RECORD NO. 15-1162

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ROBERT C. SARVIS,

Plaintiff - Appellant,

and

LIBERTARIAN PARTY OF VIRGINIA; WILLIAM HAMMER; JEFFREY CARSON; JAMES CARR; MARC HARROLD; WILLIAM REDPATH; WILLIAM CARR; BO CONRAD BROWN; PAUL F. JONES,

Plaintiffs - Appellants,

v.

JAMES B. ALCORN, in his individual and official capacities as member of the Virginia State Board of Elections; SINGLETON B. MCALLISTER, in her individual and official capacities as member of the Virginia State Board of Elections; CLARA BELLE WHEELER in her individual and official capacities as member of the Virginia State Board of Elections,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND

REPLY BRIEF OF APPELLANT

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ARGUMENT

Fundamentally Important Constitutional Rights of Candidates, Parties, and Voters Deserve a Fully Developed Factual Record. The Lower Court's Order Granting Dismissal Should Be Reversed.

For the reasons explained in the Opening Brief, which is hereby incorporated in full, fundamentally important constitutional rights of candidates, parties, and voters deserve to have a fully developed factual record. The lower court's decision to grant a motion to dismiss was incorrect and should be reversed.

Clingman v. Beaver, 544 U.S. 581 (2005) is important and instructive as the only Supreme Court case in the last 18 years that has said anything about minor parties. *Clingman* undermines Appellees' reliance on particular language from *Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)*. The opinions in *Clingman* make abundantly clear that a majority of the Court did NOT believe the language in *Timmons* about the state interest in fostering a two-party system was good law. Quite the opposite.

Justice O'Connor's explanation of the *Anderson/Burdick* framework, which also addresses the meaning of *Timmons*, is particularly germane to this case. Justice O'Connor, joined by Justice Breyer, wrote:

> Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most

> electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.

Justice O'Connor thus clearly refutes Appellees' argument. Restrictions must be reasonable and genuinely neutral. It is NOT sufficient for the state merely to recite purported state interests. The level of scrutiny is not binary, but calibrated to the burdens on constitutional rights. Courts are to be particularly skeptical of discriminatory restrictions (as we have here, where the state treats similarly situated, ballot-qualified candidates differently, simply based on party affiliation). And courts must be especially wary of electoral rules that are mere pretext for exclusionary or anticompetitive restrictions.

Justice Stevens, joined by Justices Ginsburg and Souter, likewise makes clear that the state has no role in channeling political activity into particular parties, and he rightly belittles the "paternalistic concern" about the alleged voter confusion. Important for our purposes here, the lower court had allowed a full factual record to be made, and in fact it had found that no significant voter confusion would occur. With regard to other alleged state interests, such as preventing "raiding," he again noted the state interests are "remote" and that the

district court had made factual findings that the state's argument was "unpersuasive." In stark contrast, in the instant case, the District Court below did not allow development of a factual record, could not therefore make factual findings, and did not make any attempt to ascertain the validity or remoteness or paternalism or pretextual nature of the alleged state interests—all because it incorrectly believed it did not need to do so.

As the views of five justices make clear, the *Anderson/Burdick* framework requires a serious analysis based on real facts, and the language from *Timmons* upon which Appellees so heavily depend cannot be considered good law. "At its core, this argument is based on a fear that [a minor party] might be successful in convincing Democratic or Republican voters to participate more fully in the [minor party]. Far from being a compelling interest, it is an impermissible one." *Clingman*, 544 U.S. at __ (J. Stevens dissenting).

Nothing in Appellees' Response Brief Refutes the Arguments in the Opening Brief. Appellees' Brief Unwittingly Supports the Need for Reversal to Allow for Development of a Factual Record.

Consistently throughout their brief, Appellees elide, misapprehend, or misconstrue the facts and arguments involved in this case. Their Response Brief fails to refute the arguments made in the Opening Brief and in many cases unwittingly confirms that reversal is required to allow the development of a factual record below. For example:

- Appellees demeaningly characterize the "windfall vote" as solely the result of "uninformed voters" who "unthinkingly" choose the first name they see, and quote language saying that the Constitution doesn't protect a right to the windfall vote. Response Brief, p. 1, 27-29.

Comments regarding the source of, and a right to, the windfall vote miss the point. The unequal treatment of similarly situated candidates is by itself a burden of constitutional rights, including the right of association and the right to equal protection. Additionally, the windfall vote effect, regardless of its source, is made unavailable by state law to similarly situated ballot-qualified candidates based on their choice of affiliation with certain parties or with no party. It is a further burdening of constitutional rights.

It is worth noting that the "windfall" vote is not necessarily due to "uninformed voters" who "unthinkingly" choose the first name they see.[1] In a race with multiple candidates, many intelligent, informed voters remain undecided—for a variety of reasons—between two or more candidates. They are not necessarily uninformed, and their tendency to select the first name is not necessarily "unthinking" so much as it is a factually demonstrable predilection. Of course, any factual demonstrations were foreclosed by the District Court's premature grant of

[1] Appellees' condescension toward voters is offensive and ignorant, even if demeaning them in order to pooh-pooh the windfall vote might appear to them as rhetorically shrewd.

dismissal. Appellees' passing assertions unwittingly demonstrate that reversal is required for development of a full factual record.

- Appellees put great weight on *Schaefer*, an unpublished, non-precedential, summary *per curiam* ruling that is easily factually distinguishable from the present case. Response Brief, pp. 16, 35-37, 42, 44, 45, 46-47.

It is telling that the closest Appellees can come to helpful precedent is an unpublished, non-precedential, summary *per curiam* ruling that is easily distinguished from the present case (and that contains an express proviso that it is not to be considered binding precedent). *Schaefer* is not persuasive here, and for good reason, as noted in the Opening Brief:

> *Schaefer* does not provide a resolution of the substantive issues presented here regarding the very different ballot-ordering system in Virginia, which, rather than placing all candidates on the ballot in alphabetical order, as in *Schaefer*'s Maryland statute, distinguishes based on party affiliation, placing larger parties' candidates first, then minor-party candidates, and then independent candidates at the bottom. If the Maryland alphabetical listing system upheld in *Schaefer* were the operative ballot-ordering system in Virginia, Appellant Sarvis's name would have been listed on the ballot above the incumbent Democratic candidate Senator Warner. Additionally, at least two of the three interests Appellees claim support the constitutionality of the Virginia ballot-ordering statute, and on which the court below found in their favor—"Party-Order Symmetry" and "Favoring Parties with Demonstrated Public Support" (See 2015 WL 163360 at *11-*12)—are completely inconsistent with Maryland's alphabetical scheme upheld in *Schaefer*.

Appellees are simply mistaken in seeking support in *Schaefer*.

- Appellees put great weight on their assertion that twenty-two states use a "tiered ballot order." Response Brief 1, 6-7, 17,

Notice that Appellees do not state that all of those tiered ballot order systems are analogous to Virginia's. Such an assertion is necessary to make the cited number at all relevant. But they cannot make that assertion because it is not true, and Appellees admit as much by attempting to distinguish Tennessee's tiered-ballot regime. Response Brief, pp. 16-17. Appellees want to have it both ways—they cite the number of states having tiered ballots hoping this court will assume they are all sufficiently similar to be relevant, but they also make distinctions among tiered ballots to argue that the likely unconstitutionality of, e.g., the Tennessee regime says nothing about the likely unconstitutionality of the Virginia regime. This tacit contradiction in factual representations unwittingly demonstrates the need for development of a factual record, and therefore the need for reversal.

In fact, many other tiered ballot regimes *are* different, either by their own terms or due to their interaction with other ballot-access provisions. For example, Appellees refer to New York's regime, Response Brief, p. 31, but fail to mention that New York, among other things, allows parties to achieve ballot access for all their candidates via party-wide petitioning, which Virginia does not allow—each individual candidate must separately petition. Appellees' reference to the practices

of other states is, to say the least, incomplete and supports reversal and remand for development of a factual record.

Worse still, Appellees' entire line of argument here is a red Herring—it does not matter how many states are sharing a practice that unconstitutionally burdens fundamental constitutional rights. It is no defense at all to cite other states sharing Virginia's unconstitutional laws. Recall that when the Supreme Court declared the death penalty for minors unconstitutional under the Eighth Amendment in *Roper v. Simmons* 543 U.S. 551 (2005), a majority of death-penalty states still allowed it!

- Appellees comment on a student note in their Response Brief, pp. 11-12, but decline to comment on other supporting articles. Response Brief, p. 27.

Appellees mischaracterize the import of the student note and ignore the litany of studies, some of which were noted in the Opening Brief, that further support the claims below. Rather than litigating the proper interpretation of this or that article here, it suffices to point out that the proper forum is in the court below during the development of a full factual record. Appellees' discussion of one article but no others is an unwitting demonstration of the need for this court to reverse and remand for development of a factual record.

- Appellees argue that "Experience teaches that the vast percentage of voters will choose a major-party candidate; nearly 98% did so in Sarvis's last election. So courts have appropriately recognized that voter confusion can be reduced and voting efficiency increased when the ballot lists those major-party candidates in the first-tier position." Response Brief, p. 15.

This is a *non sequitur*. Appellees don't address the ability of voters in California's recall election to find their preferred candidate despite over 100 candidates being on the ballot. That and other examples utterly demolish their argument about voter confusion and show the pretextual nature of the alleged state interests. Such examples could have been developed in a factual record and demonstrate yet again the need for reversal.

Nothing in the record even remotely supports the assertion that voter confusion relating to candidate order is substantial or that it is materially reduced by the provision in question, or that voting efficiency is materially increased by Virginia's scheme. This is especially important in light of the fact that Virginia keeps the number of candidates low by virtue of a high, outlier 10% major-party-status threshold, its high signature-petitioning requirements, and other provisions. Any remaining alleged effects on confusion and efficiency of the statute here are materially non-existent. Any assertion to the contrary requires a factual basis and therefore requires reversal for development of a factual record below.

- Appellees argue that *Hargett*[2] is distinguishable and an outlier. Response Brief, pp. 16-17, 25, 41-45.

Appellees' discussion of *Hargett* is obtuse and self-contradictory. Appellants distinguish the Tennessee statute because it only privileges the incumbent party's candidate. But they provide NO real explanation or theory why that might be impermissible but privileging *two* incumbent parties is permissible. And the putative distinction contradicts their use of a number of other states' tiered ballots as reason to accept Virginia's tiered ballot. They also provide NO explanation for their self-serving but totally unsupported statement, "Had the argument [that a state can promote political stability by favoring major parties over minor parties] been made, it would likely have been dispositive." Response Brief, p. 17. This purely conclusory assertion,[3] given with no meaningful support whatsoever, is incorrect and borders on laughable, given the Tennessee district court's clear skepticism of lame assertions of state interests, and especially given the procedural history of the *Hargett* case, which has gone up and down between the district and circuit courts

[2] *Green Party v. Hargett*, 953 F. Supp. 2d 816 (M.D. Tenn. 2013), rev'd, 767 F.3d 533 (6th Cir. 2014); *Green Party of Tenn. v. Hargett*, 767 F.3d 533 (6th Cir. 2014); *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015).

[3] Note that the Appellees later retreat from their confident assertion. Instead of "would likely have been dispositive," they write that a court of appeals "might well have" upheld the statute in question. Their only attempt at supporting the scaled back assertion is to cite *Timmons*, which fails for reasons described in this brief.

multiple times, with the district court striking down the ballot order scheme and the circuit court remanding for *development of a factual record*!

- Appellees quote from *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014) and state: "When strict scrutiny does not apply because the burden imposed is not severe, as in this case, the State's 'asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the [plaintiffs'] rights.'" Response Brief, p. 23.

Yet Appellees proceed as if they threw out some very important words in the quoted language from *Pisano* and their own characterization of the proper analysis. As numerous passages and analyses from *Anderson/Burdick*, *Pisano*, and several other cases show—in particular words like "reasonable," "sufficiently weighty," "justify," "important," "nondiscriminatory," etc.—a court must determine the nature and extent of the limitation or burden imposed on the rights and determine whether the asserted regulatory interests are sufficiently weighty. By its very terms, that test prohibits unquestioning, credulous acceptance of asserted justifications absent skeptical analysis of its factual foundations. Appellees believe they can assert an alleged interest that is factually false, and still win! That is contrary to the Supreme Court language quoted by Appellees themselves. This court should reverse and remand for development of a factual record.

- Appellees say that Virginia's 10% threshold "is also relatively undemanding" and "is not a high threshold." Response Brief, p. 26.

Not so. Appellees elide or ignore several relevant facts necessary to make such judgments, such as that Virginia is an outlier in having such a high threshold; that minor parties in Virginia cannot even petition as a party to put its candidates on the ballot, but rather each candidate must separately submit a large number of petition signatures, a significant burden the Plaintiffs can attest to; that Appellees' lone example of a minor party achieving the 10% threshold has rather unique facts, (noted in the Opening Brief) which totally undermine the conclusions Appellees wish to draw from that lonely example. By obfuscating the full factual context of Virginia's ballot rules and electoral history, Appellees unwittingly demonstrate the necessity of a factual record, and therefore the need for reversal here.

- Appellees quote a Colorado court asserting that minor parties think 10% is unattainable. Response Brief, p. 26.

Minor parties do not necessarily argue that 10% is categorically unattainable. Nor need they. Minor parties do argue, however, that 10% is very difficult to achieve—unnecessarily difficult[4]—and made even more difficult by the

[4] Indeed, unnecessarily high thresholds are chosen precisely because they are so difficult. Again, we note that Virginia is an outlier with its high 10% threshold. And as noted in the Opening Brief, when Democrats failed to maintain ballot access in an election against popular Republican Senator John Warner, the laws were changed to ensure the Democrats would not lose their ballot access, further

ballot-ordering, signature-petitioning, and other onerous ballot-access and electoral provisions that have no serious basis in legitimate, factually well-founded state interests; that these provisions are simply barriers to entry designed to perpetuate the incumbent parties' hold on power; and that these provisions violate fundamentally important rights of voters, candidates, and political parties.

Moreover, Colorado has since reduced its threshold to 1% (further isolating Virginia as an outlier with its 10% threshold), which shows that 10% is an unnecessarily high barrier and proves the quoted language is obsolete and incorrect. Appellees' argument that affirmance is appropriate because facts don't matter is undermined by actual facts! Imagine what the development of a full factual record would do. This court should reverse and remand for development of a factual record.

- Appellees' argue that "On appeal Sarvis cites, for the first time, several academic articles to support his claim of positional bias. Because they are not in the record, those articles are inadmissible." Response Brief, p. 27.

In this procedural posture, this argument is circular. The academic articles, and many other facts, are not in the factual record precisely because there is no factual record, due to the district court's premature and inappropriate 12(b)(6)

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evidence that these are pretextual provisions to benefit the incumbent major parties.

dismissal. That so many facts undermine Appellees' arguments demonstrates that reversal is necessary for development of a factual record below.

- Appellees repeatedly refer to an "admission" that Plaintiffs' expert witness would not testify about the "extent" or "degree" of positional bias. E.g., "To the contrary, [Sarvis] conceded that his expert would not have testified about the magnitude of any positional bias in his case." Response Brief, p. 28.

This is a misstatement of fact. The so-called "concession," which it was not, was a statement that a maximum value would not be given because a maximum value is not required in the case, given a properly calibrated inquiry following Supreme Court precedent. That is wholly different from saying an expert would not have testified at all "about the magnitude of any positional bias in this case." Rather than accept Appellees' mistaken assertion of "concessions" about what an expert will say about electoral burdens, this court should reverse and remand to allow for the *actual* expert testimony, and other factual development, to take place.

- Appellees attempt to focus the court's attention on the outcome of the election, and quote from *Timmons* that "Ballots serve primarily to elect candidates, not as forums for political expression." Response Brief, pp. 28-29.

This argumentative strategy is wholly invalid when a state predicates party status on the electoral performance of candidates on the ballot. Once a state does that, the ballot unquestionably plays, *as a statutory matter*, multiple roles, totally

foreclosing Appellee's line of argument here. By statute, the party-status threshold is no less important as an election outcome. Moreover, it is not just the existing 10% threshold that matters but any possible threshold the legislature might reduce it to within the relevant timeframe in which the election in question can be decisive for party status.

- Appellees rest their argument heavily on *Timmons*, but its discussions of *Timmons* are mistaken. Response Brief, *passim*.

Appellees engage in a clever sleight-of-hand by quoting Timmons and then immediately ignore important words from the quotation. Thus, Appellees pretend that words like "reasonable" and "unreasonably" weren't there, for such words obviously require an inquiry into reasonableness, and thus some factual development, and therefore reversal here. Appellees demonstrate just how far afield they are by quoting language that the "state is under no duty to ameliorate those problems." No one is asking the state to *ameliorate* problems; what is demanded is that the state live up to its duties under the First and Fourteenth Amendments; that it stop violating rights of candidates, voters, and parties; that it not erect self-serving, unreasonable, pretextual barriers to entry; that it not gin up unnecessary barriers for non-major parties and non-major-party candidates; that it not to try to support such barriers with assertions of absurd, mutually contradictory

state “interests.” Nothing in *Timmons* alters the correct disposition of this appeal—a factual record is needed, and therefore reversal is required.

CONCLUSION

As the Opening Brief explains, and the Appellees fail to controvert, the District Court should have allowed for development of a factual record and should have adopted a level of scrutiny commensurate with the burdening of constitutional rights, rather than assuming totally credulity as the only option other than strict scrutiny. The court below should have allowed for the factual development of both burdens and alleged state interests. The District Court erred in granting dismissal on 12(b)(6). This court must reverse and remand for development of a factual record.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Appellant certifies that the accompanying brief is printed in 14 point Times New Roman, a proportionally spaced typeface, and, including footnotes, contains no more than 14,000 words. According to Microsoft Word, this brief contains 3,470 words.

/s/ Robert C. Sarvis
Robert C. Sarvis, Appellant *pro se*

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that I have this November 2, 2015, filed the required copies of the foregoing Reply Brief of Appellant in the Office of the Clerk of the Court, via hand delivery and have electronically filed the Brief of Appellant using the Court's CM/ECF system which will send notification of such filing to the following counsel:

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