 1978 § 1-8-51.E, an independent candidate must obtain three times the number of signatures that NMSA 1978 § 1-8-2.B requires a minor party candidate for the same office to gather. Although the District Court cited the correct Supreme

Court precedent to apply to James Parker's First and Fourteenth Amendment claims, it applied the test set out in them incorrectly. Under *Anderson v. Celebrezze*, 460 U.S. 780 (1983) a court considering a challenge to state election law "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.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson,* 460 U.S. at 789). *Burdick* explained that courts can use a more relaxed standard of scrutiny only if the law at issue is "reasonable" and "nondiscriminatory." 504 U.S. at 434.

The District Court found that NMSA 1978 § 1-8-51.E was not discriminatory and refused to apply rigorous scrutiny, concluding that James Parker's First and Fourteenth Amendment rights were not violated and dismissing the case. By applying a lower standard of scrutiny to evaluate the ballot access law and conclude it did not violate James Parker's constitutional rights, the District Court erred. To arrive at its conclusion, the District misunderstood Parker's main argument to be that the three per cent signature requirement was discriminatory *per se*, not that the unequal signature number requirements for an independent and a minor party candidate were discriminatory. It briefly treated the actual

discrimination on which Parker based his claims, misinterpreting New Mexico minor party statute requirements to find "additional burdens" on minor parties to even the playing field and find, therefore, that there was no discriminatory treatment. In fact, the Election Code's additional requirements for minor parties are trivial, and there was no evidence in the record to support the proposition that the additional minor party qualification requirements were at all onerous. In some cases the District Court relied on, the courts approved of more stringent requirements for minor parties compared to independents, not the converse proposition the District Court adopted. *See* discussion below.

The court below also refused to consider the kind of "past history" of the number of New Mexico unaffiliated candidates who actually obtained a place on the ballot, rejecting the kind of "past history" that *Storer v. Brown*, 415 U.S. 724 (1974) and its progeny considered. Parker submitted an expert witness report summarizing the dismal past history of independent candidates on the New Mexico ballot (15 in 1,678 elections in the past three decades). The Court refused to consider this evidence, saying that the past history Parker should have submitted was evidence of how many independent candidates tried and failed to get on the ballot, not how few actually made it on the ballot. There is no basis for this definition of past history in *Storer*, and the compelling conclusions and thorough factual analysis Parker's expert witness submitted should have been considered.

The Court also ruled that the equal ballot access treatment of minor party and independent candidates in 44 other states (and the sometimes unequal and more stringent treatment of minor parties versus independents in some of those states) was irrelevant, again contrary to Supreme Court and lower court precedent. Past federal court decisions considered the laws of other states in deciding the constitionality of a particular state's election cases, and the District Court should have done so too. In fact, the election laws in the states of most of the cases cited by the District Court have equal ballot access requirements for minor party and independent candidates.

The District Court ignored and did not discuss most of the precedent Parker cited to support his argument; these cases applied strict scrutiny to ballot access statutes that discriminated against independent candidates compared to minor party candidates and decided that the laws were unconstitutional. Strict scrutiny should have likewise been applied in this case. Secretary Duran did not argue that there is a compelling state interest in the disparate treatment of independent candidates by NMSA 1978 §1-8-51.E, and there is none. The District Court erred in ruling there was no violation of Parker's constitutional rights, and the case should be reversed and remanded.

ARGUMENT

I. The District Court Erred by Not Applying Rigorous Scrutiny to a Facially Discriminatory Election Statute.

The District Court correctly set out the four equitable factors a movant must establish to obtain an injunction:[1] 1) irreparable injury in the absence of the injunction; 2) the threatened injury to the moving party outweighs the harm to the opposing party resulting from the injunction; 3) the injunction is not adverse to the public interest; and 4) the moving party has substantial likelihood of success on the merits (preliminary injunction) or has prevailed (permanent injunction). Aplt. App. 000107 and 000132. It decided to exercise its discretion and decide Parker's request for a declaratory judgment that, "as applied to him, Section 1-8-51.E of the New Mexico Election Code is constitutional." Aplt. App.000132. In denying Plaintiff's requests for preliminary, permanent injunctive, and declaratory relief, the district court correctly noted the appropriate test under *Anderson v. Celebrezze*,

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[1] In denying the preliminary injunction, the district court applied the traditional, four-part test, including irreparable harm to the plaintiff in the absence of an injunction, public interest, balance of harms and likelihood of success on the merits, Aplt. App. 000107. Once the parties agreed that there was no additional evidence and that the district court should proceed to resolve the case on the merits based on the existing record, the court applied the test for a permanent injunction, which includes actual success on the merits rather than probability of success on the merits. Aplt. App. 000145. Necessarily, if this Court were to reverse, those factors would shift to the Plaintiff. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (loss of first amendment rights in election context is irreparable harm); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) aff'd, 542 F. App'x 706 (10th Cir. 2013) (public interest and balance of harms weighs in favor of plaintiff where first amendment freedoms are violated).

460 U.S. 780 (1983); that a court considering a challenge to state election law "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.' *Burdick v. Tadishi*, 504 U.S. 428, 434 (1992), quoting *Anderson,* 460 U.S. at 789. Aplt. App. 000134-000135.

The Court noted that, in *Burdick,* the Supreme Court had elucidated the *Anderson* standard by explaining that the rigor of a court's "inquiry into the propriety of a state election law depends on the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick* at 434; Aplt. App. 000135. If state election laws impose "severe restrictions" on a plaintiff's constitutional rights, it may survive only if it is "narrowly drawn to advance a state interest of compelling importance." *Id.* If the law at issue "imposes only reasonable ***nondiscriminatory*** restrictions upon the [plaintiff's] First and Fourteenth Amendment rights… the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (emphasis added).

Although the District Court recognized that Parker was irreparably harmed by the statute, it held that the other three factors of the preliminary injunction (or,

later, the test for permanent injunction) test were not met. Aplt. App. 000145-000146. In its decision on the merits, in which it also denied the declaratory judgment relief Parker requested, the district court dealt with the second and third factors (evaluating the balance of harms between the parties and whether the injunction was in the public interest) briefly by referring to and incorporating by reference two paragraphs in the Memorandum Opinion Denying The TRO and Preliminary Injunction. Aplt. App. 000146 Most of the Court's opinion focuses, appropriately, on the legal merits of the parties' positions. Aplt. App. 000133-000146. The Court concluded that the statute was not a severe burden on Parker's and his supporters' constitutional rights and was not discriminatory and, accordingly, refusing to apply heightened scrutiny. Aplt. App. 000135-000141. It ruled that New Mexico's regulatory interests were sufficient to justify requiring Parker to obtain three times as many signatures as a minor party candidate. Aplt. App. 000142-000145.

A. The Decision Misstates Parker's Constitutional Argument and Relies on Precedent That Implicitly Supports Parker's Claims.

Although the Court cited the correct standards under *Anderson* and *Burdick*, it failed to apply them correctly. Even though NMSA 1978 § 1-8-51.E is discriminatory on its face and severely restricted Parker's rights as compared with those of minor party candidates, the Court did not apply the rigorous scrutiny

Anderson and *Burdick* require. Instead, it surprisingly concluded that the statute did not discriminate. Aplt. App. 000135-000141.

First, it apparently misunderstood and misstated Parker's argument that NMSA 1978 § 1-8-51.E discriminated against him. The opinion states, "Parker argues that New Mexico's three per cent signature requirement violates the First and Fourteenth Amendments." Aplt. App. 000135. The district court then cited a series of cases supporting the proposition that a three per cent signature requirement *per se* was not an excessive burden. Aplt. App. 000135-000137.

Parker's argument, however, was not that the specific percentage requirement violated his rights, but that the disparate signature requirement imposed on him compared to the much lower signature requirement for a minor party candidate for the same office created a severe burden and violated his constitutional rights. Parker claimed that "the State of New Mexico lacks any compelling interest to jusitfy the discriminatory and greatly disproportionate signature gathering requirements that it imposes on independent candidates seeking access to the general election ballot, as opposed to the much lighter burden on minority party candidates." Complaint, ¶ 23, Aplt. App. 000011. *See Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004) (noting that although North Carolina's two per cent signature requirement for independent candidates and its minor party candidate statute had both been found constitutional in other cases,

taken together the discriminatory treatment they imposed required strict scrutiny and the higher signature requirement for independent party candidates was unconstitutional).

Delaney did not reject the principle the District Court here also relied on, "that the qualitative differences between unaffiliated and party candidates may justify quantitative differences in their treatment….." *Id.* (citations omitted). However, the *Delaney* court continued, "unaffiliated candidates' ballot access requirements should be 'reasonable' and 'similar in degree' to party candidates' requirements… "Reasonable, nondiscriminatory restrictions'are those that 'neither substantially disadvantage independents nor favor them.'" *Id.* at 376-378, quoting *Wood v. Meadows,* 207 F.3d 708, 712 (4th Cir.2000). NMSA §1-8-51.E's disparate treatment substantially disadvantaged Parker, as stated in his declaration and the opinion of ballot access law expert Richard Winger. Aplt. App. 000014-000135. Although the *Delaney* court recognized that the North Carolina's percentage requirement was not unconstitutional *per se*, unlike the District Court, it also recognized that

> …the requirement as applied in North Carolina severely disadvantages a candidate who chooses to run without a party affiliation rather than designate himself and his supporters a new party. Given the potential magnitude of the disparity and the historical evidence of ballot exclusion, the burden on unaffiliated candidates *vis-a-vis* new party candidates appears unreasonable and discriminatory. The variance in the State's ballot access requirements is sufficiently severe to warrant strict scrutiny.

Id. at 378.

Ironically, the District Court in this case relied on cases that involve state election law schemes that treat minor parties and independent candidates equally and require the same amount of signatures from each. Aplt. App. 000135-000139. In *American Party of Texas v. White*, 415 U.S. 767 (1974)(cited at Aplt. App. 000136, *Swanson, III v. Worley*, 490 F. 3d 894 (11th Cir. 2007)(cited at Aplt. App. 000135), and *Populist Party v. Herschler*, 746 F. 2d 656 (10th Cir. 1984)(cited at Aplt. App. 000136) the Texas, Alabama and Wyoming election laws required the same amount of petition signatures for independent candidates and third party candidates. This was the nondiscriminatory treatment Parker asked for in his Complaint. Other cases on which the lower court relied also involved election laws that did not discriminate against independent candidates relative to minor party candidates. *Hagelin for President Comm. of Kansas v. Graves*, 25 F. 3d 956 (10th Cir. 1994) involved a constitutional challenge by minor party and independent candidates who claimed discriminatory treatment compared to major party candidates; *Arutunoff v. Okla. State Election Bd.*, 687 F. 2d 1375 (10th Cir. 1982) involved minor party candidates who claimed discriminatory treatment compared to major party and independent candidates. In pertinent part, this Court noted in *Arutunoff:*

> The Libertarians also argue that, under Oklahoma law, minor political parties are dealt with differently than independent candidates and that such

> discrimination violates their fourteenth amendment rights. In this regard, counsel points out that in order to gain recognition as a political party, the Libertarians in Oklahoma must present a petition bearing the signatures of five percent of the total votes cast in the last general election for either President or Governor, Okla.Stat. tit. 26, s 1-108 (1971 & Supp.1974), whereas a would-be independent candidate for state office need only file a petition signed by five percent of all registered voters, or, alternatively, by paying a filing fee, Okla.Stat. tit. 26, s 5-112 (1971 & Supp.1978). We are not persuaded by this argument. A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than one individual becoming an independent candidate to run for a particular office. As stated in *Storer v. Brown*, 415 U.S. 724, 745, 94 S.Ct. 1274, 1286, 39 L.Ed.2d 714 (1974), "the political party and the independent candidate approaches to political activity are entirely different." It is our view, therefore, that the states need not treat minor political parties and independent candidates identically in order for state laws to withstand constitutional challenge.

Id. at 1380. *Delaney* explains there are good reasons to require *more* of minor parties and does not support the District Court's reasoning that there are good reasons for the reverse.[2] The Kansas and Oklahoma election laws in these cases

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[2] *See also Cromer v. State of S.C.,* 917 F.2d 819, 823 (4th Cir. 1990):

> And as between new (third) party candidacies and independent candidacies, ***independent candidacies must be accorded even more protection than third party candidacies***. This flows from the states' heightened interest in regulating the formation of new parties having the potential not possessed by independent candidacies for long-term party control of state government…., in combination with the peculiar potential that independent candidacies have for responding to issues that only emerge during or after the party primary process.

did not discriminate against independent candidates versus minor party candidates. Each had earlier deadlines and a higher signature requirement for minor parties than for independent candidates, and the policy behind this treatment was not constitutionally infirm, because a new party could flood the ballot with nominees for every office, whereas an independent candidate only adds one name to a November ballot. Those states reasonably required more from their minor parties than their independent candidates and the two decisions lend no support to the District Court's decision that New Mexico could constitutionally do the reverse.[3]

B. The District Court Erred When it Assumed that Additional Insubstantial Requirements on Minor Parties Erased the Discriminatory Nature of New Mexico's Highly Disparate Signature Requirements

The District Court briefly addressed Parker's actual constitutional argument in one page of her opinion. Aplt. App. 000138. It stated that the fact that Plaintiff had to gather three times more signatures than a minor party candidate "alone" did

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Id. (emphasis added and citations omitted). *See also Hess v. Hechler*, 925 F. Supp. 1140, 1153 (S.D.W. Va. 1995) *aff'd sub nom. Fishbeck v. Hechler*, 85 F.3d 162 (4th Cir. 1996).

[3] Likewise, the election law schemes in two other cases the District Court relies on, *Miller v. Lorain County Bd. of Elections*, 141 F.3d 252 (6th Cir. 1998) (cited at Aplt. App. 000138-000139) and *Kuntz v. N.Y. State Senate*, 113 F.3d 326 (2d. Cir. 1997) (cited at Aplt. App. 000139), implicitly support equal signature requirements for independent candidates and minor party candidates for the same office. Ohio and New York did not require more signatures for an independent candidate than for a new party candidate, and these cases involve whether a state can require more signatures for an independent candidate than for a *major* party candidate, which is not an issue in this lawsuit.

not constitute a severe burden on Parker's constitutional rights because independent candidates and minor party candidates are not "similarly situated." *Id.* The Court reasoned that because minor parties have the "burden" of gathering ½ of one per cent of the total votes in the last gubernatorial election to get the party on the ballot, must adopt rules and regulations, and must hold a nominating convention, the requirement that independent candidates obtain three times more signatures than minor party candidates was rendered non-discriminatory. *Id.*

These were mixed conclusions of fact and law that were unsupported by any evidence in the record regarding the impact, if any, of those other burdens, and was based on a misunderstanding of the law. In fact, these burdens on minor parties are minimal and trivial. The Court's assumption that a minor party must qualify for the ballot by gathering signatures every four years was incorrect. Once a party is qualified, if it does not run a candidate for president or governor and has even one candidate on the ballot for local office, it can remain on the ballot forever and does not have to file party qualifying petitions. NMSA 1978 §1-7-2.C. It will also stay on the ballot if its presidential candidate gets one half of one percent of the total vote for president. *Id.*[4]

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[4] Although not in the record below, this Court can take judicial notice that the Green Party remained on the New Mexico ballot without submitting qualifying petitions for the party from 1992 to 2008. http://ballot-access.org/print-issues/ (May 3 1993 issue, 1994 petitioning chart; March 9, 1995 issue, 1996 Petitiioning

Furthermore, nothing in the New Mexico statutes prevents a minor party candidate from collecting the same signatures at the same time to qualify the party for the ballot and to qualify a party candidate for the ballot. The additional burden would be filing two different petitions. The statutes contain no requirements for the rules and regulations that a minor party must file, and the requirements for a minor party's nominating convention are trivial – a minor party nominating convention can be a normal business meeting; no minimum number of attendees is required, and no fee is involved for getting nominated. *See* NMSA 1978 § 1-7-2.A. In fact, under the New Mexico minor party ballot access requirements, Parker could have organized his own party, written and submitted his own rules, been the only registered member of his party, held a one person meeting, given himself the nomination and obtained a place on the ballot by gathering a third of the number of signatures he was required to obtain as an independent candidate. *Id.* He could have asked registered voters to sign his qualifying petition and his nominating

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for president; April 7, 1997 issue, 1998 petitioning chart; March 6, 1999 issue, 2000 petitioning for president chart; Nov. 16, 2000 issue, qualified status of political parties for 2002 chart; March 1, 2003 issue, 2004 petitioning for president chart; March 1, 2005 issue, 2006 petitioning for statewide office chart, March 1 2007 issue 2008 petitioning for president chart). The Independent American Party, having no candidates for president or governor, remains on the ballot since it first tried to qualify in 2011. http://ballot-access.org/print-issues/ (Sept. 1, 2013 and Sept. 1, 2014 issues, party revenue charts).

petition at the same time and gained a spot on the ballot with signatures equal to one per cent of the total number of votes cast at the last preceding gubernatorial election in District 4 instead of three times that amount.

As noted above, all the cases the District Court cites on this one page of its opinion to support its ruling that there is no discrimination by requiring an independent candidate to submit three times as many signatures as a minor party candidate are cases from states which treat their independent candidates equally or *less* stringently than their minor party candidates. The District Court also relied pointedly on *Jenness v. Fortson*, 403 U.S. 431 (1971) (cited at Aplt. App. 000136-000137). But *Jenness* addressed Georgia's election law, which permits an independent candidate, when he or she is an incumbent like Parker, to have no petition at all. *See* Ga. Code Ann. § 21-1-132(e)(3) ("Such petition shall not be required if such candidate is an incumbent qualifying as a candidate to succeed himself or herself.") Under the law of the state in a case the District Court relies on heavily, Parker wouldn't have had to submit any signatures at all. *Jenness* provides no implicit support for the constitutionality of NMSA 1978 § 1-8-51.E. In fact, the election laws in forty four other states treat independent candidates and minor parties evenhandedly as to signature requirements; almost half of this number have more lenient requirements for independent candidates as opposed to

minor party candidates.[5] All of these states have additional organizational requirements that minor parties must meet, but this has not resulted in laws that impose discriminatory requirements on independent candidates in order to somehow "balance" the burdens.[6] The District Court found, in effect, that the additional minor burdens on minor parties somehow evened the playing field but, without an evidentiary basis for assessing the weight of the additional requirements for minor parties, independent candidates are left to gain thirty yards for the first down while minor parties must only gain ten. No one would seriously suggest that

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[5] *See* chart attached at the end of this brief which lists the relevant statutes in all other jurisdictions regarding voting requirements for valid access for a new party candidate and an independent candidate. (The wording in the chart is included in the word count for this brief.)

[6] The District Court stated that the fact that an overwhelming majority of states did not discriminate against independent candidates was "not relevant." Aplt. App. 000140, note 2. On the contrary, the Supreme Court has often looked at the election schemes of other states in deciding the constitutionality of one state's election law. *See Williams v. Rhodes*, 393 U.S. 23 (1968) and *Jenness v. Fortson*, 403 U.S. 431 (1971). *See also Lee v. Keith*, 463 F. 3d 763, 766 (7th Cir. 2006) (cited at Aplt. App. 000140-000141), a case which the District Court quoted language in *Lee* that discussed the comparable access requirements in other states. *Id. Lee* explicitly noted it was comparing the Illinois ballot access statute with laws in the other states. ("Whether measured by comparison to the ballot access requirements in the other 49 states or by the stifling effect they have had on independent legislative candidacies since their inception, the combined effect of Illinois's ballot access requirements for independent General Assembly candidates falls on the "severe" end of this sliding scale.") Moreover, the various states' non discriminatory treatment of independent candidates in the cases the District Court relies on to approve of New Mexico's discriminatory statute are relevant to an evaluation of the court's legal analysis.

imposing a requirement on the minor party of filing a set of rules and having a huddle every so often would make up for the yardage requirement.

In deciding that Parker's constitutional rights were not severely burdened, the Court also erred by using a definition of "past history" unsupported by any precedent when considering the burden on Parker. The Court cited *Storer v. Brown*, 415 U.S. 724 (1974) and criticized Parker for not presenting evidence that an independent candidate has ever sought and failed to gain ballot access for the office of PEC Commissioner or any other local or state office. Aplt. App. 000139. The State had presented no evidence whatsoever about this point. But *Storer* does not say that courts must determine just when anyone had tried to qualify as an independent. Such evidence is not the "past history" the District Court should consider. The inquiry required by *Storer* is not whether an independent candidate has *ever* gotten on the ballot in New Mexico. Rather, it is a question of whether they have had a place on the ballot regularly. *Id*. at 742 ("[I]t will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.*) See also *Lee v. Keith*, 463 F. 3d at 769 (7th Cir 2006)(quoting the same language in *Storer*); and *Delaney v. Bartlett*, 370 F. Supp. 2d 373, 377 (M.D.N.C. 2004) ("North Carolina's restrictions limit the opportunities for unaffiliated candidates to impact the State's political landscape. This is evidenced by the degree of exclusion from the ballot of unaffiliated candidates in

comparison with party candidates.") Only Parker presented relevant evidence on this past history:

> During the last four years, New Mexico voters have had fewer independent and minor party candidates for federal and state office on their general election ballots than the voters of any state except for Nebraska…[This] is not surprising, since Nebraska has a non-partisan legislature, so there are never any minor party or independent candidates for the Nebraska legislature…

Decl. of Richard Winger, ¶ 8. Aplt. App. 000018. New Mexico has had fifteen independent candidates qualify for the ballot in the 37 years independent candidate procedures have been in the New Mexico Election Code: 15 candidates in 1,638 legislative elections. Decl. Richard Winger, ¶ 7, Aplt. App. 00018. By failing to consider the past history of whether an independent candidates actually have been on the New Mexico ballot, the District Court favored the discriminatory statute and again erred in its interpretation of precedent to conclude that Parker, who was excluded from the ballot because he was only able to get twice as many signatures instead of three times as many as required of a minor party candidate, was not severely burdened by NMSA §1-8-51.E .

The District Court's decision is unsupported by any evidence, was based on an incomplete understanding of the New Mexico minor party statutes, failed to consider the appropriate evidence establishing a severe burden on independent candidates shown in past New Mexico ballot history, and evidenced no consideration of the ballot access laws of a large majority of states that do not

require more of their independent candidates to obtain a position on the ballot. The decision is out of line with the non discriminatory treatment of independent candidates in most other states, which treat independent candidates the same as or more leniently than minor party candidates in ballot access laws. *Cf. Hagelin for President Comm. of Kansas v. Graves*, 25 F.3d 956, 960 (10th Cir. 1994) (holding a filing deadline for minor party and independent candidates "in line with the deadlines of approximately two-thirds of the states" was constitutional). The statute is discriminatory on its face and imposed severe burdens on Parker. The Supreme Court, in *Burdick,* accepted that there would necessarily be some burdens on ballot access, and distinguished between "severe" burdens (which face heightened scrutiny") and "reasonable nondiscriminatory" burdens (which face the lower scrutiny the District Court applied in this case). *Burdick,* 504 U.S. at 434. Thus a burden is only constitutionally reasonable if it is nondiscriminatory within the meaning of *Burdick.* The District Court should have applied heightened scrutiny and should have granted the declaratory and injunctive relief Parker requested. *Burdick v. Takushi*, 504 U.S. at 434.

II. Applying Rigorous Scrutiny to NMSA 1978 § 1-8-51.E, the Court Should have Granted Parker Injunctive and Declaratory Relief

As shown above, the District Court erred in refusing to apply rigorous scrutiny to NMSA 1978 § 1-8-51.E, denying that the burden placed on Parker was severe, and concluding that Parker should not succeed on the merits of his claim.

Since the statute discriminates against independent candidates on its face, the proper inquiry under *Burdick* was whether the statute was narrowly drawn to advance a compelling state interest. See *Lee v. Keith*, 463 F.3d at 768 (7th Cir. 2006) (applying strict scrutiny to find unconstitutional Illinois statute that imposed early deadline and ten per cent signature requirement on independent candidate); *Delaney v. Bartlett*, 370 F. Supp. 2d at 377 (M.D.N.C. 2004) (applying strict scrutiny to decide North Carolina's higher signature requirements for independent gubernatorial candidate than number required for minor party candidate violated independent candidate's First and Fourteenth Amendment Rights). *See also Greaves v. State Bd. of Elec. of North Carolina,* 508 F. Supp. 78 (1980)(applying strict scrutiny to ten per cent signature requirement for independent candidate); *Danciu v. Glisson*, 302 So. 2d 131 (Fla. 1974) (minor party signature requirement of three per cent and independent party signature requirement of five per cent unconstitutional). *See also Childrey v. Bennett*, 997 F.2d 830, 831-32 (11th Cir. 1993)(discussing earlier consent decree "after the State conceded that such disparity of treatment between independent and minor party candidates was unconstitutional; accordingly, on August 31, 1992, the date of the petition filing deadline, the State and Patton entered into a consent decree and order signed by the district court which reduced the number of required signatures to 12,158, the same number required for minor party candidates to appear on the ballot." *Id.*)

A. The State did not Argue it Had a Compelling State Interest in Making the Signature Requirement for Independent Candidates Three Times Greater than the Minor Party Signature Requirement.

Secretary Duran did not argue below that the State's interest "in running an orderly election and avoiding voter confusion" was a compelling one because it asserted that "Parker could not show a severe burden to his constitutional rights." State's Response, Aplt. App. 000091. The state did not explain why having the same signature requirement for an independent candidate that it had for a minor party wasn't a "sufficient modicum of support" even under this relaxed standard. Regardless, neither the State nor the District Court advanced any reason, much less a compelling one, why New Mexico needs a much more stringent signature requirement for independent candidates than it does for minor party candidates. Indeed, as cases even the District Court relies on demonstrate, although there may be reasons to have more stringent ballot access requirements for minor party candidates than for independent party candidates, the converse is not true. *See* discussion, *infra*, at pp. 17-20.

B. There is no Compelling State Interest in New Mexico's More Stringent Ballot Access Requirement for Independent Candidates like Parker

Eliminating ballot clutter and conducting an orderly election may be a valid state interest, but NMSA § 1-8-51.E is not the least restrictive means to achieve it. Even the one per cent signature requirement for minor parties is not a *de minimis*

or insubstantial burden for any candidate in New Mexico. In fact, New Mexico voters have had fewer third party and independent candidates for federal and state office on their general election ballots than voters in any other state except Nebraska (which understandably has a small number since it has a non-partisan legislature). Decl. Richard Winger ¶ 8, Aplt. App. 00018. It has not resulted in an explosion of new parties, and there is no evidence it would result in an unmanageable increase in candidates if applied to unaffiliated candidates. If Parker's effort to get on the ballot is any indication, New Mexico's supposed desire to avoid ballot clutter more likely results in a ballot of only one candidate and the elimination of the incumbent who happens to be an independent candidate for reelection.

Interest in an orderly ballot may be legitimate, but the Supreme Court has also observed that the interest in political stability "does not permit a State to completely insulate the two-party system from minor parties' and independent candidates' competition and influence." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 at 366-367 (1997). In District 4, a *one* party system was what NMSA §1978 §1-8-51.E protected successfully; one candidate who gathered 272 signatures in the district was the only one on the ballot. The State's simplistic argument that NMSA 1978 §1-8-51.E prevents "ballot clutter" through the de facto

exclusion of independent candidates is misguided and is unsupported either by any imperical evidence or even an expression of opinion by the defendant.

Venerable Supreme Court precedent emphasizes that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty…" and the Supreme Court requires states to "adopt the least drastic means to achieve their ends;….this requirement is particularly important where restrictions on access to the ballot are involved." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-87, (1979)(quotations and citations omitted)(holding higher signature requirements for minor party and independent candidates in Chicago than signature requirements for these candidates in Illinois served no compelling state interest).

New Mexico's interest in screening out frivolous candidates must be considered in light of the significant role that independents and third parties have played in the political development of the country, even if they have not been elected. "As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office…….. Overbroad restrictions on ballot access jeopardize this form of political expression." *Id.* In the case at bar, there was no minor candidate, and the only candidate who could have given voters a choice on the PEC ballot in District 4 was prevented from doing so. The triple times higher signature requirements for independent candidates as

opposed to minor party candidates is not the least restrictive means of protecting the State's objectives. The New Mexico Legislature determined that its interest in avoiding overloaded ballots is served by the one per cent signature requirement for minor party candidates and has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Parker.

CONCLUSION

For the reasons set forth above, Appellant James T. Parker respectfully requests that the Court reverse the decision of the District Court and remand this matter for entry of appropriate injunctive and declaratory relief.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the important issues presented, counsel believes oral argument will be helpful to the Court.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

Pursuant to Federal rules of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 8,461 words, which word count includes the text on the Chart for Footnote 5 attached at pp 36-38.

I relied on Word 7 on my computer to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

Dated this 12th day of August, 2015.

/s/ *Roberta M. Price*
Roberta M. Price, Esq.

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I certify that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on this 12th day of August, 2015.

I also certify that Robert M. Doughty III and Nicolas M. Sydow, attorneys for Defendant-Appellee, are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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/s/ Roberta M. Price
Roberta M. Price

CHART FOR FOOTNOTE 5

STATES TREATING MINOR PARTY CANDIDATES AND INDEPENDENT CANDIDATES EQUALLY, OR THAT HAVE MORE STRINGENT REQUIREMENTS FOR MINOR PARTIES AND CANDIDATES

	New Party	Independent Candidate
Ala	ALA Code §17-6-22	ALA Code § 17-9-3 (a)(3)
Alas	Alaska Stat. § 15.25.160	Alaska Stat. § 15.25.160
Ar	Ariz. Rev. Stat. Ann. §16-801	Ariz. Rev. Stat. Ann. §16-341.E
Ark	Ark. Code Ann. §7-7-205(2012)	Ark. Code Ann. §7-7-103(2)
Cal	CA Codes Elect. Code 5100(b)	CA Codes Elect. Code 8062(a)
CO	Colo. Rev. Stat. Ann. § 1-4-801	Colo. Rev. Stat Ann. § 1-4-801
Ct	Conn. Gen. Stat. Ann. § 9-453 (2013)	Conn. Gen. Stat. Ann. § 9-453 (2013)
Del	Del. Code § 3002	Del. Code § 3002
Fla	Fla. Stat. Ann. § 97.021(12)	Fla. Stat. Ann. § 99.0955
	Fla. Stat. § 103.021	
GA	Ga. Code Ann. § 21-1-132(e)(3)	Ga. Code Ann. § 21-2-170
Hi	Haw. Rev. Stat. § 12-6	Haw. Rev. Stat. § 12-6
Id	Idaho Code Ann. § 34-501	Idaho Code Ann. § 34-708
Il	10 Ill. Comp. Stat. Ann. § 5/10-2	10 Ill. Comp. Stat. Ann. § 5/10-3
In	Ind. Code Ann. § 3-8-6-3	Ind. Code Ann. § 3-8-6-3
Io	Iowa Code Ann. § 45.1	Iowa Code Ann. § 45.1
Kan	Kan. Stat. Ann. § 25-302a	Kan. Stat. Ann. § 25-303
Ky	Ky. Rev. Stat. Ann. § 118.315 (2)	Ky. Rev. Stat. Ann. § 118.315 (2)

La	La. Rev. Stat. Ann. § 464.B(1)	La. Rev. Stat. Ann. § 464.B(1)
Me	Me. Rev. Stat. Ann. tit. 21 § 494.5	Me. Rev. Stat. Ann. tit. 21 § 494.5
Md	Md. Code Ann., Com. Law § 4-102(b)	Md. Code Ann., Com. Law, Art. 33, § 5-703(e)
Ma	Mass. Gen. Laws ch. 53, § 6	Mass. Gen. Laws ch. 53, § 6
Mi	Mich. Stat. Ann. § 168.685(1)	Mich. Stat. Ann. § 168.590b(2)
Mn	Minn. Stat. Ann. § 204B.08	Minn. Stat. Ann. § 204B.08
Ms	Miss. Code Ann. § 23-15-1051	Miss. Code Ann. § 23-15-359
Mo	Mo. Ann. Stat. § 115.315	Mo. Ann. Stat. § 115.321
Mt	Mont. Code Ann. § 13-10-601	Mont. Code Ann. § 13-10-502(2)
Neb	Neb. Rev. Stat. Ann. § 32-716	Neb. Rev. Stat. Ann. § 32-504(1)(b)
Nev	Nev. Rev. Stat. Ann. § 293.1715	Nev. Rev. Stat. Ann. § 293.200
NH	N.H. Rev. Stat. Ann. § 655:42	N.H. Rev. Stat. Ann. § 655:42
NJ	N.J. Stat. Ann. § 19:13-5	N.J. Stat. Ann. § 19:13-5
NM	NMSA 1978, § 1-8-2.B	NMSA 1978, § 1-8-51
	NMSA 1978, § 1-7-2.A	
NY	N.Y. ELN.LAW §6-142	N.Y. ELN.LAW §6-142
NC	N.C. Gen. Stat. Ann. § 163-96	N.C. Gen. Stat. Ann. § 166-122
ND	N.D. Cent. Code § 16.1-11-30	N.D. Cent. Code § 16.1-12-02
Oh	Ohio Rev. Code Ann. § 3517.01	Ohio Rev. Code Ann. § 3513.257
Ok	Okla. Stat. Ann. tit. 26, §109 (2015)	Okla. Stat. Ann. tit. 26, §5-112
		Okla. Stat. Ann. tit. 26, §6-106
Ore	Or. Rev. Stat. Ann. § 249.735	Or. Rev. Stat. Ann. § 249.735
Pa	25 Pa. Cons. Stat. Ann. § 2911	25 Pa. Cons. Stat. Ann. § 2911

RI	R.I. Gen. Laws § 17-14-7	R.I. Gen. Laws § 17-14-7
SC	S.C. Code Ann. § 12-5-1	S.C. Code Ann. § 7-11-70
SD	S.D. Codified Laws § 12-5-1	S.D. Codified Laws § 12-7-1
Tn	Tenn. Code Ann. § 2-104(27)(b)	Tenn. Code Ann. § 2-505
Tx	Tex. Bus. & Com. Code § 181.006	Tex. Bus. & Com. § 142.007
Ut	Utah Code Ann. § 20-3-38	Utah Code Ann. § 20-3-38
Vt	Vt. Stat. Ann. tit. 17, § 2402(b)	Vt. Stat. Ann. tit. 17, § 2402(b)
Va	Va. Code Ann. § 24.2-506	Va. Code Ann. §24.2-506
Wa	Wash. Rev. Code Ann. § 29A.24.091	Wash. Rev. Code Ann. § 29A.24.091
WV	W. Va. Code Ann. § 3-5-23	W. Va. Code Ann. § 3-5-23
Wis	Wis. Stat. Ann. tit. 2, § 8.20(4)	Wis. Stat. Ann. tit. 2, § 8.20(4)
Wy	Wyo. Stat. Ann. § 22-4-402(d)	Wyo. Stat. Ann. § 22-5-301