No. 19-1783

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT S. JOHNSTON III,
and LIBERTARIAN PARTY OF MARYLAND,

Plaintiffs-Appellants,

v.

LINDA LAMONE, in Her Official Capacity
as Administrator of the Maryland State Board of Elections

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF APPELLANTS ROBERT S. JOHNSTON III and LIBERTARIAN PARTY OF MARYLAND

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September 11, 2019

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1783 Caption: Robert S. Johnston III, et al. v. Linda H. Lamone

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Robert S. Johnston III and the Libertarian Party of Maryland
(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Mark D. Davis Date: September 11, 2019

Counsel for: Appellants

CERTIFICATE OF SERVICE

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I certify that on September 11, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Mark D. Davis (signature) September 11, 2019 (date)

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the plaintiffs' claims arise under the Constitution and laws of the United States, including the First Amendment and 42 U.S.C. § 1983. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. The District Court dismissed the Complaint with prejudice on July 11, 2019, which was an appealable final judgment. JA420. The Appellants filed a timely notice of appeal on July 24, 2019. JA421.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court improperly resolve disputed factual issues in a motion to dismiss by concluding, contrary to the allegations in the complaint, that the burdens imposed by the statute were "modest" and that the law advanced important interests of the State?

2. Did the district court err by mischaracterizing the plaintiffs' complaint as a challenge to Maryland's "two-tiered" ballot protocol when, in fact, the plaintiffs repeatedly made clear that they were not challenging the State's decision to adopt a two-tiered system?

3. Did the district court err by dismissing the plaintiffs' challenge to the State's signature-validation requirements as unripe, citing insufficient "information in the record," when there had obviously been neither an obligation nor an

opportunity for the plaintiffs to proffer evidence prior to the motion to dismiss under Rule 12(b)(6)?

STATEMENT OF THE CASE

This is a case about whether it is constitutional for Maryland to require smaller political parties such as the Libertarian Party to engage in months of burdensome but entirely pointless signature-collection activities in order to retain their status as a "recognized" political party. As explained below, Maryland's election law requires small parties such as the Libertarian Party, as a condition to retaining their status as a recognized political party, to file a petition showing support from 10,000 registered voters. The Complaint alleged that, as applied here, this requirement provides little to no benefit to the State because the State's own records *already show* that more than 22,000 voters are currently registered with the Party. At the same time, the Complaint alleges that this 10,000-signature requirement imposes a very substantial burden on the Party because it will swallow up the bulk of the Party's budget. In short, the Complaint alleged that, as applied here, the burdens of the requirement severely infringe the plaintiffs' rights under the First Amendment without materially advancing any constitutionally significant state interest.

The plaintiffs also challenged the constitutionality (as applied) of certain standards for validating petition signatures, because these standards (as interpreted

by Maryland's highest court) require the State Board of Elections to invalidate signatures from known registered voters based on defects of no constitutional moment, such as a failure to include a middle initial.

As explained below, the district court dismissed Count I under Rule 12(b)(6) because it disagreed with the plaintiffs' allegation that the 10,000-signature requirement was burdensome and because it concluded, contrary to the allegations in the Complaint, that the requirement provided substantial benefits to the State. The court dismissed Count II because it concluded that the claim was not ripe.

A. The 10,000 Signature Requirement.

The Statutory Scheme. Maryland law permits recognized political parties to nominate candidates directly to the general election ballot without the need for each individual candidate to collect signatures and file his or her own petition with state or local boards of elections. JA8 ¶ 8; Md. Code Ann., Elec. Law §§ 4-102(f), 5-701. To obtain these ballot-access privileges for the first time, a new political party in Maryland is required, among other things, to submit a petition to the State Board of Elections. "Appended to the petition shall be papers bearing the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the first day of the month in which the petition is submitted." Md. Code Ann., Elec. Law § 4-102(b)(2)(i).

Once a political party has been recognized by the State, it retains its status "until December 31 in the year of the second statewide general election following the party's qualification under § 4-102 of this subtitle." *Id.* § 4-103(a)(1). Statewide general elections occur every two years, so each successful petition enables a party to obtain ballot access benefits for no more than four years. A party, once recognized, continues to be recognized if it has attracted the party affiliations of at least 1% of all registered voters. *Id.* § 4-103(a)(2). Since the enactment of this provision of the Election Law, no party other than the Democrats and the Republicans has ever attracted the affiliation of more than 1% of registered voters.[1] Thus, large parties need not concern themselves with any of the mechanics of renewing their party recognition, nor do any of the Democrats and Republicans in the General Assembly need to worry about how they will get their names on the ballot for re-election.

For smaller parties, however—i.e., every party that Maryland has recognized under these laws except the Democrats and the Republicans—the only path to automatic renewal is for the party's gubernatorial or presidential nominee to attract

[1] The Libertarian Party, which is Maryland's third-largest party, had attracted the affiliations of approximately 22,464 registered voters as of December 31, 2018. That represented a little more than half a percent of Maryland's 4,028,106 registered voters as of that date. Approximately 54.8% of the state's active registered voters are Democrats, 25.4% are Republicans, and 18.6% are unaffiliated with any party. JA91.

more than 1% of the vote. *Id.* When recognition is extended based on vote totals, it lasts for only one two-year election cycle, so all it takes is one election in which the top of the ticket finishes with less than 1% and a small party finds its party recognition in jeopardy. When that happens, the party must re-qualify "by complying with all the requirements for qualifying as a new party under § 4-102 of this subtitle." *Id.* § 4-103(c). This means submitting a new petition with the names of at least 10,000 registered voters, as described above.

The Libertarian Party has been recognized without interruption since its successful petition drive in 2012. JA58 ¶ 6. The Libertarian nominee for Governor attracted more than 1% of the votes cast in the 2014 election for Governor—the first and only time in the modern era that a small-party candidate has achieved this—and the Libertarian nominee for President attracted more than 1% in 2016. JA59 ¶ 7. Due in no small part to this period of uninterrupted recognition by the State, the number of registered voters affiliated with the Libertarian Party grew from 9,753 at the end of 2011 to 22,464 at the end of 2018. *Id.* Significantly, this has occurred at a time when party affiliation has in general declined. In 2017, for example, the Libertarian Party was the only recognized political party in Maryland that grew at all; the others all shrank that year. *Id.* However, during the 2018 Gubernatorial General Election, the Libertarian nominee for Governor received approximately 13,241 votes, fewer than the approximately

23,045 votes (1% of the total votes cast for governor) necessary to extend the party's official recognition automatically. JA58 ¶ 6. As a consequence, the Election Law on its face requires the party to submit a new party recognition petition signed by at least 10,000 registered voters.

Burdens Imposed by the Scheme. The Complaint alleged that collecting these 10,000 signatures would impose a significant burden to the Libertarian Party. Specifically, the Complaint alleged that it would cost between $65,000 and $110,000 to collect these signatures. JA14 ¶ 27.

Why so expensive? The Complaint explained that the rules governing signature validation are so complicated that "as a practical matter, petitioners hire professional petition circulators who collect signatures by standing in public places and asking passers-by if they will sign a petition in support of the petitioning party's access to the ballot." JA11 ¶ 14; *see generally* Md. Code Ann., Elec. Law §§ 6-201–6-211. It explained that hiring these professionals costs between $2.50 and $4.00 per collected signature. JA11 ¶ 17. Moreover, because many of the signatures collected will be invalidated by Maryland's complicated signature-validation rules, "a successful party recognition petition requires the collection of far more than 10,000 signatures." JA12 ¶ 20. Based on their past experience, the plaintiffs alleged that they would need to collect at least 25,000 signatures, bringing the cost to $65,000 to $110,00. JA14 ¶ 27.

For a large party, that might not sound consequential. But for a smaller party, these costs are enormous. Indeed, the Complaint alleged that complying with the State's requirement would require the Party to "spend the bulk of the group's entire budget." JA6. A subsequent declaration submitted in support of the plaintiffs' motion for a temporary restraining order put it even more starkly:

> If the Libertarian Party is required to collect 10,000 signatures to maintain its ballot access in Maryland, the cost will soak up essentially all of our small party's budget for the two year period, and then some, to say nothing of the hours of volunteer time that would be required.

JA60 ¶ 10.

Interests of the State. On the other side of the scales, the Complaint alleged that—as applied to this particular case—the 10,000-signature requirement provides essentially no benefit to the State. JA5–6. According to the State, the purpose of requiring 10,000 signatures is to ensure that only parties with sufficient political support may nominate candidates directly to the ballot. That is, of course, a legitimate state interest. But the Complaint alleged that in this particular case, the 10,000-signature requirement does not substantially further the State's interest in ensuring sufficient political support. *Id.*

That was true for two reasons. First, the Complaint alleged that the State *already has* reliable information about the level of support for the Party. Specifically, the State's own records demonstrate that, as of November 2018, more than 22,000 registered Maryland voters have officially "affiliated" with the

Libertarian Party. JA7 ¶ 1. "In other words, those 22,338 registered voters within the State of Maryland had asked the State to consider them to be Libertarians rather than Democrats, Republicans, Greens, or unaffiliated voters." *Id.*

Second, the Complaint alleged that 10,000 signatures on a ballot-access petition is actually a *less reliable* indicator of political support than the information already in the State's possession—that 22,000 voters have declared themselves to be Libertarians. JA12 ¶ 19. That is because "the statutory standards do not require a voter who signs a party recognition petition to be affiliated with the petitioning party, or even to represent that he or she will vote for a candidate from the petitioning party." JA11 ¶ 15. Indeed, the Complaint alleged that the vast majority of signatures on a ballot-access petition come from "Democrats, Republicans, unaffiliated voters, and even a few (very sympathetic) Greens." *Id.* As a result, a ballot-access petition "tells the State almost nothing about the level of support Libertarians currently enjoy within Maryland." *Id.* ¶ 16. The fact that 22,000 voters have affiliated themselves with the Libertarian Party is therefore "both a more informative and a more reliable gauge of support for the Libertarian Party than the signatures of 10,000 registered voters who may not be Libertarians but who shop at Safeway would be." JA12 ¶ 19. (Historically, petition drives have often been conducted in supermarket parking lots.)

B. The Signature-Validation Requirements.

In Count II, the plaintiffs challenged certain signature-validation rules that the Board of Elections applies in determining whether to count a signature on a petition. The Complaint alleges, based on the Party's own prior experience, that the Board of Elections uses these rules to invalidate signatures *even when it has determined that the signature is authentic and has confirmed that it is the signature of an eligible voter.* The Complaint also alleges that Maryland disqualifies signatures known to be from eligible voters as "duplicates" even when no earlier signature has been counted. It alleged that no valid state interest is served by either application of the signature-validation rules, and therefore that it is unconstitutional for the State to use the signature-validation rules to disenfranchise people whom the State has actually identified as registered voters.

The Statutory Framework. The signature-verification requirements are codified in part at Title 6, Subtitle 2, of Maryland's election law, and they have been clarified in various sets of guidelines adopted by the Board and in litigation. Under § 6-203, a voter must either (1) "sign the individual's name as it appears on the statewide voter registration list" or (2) sign "the individual's surname of registration and at least one full given name and the initials of any other names." Md. Code Ann., Elec. Law § 6-203(a)(1). In addition, the voter must print "the signer's name as it was signed" and certain other information, including any "other

information required by regulations adopted by the State Board." *Id.* § 6-203(a)(2).

After a petition is filed, the law requires the Election Board to "proceed to verify the signatures" for compliance with these requirements and to "count the validated signatures contained in the petition." *Id.* § 6-207(a)(1). The statute explains that the purpose of the signature-validation requirement is "to ensure that the name of the individual who signed the petition is listed as a registered voter." *Id.* § 6-207(a)(2).

While these rules may initially sound simple, they yield counterintuitive results that depend heavily on how a voter's name happens to be listed in the voter-registration records. For example, a voter who is registered as Timothy Joseph Smith could validly sign as Timothy Joseph Smith, Timothy J. Smith, or T. Joseph Smith. JA13 ¶ 22. But his signature would not count if he signed as Timothy Smith, Joseph Smith, or T.J. Smith—even if any of those happened to be the way that Smith is known to the world and the way that Smith always signs his name. *Id.* This is because the statute requires at least one given name to be written out and at least one initial to be included for every given name. *Id.* Revealingly, "Timothy J. Smith" would count as a valid signature even if everyone knew him as Joe Smith and none of his friends or neighbors had the foggiest idea that his first name was Timothy. *Id.*

Similarly, if a voter who is registered as "Catherine Jones" printed her name as "Cathy Jones," her signature in support of the petition would be invalidated even if she properly signed "Catherine Jones." *Id.* ¶ 23; Md. Code Ann., Elec. Law § 6-203(a)(2)(i). This is because the State Board invalidates all nicknames. JA13. ¶ 23. This is something that is impossible for circulators to catch in the field, because sometimes "Don" is short for "Donald" but sometimes "Don" stands alone as the voter's full given name. *Id.*

Application by the Board of Elections. The stated purpose of the signature-validation requirements is "to ensure that the name of the individual who signed the petition is listed as a registered voter." Md. Code Ann., Elec. Law § 6-207(a)(2). Yet the Complaint alleges that the Board routinely applies the signature-validation requirements to invalidate signatures *even when it knows that the signature came from an eligible registered voter*. JA14–17 ¶¶ 28–31, 38. This happens when a signature has a technical defect, but the Board is nevertheless able to identify which voter signed it. In these cases, the Board treats the signature as valid for some purposes but invalidates it for the purpose of counting signatures on a petition. In other cases, the State invalidates a signature as a "duplicate" even if the prior signature was not counted. JA17 ¶ 38.

An example demonstrates the problem: "suppose that a petition were signed by a Judson Van Danderslaven at 123 Market Street, and the reviewer noticed that

the voter registration records showed a Judson B. Van Danderslaven with the same birthday and in the same town but with a different street address." JA15 ¶ 30. The complaint alleges that under these circumstances, the reviewer would change the address in Mr. Van Danderslaven's voter registration to reflect the address listed on the petition and would add a note to Mr. Van Danderslaven's file indicating that he had signed a petition, which would be sufficient to move his file from inactive to active. JA14–15 ¶¶ 30, 28; *see also* Md. Code Ann., Elec. Law § 3-503(b)(2). "But even after using Mr. Van Danderslaven's signature as the basis for altering the State's official records, the State would not count Mr. Van Danderslaven's signature" towards the number of signatures required for a petition "because he omitted his middle name." JA15 ¶ 30.

The Complaint alleges that it is unconstitutional for the State to refuse to count a signature based on a technical defect *when the State has already determined that the signature came from an eligible registered voter*, and it requests a declaratory ruling that the Board may not continue to engage in this practice. As the plaintiffs explained to the district court, it is important to receive this clarification now—before the Party has finished circulating petitions—because a ruling will guide its conduct in collecting signatures. JA390–91.

C. The Proceedings Below.

In December 2018, the plaintiffs sued the Administrator of the Maryland State Board of Elections, alleging that the 10,000-signature requirement and the signature-validation requirements violate their First and Fourteenth Amendment rights of speech, association, and political participation. Prior to the filing of the lawsuit, the parties conferred and agreed, to the extent possible, to create a stipulated record so the matter could be decided quickly and to preserve the ability of Maryland voters to register as Libertarians during the pendency of the litigation. However, unrelated activity by a different political party prompted the defendant to withdraw from that agreement.

After the agreement fell apart, the plaintiffs moved for a temporary restraining order and preliminary injunction, but the court denied the motion. In opposing preliminary relief, the Defendant submitted documentary evidence and attempted to present testimony from a witness, JA283 (Tr. 12:14–22), but the court indicated that testimony was not necessary, JA285 (Tr. 14:23–24). The district court found that the plaintiffs were unlikely to succeed on the merits and that they had not proven that loss of their party recognition would cause irreparable harm. JA319–20 (Tr. 48:22–49:5).

The court subsequently dismissed the Complaint under Rule 12(b)(6). It purported to apply the framework established by the Supreme Court in *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), which requires a balancing of the burdens imposed on the plaintiffs against the interests advanced by the State. JA410–412. The court determined, as a matter of law, that the "burden imposed on the Party is modest," JA413–15, and that the 10,000-signature requirement "advances what is at least an important regulatory interest." JA415. It therefore determined that the 10,000-signature requirement is constitutional as a matter of law, without regard to the novel circumstances alleged by the plaintiffs in their as-applied challenge. *Id.* The court declined to address the signature-validation requirements, finding that they were not ripe. The court explained that "[t]here is no information in the record about the extent to which various components of the name standard rule contribute to allegedly needless invalidations, nor information about the various state interests advanced by § 6-203's multiple requirements for a signature to be valid. Such factual information is needed to properly define the legal question." JA418. The plaintiffs filed this timely appeal.

SUMMARY OF ARGUMENT

Count I. The district court misapplied the Supreme Court's *Anderson-Burdick* framework, which required it to weigh the burdens imposed by an election law against the relevant State interests advanced by that law. The Complaint alleged that complying with Maryland's 10,000-signature would consume the bulk

of its entire budget, and it alleged specific facts showing why that was true. At the same time, it alleged that, under the specific facts of this case, the requirement did not materially advance any legitimate State interest. That was because the State already had information in its possession showing that at least 10,000 Maryland voters support the Libertarian Party. The district court improperly rejected those detailed factual allegations. It held that the burden on the plaintiffs was "modest" as a matter of law because laws requiring a similar number of signatures had been upheld in other cases, even though *none* of those cases presented anything like the "pointless busywork" element alleged here. That was a fundamental mistake because the *Anderson-Burdick* framework is fact-intensive, and the precedents on which the district court relied were decided based on the specific evidence presented in those cases—either on summary judgment or after a trial. The district court thus erred by deciding this case, ostensibly as a matter of law, but in reality based on the evidence presented in completely different cases rather than on the facts alleged in the Complaint.

Count II. The district court also erred by holding that the plaintiffs' challenge to Maryland's signature-verification requirements was not ripe. The plaintiffs alleged that it was unconstitutional for Maryland to refuse to count signatures on petitions—based on technicalities like the failure to include a middle initial—in cases where the State actually concedes that the signature is the genuine

signature of a registered Maryland voter and treats the signature as valid for other official purposes like address correction. The state has used these rules to disqualify numerous signatures in past petitions, and the plaintiffs sought declaratory relief to guide their conduct as they collect signatures.

This case is ripe because it presents a well-defined legal issue—whether it is constitutional for Maryland to refuse to accept signatures that it concedes are genuine and that it actually uses for other purposes. The answer to that legal issue does not depend on some future event. At the same time, the Libertarian Party—which is currently attempting to collect petitions that comply with the State's requirements—will suffer a serious hardship if this question is not answered.

STANDARD OF REVIEW

In reviewing the dismissal of claims under Rule 12(b)(6), this Court "take[s] the factual allegations in the complaint as true and review[s] any legal issues *de novo*." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir. 2003). This Court also reviews *de novo* a district court's dismissal for lack of ripeness. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). Because the defendant presented her ripeness arguments in a Rule 12(b)(6) motion and did not mount an "evidentiary attack" to ripeness under Rule 12(b)(1), this Court makes its ripeness determination by accepting all facts in the Complaint as true. *See Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982).

ARGUMENT

I. THE COURT ERRED BY DISMISSING COUNT I UNDER RULE 12(B)(6).

This case turns on the results of what was supposed to be a fact-intensive weighing process prescribed by the Supreme Court in *Anderson v. Celebrezze* and *Burdick v. Takushi*. *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. As explained below, the district court fundamentally misapplied that framework by ignoring the facts alleged in the Complaint about the relevant benefits and burdens and by treating these questions as legal issues to be resolved solely by analogy to prior precedents. In effect, the court treated the motion to dismiss as if it were a "quick and dirty" summary judgment. That was erroneous, and this Court should reverse.

Under the *Anderson-Burdick* framework, the district court was required to begin by assessing the nature and extent of the burdens imposed by the statute. If the burdens are "severe," the statute is subject to strict scrutiny. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). If the burden is not "severe," then a court must apply a flexible *ad hoc* balancing test to determine whether the statute is constitutional. Specifically, the court must weigh the burdens imposed by the statute against the validity and importance of the state's interests that are advanced by the statute. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (if burden is not severe, court must determine whether state's

interests are "'sufficiently weighty to justify the limitation' imposed on the party's rights") (quoting *Norman*, 502 U.S. at 288–89). Under this flexible standard, greater burdens are subject to greater scrutiny. But even slight burdens are subject to the weighing process. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) ("However slight that burden may appear, as Harper demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'") (quoting *Norman*, 502 U.S. at 288–89).

The facts alleged in the complaint established a straightforward constitutional violation under the *Anderson-Burdick* framework. The Complaint alleged that the 10,000-signature requirement imposes substantial burdens—namely, a monetary burden that will consume the bulk of the Party's entire budget. And it alleged that—as applied here—they provide essentially no benefit to the State. That is because signatures on a ballot-access petition typically come from "random passers-by, approximately 99.5% of whom are not (yet) Libertarians." JA11 ¶ 15. As a result, these signatures yield "almost no information of any value about the level of support within Maryland for the Libertarian Party." Compl. ¶ 18. At the same time, the Complaint alleges that the State already possesses *more reliable information* about the level of support for the Party. JA12 ¶ 19. If accepted, these facts plainly establish that the State is imposing a burden on ballot access that cannot be justified by the benefits.

The district court erred at each stage of the *Anderson-Burdick* framework. First, it improperly treated the burdens as negligible even though the plaintiffs had alleged that complying with the statutory requirements would consume the bulk of their entire budget. It did this because it misread prior precedents as establishing, "as a matter of law," that the burdens of a 10,000-signature requirement are modest regardless of the actual circumstances. Second, it improperly found that the 10,000-signature requirement advances important interests of the State—even though the Complaint alleged specific facts not present in any prior case, demonstrating why the State's 10,000-signature requirement did not actually serve any purpose under the circumstances here.

The district court's approach would have been incorrect in any case subject to the *Anderson-Burdick* framework, but it was particularly inappropriate in this *as-applied* constitutional challenge. The plaintiffs did not claim that the statute was unconstitutional in every application; they alleged that the *under the particular facts of this case*, the burdens imposed could not be justified by the State's interests. By failing to consider the specific facts alleged here, the court never reached that issue and instead dismissed this case based on the facts developed in other cases that did not present the same questions of burdens and benefits.

A. The District Court Erred in Assessing the Character and Extent of the Burdens.

The district court got off on the wrong foot by determining that the burdens imposed by the statute were, "as a matter of law, . . . modest." JA412. In reaching that conclusion, the court did not even discuss the specific burdens alleged in the Complaint—for example, that the collection of 10,000 signatures would cost more than $100,000 and that it would essentially swallow the Libertarian Party's entire annual budget. *See* JA6, 14 ¶ 27. Rather, the court treated the burdens imposed as an abstract legal question to be resolved solely by reference to prior precedents which had addressed other signature-collection requirements in other factual scenarios. *See* JA412 ("Thus, to the extent the plaintiffs assert that strict scrutiny applies or that the magnitude of the burden imposed by the signature requirement is a factual assessment that should be tabled until summary judgment, this argument is squarely foreclosed by precedent."). That was a fundamental mistake—especially in an as-applied constitutional challenge, where the plaintiffs had alleged that the signature-collection requirement was unconstitutional under the unique facts of this case.

1. The District Court Erred in Evaluating the Burdens Based on the Evidence in Other Cases.

Courts have repeatedly held that the level of burdens imposed is a highly fact-intensive question. *See, e.g.*, *Ariz. Green Party v. Reagan*, 838 F.3d 983, 989

(9th Cir. 2016) ("'[T]he extent of the burden that a primary system imposes . . . is a factual question on which the plaintiff bears the burden of proof.'") (quoting *Anderson*, 460 U.S. at 789); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 547 (6th Cir. 2014) ("Whether a voting regulation imposes a severe burden is a question with both legal and factual dimensions.").[2] That is because the magnitude of the burden depends on how the regulation actually affects the relevant parties in the real world. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (2006) ("In determining the magnitude of the burden imposed by a state's election laws, the Supreme Court has looked to the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the regulations on the voters, the parties and the candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election.").

The Complaint alleged specific facts about how the 10,000-signature requirement affects the Libertarian Party in the real world—for example, it alleged

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[2] *See also Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003) ("We observe that the Court in *Jones* treated the risk that nonparty members will skew either primary results or candidates' positions as a factual issue, with the plaintiffs having the burden of establishing that risk."); *One Wis. Inst., Inc. v. Nichol*, 155 F.Supp.3d 898, 905 (W.D. Wis. 2015) ("Whether Wisconsin's restrictions have actually burdened Democratic voters, and if so, to what degree, is a question of fact that cannot be resolved at the pleading stage.").

the amount of money that the Party will have to expend to comply with the requirement and that complying with the requirement will hobble the Party by requiring it to expend all its resources just to regain its status as a "recognized" party. *See* JA6, 14 ¶ 27. Those allegations were plainly relevant to—and should have controlled—the burdens analysis. Indeed, the primary question in determining whether a burden is "severe" is whether it "affect[s] a political party's ability to perform its primary functions—organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election." *See Blackwell*, 462 F.3d at 587. The facts alleged in the Complaint spoke decisively to that question: by requiring the Party to spend all its resources to regain its status as a recognized party, the statute prevented it from performing its primary functions.

The district court did not engage with those allegations. Instead, the court focused solely on the *number* of signatures required and how that number compared to signature requirements challenged in previous precedents. *See* JA411–12 ("Case law analyzing more onerous recognition requirements confirms that the signature requirement imposed here is merely a modest burden on the Party"). But that is not the right question. The cases cited by the district court were decided on summary judgment based on the evidence of the burdens presented in *those* cases. Thus, the district court essentially decided this case based

on the evidence in *other* cases—not based on the specific facts alleged here. *Cf. Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670 SBA, 2006 WL 3462780 at *5 (N.D. Cal. Nov. 28, 2006) ("However, Plaintiffs correctly point out that Weber was at the summary judgment stage, and the court had facts before it such as the results of state testing showing the benefits of the touchscreen system. This case is before the Court on a motion to dismiss, which means that the Court must decide whether any set of facts could support Plaintiffs' claim that the challenged voting systems violate the Fourteenth Amendment.").

This Court has expressly rejected this sort of fact-light analysis, noting that "[i]n *Anderson*, the Supreme Court instructed that a fact-specific inquiry be undertaken." *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997). In *Wood*, the issue was whether it was constitutional to require independent candidates to perfect their candidacies more than 90 days before the general election. As in this case, the district court found that the *Anderson* analysis was "controlled" by prior Fourth Circuit precedent, which had applied the *Anderson* framework to a similar statutory scheme. The Fourth Circuit reversed, noting that *Anderson* requires a "fact-specific inquiry," that "the factual record" regarding the burdens imposed "remains largely undeveloped," and that "the record before us is likewise virtually barren of any evidence of the strength or legitimacy of the Commonwealth's interests, administrative or otherwise, in the 150 day deadline." *Id.* Therefore,

although the Fourth Circuit was skeptical that the plaintiffs in that case could prevail, it reversed and remanded to the district court for development of the record.

Although *Wood* was decided at the summary-judgment stage, courts in other circuits have confirmed that it is even more inappropriate to proceed in this way at the motion-to-dismiss stage. For example, in *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018), a Socialist candidate challenged a California statute that required the ballot to list his party preference as "none." The district court dismissed the complaint under Rule 12(b)(6) after rejecting the plaintiff's "contention that *Anderson / Burdick* balancing is inherently 'fact-intensive.'" *Id.* at 443. The court of appeals reversed, emphasizing that application of the *Anderson-Burdick* framework "rests on the specific facts of a particular election system, not on strained analogies to past cases." *Id.* at 444 (quoting *Reagan*, 838 F.3d at 990). The court emphasized that until the parties were given the opportunity to present evidence regarding the benefits and burdens of the statute, it was impossible to apply the *Anderson-Burdick* framework. That is because, "[l]acking any evidence showing the true extent of the burden on candidates like Soltysik and the weightiness of California's interests in imposing that burden, 'we find ourselves in the position of Lady Justice: blindfolded and stuck holding empty scales.'" *Id.* at

450 (quoting *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 736 (9th Cir. 2015)).

Similarly, in *Wilmoth v. Secretary of New Jersey*, 731 Fed. App'x 97 (3d Cir. 2018) the plaintiff challenged a statutory provision requiring that circulators of petitions be registered to vote in the state. The district court dismissed the case under Rule 12(b)(6), but the court of appeals reversed, explaining that without an evidentiary record, it was impossible to weigh the competing interests under *Anderson-Burdick*:

> In other words, because the District Court granted New Jersey's motion to dismiss prior to discovery taking place, the parties were not afforded an opportunity to develop an evidentiary record, and thus we have no basis upon which to gauge the validity of the competing interests at stake.

Id. at 104.

2. The Cases Cited by the District Court Did Not Support Its Analysis.

In evaluating the character and magnitude of the burdens in this case, the district court relied on four cases. Based on these cases, it rejected the plaintiffs' argument "that strict scrutiny applies or that the magnitude of the burden imposed by the signature requirement is a factual assessment that should be tabled until summary judgment," and it held that "this argument is squarely foreclosed by precedent." JA412. The cases cited by the district court do not support this conclusion and, in fact, demonstrate why it was improper for the district court to

dismiss this case. As explained below, each of the cases cited was decided based on the evidentiary record presented to the court—either on summary judgment or following a trial. Far from demonstrating that the burden was modest "as a matter of law," these cases demonstrate that the district court should have allowed the parties to develop the factual record.

First, the district court relied on *Mathers v. Morris*, 515 F. Supp. 931, 937 (D. Md. 1981), a district-court decision which was decided on summary judgment and was affirmed by the Supreme Court in an unexplained *per curiam* opinion.[3] *Morris v. Mathers*, 454 U.S. 934 (1981). The district court apparently believed that *Mathers* was dispositive because it examined a prior version of Maryland's election law, which also imposed a 10,000-signature requirement. But *Mathers* did not purport to establish any bright-line rule that the burdens imposed by that requirement are *in every case* modest. In *Mathers*, the parties "filed a joint

[3] In *Anderson*, the court of appeals had also relied on a prior summary affirmance by the Supreme Court. In explaining its decision to reverse, the Supreme Court emphasized the limited utility of a summary affirmance: "The Court of Appeals quite properly concluded that our summary affirmances in *Sweetenham v. Gilligan* and *Pratt v. Begley* were 'a rather slender reed' on which to rest its decision. 664 F.2d, at 560. We have often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Anderson*, 460 U.S. at 786 n.5 (quoting *Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182–83 (1979).

stipulation of facts," and the district court granted summary judgment based on the factual record before it. 515 F. Supp. at 932. The court nowhere ruled that the 10,000-signature requirement was modest in every circumstance or that this issue could be decided on a motion to dismiss.

Moreover, setting aside the impropriety of relying on the evidentiary record developed in a different case, the issues litigated in *Mathers* were completely different than the issue raised here. In *Mathers*, the plaintiffs challenged the number of signatures required to nominate a candidate in a special election, combined with an early deadline, and the court found those requirements unconstitutional. The court went on to consider whether Maryland was constitutionally required to print a candidate's affiliation with the Libertarian Party on the ballot when the Party was not officially recognized. The court held that it was not. It was in that context that the court stated that requiring 10,000 signatures as a prerequisite to associating the Party's name with a candidate who would be on the ballot either way did not impose a "severe" burden on rights of electoral participation.

Because of the nature of their challenge, the plaintiffs in *Mathers* do not appear to have presented evidence regarding the specific nature of the burdens on them. The plaintiffs argued primarily that it was *per se* unlawful to require a greater level of support to retain party status than to obtain it initially. And they

explicitly did "not challenge the constitutionality of the general organizational requirements for a new political party under the statute." 515 F. Supp. at 936. Thus, they do not appear to have presented any evidence regarding the actual burden of obtaining 10,000 signatures—a completely different posture than this case. To the extent the district court found the burden of gathering 10,000 signatures to be "modest," it was on the evidentiary record before it, which appears to have been devoid of evidence on this point.

Second, the district court relied on *Pisano v. Strach*, 743 F.3d 927, 935 (4th Cir. 2014), a case that was also decided on summary judgment. But *Pisano* likewise did not hold that the burdens imposed were a legal issue or that it was appropriate to decide that issue in a motion to dismiss. In *Pisano*, the plaintiffs challenged a deadline, in combination with a signature requirement. But in presenting their case, they apparently failed to create a satisfactory evidentiary record. According to the opinion, the district court "allowed Plaintiffs time to file additional affidavits before the court ruled on the summary judgment motion, but Plaintiffs did not take advantage of that opportunity." *Id.* at 931. The Fourth Circuit therefore affirmed the dismissal on summary judgment because "Plaintiffs have not shown that North Carolina's scheme burdens them in any meaningful way." *Id.* at 935.

Third, the district court relied on *American Party of Texas v. White*, 415 U.S. 767, 771 (1974)—a case that was decided "[f]ollowing a trial." The plaintiffs challenged a requirement to demonstrate support of approximately 22,000 voters. *Id.* at 776. On appeal, the Supreme Court applied strict scrutiny to this requirement. *Id.* at 780 ("We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests . . . ."). And although it affirmed the district court's decision dismissing the case, it made clear that it was doing so *based on the evidentiary record*. *See id.* at 781 ("we are wholly unpersuaded by the record"); *id.* at 787 ("On the record before us, we are in no position to disagree."). Indeed in rejecting one argument, it explained that "[t]his was simply a failure of proof, and for that reason we must affirm the District Court's judgments with respect to these appellants." *Id.* at 790–91. The court did not hold that a 10,000-signature requirement can never impose a severe burden or that this issue should be decided on a motion to dismiss.

Finally, the district court relied on *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), a case that was decided on summary judgment. In that case, the plaintiffs challenged a North Carolina statute requiring

them to present "petitions signed by registered voters numbering at least 2% of the total number of votes cast in the most recent general election for Governor." *Id.* at 1218. On appeal, this Court held that the ballot-access restrictions imposed a burden that was "undoubtedly severe" and disagreed with the district court's contrary ruling. *Id*. at 1221. Further, in applying the *Anderson-Burdick* framework, the court emphasized that it was inappropriate to dispose of the case as the district court did here—"simply by noting that schemes with similar tiers have been uniformly upheld." *Id.* at 1223. It then engaged in a fact-intensive analysis *based on the evidence presented*, emphasizing that its ruling was based on the evidence—or lack therefore—presented by the parties:

> *In the absence of any evidence* that the challenged language has made it any more difficult for the Libertarians to secure petition signatures than their task would have been had their petitions omitted the objectionable references, the dispositive question is whether, as the Libertarians urge, we should simply assume that the challenged language does hamper small parties' efforts to attract voters to sign their petitions."

Id. at 1227. In the end, the court emphasized that the burdens were not to be evaluated based on speculation but based on the facts presented to the factfinder:

> At bottom, we believe that we may not declare a state's mandatory ballot petition language unconstitutional merely because it could conceivably mislead some individuals and could have been crafted more adroitly. Rather, either the factfinder must be persuaded that protected expressive, political, and associational rights have in fact been invaded, or the court must be able to conclude as a matter of law that such is the inevitable consequence. Because neither condition is here satisfied, the district court properly refused to declare N.C. Gen.Stat. § 163–96(b) unconstitutional on the stipulated record before it.

Id.

In short, the cases cited by the district court in no way establish that the burdens alleged here are, "as a matter of law, modest." And they certainly do not establish that this is a question to be decided on a motion to dismiss. Rather, these cases show that the level of the burden is a fact-intensive inquiry to be decided based on the facts presented to the district court. By treating this issue as a legal question foreclosed by precedent, the district court erred.

3. The District Court's Analysis Was Inconsistent with this Court's General Rule 12(b)(6) Precedents.

In addition to being inconsistent with precedents applying *Anderson-Burdick* specifically, the district court's ruling is also inconsistent with the precedents regarding Rule 12(b)(6) more generally, which emphasize that district courts must not impose a "probability" standard in deciding a motion to dismiss and that fact-intensive constitutional balancing tests should ordinarily wait until summary judgment.

For example, in *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015), this Court considered an appeal from the 12(b)(6) dismissal of an antitrust case alleging a group boycott—precisely the kind of allegation in which *Twombly/Iqbal* concerns about "plausibility" are most serious. Nonetheless, the Court reversed the trial court's dismissal and delivered a highly relevant discussion of how courts should assess the sufficiency of factual allegations under Rule 12(b)(6). "Importantly," the Court emphasized, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) "does not impose a probability standard at the motion-to-dismiss stage." *SD3*, 801 F.3d at 425 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Courts must be careful, then, not to subject the complaint's allegations to the familiar 'preponderance of the evidence' standard . . . . When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint." *Id.* (citations omitted). Such weighing "is not [the court's] task at the motion-to-dismiss stage . . . . [A]ppellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases." *Id.* The *SD3* court criticized the district court for "confus[ing] the motion-to-dismiss standard with the standard for summary judgment," and "appl[ying] a standard much closer to probability than plausibility." *Id.* at 426. Consequently, the Court reversed the trial court's dismissal: "[t]o dismiss [the plaintiff's] complaint because

of some initial skepticism would be to mistakenly 'collapse discovery, summary judgment[,] and trial into the pleading stages of a case.'" *Id.* at 434 (quoting *Petro-Hunt, LLC v. United States*, 90 Fed. Cl. 51, 71 (2009)).

SD3 was an antitrust case, but *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013) illustrates the correct approach when dealing with a broad constitutional balancing test like the one at issue in our case. In *Hazel*, the plaintiffs were medical providers from outside Virginia, who alleged that Virginia's regulatory requirements for a "certificate of need" discriminated against out-of-state interests and violated the plaintiffs' rights under the dormant commerce clause. 733 F.3d at 540–42. They raised two distinct claims of unconstitutional treatment, one of which required an allegation of discriminatory purpose or effect and the other of which required an allegation of "undue burden" on interstate commerce. Judge Hilton in the Eastern District of Virginia dismissed the complaint under Rule 12(b)(6), but this Court faulted him for neglecting the "fact-intensive quality of the substantive inquiry." *Id.* at 545. In pleading their "undue burden" challenge under the dormant commerce clause, the *Hazel* plaintiffs had alleged "that Virginia's certificate-of-need program 'does not actually achieve any legitimate local benefits,'" while "substantially burden[ing] the interstate market for both medical devices and services," *id.* at 545–46 (internal citation

omitted), allegations quite similar to those the district court swept away in our case.

There were other similarities as well: the Court noted that the plaintiffs' contentions found "some support in the case law," that there were only a small number of other states with laws as onerous, and that "the state's political process cannot be relied upon to rectify" the unfair discrimination because the plaintiffs lacked political power within the state. *Id.* at 546. Under these circumstances, the *Hazel* court declared the constitutional balancing inquiry—a question of law—to be "fact-bound" to a degree that prevented resolution on a motion to dismiss. *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "We shall not attempt to forecast what further investigation may demonstrate. The fact-intensive character of this inquiry, however, counsels against a premature dismissal. . . . This particular challenge too presents issues of fact that cannot be properly resolved on a motion to dismiss." *Id.* So too here.

4. The District Court Erred by Concluding that the Burdens Were "Modest."

Finally, the district court erred in concluding that the burdens were "modest." In reaching that conclusion, the court appears, erroneously, to have applied a binary standard under which a burden is either "severe" or "modest." But the test is not binary; there is lots of space on the scales between "severe" and "modest."

In the district court, the plaintiffs argued that the burden in this case is severe because it makes it difficult, though not impossible, for them to gain access to the ballot. *McLaughlin*, 65 F.3d at 1221 n.7 (the test is not whether a restriction actually prevents a party from obtaining access to the ballot but whether it makes ballot access "difficult," even if not impossible) (quoting *Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993) (applying strict scrutiny to requirement that voter disclose a Social Security Number)). The burden is also severe because it consumes their budget, hobbling their ability to perform its basic functions. *See Blackwell*, 462 F.3d at 587 (noting that the test is whether a burden "affect[s] a political party's ability to perform its primary functions—organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election").[4]

The Appellants still maintain that was correct. But even if the burden did not qualify as severe, the district court erred by assuming that it was therefore "modest" and subject to the most deferential review. Both the Supreme Court and

[4] Moreover, while the burden is fact-specific, our argument is consistent with the Supreme Court's treatment of other signature requirements. For example, in *Norman v. Reed*, the Court explicitly treated the signature-collection requirement as a "severe restriction" that could only be justified by a "compelling" state interest. 502 U.S. at 288–89. And this Court dutifully applied the same standard to North Carolina's ballot access restrictions, treating them as "undoubtedly severe." *McLaughlin*, 65 F.3d at 1221.

the courts of appeals have recognized that there is a wide range between slight and severe. *See, e.g.*, *Timmons*, 520 U.S. at 363 ("We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not trivial—are not severe."); *Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999) (noting that where the burden was "not trivial" but "not severe," the Supreme Court applied "an intermediate level of scrutiny"). And the greater the burden, the greater the justification required by the state. Thus, even when a burden is not large enough to warrant strict scrutiny, it may be "serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests." *Soltysik*, 910 F.3d at 445.

Even if the burden was not severe, it certainly was substantial enough to require real scrutiny from the court. By treating the burden as negligible, the district court wrongly excused it from any serious review, presuming that a modest burden "will usually be" justified by the State's interests.

B. The District Court Erred in Evaluating Strength and Legitimacy of the State Interests.

In much the same way it erred in quantifying the burdens on the Party, the district court also erred in taking a fact-free, matter-of-law approach to the "benefit" side of the *Anderson-Burdick* balancing test. The cases show that the interests side of the *Anderson-Burdick* equation is a highly fact-sensitive inquiry.

Here, the district court improperly ignored the facts alleged in the Complaint, which demonstrated that, in the specific circumstances of this case, the 10,000-signature requirement advances no real interest of the State.

1. The Interests Analysis is a Fact-Sensitive Inquiry.

In this case, the State contends that the 10,000-signature requirement is necessary to further its interest in ensuring that parties which nominate candidates to the ballot have a "significant modicum of support." *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The Appellants do not dispute that this is a legitimate interest. But the fact that a state articulates a theoretically legitimate interest does not end the *Anderson-Burdick* analysis. An interest counts in the *Anderson-Burdick* analysis only if the relevant statute *actually advances* that interest. *See Anderson v. Morris*, 636 F.2d 55, 58 (4th Cir. 1980) ("We cannot conclude, however, that the early filing date under attack achieves or helps to achieve these objectives.").

The cases confirm that this question—the extent to which a law actually advances a state's legitimate interests—is a highly fact-sensitive inquiry. For example, in *Wood v. Meadows*, Virginia asserted that its interests in administrative convenience justified the filing deadline that was challenged in that case. This court emphasized, however, that the strength and legitimacy of that interest was fact-dependent, and "the record before us is likewise virtually barren of any

evidence of the strength or legitimacy of the Commonwealth's interests, administrative or otherwise, in the 150 day deadline." 117 F.3d at 776. Thus the court remanded the case for "factual development" as to the burdens and "as to the interests of the Commonwealth in imposing that deadline." *Id.*

Similarly, in *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993), a candidate challenged a statutory provision that permitted a candidate-selection committee discretion to exclude him from the ballot. The district court dismissed the case under Rule 12(b)(6), but the court of appeals vacated and remanded. The court of appeals explained that the procedural posture of the case—i.e., the fact that it had been decided under Rule 12(b)(6)—made it impossible to apply the *Anderson-Burdick* framework:

> The posture of this case makes it impossible for us to undertake the proper review required by the Supreme Court. While Duke and the Voters have made clear their asserted rights under the First and Fourteenth Amendments, the record before us is devoid of evidence as to the state's interests in promulgating section 21–2–193. This case is before us on appeal from a dismissal of the plaintiffs' amended complaint under Rule 12(b)(6). Discovery has not commenced. The state, therefore, has not as yet asserted its precise interests justifying the burden imposed by its election law.

Id. at 1405. Moreover, although the state had articulated its interests in its briefs in a prior appeal, the court of appeals emphasized that this was insufficient: "The existence of a state interest, however, is a matter of proof." *Id.* at 1405 n.6 (citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)).

And in *Soltysik v. Padilla*, the court reversed the grant of a 12(b)(6) motion, in part, because the it was necessary to develop an evidentiary record regarding the strength and importance of the State's interests. The court explained that "[w]ithout factual support at this early stage, the Secretary's arguments for the . . . requirement do not warrant dismissal of Soltysik's claims." 910 F.3d at 446.

The court acknowledged that the state had asserted an "important" interest, but it "struggle[d] to understand" how the statute "advances that goal." *Id.* at 447. Because that was a fact-dependent question, the court remanded for development of the record.

Moreover, the Supreme Court has repeatedly struck down signature-collection requirements that do not, in fact, advance the state's interest in demonstrating "a significant modicum of support" and preventing undue fragmentation. Thus, in *Illinois State Board of Elections v. Socialist Workers Party*, the Court invalidated an Illinois law requiring over 60,000 signatures (later reduced administratively to 35,947 signatures) to run for office in Chicago when only 25,000 were required to run for statewide office. 440 U.S. at 177, 187. The Court found "no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago" than for the state of which Chicago is only a part. *Id.* at 186.

Likewise, in *Norman v. Reed*, the Court struck down a similarly irrational signature-collection requirement for Cook County, Illinois. 502 U.S. 279. The Harold Washington Party, already established in Chicago and named after its late Mayor, wished to establish itself in Cook County, and in order to do that state law required it to qualify candidates for the entire slate of county offices. But because county board seats in Cook County are allocated by separate districts, state law required the Harold Washington Party to collect not just the 25,000 required for statewide office, or even 25,000 for Cook County as a whole, but 25,000 signatures for each district within Cook County. *Id.* at 283–84. This was essentially a fractal replication of the constitutional flaw the Court had already confronted in *Socialist Workers Party*, and the Court said so. *Id.* at 293.

All of these cases demonstrate that it is not enough for a State merely to articulate an interest. Rather, the state must articulate an interest that is materially advanced by the statute at issue. The plaintiffs alleged as clearly as can be that the information the State wanted them to collect was actually *less* valuable in any constitutionally relevant sense than the information that was already in the state's files. No matter who ultimately wins that argument, it is undeniably a fact-sensitive issue. At the Rule 12(b)(6) stage, the district court was simply not permitted to indulge in any factual speculation at odds with the facts alleged in the Complaint.

2. The District Court Erred by Ignoring the Facts Alleged in the Complaint.

The Complaint alleged that the 10,000-signature requirement advances no important state interest *in this case* because of the unprecedented fact that the state's own records show there are more than twice as many Libertarians in Maryland as the number of signatures the state wants the Party to collect. It alleges that the 10,000 signatures are not a very good proxy for support because the vast majority of signatures on petitions come from "random passers-by," approximately 99.5% of whom are not Libertarians. JA11 ¶ 15. And it alleges that the State's own records already contain "a more informative and a more reliable gauge of support." JA12 ¶ 19. Thus, *as applied here,* the signature-collection requirement "yields almost no information of any value about the level of support within Maryland for the Libertarian Party." *Id.* at ¶ 18. And "[t]he State's interest in ensuring that there is a significant modicum of support within Maryland for the Libertarian Party is simply not advanced one iota by requiring Maryland's 22,000 Libertarians to petition their non-Libertarian neighbors for permission to continue to participate in the political process." JA5–6.

The district court rejected these allegations out of hand. It explained, without citation, that "the voter registration materials and new party petition forms ask potential signers different questions for different purposes" and therefore concluded that "it cannot be inferred that a voter who signed one form would

necessarily sign another." JA414. But of course, whether petitions or current registrations are more reliable indicators of the current level of support is a *factual question* subject to empirical verification. The plaintiffs alleged that current registration information is more reliable and that the petition provides the State with essentially no additional information. And they proffered evidence on this point in support of their motion for a preliminary injunction. *See* JA120. They should have been allowed to engage in discovery and prove the case they pleaded.

The district court also rejected the plaintiffs' allegation that a petition provides the state with no valuable information because "most critically, the signature requirement has a temporal axis." JA414. The district court stated the record did not indicate whether "the state of Maryland systematically culls its databases for expired registrations, nor necessarily removes voters when they move out of state, or even when they are deceased." JA414–15. The district court further speculated that the 22,000 registered Libertarians could include voters "who affiliated with a particular party years ago, but whose political persuasions have since evolved." JA415. It therefore concluded that the voter registrations "may well be outdated." *Id.*

Of course, all the questions raised by the district court are factual questions on which the plaintiffs were entitled to discovery and to present evidence. But even a quick look at Maryland's election law would have revealed that the court's

speculation was unfounded. By statute, the Board of Elections receives reports from the Department of Health regarding voters who die, and it is required to remove those voters from its voter-registration list. *See* Md. Code Ann., Elec. Law §§ 3-504, 3-501. Similarly, the Board is required to remove voters who move out of state. *See id.* § 3-501(3).[5]

Moreover, the district court's speculation that voters who registered initially as Libertarians might not change their party affiliations if their political persuasions later evolved was highly far-fetched. In Maryland's closed-primary system, a person who registers to vote as a Libertarian gives up his or her ability to vote in a primary. That is because the Libertarian Party does not hold a primary, and a registered Libertarian may not vote in the Democratic or Republican primary. *See* Md. Code Ann., Elec. Law § 8-202(c) (permitting parties to exclude voters "not affiliated with the party"); *id.* § 8-202 (noting that only a "principal political party" must hold a primary). Thus, there are strong incentives for registered Libertarians who becomes disenchanted with the Libertarian Party to update their registrations. Certainly, at the Rule 12(b)(6) stage, it was not appropriate for the district court to speculate about these questions. At the

[5] *See also*, Md. Dept. of Elections, *Voter Registration Maintenance*, https://elections.maryland.gov/voter_registration/documents/Voter%20Registration%20List%20Maintenance.pdf (last visited Sept. 10, 2019).

preliminary injunction-stage, where the plaintiffs bore the burden of presenting evidence, it may well have been appropriate for the district court to demand evidence regarding the recency of the 22,000 registrations. But at the Rule 12(b)(6) stage, the presumptions are reversed: the plaintiffs had alleged that the voter registrations were a more reliable indicator of support. The Court was required to accept that allegation as true—not to dismiss the case before the plaintiff could possibly prove it.

Finally, the court determined that the 10,000-signature requirement advances important State interests because it is part of a "two-tiered" system. In a two-tiered system, the State requires a lower showing of support to qualify initially as a political party, but to maintain that status it is necessary to make a showing of greater support. The court stated that the statute advances important state interests because Maryland's "two-tiered system encourages a diversity of political options by imposing a relatively modest barrier to entry, but then installing an exit ramp for political parties that fail to win or maintain voter support." JA413.

The district court's references to a "two-tiered system" were a Red Herring that completely mischaracterized the plaintiffs' challenge. The plaintiffs repeatedly explained that they were *not* challenging Maryland's decision to adopt a two-tiered system. *See, e.g.*, JA254, 258–263; JA385 n.4. And the relief requested in this case would not require Maryland to revert to a single tier. Under the current

regime, parties must initially obtain support from 10,000 voters, but small parties must obtain 1% of the vote to retain that status. If the Appellants prevail, the State can maintain this same distinction. The only question here is whether—in evaluating whether a party has the support of 10,000 voters—the State may ignore the evidence of that fact that is already in its possession. The fact that Maryland has adopted a two-tiered system has nothing to do with this issue.

II. THE PLAINTIFFS' CHALLENGE TO MARYLAND'S SIGNATURE-VALIDATION REQUIREMENTS IS RIPE.

The district court also erred in ruling that the plaintiffs' challenge to the signature-validation requirements was not ripe. Oddly, the court—which had just found that obtaining 10,000 signatures was a negligible burden on the Party, in part because the Party had met the requirement repeatedly in the past—then found that it was actually "uncertain" whether the Party would be able to meet that requirement, uncertain whether it would submit more than 10,000 signatures, and uncertain whether it will "otherwise fail to meet the 10,000 signature threshold." JA416. Based on the "uncertainties surrounding the submission of a new political party petition and the relative lack of hardship imposed on the Party," the district court determined that Count II was not ripe.

The court's analysis was erroneous. Ripeness is an issue of timing—whether it is more appropriate to hear a dispute now or to wait until it further crystalizes. To determine whether a claim is ripe, the court must "'balance the

fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.'" *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 198 (4th Cir. 2013) (quoting *Miller*, 462 F.3d at 318–19). In First Amendment cases, the requirements for ripeness are relaxed. *See Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("Much like standing, ripeness requirements are also relaxed in First Amendment cases."). That relaxation is particularly appropriate for First Amendment challenges involving election procedures, which are disruptive when they come on the eve of an election. *See Miller*, 462 F.3d at 320 ("Bringing lawsuits on the eve of pending elections disrupts the electoral process. Not only would a last-minute decision declaring Virginia's open primary law unconstitutional affect the parties in the case, but it would significantly affect non-parties as well.").

This case is ripe. The challenge to the signature-validation requirements is fit for review because it presents a straightforward legal question: whether it is constitutionally permissible for Maryland to refuse to count signatures based on their form (for example, use of a nickname) when it determines that the signature is a genuine signature of a qualified Maryland voter. The answer to this question does not depend on any future event. The Complaint alleged that Maryland's validation standards "virtually guarantee the invalidation of many signatures that the State Board of Elections definitively identifies as having come from particular

registered voters." JA12 ¶ 21. And there is no question about what those standards are. As the district court explained, the State conceded that "state courts have clarified how the name standard is to be applied in the wake of the 2011 petition and future signature invalidations are likely to be more predictable." JA416. The State's rules regarding the invalidation of signatures are thus straightforward and easy to evaluate without waiting.

Oddly, the district court thought that the case was not ripe because "[t]here is no information in the record about the extent to which various components of the name standard rule contribute to allegedly needless invalidations, nor information about the various state interests advanced by § 6-203's multiple requirements for a signature to be valid." JA418. That, of course, was because the court dismissed this case under Rule 12—without permitting the parties to build a record. Had the court allowed this case to proceed to summary judgment or trial, both parties undoubtedly would have presented evidence about the State's long history of invalidating signatures, as well as the State's interests (or lack of interests) in doing so. More fundamentally, however, it was not necessary for the district court to know whether (for example) a greater number of invalidations occurred because of an omitted initial or the use of a nickname. The constitutionality of such a disqualification does not depend on whether it was based on a missing middle initial or the use of "Larry" rather than "Lawrence." The legal issue is the same in

either case: whether it is constitutionally permissible for the state to *pretend not to know* what its own records conclusively establish.

The district court also erred in determining that the plaintiffs will suffer "comparatively little hardship" by delaying resolution of the signature-validation issues. As the plaintiffs explained in their opposition to the motion to dismiss, it is important to resolve the signature-validation issue now in order to guide the behavior not only of the plaintiffs but of the many other Maryland voters whom they will solicit for signatures. It is undeniably a hardship to require the plaintiffs to proceed in so large a project without knowing what the standards are or whether as a practical matter they will need 12,500 or 25,000 signatures; that is a material difference. The district court's strange suggestion in Footnote 6 that the Party should engage in piecemeal litigation—that is, that the plaintiffs should mobilize their professional and volunteer circulators, collect perhaps 15,000 signatures, give it a go with the State Board, and then return to court to litigate this issue, and do it all in time to repeat the process if necessary, presumably all before the nomination deadlines for the 2020 elections—is deeply impractical for all concerned, and worst of all for the plaintiffs.

The impracticality of waiting is highlighted by the Party's prior failed attempt to litigate the signature-validation requirement. Nine years ago, the Party attempted to raise all of the issues covered by Count Two in the litigation that

ultimately resulted in the decision by the Maryland Court of Appeals in *Maryland State Board of Elections v. Libertarian Party of Maryland*, 44 A.3d 1002 (Md. 2012). In that litigation, the Party deferred its constitutional challenge until it had exhausted all possibility of a saving construction of the statute—and by that time the election was too close to permit timely adjudication of the issues. *See* 44 A.3d at 1016 n.11. Asking the plaintiffs here to place their constitutional claims on hold until after the next petition, on the merest chance that the State Board might act differently next time either as a reviewer or as a litigant, is like Lucy asking Charlie Brown to run up and kick the football, for real this time.

Problems like that are exactly why this Court has previously held that it is important to decide challenges to election laws early in the process. As the court explained in *Miller*, "'[c]hallengers to election procedures often have been left without a remedy'" because "'the election is too far underway or actually consummated prior to judgment.'" 462 F.3d at 320 (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301 n.12 (1979)). Nevertheless, "'[t]here is value in adjudicating election challenges notwithstanding the lapse of a particular election'" because doing so will simply "'future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.'" *Id.*

CONCLUSION

For these reasons, the judgment of the district court should be REVERSED, and the case should be remanded for discovery.

Dated: September 11, 2019

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants believe that the decisional process would be aided by oral argument and therefore respectfully request that the Court schedule this case for argument. *See* Local Rule 34(a).

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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Md. Code Ann., Elec. Law, § 3-501

Removal of voters from statewide voter registration list

An election director may remove a voter from the statewide voter registration list only:

(1) at the request of the voter, provided the request is:

(i) signed by the voter;

(ii) authenticated by the election director; and

(iii) in a format acceptable to the State Board or on a cancellation notice provided by the voter on a voter registration application;

(2) upon determining, based on information provided pursuant to § 3-504 of this subtitle, that the voter is no longer eligible because:

(i) the voter is not qualified to be a registered voter as provided in § 3-102(b) of this title; or

(ii) the voter is deceased;

(3) if the voter has moved outside the State, as determined by conducting the procedures established in § 3-502 of this subtitle; or

(4) if, in accordance with the administrative complaint process under § 3-602 of this title, the State Administrator or the State Administrator's designee has determined that the voter is not qualified to be registered to vote.

Md. Code Ann., Elec. Law, § 3-503

Inactive Status of Voters

Placement on inactive status

(a) If a voter fails to respond to a confirmation notice under § 3-502(c) of this subtitle, the voter's name shall be placed into inactive status on the statewide voter registration list.

Restoration to active status

(b) A voter shall be restored to active status on the statewide voter registration list after completing and signing any of the following election documents:

(1) a voter registration application;

(2) a petition governed by Title 6 of this article;

(3) a certificate of candidacy;

(4) an absentee ballot application; or

(5) a written affirmation of residence completed on election day to entitle the voter to vote either at the election district or precinct for the voter's current residence or the voter's previous residence, as determined by the State Board.

Removal from statewide voter registration list

(c) An inactive voter who fails to vote in an election in the period ending with the second general election shall be removed from the statewide voter registration list.

Not counted for administrative purposes

(d) Registrants placed into inactive status may not be counted for official administrative purposes including establishing precincts and reporting official statistics.

Md. Code Ann., Elec. Law § 3-504

Information from other agencies

Information reported to State Administrator

(a)(1)(i) Information from the agencies specified in this paragraph shall be reported to the State Administrator in a format and at times prescribed by the State Board.

(ii) The Maryland Department of Health shall report the names and residence addresses (if known) of all individuals at least 16 years of age reported deceased within the State since the date of the last report.

(iii) The clerk of the circuit court for each county and the administrative clerk for each District Court shall report the names and addresses of all individuals convicted, in the respective court, of a felony since the date of the last report.

(iv) The clerk of the circuit court for each county shall report the former and present names and residence addresses (if known) of all individuals whose names have been changed by decree or order of the court since the date of the last report.

(2) The State Administrator shall make arrangements with the clerk of the United States District Court for the District of Maryland to receive reports of names and addresses, if available, of individuals convicted of a felony in that court.

(3) The State Administrator shall make arrangements with the United States Social Security Administration or an entity that receives information from the Social Security Administration and is approved by the State Administrator to receive reports of names and addresses, if available, of all Maryland residents at least 16 years of age who are reported deceased.

Information reported to local boards

(b)(1) The State Administrator shall transmit to the appropriate local board information gathered pursuant to subsection (a) of this section.

(2) Every agency or instrumentality of any county which acquires or condemns or razes or causes to be condemned or razed any building used as a residence within the county shall promptly report this fact and the location of the building to the local board in the county or city.

(3) Registration cancellation information provided by an applicant on any voter registration application shall be provided to the appropriate local board by the State Administrator or another local board.

(4) A local board may:

(i) make arrangements to receive change of address information from an entity approved by the State Board; and

(ii) pay a reasonable fee to the entity for the information.

Deceased voters

(c)(1)(i) Except as provided in paragraph (2) of this subsection, whenever a local board becomes aware of an obituary or any other reliable report of the death of a registered voter, the election director shall mail a notice to the registered voter, as prescribed by the State Board, to verify whether the voter is in fact deceased.

(ii) On receipt of a verification of the death of a voter, provided in accordance with the notice mailed under subparagraph (i) of this paragraph, the election director may remove the voter from the statewide voter registration list under § 3-501 of this subtitle.

(2)(i) Whenever a local board receives a report obtained by the State Administrator under subsection (a)(3) of this section that includes a registered voter, the election director shall mail to the address shown on the statewide voter registration list, by regular U.S. mail, a notice that:

1. states that the registered voter has been reported by the Social Security Administration to have died; and

2. notifies the registered voter or a person attending the affairs of a deceased voter that the voter will be removed from the statewide voter registration list unless, within 2 weeks after the date of the letter, the registered voter or a representative:

A. objects to the removal; and

B. shows cause why the removal should not proceed.

(ii) If the registered voter or a representative timely objects and shows cause why the removal should not proceed, the election director may:

1. terminate the removal process and retain the registered voter on the statewide voter registration list; or

2. refer the matter to the local board for a hearing to determine the registered voter's status.

(iii) If the registered voter or a representative fails to timely object and show cause why the removal should not proceed, the registration shall be canceled and the registered voter removed from the statewide voter registration list.

Md. Code Ann., Elec. Law § 4-102

Formation of new political parties

In general

(a) Any group of registered voters may form a new political party by:

(1) filing with the State Board on the prescribed form a petition meeting the requirements of subsection (b) of this section and of Title 6 of this article; and

(2) adopting and filing an interim constitution and bylaws in accordance with subsection (e) of this section.

Requirements of petition

(b)(1) The petition shall state:

(i) the partisan organization's intent to organize a State political party;

(ii) the name of the partisan organization;

(iii) the name and signature of the State chairman of the partisan organization; and

(iv) the names and addresses of 25 registered voters, including the State chairman, who shall be designated as constituting the initial governing body of the partisan organization.

(2)(i) Appended to the petition shall be papers bearing the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the first day of the month in which the petition is submitted.

(ii) Signatures on the petition must have been affixed to the petition not more than 2 years before the filing date of the last qualifying signature.

Filing of petition

(c)(1) Except as provided in paragraph (2) of this subsection, a petition for the formation of a new political party, or any additional signatures to a petition, may be filed at any time.

(2) A petition for the formation of a new political party, or any additional signatures to a petition, may be filed:

(i) in the year of an election at which the President is elected except:

1. during the period of time that registration is closed before and after a primary election in accordance with § 3-302(a) of this article; and

2. after the first Monday in August until registration reopens after the general election in accordance with § 3-302(a) of this article;

(ii) in the year of an election at which the Governor is elected, except after the first Monday in August until registration reopens after the general election in accordance with § 3-302(a) of this article; or

(iii) when a special primary election and a special election are proclaimed by the Governor in accordance with § 8-710 of this article except:

1. after the fifth Monday before the special primary election through the tenth day following the special primary election; and

2. after the fifth Monday before the special election through the fifteenth day following the special election.

Powers and duties of State Board

(d)(1)(i) If the petition is certified under Title 6 of this article, the State Board shall promptly notify the State chairman of the partisan organization.

(ii) Upon the filing of a constitution and bylaws with the State Board by a partisan organization in accordance with subsection (e) of this section, the State Board shall:

1. review the constitution and bylaws to determine whether the constitution and bylaws meet the requirements of subsection (e) of this section; and

2. if the constitution and bylaws meet the requirements of subsection (e) of this section, promptly notify the partisan organization designated in the petition that it is considered a State political party for the purposes of this article.

(2) If the petition does not meet the requirements of this section and of Title 6 of this article:

(i) the State Board shall declare the petition insufficient;

(ii) the partisan organization is not a State political party for the purposes of this article; and

(iii) the State Board shall promptly notify the State chairman of the partisan organization.

Constitution and bylaws of new political party

(e)(1) The constitution and bylaws of a new political party shall:

(i) comply with the requirements of § 4-204 of this title; and

(ii) be adopted by the individuals designated in the petition as the initial governing body at an organizational meeting held within 90 days after the date of the filing of the last qualifying signature on its petition.

(2) The individual designated in the petition as the State chairman of the political party shall convene the organizational meeting under paragraph (1)(ii) of this subsection and shall preside as president pro tem of the meeting until party officers are elected.

Nomination of candidates

(f) Unless a new political party is required to hold a primary election to nominate its candidates under Title 8 of this article, the new political party may nominate its candidates in accordance with the constitution and bylaws adopted by the political party and submitted to the State Board.

Md. Code Ann., Elec. Law § 4-103

Loss of status as a political party

Retention of status

(a)(1) Unless extended pursuant to paragraph (2) of this subsection, a new political party shall retain its status as a political party until December 31 in the year of the second statewide general election following the party's qualification under § 4-102 of this subtitle.

(2) The political party shall retain its status as a political party through either of the following:

(i) if the political party has nominated a candidate for the highest office on the ballot in a statewide general election, and the candidate receives at least 1% of the total vote for that office, the political party shall retain its status through December 31 in the year of the next following general election; or

(ii) if the State voter registration totals, as of December 31, show that at least 1% of the State's registered voters are affiliated with the political party, the political party shall retain its status until the next following December 31.

Notification by State Board

(b) The State Board shall promptly notify the State chairman of a group that loses its status as a political party.

Effect of loss of status

(c) A group that loses its status as a political party may regain that status only by complying with all the requirements for qualifying as a new party under § 4-102 of this subtitle.

Md. Code Ann., Elec. Law § 5-701

Nominations for public offices

Nominations for public offices that are filled by elections governed by this article shall be made:

(1) by party primary, for candidates of a principal political party;

(2) by petition, for candidates not affiliated with any political party; or

(3) in accordance with the constitution and bylaws of the political party, for candidates of a political party that does not nominate by party primary.

Md. Code Ann., Elec. Law § 6-201

Content of petitions

In general

a) A petition shall contain:

(1) an information page; and

(2) signature pages containing not less than the total number of signatures required by law to be filed.

Information page

(b) The information page shall contain:

(1) a description of the subject and purpose of the petition, conforming to the requirements of regulations;

(2) identification of the sponsor and, if the sponsor is an organization, of the individual designated to receive notices under this subtitle;

(3) the required information relating to the signatures contained in the petition;

(4) the required affidavit made and executed by the sponsor or, if the sponsor is an organization, by an individual responsible to and designated by the organization; and

(5) any other information required by regulation.

Signature page

(c) Each signature page shall contain:

(1) a description of the subject and purpose of the petition, conforming to the requirements of regulations;

(2) if the petition seeks to place a question on the ballot, either:

(i) a fair and accurate summary of the substantive provisions of the proposal; or

(ii) the full text of the proposal;

(3) a statement, to which each signer subscribes, that:

(i) the signer supports the purpose of that petition process; and

(ii) based on the signer's information and belief, the signer is a registered voter in the county specified on the page and is eligible to have his or her signature counted;

(4) spaces for signatures and the required information relating to the signers;

(5) a space for the name of the county in which each of the signers of that page is a registered voter;

(6) a space for the required affidavit made and executed by the circulator; and

(7) any other information required by regulation.

Petition relating to questions

(d) If the petition seeks to place a question on the ballot and the sponsor elects to print a summary of the proposal on each signature page as provided in subsection (c)(2)(i) of this section:

(1) the circulator shall have the full text of the proposal present at the time and place that each signature is affixed to the page; and

(2) the signature page shall state that the full text is available from the circulator.

Signature page to meet requirements at all times

(e) A signature page shall satisfy the requirements of subsections (c) and (d)(2) of this section before any signature is affixed to it and at all relevant times thereafter.

Md. Code Ann., Elec. Law § 6-202

Advance determinations of sufficiency by chief election official

In general

(a)(1) The format of the petition prepared by a sponsor may be submitted to the chief election official of the appropriate election authority, in advance of filing the petition, for a determination of its sufficiency.

(2) In making the determination under this subsection, the chief election official may seek the advice of the legal authority.

Procedure

(b)(1) When determining the sufficiency under subsection (a) of this section of a petition that seeks to place a question regarding a local law or charter amendment on a ballot, the election director of the local board shall determine the sufficiency of any summary of the local law or charter amendment that is contained in the petition.

(2) If the election director determines that the summary of the local law or charter amendment is insufficient, the election director shall provide the sponsor with a clear, concise, and understandable explanation of the reasons for the determination.

(3) In making the determination under this subsection, the election director may seek the advice of:

(i) the counsel to the local board; or

(ii) the Attorney General.

Md. Code Ann., Elec. Law § 6-203

Signers of petition and information provided by signers

In general

(a) To sign a petition, an individual shall:

(1) sign the individual's name as it appears on the statewide voter r egistration list or the individual's surname of registration and at least one full given name and the initials of any other names; and

(2) include the following information, printed or typed, in the spaces provided:

(i) the signer's name as it was signed;

(ii) the signer's address;

(iii) the date of signing; and

(iv) other information required by regulations adopted by the State Board.

Validation and counting of signatures

(b) The signature of an individual shall be validated and counted if:

(1) the requirements of subsection (a) of this section have been satisfied;

(2) the individual is a registered voter assigned to the county specified on the signature page and, if applicable, in a particular geographic area of the county;

(3) the individual has not previously signed the same petition;

(4) the signature is attested by an affidavit appearing on the page on which the signature appears;

(5) the date accompanying the signature is not later than the date of the affidavit on the page; and

(6) if applicable, the signature was affixed within the requisite period of time, as specified by law.

Removal of signature

(c)(1) A signature may be removed:

(i) by the signer upon written application to the election authority with which the petition will be filed if the application is received by the election authority prior to the filing of that signature; or

(ii) prior to the filing of that signature, by the circulator who attested to that signature or by the sponsor of the petition, if it is concluded that the signature does not satisfy the requirements of this title.

(2) A signature removed pursuant to paragraph (1)(ii) of this subsection may not be included in the number of signatures stated on the information page included in the petition.

Md. Code Ann., Elec. Law § 6-204

Circulators and affidavit of circulator

In general

(a) Each signature page shall contain an affidavit made and executed by the individual in whose presence all of the signatures on that page were affixed and who observed each of those signatures being affixed.

Requirements of affidavit

(b) The affidavit shall contain the statements, required by regulation, designed to assure the validity of the signatures and the fairness of the petition process.

Age of circulator

(c) A circulator must be at least 18 years old at the time any of the signatures covered by the affidavit are affixed.

Md. Code Ann., Elec. Law § 6-205

Filing and acceptance of petitions

In general

(a)(1) Unless otherwise required by the Maryland Constitution, a petition shall be filed, in person by or on behalf of the sponsor, in the office of the appropriate election authority.

(2) If the Maryland Constitution provides that a petition shall be filed with the Secretary of State, the Secretary of State shall deliver the petition to the State Board within 24 hours.

(3) If the Maryland Constitution provides that a petition shall be filed with an official or a governmental body of a county, the official or governmental body, after determining that the petition is in conformance with the requirements of law, shall dispatch the petition to the local board for that county within 24 hours.

(4) A petition forwarded under paragraph (2) or (3) of this subsection shall be processed under this subtitle as if it had been filed with the election authority.

Regulations

(b) The regulations adopted by the State Board may provide that the signature pages of a petition required to be filed with the State Board be delivered by the sponsor, or an individual authorized by the sponsor, to the appropriate local board or boards for verification and counting of signatures.

Information page requirements

(c) A petition may not be accepted for filing unless the information page indicates that the petition satisfies any requirements established by law for the time of filing and for the number and geographic distribution of signatures.

Additional signatures

(d) Subsequent to the filing of a petition under this subtitle, but prior to the deadline for filing the petition, additional signatures may be added to the petition by filing an amended information page and additional signature pages conforming to the requirements of this subtitle.

Md. Code Ann., Elec. Law § 6-206

Determinations by chief election official at time of filing

Review by chief election official

(a) Promptly upon the filing of a petition with an election authority, the chief election official of the election authority shall review the petition.

Determinations by chief election official

(b) Unless a determination of deficiency is made under subsection (c) of this section, the chief election official shall:

(1) make a determination that the petition, as to matters other than the validity of signatures, is sufficient; or

(2) defer a determination of sufficiency pending further review.

Declaration of deficiency

(c) The chief election official shall declare that the petition is deficient if the chief election official determines that:

(1) the petition was not timely filed;

(2) after providing the sponsor an opportunity to correct any clerical errors, the information provided by the sponsor indicates that the petition does not satisfy any requirements of law for the number or geographic distribution of signatures;

(3) an examination of unverified signatures indicates that the petition does not satisfy any requirements of law for the number or geographic distribution of signatures;

(4) the requirements relating to the form of the petition have not been satisfied;

(5) based on the advice of the legal authority:

(i) the use of a petition for the subject matter of the petition is not authorized by law; or

(ii) the petition seeks:

1. the enactment of a law that would be unconstitutional or the election or nomination of an individual to an office for which that individual is not legally qualified to be a candidate; or

2. a result that is otherwise prohibited by law; or

(6) the petition has failed to satisfy some other requirement established by law.

Consistency with advance determination

(d) A determination under this section may not be inconsistent with an advance determination made under § 6-202 of this subtitle.

Notice of determination

(e) Notice of a determination under this section shall be provided in accordance with § 6-210 of this subtitle.

Md. Code Ann., Elec. Law § 6-207

Verification of signatures contained in petition

In general

(a)(1) Upon the filing of a petition, and unless it has been declared deficient under § 6-206 of this subtitle, the staff of the election authority shall proceed to verify the signatures and count the validated signatures contained in the petition.

(2) The purpose of signature verification under paragraph (1) of this subsection is to ensure that the name of the individual who signed the petition is listed as a registered voter.

Process followed by election authorities

(b) The State Board, by regulation, shall establish the process to be followed by all election authorities for verifying and counting signatures on petitions.

Verification by random sample of signatures

(c)(1) The process established under subsection (b) of this section shall provide for optional verification of a random sample of signatures contained in a petition.

(2) Verification by random sample may only be used, with the approval of the State Board:

(i) for a single-county petition containing more than 500 signatures; or

(ii) in the case of a multicounty petition, by a local board that receives signature pages containing more than 500 signatures.

(3) Verification under this subsection shall require the random selection and verification of 500 signatures or 5% of the total signatures on the petition, whichever number is greater, to determine what percentage of the random sample is composed of signatures that are authorized by law to be counted. That percentage shall be applied to the total number of signatures in the petition to establish the number of valid signatures for the petition.

(4)(i) If the random sample verification establishes that the total number of valid signatures does not equal 95% or more of the total number required, the petition shall be deemed to have an insufficient number of signatures.

(ii) If the random sample verification establishes that the total number of valid signatures exceeds 105% of the total number required, the petition shall be deemed to have a sufficient number of signatures.

(iii) If the random sample verification establishes that the total number of valid signatures is at least 95% but not more than 105% of the total number required, a verification of all the signatures in the petition shall be conducted.

Md. Code Ann., Elec. Law § 6-208

Certification of petition process

In general

(a) At the conclusion of the verification and counting processes, the chief election official of the election authority shall:

(1) determine whether the validated signatures contained in the petition are sufficient to satisfy all requirements established by law relating to the number and geographical distribution of signatures; and

(2) if it has not done so previously, determine whether the petition has satisfied all other requirements established by law for that petition and immediately notify the sponsor of that determination, including any specific deficiencies found.

Proof of filing required for petition certification

(b) If a petition sponsor's ballot issue committee fails to provide proof of filing the report required under § 13-309(e) of this article, the chief election official may not certify the petition.

Certification by chief election official

(c) If the chief election official determines that a petition has satisfied all requirements established by law relating to that petition, the chief election official shall certify that the petition process has been completed and shall:

(1) with respect to a petition seeking to place the name of an individual or a question on the ballot, certify that the name or question has qualified to be placed on the ballot;

(2) with respect to a petition seeking to create a new political party, certify the sufficiency of the petition to the chairman of the governing body of the partisan organization; and

(3) with respect to the creation of a charter board under Article XI-A, § 1A of the Maryland Constitution, certify that the petition is sufficient.

Notice of determination

(d) Notice of a determination under this section shall be provided in accordance with § 6-210 of this subtitle.

Md. Code Ann., Elec. Law § 6-209

Judicial review

In general

(a)(1) A person aggrieved by a determination made under § 6-202, § 6-206, or § 6-208(a)(2) of this subtitle may seek judicial review:

(i) in the case of a statewide petition, a petition to refer an enactment of the General Assembly pursuant to Article XVI of the Maryland Constitution, or a petition for a congressional or General Assembly candidacy, in the Circuit Court for Anne Arundel County; or

(ii) as to any other petition, in the circuit court for the county in which the petition is filed.

(2) The court may grant relief as it considers appropriate to ensure the integrity of the electoral process.

(3) A judicial proceeding under this section shall be conducted in accordance with the Maryland Rules, except that:

(i) the case shall be heard and decided without a jury and as expeditiously as the circumstances require; and

(ii) an appeal shall be taken directly to the Court of Appeals within 5 days after the date of the decision of the circuit court.

(4) The Court of Appeals shall give priority to hear and decide an appeal brought under paragraph (3)(ii) of this subsection as expeditiously as the circumstances require.

Declaratory relief

(b) Pursuant to the Maryland Uniform Declaratory Judgments Act and upon the complaint of any registered voter, the circuit court of the county in which a petition has been or will be filed may grant declaratory relief as to any petition with respect to the provisions of this title or other provisions of law.

Md. Code Ann., Elec. Law § 6-210

Schedule of process

Request for advance determination

(a)(1) A request for an advance determination under § 6-202 of this subtitle shall be submitted at least 30 days, but not more than 2 years and 1 month, prior to the deadline for the filing of the petition.

(2) Except as provided in paragraph (3) of this subsection, within 5 business days of receiving a request for an advance determination, the election authority shall make the determination.

(3) Within 10 business days of receiving a request for an advance determination of the sufficiency of a summary of a local law or charter amendment contained in a petition under § 6-202(b) of this subtitle, the election director shall make the determination.

Notice of advance determination

(b) Within 2 business days after an advance determination under § 6-202 of this subtitle, or a determination of deficiency under § 6-206 or § 6-208 of this subtitle, the chief election official of the election authority shall notify the sponsor of the determination.

Verification and counting of validated signatures

(c) The verification and counting of validated signatures on a petition shall be completed within 20 days after the filing of the petition.

Certification by appropriate election official

(d) Within 1 business day of the completion of the verification and counting processes, or, if judicial review is pending, within 1 business day after a final judicial decision, the appropriate election official shall make the certifications required by § 6-208 of this subtitle.

Judicial review

(e)(1) Except as provided in paragraph (2) of this subsection, any judicial review of a determination, as provided in § 6-209 of this subtitle, shall be sought by the 10th day following the determination to which the judicial review relates.

(2)(i) If the petition seeks to place the name of an individual or a question on the ballot at any election, except a presidential primary election, judicial review

shall be sought by the day specified in paragraph (1) of this subsection or the 69th day preceding that election, whichever day is earlier.

(ii) If the petition seeks to place the name of an individual on the ballot for a presidential primary election in accordance with § 8-502 of this article, judicial review of a determination made under § 6-208(a)(2) of this subtitle shall be sought by the 5th day following the determination to which the judicial review relates.

(3)(i) A judicial proceeding under this subsection shall be conducted in accordance with the Maryland Rules, except that:

1. the case shall be heard and decided without a jury and as expeditiously as the circumstances require; and

2. an appeal shall be taken directly to the Court of Appeals within 5 days after the date of the decision of the circuit court.

(ii) The Court of Appeals shall give priority to hear and decide an appeal brought under subparagraph (i)2 of this paragraph as expeditiously as the circumstances require.

Md. Code Ann., Elec. Law § 6-211

Offenses and penalties relating to petition process

Offenses and penalties relating to the petition process shall be as provided in Title 16 of this article.

Md. Code Ann., Elec. Law § 8-202

Use of primary election by principal political party

In general

(a) A principal political party, as determined by the statement of registration issued by the State Board:

(1) shall use the primary election to:

(i) nominate its candidates for public office; and

(ii) elect all members of the local central committees of the political party; and

(2) may use the primary election in the year of a presidential election to elect delegates to a national presidential nominating convention.

Requirements for nominees

(b) Except for a nominee for President or Vice President, the name of a nominee of a principal political party may not appear on the ballot in a general election if the individual has not:

(1) been nominated in the primary election; or

(2) been designated to fill a vacancy in nomination in accordance with Title 5 of this article.

Unaffiliated voters

(c) If a political party chooses to permit voters not affiliated with the party to vote in the party's primary election, the chairman of the party's State central committee shall so notify the State Board at least 6 months before the date of the primary election.

CERTIFICATE OF COMPLIANCE

Type-Volume Limitation

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 11,803 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Typeface

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

Dated: September 11, 2019

/s/ Mark D. Davis
Mark D. Davis

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I filed the foregoing brief on the Court's CM/ECF system, which caused a copy of the foregoing to be served electronically upon the following:

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