RECORD NO. 19-2355

In The

United States Court Of Appeals

For The Fourth Circuit

GREGORY BUSCEMI;
KYLE KOPITKE;
WILLIAM CLARK,

Plaintiffs – Appellants,

v.

EXECUTIVE DIRECTOR KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT WILMINGTON

OPENING BRIEF OF APPELLANT

Alan P. Woodruff
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 7:19-cv-00164-D

Plaintiff(s), GREG BUSCEMI, KYLE KOPITKE, and WILLIAM CLARK

vs KAREN BRINSON BELL in her official capacity as Executive Director of the North Carolina State Board of Elections

Defendant(s).

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed.R.Civ.P. 7.1 and Local Civil Rule 7.3, or Fed.R.Crim.P. 12.4 and Local Criminal Rule 12.3,

Greg Buscemi (name of party) who is Plaintiff (plaintiff/defendant/other:_____),

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

YES ○ NO ◉

2. Does party have any parent corporations?

YES ○ NO ◉

If yes, identify all parent corporation, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party 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 Civil Rule 7.3 or Local Criminal Rule 12.3)?

YES ○ NO ◉

If yes, identify entity and nature of interest:

5. Is party a trade association?

YES ○ NO ◉

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors's committee:

Signature: /s/ Gregory A. Buscemi

Date: 08.30.2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 7:19-cv-164-D

Greg Buscemi, Kyle Kopitkeand William Clark)
Plaintiff(s),)
vs)
Karen Brinson Bell)
Defendant(s).)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed.R.Civ.P. 7.1 and Local Civil Rule 7.3, or Fed.R.Crim.P. 12.4 and Local Criminal Rule 12.3,

William Clark (name of party) who is Plaintiff (plaintiff/defendant/other:_____),

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

YES ○ NO ◉

2. Does party have any parent corporations?

YES ○ NO ◉

If yes, identify all parent corporation, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party 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 Civil Rule 7.3 or Local Criminal Rule 12.3)?

YES ○ NO ◉

If yes, identify entity and nature of interest:

5. Is party a trade association?

YES ○ NO ◉

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors's committee:

Signature: /s/ William Clark

Date: 09/03/2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 7:19-cv-164-D

Greg Buscemi, Kyle Kopitke and William Clark
Plaintiff(s),

vs

Karen Brinson Bell
Defendant(s).

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed.R.Civ.P. 7.1 and Local Civil Rule 7.3, or Fed.R.Crim.P. 12.4 and Local Criminal Rule 12.3,

Kyle K. Kopitke (name of party) who is Plaintiff (plaintiff/defendant/other:_____),

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

YES ○ NO ◉

2. Does party have any parent corporations?

YES ○ NO ◉

If yes, identify all parent corporation, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party 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 Civil Rule 7.3 or Local Criminal Rule 12.3)?

YES ○ NO ◉

If yes, identify entity and nature of interest:

5. Is party a trade association?

YES ○ NO ◉

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors's committee:

Signature: /s/ Kyle K. Kopitke

Date: 09/03/2019

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I. JURISDICTIONAL STATEMENT:

This is an appeal from a final judgment of dismissal entered on November 22, 2019 from which a timely notice of appeal was filed on November 25, 2019. In this action, appellants sought relief pursuant to 42 U.S.C. §1983 for violation of their rights under the First and Fourteenth Amendments of the United States Constitution. The district court had jurisdiction pursuant to 28 U.S.C. §1331.

This court has jurisdiction pursuant to 28 U.S.C. §1291.

II. ISSUES PRESENTED FOR REVIEW

Issue I: Whether the district court erred in dismissing plaintiffs' claims based on its analysis of the merits of those claims.

Issue II: Whether the petition signature requirements and filing deadline established by N.C. Gen. Stat. (herein referred to as "NCGS") §163-122(a)(1)[1], individually or in combination, impose an unconstitutional burden on unaffiliated candidates to be voted on statewide.

[1] Following the filing of appellants complaint, the North Carolina election code was re-codified and its sections renumbered. In the pleadings in the district court, the relevant statutes were referred to by their numbers at the time the complaint was filed. The Order appealed refers to the statutes by their re-codified numbers. In this brief, they are also referred to by their re-codified numbers. To facilitate reference to the pleadings, the statutes identified in Table of Authorities identify the former statute number for each referenced statute.

Issue III: Whether North Carolina's policy of not counting write-in votes for candidates who have not satisfied the requirements of its write-in statute unconstitutionally impairs the fundamental right to vote.

III: STATEMENT OF THE CASE

III-A: Facts Relevant to the Issues Submitted for Review:

Five sets of facts are relevant to this case.

First: In North Carolina, a *new political party* is recognized based on the submission of petitions containing the signatures of "one-quarter of one percent (0.25%) of the total number of voters who voted in the most recent general election for Governor." NCGS §163-96(a)(2). For 2020, the number of signatures required to form a new party is 11,924. On the other hand, to be listed on the ballot, an *unaffiliated candidate* to be voted on by the entire state must submit petitions containing the signatures of "one and one half (1.5%) percent of the total number of voters who voted in the most recent general election for Governor." NCGS §163-122(a)(1). For 2020, the number of petition signatures required is 71,545.

Appellees never offered any justification for requiring *individual* unaffiliated candidates to be voted on statewide to file petitions containing *six times* the number of signatures needed to form a new party that can nominate candidates for every office on the ballot.

In their complaint, appellants specifically contend that NCGS §163-§122(a)(1) imposes a *severe* burden and is not *necessary* to satisfy any state interest. [See Appendix 1, ¶¶ 28 and 29]. In support of their contentions, appellants produced *evidence* that a 5,000-signature petition requirement is sufficient to satisfy any legitimate state interest. On the other hand, appellee has not offered *admissible evidence* of *any* justification for the petition signature requirement for unaffiliated candidates.

Second: NCGS §163-122(a) requires that unaffiliated candidate signature petitions must be filed "on or before 12:00 noon on the day of the primary election." For 2020, the filing date is March 3. No decision has ever upheld a candidate petition filing date before April, and *the U.S. Supreme Court has specifically held a March filing date to be unconstitutionally early in the election cycle*.

Also relevant is the fact that until 2020 unaffiliated candidates did not have to file their qualifying petitions until at least May. Appellee did not offer *any* justification for moving the filing date up by two months.

Third: Pursuant to NCGS §163-122(a), to become an unaffiliated candidate, a candidate must first be a "qualified voter." However, as to candidates for *federal office*–which appellants Buscemi (a candidate for U.S. Representative) and Kopetik (a candidate for President) desire to be–the U.S. Constitution is the exclusive source of officeholder qualifications and states may not add any qualifying requirement not found in the Constitution.

Fourth: In North Carolina, votes cast for any individual who has not separately satisfied the requirements to be a write-in candidate are not counted. Appellee has not offered *any* justification for this practice.

Fifth: In its ruling with respect to facts one and two, the district court relied exclusively on an authority, *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014), where (a) did plaintiff did *not* challenge the petition signature requirements of NCGS 163-122(a), (b) the court ruled on the constitutionality of a filing deadline that was *different from* the filing deadline challenged in this case and (c) the court did not apply the standard of constitutional review applicable to challenges to the petition signature requirements for *presidential* candidates. The district court's ruling was also based on the acceptance of "justifications" for the challenged statutes and practices for which the appellee *had not offered admissible evidence*.

III-B: Procedural History:

On August 30, 2019, appellants filed their complaint [Dkt.[2] 1; Appendix pp: 8-17] challenging, *inter alia* (a) the constitutionality of the petition signature requirement for an unaffiliated candidate to be voted on statewide: (b) the filing deadline for unaffiliated candidate petitions; and (c) North Carolina's practice of not counting votes for write-in candidates who had not

[2] All "Dkt." references refer to documents in the district court docket presented as Appendix pp: 1-7.

satisfied the requirements of North Carolina's write-in candidate statute. On September 10, appellants filed a motion for a preliminary and permanent injunction and a supporting memorandum [Dkt. ##12/15] seeking to bar appellee from enforcing the petition signature requirements and filing date requirements of NCGS §163-122. Appellee filed a response [Dkt. #26] on October 1, and appellant filed a reply [Dkt. #28] on October 7.

On October 1, 2019, appellee filed (a) a motion to dismiss and supporting memorandum [Dkt. ##24/25] asserting a lack of standing and failure to state a cause of action, and (b) a response to appellants' motion for injunctive relief. Appellant filed a response [Dkt. #27] on October 7, and appellant filed a reply [Dkt. #30] on October21.

On November 22, the district court entered its order [Dkt. #42 / Appendix. pp: 18-27] (a) finding that appellants had standing to assert their various claims but (b) holding that appellants' claim that the petition signature requirement and filing deadline established by NCGS §163-122(a) were unconstitutionally burdensome failed to state a cause of action. Specifically, the district court analogized appellants claim to those ruled on in *Pisano v. Strach, supra*, and concluded that appellants could not prevail on the merits of their claims and, therefore, "Plaintiffs have failed to state a claim upon which relief can be granted." A final judgment dismissing this case [Dkt. #43 / Appendix. p: 29 was filed on November 22, 2019.

Appellants filed a timely notice of appeal [Dkt. #43 / Appendix. p: 30] on November 25, 2019

III-C: Rulings Presented for Review:

Appellants appeal the district court's order and judgment finding that appellants have failed to state claims on which relief could be granted and dismissing this case.

IV: SUMMARY OF ARGUMENTS:

Issue I: Appellants contend that the district court erred in dismissing this case based on an analysis of the merits of appellants' claim. Specifically. the district court errored in its reliance on *Pisano v. Strach*, and in applying the analysis from a case where to issue concerned the filing deadline for petitions for the recognition of a *new party* to this case where the issue is the number of petition signatures required and the petition filing date for ballot access by an *unaffiliated candidate*.

As to Issue I, appellants also contend that the district court's reliance on *Pisano v. Strach* was improper because it applied a standard of review that is not wholly applicable to ballot access claims by *presidential* candidates.

Finally, appellants contend that the district court erred in ignoring its own *on-point* precedent in *Greaves v. State Bd. of Elections*, 508 F. Supp. 78 (E.D. N.C. 1980) in which the court held that prior versions of the same statutes challenged in this case were unconstitutional.

Issue II: Appellants contend that the district court erred in finding, based on its misapplication of *Pisano v. Strach,* that NCGS §163-122(a)(1) does not impose an unconstitutional petition signature burden on unaffiliated candidates. Specifically, appellants contend that the court erred when it failed to consider the *evidence* that the petition signature requirements of §163-122(a)(1) were unnecessarily burdensome and make it virtually impossible for an unaffiliated candidate to be voted on statewide to satisfy the requirements of that statute.

Appellants further contend that the district court erred when it failed to find that the §163-122 requirement that an unaffiliated candidate be a "qualified voter" imposes an unconstitutional qualification on candidates for *federal office*.

Finally, appellants contend that the district court erred in failing to find that the deadline for filing unaffiliated candidate signature petitions is unconstitutionally early. Specifically, appellants contend that in relying on *Pisano v. Strach,* the district court failed to consider the holdings of all other courts that have considered the issue, including the U.S. Supreme Court, and itself, in *Greaves*, finding that filing deadlines earlier than April are unconstitutional.

Issue III: Appellants contend that the district court erred in concluding that North Carolina's practice of not counting write-in votes for candidates who have not satisfied the requirements of its write-in statute unconstitutionally impairs the fundamental right to vote. In particular, appellants contend that the district court misapplied what it

considered to be controlling case authority and ignored this court's ruling in *Dixon v. Maryland State Administrative Bd. of Election Laws,* 878 F.2d 776 (4th Cir. 1989).

V: ARGUMENT:

V-A: STANDARD OF REVIEW:

Although the district court order being appealed was denoted a judgment dismissing this case, the memorandum order reads significantly more like an order granting a motion for summary judgment.[3] While a court has the power to treat a motion to dismiss as a motion for summary judgment, before doing so it must give the parties notice–unless its intent is apparent to the parties. *Tuttle v. McHugh,* 457 Fed. Appx. 234 (4th Cir. 2011). Although *no such notice was provided*, appellants believe that the ruling should be treated as a grant of summary judgment and that this court should analyze it as such. However, whether the court treats the order on appeal as a ruling on a motion to dismiss or on a motion for summary judgment, the standard of review is *de novo*. *Glaser v. Enzo Biochem, Inc.,* 464 F.3d 474, 476 (4th Cir. 2006) ("This Court reviews

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[3] Pursuant to Fed. Rule Civ. Proc. 12(d), "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." In the order being appealed, the district court relied extensively on its analysis of case authorities addressing the merits of appellants' claims and on unsupported assertions of appellee's counsel. Inasmuch as the district court's ruling was not limited to assertions made within the four corners of the complaint, it *must* be treated as a ruling on a motion for summary judgment.

de novo a decision dismissing a complaint for failure to state a claim."); *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014) ("We review a district court's grant of summary judgment *de novo*.")

V-B: THE DISTRICT COURT ERRED IN DISMISSING THE CASE BASED ON AN ANALYSIS OF THE LIKELIHOOD THAT PLAINTIFFS WOULD PREVAIL:

V-B-1: General Standard for Ruling on A Motion to Dismiss:

As this court stated in *Cooper v. Smithfield Packing Co.* 724 Fed. Appx. 197, 200 (4th Cir. 2018);

> "A district court properly dismisses a claim under Federal Rule of Civil Procedure 12(b)(6) [only] when the complaint does not include sufficient factual allegations to render the claim facially plausible or to permit reasonable inference that the defendant is liable for the alleged misconduct. The court accepts as true all well-pleaded factual allegations and makes all reasonable inferences in the favor of the plaintiff." *Id* at 200 (Citations to authorities omitted)

"In a Rule 12(b)(6) context, the reviewing court must determine whether the complaint alleges sufficient facts to raise a right to relief above the speculative level." *Goldfarb v. Mayor & City Council of Baltimore,* 791 F.3d 500, 508 (4th Cir. 2011). It is error for a court to dismiss a case based on an analysis of the merits of the claim asserted. As this court said in *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992):

> "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; ***importantly***, *it does not resolve contests surrounding* the facts, *the merits of a claim*, or the applicability of defenses." (Emphasis added) *Id.* at 952.

(Cited and applied in *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013)). *See also Bell v. HCR Manor Care Facility of Winter Park*, 432 Fed. Appx. 908, 910 (11th Cir. 2011) ("[T]he district court erred by dismissing Bell's complaint [] because Defendants' motion to dismiss directly challenged the merits of Bell's federal claims.") (Citations omitted).

V-B-2: The District Court's Reliance On *Pisano v. Strach* is Misplaced:

In reliance on *Pisano v. Strach*, *supra*, the district court concluded that appellant was unlikely to prevail as to *either* their claim that NCGS §163-122(a)(1) imposed an unconstitutional petition signature burden *or* that North Carolina's March filing deadline was unconstitutional. However, *Pisano* was principally a "filing deadline" case. In fact, the court expressly stated that:

> "Although Plaintiffs *do not challenge North Carolina's [unaffiliated candidate petition] signature requirement*, they argue that the deadline, in combination with the signature requirement, creates an impermissible barrier to ballot access." 743 F.3d at 931-32.

The reason for the district court's reliance on *Pisano* is found in its statements that "[t]his case is easily analogized to the Fourth Circuit's decision in *Pisano v. Strach,* 743 F.3d 927 (4th Cir. 2014)" [Appendix p-23] and "[t]he Court sees little difference between the combined effect of the requirements upheld in *Pisano* and the one at issue here." [Appendix p-24]. However, there is a vast difference between the issues in *Pisano* and those asserted in this case.

First: *Pisano* was a challenge to the filing deadline for the creation of *new parties* and the burden imposed on them by the combined petition signature requirement and the filing date to establish them. However, in this case, appellees contend that the signature requirements and filing dates for *unaffiliated candidates* to achieve ballot inclusion are unconstitutional. Significantly, in the district court proceedings in *Pisano*, *N.C. Constitution Party v. Bartlett*, 2013 U.S. Dist. LEXIS 28394 (W.D.N.C., Mar. 1, 2013), the court expressly recognized that "new party candidates and unaffiliated candidates are not similarly situated," *Id*. at *18, and "a political party is fundamentally different from an unaffiliated candidate." *Id.* at *19. Acceptance of these statements alone makes *Pisano* inapplicable to this case.

Equally importantly, assuming *arguendo* that an analogy to *Pisano* would be relevant to claims by ***non-presidential*** candidates, it would not be applicable when asserted by presidential candidates. This is because, as discussed in greater detail *infra,* burdens imposed on *presidential* candidates must be evaluated based on a standard that is less deferential to a state than when an analogous claim is brought by a non-presidential candidate. On this issue, *Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. 2014), is directly on point. In that case, the Eleventh Circuit reversed the district court's dismissal for failure to state a cause of action based on the fact that the petition signature decisions on which the district court had relied had not involved a *presidential* candidate. If failure to consider the differences

between cases involving presidential and non-presidential candidates is sufficient to warrant a reversal or a dismissal, surely the failure to recognize the difference between a case involving ballot access by a *presidential candidate* and a *new party* ***compels*** a reversal in this case.

Second: In analogizing the requirements applicable to minor parties to those applicable to independent candidates, the district court ignored the fact that in *Cromer v. South Carolina*, 917 F.2d 819, 823 (4th Cir. 1990) the court said,

> "[A]s between new party candidacies and independent candidacies, *independent candidacies must be accorded even more protection than third-party candidacies.* This flows from the states' heightened interest in regulating the formation of new parties having the potential not possessed by independent candidacies for long-term party control of state government." *Id*. at 823.

The obvious implication of this statement is that restrictions on independent candidates should be *less burdensome* than those applicable to new parties and their candidates.

Third: As discussed in detail *supra*, there is a vast difference between the burden imposed by the *May* filing deadline at issue in *Pisano* and the *March* filing deadline at issue in this case.

Fourth: In *Pisano* the court rejected the argument that the party qualifying petition filing deadline burdened new parties because it came before voters were not motivated and before the primaries. The basis for rejecting the plaintiffs' argument was that new parties had a virtually unlimited time to collect petition signatures.

While this analysis may be appropriate when applied to petitions to form *new parties*, it is *not* appropriate to an analysis of the time available for *candidates* to satisfy petition signature requirements. This is because voter interest in forming *new parties* is based on fundamental feelings about broadening voter choices and reflect feelings about the democratic process that do not generally change over time. On the other hand, support for individual unaffiliated candidates is largely dependent on the results of primary elections, and the time when voters become interested in supporting unaffiliated candidates does not effectively begin until the candidates nominated through party primaries are known.

Fifth: *Pisano* was necessarily decided based on the arguments presented by appellants. In *Pisano*, the appellants based their contentions exclusively on legal arguments supported by case authorities. That is, they did not assert any *facts* supporting their arguments that the challenged statutes were overly burdensome. No discovery was taken, and appellants did not take advantage of the offered opportunity to supplement their pleadings with affidavits.[4]

In contrast, in this case, appellants *have* asserted facts, via the affidavit of their expert, Richard Winger, establishing that (a) 5,000 petition signatures is sufficient to satisfy any state interest and (b) as discussed in greater detail *infra*, the cost of

[4] See 743 F.3d at 931.

satisfying the requirements of NCGS 163-§122(a)(1) is so great as to represent a *severe* burden on candidates to be voted on statewide. These *facts* establish that, as alleged in appellants' complaint[5], the burden on such candidates is *severe* and the requirements of NCGS 163-§122(a)(1) are not *necessary* to satisfy any state interest. Because the facts alleged, and established by competent evidence, are materially different from those considered in *Pisano*, the ruling in *Pisano* does not provide a sufficient basis for any ruling on this case.

Sixth: In *Pisano*, the court applied the *Anderson/Burdick* test. However, as discussed *infra,* case authorities make it clear that statutory provisions challenged in this case require strict scrutiny.[6]

For all the above-stated reasons, the district court's analogy of this case to *Pisano* is so defective that its dismissal of this case based on an analysis of *Pisano* was clearly wrong.

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[5] See Appendix 1, ¶¶ 28 and 29.

[6] In their complaint, appellants contended that both the signature requirements and filing deadline established by NCGS 162-122(a)(1) impose "severe" burdens. [Appendix, 1, ¶¶ 28 and 46,]. As discussed elsewhere herein, the constitutionality of statutes that impose severe burdens is determined by applying "strict scrutiny."

V-B-3: The District Court Erroneously Ignored Its Own Precedent That is Precisely On-Point:

Significantly, while the district court *analogized* this case to *Pisano,* it completely ignored (e.g., never mentioned) *Greaves v. State Bd. of Elections*, *supra,* which, like this case, was decided by the U.S. District Court for the Eastern District of North Carolina (and is controlling precedent within the district) and is *precisely on point* as to the major issues raised by appellant and was discussed throughout appellants' pleadings. Specifically, (a) the plaintiff in *Greaves* was, like appellant Kopetik, a presidential candidate and (b) the petition signature filing date statutes that are challenged in this case are *the same statutes* that were challenged in *Greaves*. As discussed *infra*, in *Greaves* the court held the challenged statutory requirements to be unconstitutional. *Greaves* remains good law, and appellants claims are patterned after the same claims asserted in *Greaves*.

V-C: THE DISTRICT COURT DID NOT PROPERLY APPLY THE *ANDERSON/BURDICK* TEST AS IT RELATES TO STATUTES BURDENING BALLOT ACCESS BY UNAFFIL-IATED CANDIDATES FOR *PRESIDENT*:

The *general* standard for evaluating constitutional challenges to state election laws was articulated by the Supreme Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983) and restated in *Burdick v. Takushi*, 504 U.S. 428 (1992). As initially stated in *Anderson*, the *Anderson/Burdick* test imposes the following requirements.

> "[The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

> Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the *precise interests* put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the *legitimacy* and strength of each of those interests; it also must consider the extent to which those interests make it *necessary* to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." 460 U.S. at 789. (Emphasis added)[7]

V-C-1: Application of the *Anderson/Burdick* Test to Ballot Access Challenges by *Presidential* Candidates:

Although the *Anderson/Burdick* test established the general analytical framework for determining the constitutionality of election-related statutes, in ballot access cases the balancing of burdens and state interests is governed by somewhat different standards when the issue is ballot access on the part of a candidate for *president* as opposed to ballot access on the part of candidates for other offices. As the Supreme Court explained in *Anderson*.

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[7] Although the *Anderson/Burdick* test is commonly characterized as a "balancing" test, in his concurring opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) Justice Scalia characterized the test as a "two-track" test in which the court first analyzes the burden on plaintiffs independent of any asserted state interest. If this analysis leads the court to conclude that the burden is *severe*, the court must then apply strict scrutiny. Justice Scalia's analysis of when the *Anderson/Burdick* test is applicable is neither new or novel. In *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995), the court also analyzed the limits of the *Anderson/Burdick* test and explained:

> "When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. *If so, strict scrutiny applies*." *Id.* at 1221. (Emphasis added)

> "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest for the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. [] Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." 460 U.S. 794-95.

The need to give less weight to a state's interest in limiting ballot access by presidential candidates was further explained in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) where the court said:

> [I]t is important to note that the state's interests in regulating an election cannot trump the national interest in having presidential candidates appear on the ballot in each state. In the context of the presidential election, 'state-imposed restrictions implicate a uniquely important national interest.' *Anderson*, 460 U.S. at 794-95. Strict ballot access requirements imposed by states have an impact beyond their own borders, placing some limits on a state's prerogative to regulate its elections." 462 F.3d at 594

Most recently, in *Green Party of Ga. v. Georgia*, *supra*, the court emphasized that "ballot access restriction for ***presidential*** *elections requires a different balance than a restriction for state elections.*" 551 Fed. Appx. at 984 (Emphasis added). S*ee also McCrary v. Poythress*, 638 F.2d 1308, 1314 n.5 (5th Cir. 1981) (Noting the "different character" of presidential candidates.) and *Greaves, supra*, where the court noted the "*special circumstances* present in the Presidential election." 508 F. Supp. at 83 (Emphasis added.).

V-C-2: Standards for Evaluating the "Precise State Interest" Requirement of the *Anderson/Burdick* Test:

The *Anderson/Burdick* test unambiguously requires a state to justify a burden on ballot access with the identification of a "*precise*" state interest. The test also unambiguously requires the court to make a determination of the "*legitimacy*" of a proffered state interest. A recognition of these requirements is relevant to this case for three reasons.

V-C-2-a: Statements of Abstract State Interests are Insufficient: As discussed *infra*, appellee's pleadings assert several state interests that are purportedly advanced by its ballot access requirements. However, none of these interests have been posited with any precision. That is, they all represent abstract interests. But the assertion of an abstract interest is insufficient to satisfy the *Anderson/Burdick* requirements. As the Sixth Circuit explained in *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011), "[t]he defendants must do more than assert interests that are important *in the abstract*.") *Id* at 736. (Emphasis added). Later, the Sixth Circuit in, *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), expanded on this requirement when it explained:

> "Once a court has determined that a law burdens voters, under *Anderson-Burdick* those burdens must be weighed against "the *precise* interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789 (emphasis added). Put differently, *the state must articulate specific, rather*

> *than abstract state interests*, *and explain why the particular restriction imposed is actually* ***necessary****, meaning it actually addresses the interest put forth*." *Id.* at 545 (Emphasis added)

Nowhere in her pleadings does appellee offer any evidence that the requirements of the challenged statutes are *necessary* to satisfy any of its proffered interests.

V-C-2-b: Appellee Has Not Established That Her Asserted Interests are REAL: The interests that appellee contends justify the challenged statutes are nothing more than a recitation of interests that other cases have found to justify ballot access restrictions. The absence of anything tending to show that the stated interests are the *real* interests being advanced by the challenged statutes means that they cannot be accepted at face value. In *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), the Eleventh Circuit made this point very forcefully when, in rejecting Florida's attempt to justify its ballot access schema, the court observed:

> "The problem is that the state has plucked these interests from other cases without attempting to explain how they justify the discriminatory classification here at issue." *Id.* at 1542.

Likewise, in *Libertarian Party of Ohio v. Blackwell, supra,* the Sixth Circuit rejected Ohio's proffered justification for its new party petition requirements on the basis that …

> "The State has made no clear argument regarding the precise interests it feels are protected by the regulations at issue in the case, relying instead on generalized and hypothetical interests identified in other cases." 462 F.3d at 593.

V-C-2-c: Appellee's Asserted Interests Cannot Be Accepted by the Court:

While the pleadings of the appellee did assert justifications for the challenged statutory requirements,[8] their assertions are not supported with any admissible evidence – no affidavits, no statements from legislative hearings, nothing[9] – establishing that they are the *real* purposes of its ballot access restricting statutes.[10]

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[8] As to appellants contention that NCGS 163-122(a)(1) imposes an unconstitutionally burdensome *petition signature requirement* on prospective unaffiliated candidates for president, appellee has asserted that its interest is in requiring that candidates show a "modicum of support" before being included on the ballot and that this is necessary "to avoid voter confusion." [Dkt. 20, p:18]

As justification for its *filing deadline* – which assures that unaffiliated candidates file their qualifying petition on the same day as the primary election – the state has asserted that its interest is in "[t]reating unaffiliated candidates similarly to party nominees by affording the same amount of time to focus on the general electorate." [Dkt. 20, p: 12] However, this is not a *state* interest. Unaffiliated candidates wanting to focus on the general election can file their petitions as early as they want, but it is not for the *state* to tell them when they must file. Furthermore, making unaffiliated candidates file their petitions on the same day as the primary does not create equality among *all* candidates because newly organized parties have until June 1 to become recognized [See NCGS §163-96(a)(2)] and until July 1 to designate their candidates. [See NCGS §163-98]

*Appellee did not assert **any** justification for not counting votes cast for anyone who did not satisfy the requirements of NCGS 163-123*.

[9] In contrast, in *Pisano v. Strach*, on which appellee and the district court relied, the state had filed the sworn statement of the director of the state board of elections in which he stated the state interest that justified the challenged statutory schema.

[10] In their pleadings, appellants expressly noted that "Defendant does not offer any *evidence* that its asserted justifications are the *real* purposes for its statutory

On the contrary, they are merely assertions made by counsel. However, "statements and arguments of counsel are not evidence in the case"[11] Therefore, the record is devoid of any justification for any restrictions on ballot access be they petition signature requirements or filing deadlines. Nonetheless, the district court treated the assertions of counsel as evidence and stated that "defendant's asserted regulatory interests in minimizing voter confusion and focusing voter attention on the general election after conclusion of the primary are sufficiently weighty to justify the requirements." [Appendix p-24]

As discussed *supra*, the *legitimacy* of appellee's asserted justifications is, at a minimum, highly questionable. Their legitimacy is, however, a material fact. Where there is a genuine question over a material fact, summary judgment is *not* appropriate.[12]

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schema." [Dkt. 27, p-19] However, even after the absence of evidence supporting its purported justifications was noted, appellee did nothing to establish the legitimacy of her purported justifications.

[11] *See United States v. Runyon*, 707 F.3d 475, 515 (4th Cir. 2013); *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 253 (4th Cir. 2001)

[12] It should also be noted that "[s]ummary judgment is inappropriate when a disputed material fact requires a *credibility* determination for resolution." *Bunch v. Shalala*, 1995 U.S. App. LEXIS 27275, *28 (4th Cir. 1995) (Emphasis added). *See also Gray v. Spillman,* 925 F.2d 90, 95 (4th Cir. 1991) (finding that summary

V-D: ARGUMENTS ON THE MERITS OF APPELLANTS CLAIMS:

V-D-1: In Re: Count I-A

In count I-A of their complaint, appellants expressly assert that the petition signature requirements of NCGS §163-122(a)(1) establish an unconstitutionally "severe" and not "necessary" signature requirement on unaffiliated candidates to be voted on by the entire state. [Appendix. 1 ¶¶ 28, 29] Appellants further contend that the requirement that an unaffiliated candidate be a "qualified voter" imposes an unconstitutional requirement on candidates for federal office.

V-D-1-a: NCGS §163-122(a)(1) Imposes an Unconstitutionally Burdensome Petition Signature Requirement on Unaffiliated Candidates to be Voted on Statewide:

The number of petition signatures required of a candidate to be voted on statewide is more than *six times* the number of petition signatures required to form a new party. In *DeLaney v. Bartlett,* 370 F. Supp. 2d 373 (M.D. N.C. 2004) the court held that it was unconstitutional for the State to require a greater number of petition

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judgment is precluded where resolution of a claim depends on *credibility* determination.) (Emphasis added)

Inasmuch as the record contains only *counsel's* statement of justifications for the challenged statutes, there is *no credible evidence* of the state's real interest in, and justifications, for the challenged statutes and practices. At a minimum, appellant should have an opportunity to depose appellee to inquire into the *legitimacy* of the asserted justifications.

signatures from a candidate than is required to form a new political party.[13] In reaching its conclusion, the Court explained:

> "[I]n 2002, a candidate seeking statewide office as the sole representative of a "political party" would be placed on the ballot after obtaining approximately 32,000 fewer signatures than if he ran without a party affiliation. [] Consequently, the statutory scheme discourages a candidate who wishes to be unaffiliated in favor of the formation of a political party, whatever its size or motivation." *Id.* at 276.[14]

Significantly, when *Delaney* was decided, the difference between the petition signature requirement for an unaffiliated candidate to be voted on by the voters of the entire state and the signature requirement to qualify a new party was only approximately 32,000 signatures. Under current law, that difference is in excess of 58,000 signatures. *Delaney* compels the conclusion that NCGS §163-122(a)(1) is excessively burdensome and unconstitutional.

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[13] When *DeLaney* was decided, NCGS §163-122(a)(1) required unaffiliated candidates for statewide offices to file petitions containing the signatures of "two percent (2%) of the total number of *registered voters* in the State" and NCGS §169-96(a)(2) provided for the formations of a new political party by submitting petitions containing the signatures of "two percent (2%) of the total number of *voters who voted in the most recent general election for Governor*."

[14] In response to *Delaney*, the General Assembly amended NCGS §163-122(a)(1) to match the requirements of NCGS §163-96(a)(2), but 2017 amendments to the two statutes restored the mismatch that *Delaney* held to be unconstitutional. Significantly, the authorities on which appellee relies in an attempt to persuade the court that *DeLaney* should be disregarded were decided when the mismatch in which *DeLaney* was based *did not exist*.

Appellee will undoubtedly argue that the court should ignore *DeLaney* because there is a qualitative difference between new parties and independent candidacies and *DeLaney*'s "reliance" on a "party/candidate" comparison was error. Such an argument would represent a misinterpretation of the basis for the decision in *DeLaney*. *DeLaney* expressly acknowledged the difference between parties and candidates (370 F. Supp. 2d at 378) and based its holding on the premise that:

> "[U]naffiliated candidates' ballot access requirements should be 'reasonable' and 'similar in degree' to party candidates' requirements. *Wood v. Meadows*, 207 F.3d 708, 712 (4th Cir. 2000)." 370 F. Supp. 2d at 378

The court then went on to emphasize that "the [North Carolina ballot access schema] *severely disadvantages a candidate who chooses to run without a party affiliation rather than designate himself and his supporters a new party*." 370 F. Supp. 2d at 378. In *Storer v. Brown*, 415 U.S. 724 1974), the Court flatly rejected the notion that an independent could be forced to seek ballot access by establishing a new political party. In reaching this conclusion, the Court said:

> "[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. … For the candidate himself, it [forming a new party as opposed to running as an independent candidate] would mean undertaking the serious responsibilities of qualified party status… such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and

> desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not." 415 U.S. at 745-746

As the Supreme Court stated in *Clements v. Fashing*, 457 U.S. 957 (1982),

> "[In ballot access cases] the inquiry is whether the challenged restriction *unfairly* or *unnecessarily* burdens the 'availability of political opportunity." 457 U.S. at 964. (Emphasis added)

Significantly, in *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687 (8th Cir. 2011), *cert. denied*, 566 U.S12/19/2019. 939 (2012), the Eighth Circuit said:

> "We may uphold a specific ballot access statute as constitutional so long as the restrictions it imposes are reasonable, justified by reference to a compelling state interest, and *do not go beyond what the state's [] interests actually require*." 659 F.3d at 693 (Emphasis added)

That is, if the asserted state interest can be satisfied with fewer petition signatures than are required by the statute, the statute must be found to be unconstitutional.

In this case, the historical record makes it clear that any state interest can be satisfied by a substantially lower petition signature requirement than is imposed by North Carolina.[15]

[15] Data compiled by appellants' expert, Richard Winger, shows that since 1900 only 8 presidential candidates have satisfied petition signature requirements in excess of 5,000 in *any* state. [Dkt. 14.2]

V-D-1-b: NCGS §163-122(a)(1) Has Been Held Unconstitutionally Burdensome:

In *Greaves v. State Bd. of Elections*, 508 F. Supp. 78 (E.D. N.C. 1980) the court held North Carolina's statute for an unaffiliated candidate to be voted on statewide to be unconstitutional based on the fact that North Carolina's petition signature requirement was far in excess of the requirement of other states. The Court emphasized that:

> "North Carolina stands out dramatically among the 50 states in establishing an onerous burden on ballot access; its [] requirement is twice as high as the next highest state's, and … more than six times as high as the number required by the highest fixed-number state." *Id.* at 81.[16]

Although the formula for determining petition signature requirements has been adjusted several times since *Greaves* was decided, the *Greaves* analysis remains applicable. Specifically, as shown by [Dkt. 15.1], North Carolina's petition signature requirement for unaffiliated candidates to be voted on statewide is: (a) still the

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16 Judicial consideration of the practices of other states is clearly appropriate in an examination of the constitutionality of a state statute. *See Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006) (Holding Ohio's new party petition signature requirement to be unconstitutional in large part based on the fact that, in the preceding 10 years, Ohio had the fewest number of ballot qualified minor parties of the eight most populous states.); *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (holding an Illinois' signature requirement unconstitutional based on the fact that other states with significantly lower signature requirements had not experienced any of the problems that Illinois claimed its requirements were needed to avoid.)

highest of all states not having a filing fee option[17]; (b) twice as high as the requirement of the next highest state: and (c) almost three times higher than any state having a fixed or capped signature requirement.

In *Greaves,* the court specifically examined the statutory requirements of other states in reaching its conclusion. After discussing the factors to be considered in determining the constitutionality of the North Carolina statute, the court said:

> "[T]he present case is not a close one.
>
> "Of the 50 states, 24 require nominating petitions with a fixed number of signatures for an independent candidate for President to gain a place on the ballot. Of these 24, 22 require 10,000 or fewer signatures, one requires 20,000, and one requires 25,000. Twenty-six states require a fixed percentage, either of registered voters or of the number of votes cast in the last election. Of these 26, 20 require less than 5%, 5 require 5%, and North Carolina requires 10%." 508 F. Supp. at 81

For purposes of this case, it is relevant that, as shown in [Dkt. 15.1], of the 50 states, 32 require nominating petitions with a fixed or capped number of signatures for an independent candidate to gain a place on the ballot. Of these 32, 30 require 10,000 or fewer signatures, one caps its requirement at 15,000, and one caps its requirement

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[17] Several states, most notably California, Florida and Texas, that have a filing fee option for candidates for statewide office do not provide a filing fee option for independent candidates for president. Each of these states have higher petition signature requirements for independent presidential candidates than North Carolina.

at 25,000.[18] Thirteen states require petition signatures based on a percentage of either the number of registered voters or of the number of votes cast in the last election. Of these 13, eight require less than the 1.5% required by North Carolina. [Of the remaining five states: three have petition signature requirements that have never been used because the state has a filing fee alternative that is always used; one bases its petition requirement on a percentage of *independent* voters and one bases its petition requirement on the votes cast for the *winning candidate* for statewide office and are therefore not relevant to an analysis of North Carolina's requirement.]

The fact that every almost other state has determined that any legitimate state interest can be satisfied with a signature requirement that is only a fraction of North

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[18] Historically, the constitutionality of petition signature requirements has been based on an analysis of the *formula* by which they are established. However, it is within the court's authority to find a statute unconstitutional based solely on the *number* of petition signatures it requires. *See, e.g., Graveline v. Johnson*, 336 F. Supp. 3d 801 (E.D. Mich. 2018) (Finding that Michigan's fixed 30,000 signature requirement was unconstitutional.) *aff'd* 747 Fed. Appx. 408 (6th Cir. 2018); *Green Party of Ga. v. Kemp,* 171 F. Supp. 3d 1340 (N.D. Ga. 2016) (Finding that Georgia's 1% of registered voters requirement was unconstitutional because it resulted in a requirement of approximately 50,000 signatures.) *aff'd*. *per curium* 674 Fed. Appx. 974 (11th Cir. 2017).

Significantly, in *Graveline*, the court placed great emphasis on the fact that Michigan's petition signature requirement was the fifth highest in the country. North Carolina's petition signature requirement for unaffiliated statewide candidates is more than twice as high as Michigan's.

Also significant is the fact that in *Green Party of Ga. v. Kemp* the court expressly found that "the burden on Plaintiffs' rights is so severe that *strict scrutiny applies.*" 171 F. Supp. 3d at 1359 (Emphasis added)

Carolina's requirement is sufficient to show that North Carolina's requirement is far more burdensome than *necessary*.

Although the foregoing analysis alone provides a sufficient basis for finding North Carolina's petition signature requirement unconstitutionally burdensome, a consideration of the cost[19] of satisfying North Carolina's requirement demands such a finding.

According to appellants' expert, Richard Winger, to satisfy any significant petition signature requirement a candidate must collect from 1.5 to 1.75 times the number of valid signatures required. Furthermore, according to Winger, to satisfy any significant petition signature requirement a candidate must engage the services of paid signature collectors at a rate of from $2.00 to $3.50 per signature (whether valid or not.) Winger further states that when petition signature requirements exceed 10,000 they rarely succeed without using the services of professional organizations. [Dkt. 15.1; p:5-6] Therefore, even assuming a candidate could collect 10,000 valid signatures, the cost of satisfying the requirements of NCGS §163-122(a)(1) would likely be between $180,000 and $367,000. By any standard, this financial cost represents a *severe* burden requiring the application of strict scrutiny.

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[19] Although the cost of signature collection was discussed in *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), no identified decision has expressly used cost as a measure of the burden imposed by a petition signature requirement. However, in the final analysis, this is the *only* reasonable means of assessing the burden represented by high petition requirements.

V-D-1-c: States are Obligated to Provide all Candidates With a *FEASIBLE* Means of Achieving Ballot Inclusion

In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court expressly stated that:

> "[A]lthough the citizens of a State are free to associate with one of the two major political parties, … *the State **must** also provide **feasible** means for other political parties **and other candidates** to appear on the general election ballot*." 415 U.S. at 728 (Emphasis added)

In assessing the constitutionality of a challenged statute, it is appropriate to look to historical evidence of the success in achieving ballot inclusion under the provisions of a challenged statute.[20] As the evidence shows, only eight presidential candidates have, since 1892, satisfied *any* state's petition signature requirements when it is in excess of 5,000. [Dkt. 15.2] The fact that only one candidate——billionaire Ross Perot in 1992 when the signature requirement was "only" 43,601——has ever satisfied the requirements of NCGS §163-122(a) is strong evidence that it is overly burdensome. Even such nationally prominent candidates as Eugene McCarthy (1976), John Anderson (1980) and Ralph Nader (2004) did not obtain ballot inclusion in North Carolina.

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[20] See *Storer v. Brown*, 415 U.S. 724, 742 (1974) ("Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.") *See also Fishbeck v. Hechler*, 85 F.3d 162, 164-65 (4th Cir. 1996) (examining historical data to determine severity of burden of ballot access requirements.).

A statute, or statutory schema, that imposes a severe burden on ballot access is subject to strict scrutiny. While the Supreme Court has not set forth a clear test for what constitutes a *severe* burden, in *Storer v. Brown*, 415 U.S. 724 (1974) the court asked, "could a reasonably diligent independent candidate be expected to satisfy" the suspect regulation. 415 U.S. at 742. As the Sixth Circuit stated in *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016), "[t]he hallmark of a severe burden is exclusion *or virtual exclusion* from the ballot."

In *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995), this court specifically noted that:

> "[] *strict scrutiny* can apply to laws which *make it difficult, but not impossible,* [] to obtain a position on the ballot. *Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993)") *Id.* at fn. 7 (Emphasis added)

The fact that only one candidate has ever satisfied the requirements of NCGS §163-122(a)(1) is itself proof that the statute makes it all but impossible to qualify as an unaffiliated candidate to be voted on statewide. Thus it is evident that because, NCGS §163-122(a)(1) imposes a severe burden on unaffiliated candidates to be elected by a statewide vote, strict scrutiny is the applicable standard of review.

V-D-1-d: Limiting Ballot Access to Candidates Who Are "Qualified Voters" is Unconstitutional as to Candidates for *Federal Offices*.

By its terms, NCGS §163-122(a) only provides a means of ballot access for unaffiliated candidates who are "qualified voters." However, it is well established

that imposing such a requirement violates the U.S. Constitution when applied to candidates for *federal* office because it imposes a "qualification" that is not expressly included in the Constitution.[21] The courts have specifically held that any requirement that a candidate be a registered voter as a precondition to being a candidate for federal office is *per se* unconstitutional. Of particular significance, in *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000), the Tenth Circuit held that a Colorado statute requiring that candidates for the U.S. House of Representatives be registered voters was unconstitutional because it impermissibly imposed a qualifying requirement not found in the Constitution.

The term "qualified voter" is not defined anywhere in the North Carolina statutes. However, the term has been judicially construed to mean a "registered voter." *See McDowell v. Rutherford Ry. Const. Co.*, 96 N.C. 514, 530 (N.C. 1887) ("A lawful registered elector, and only he, is a qualified voter."). In its ruling, the district court conceded that, if this is the proper interpretation of the term "qualified voter," NCGS §163-122 *would* be unconstitutional when applied to candidates for

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[21] *See e.g. Cook v. Gralike*, 531 U.S. 510, 527 (2001) (Justice. Kennedy concurring) (States "simply lack [] the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4."); C*artwright v. Barnes*, 304 F.3d 1138, 1142 (11th Cir, 2002) ("States may not impose additional qualifications for election to the House of Representatives beyond those contained in the Qualifications Clause.")

federal offices. [Appendix p-23]. Nonetheless, the district court accepted appellee's naked contention that the term does not mean that an unaffiliated candidate must be a registered voter[22] and that the "qualified voter" requirement of NCGS §163-122 would not prevent appellee Kyle Kopetik from becoming an unaffiliated candidate for president. Specifically, the district court said:

> "[T]he court is assured that the phrase would not preclude Mr. Kopitke from submitting an otherwise compliant unaffiliated candidate or write-in petition. Accordingly, the Court rejects plaintiffs' claim with respect to the phrase "qualified voter." [Appendix p-23]

Significantly, the only basis for the "assurance" referred to by the district court is that Ross Perot satisfied the requirements of NCGS §163-122 in 1992. However, the fact that the "qualified voter" requirement of NCGS §163-122 was not applied to a single candidate almost forty years ago is too slender a reed on which to base a determination that the requirement would be ignored as to Mr. Kopitke.

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[22] As discussed *supra*, in ruling on a motion to dismiss, the court must accept as true all allegations in the complaint. Paragraph 23-25 of the complaint [Appendix. 1] asserts that:

23. For purposes of NCGS [§163-122], a "qualified voter" is someone who satisfies the statutory requirements to vote in North Carolina and has registered to vote.
24. Plaintiff Kyle Kopitke is a resident of Michigan where he is registered to vote and he is, therefore, not a "qualified voter" in North Carolina.
25. The "qualified voter" requirement of NCGS [§163-122] precludes anyone who is not a resident of North Carolina at the time signature petitions are due to be filed from becoming an Unaffiliated Candidate for any office."

Therefore, for purposes of ruling on appellee's motion to dismiss, the district court was required to (a) construe the term "qualified voter" to mean registered voter and (b) find that the "qualified voter" constituted a bar to appellant Kopetik's candidacy.

More importantly, the district court's conclusion is entirely beside the point. The issue is not simply whether the "qualified voter" requirement would constitute a ballot access bar as to Mr. Kopitke. Rather, the issue is whether North Carolina can add a qualifying requirement *of any kind* to candidacies for *federal office*. On this point, the law is clear; the U.S. Constitution establishes the exclusive qualifying requirements for federal office, and a state cannot impose *any* a requirement that expands on those found in the Constitution. Whatever the phrase "qualified voter" means, it is an additional requirement to be an unaffiliated candidate—and this is not permissible. [23]

V-D-2: In Re: COUNT II:

In count II of their complaint, appellants contend that North Carolina's practice of not counting write-in votes for candidates who have not satisfied the petition requirements of NCGS §163-123 unconstitutionally deprives appellant Clark of the right to have write-in votes for the candidates of his choice counted. Cases involving the deprivation of the right to have one's vote counted have "traditionally [] been examined under *strict scrutiny*." *Southwest Voter Registration*

[23] It is a fundamental principle of statutory construction that every word or phrase in a statute must be given effect. *See Bowsher v. Merck & Co*., 460 U.S. 824, 833 (1983) (identifying the "settled principle of statutory construction that [the court] must give effect, if possible, to every word of the statute"). In this case it is not necessary to determine what the phrase "qualified voter" means; it is only necessary for the court to recognize that the phrase adds a qualifying requirement that a state is not permitted to do with respect to candidates for *federal* offices.

Educ. Project v. Shelley, 344 F.3d 882, 899 (9th Cir. 2003) (Criticizing the District Court's application of the *Anderson/Burdick* test.)

The district court's analysis of this count II demonstrates a total misunderstanding of appellants' argument. In particular, the district court's analysis focused on the constitutionality of the petition signature requirements of North Carolina's write-in candidate statute, NCGS §163-123, and found that the burden it imposed were *de minimis*. [Appendix p: 26] However, appellants never challenged the constitutionality of the requirements of the write-in statute. Rather, they challenge only the constitutionality of North Carolina's practice of not counting write-in votes for candidates who have not satisfied the petition signature requirements of NCGS §163-123.

In *Dixon v. Maryland State Administrative Bd. of Election Laws, supra* this court considered a challenge to a Maryland statute that provided that any write-in candidate who fails to pay Maryland's required filing fee and become certified will neither be considered an official candidate nor have reported the write-in votes cast for him. In holding Maryland's statute unconstitutional the Court said:

> "[W]e … can conceive of no basis whatsoever for conditioning the reporting of write-in votes either on payment of such a fee *or on certification of candidates*." 878 F.2d at 785 (Emphasis added)

Although the statute at issue in *Dixon* was a filing fee requirement and the North Carolina statute is a candidate petition statute, this is a distinction without a

difference because both impose a requirement predicate to having write-in votes *counted*.

As the Supreme Court put it in *Reynolds v. Sims,* 377 U.S. 533, 555 (1964) "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." "Supporting a political party or candidate of one's choosing is a fundamental right protected under the First Amendment." *Murphy v. Cockrell*, 505 F.3d 446, 453 (6th Cir 2007). Moreover, the right to have one's vote counted enjoys the same constitutional protections as the right to vote in the first place. *See United States v. Mosley*, 238 U.S. 383, 386 (1915) (Stating that it is "unquestionable that the right *to have one's vote counted* is as open to protection [] as the right to put a ballot in a box.") (Emphasis added); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("[W]ithin the right [to vote] secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have them counted*…") (Emphasis added). Based on these principles, a voter has a fundamental right to vote for whomever they want, whether the candidate's name is on the ballot or the vote is cast for a write-in candidate who has not satisfied the requirements of NCGS §163-123, and to have that vote counted.

In its ruling, the district court cited *Burdick v. Takushi,* 504 U.S. 428 (1992) as authority for its finding that North Carolina's practice is constitutional. [Appendix

p-29]. However, *Burdick* is readily distinguishable[24]. In particular, *Burdick* upheld Hawaii's statutory *complete ban* on write-in voting. However, North Carolina has elected to provide for write-in candidacies, and the only issue is whether, having provided for write-in voting, the state can refuse to count votes for candidates who have not satisfied the requirements of NCGS §163-123.

In *Dixon v. Maryland, supra*, the Court said:

> "It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. *Nor do we think it loses this character if cast for a non-existent or fictional person*, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable." 878 F.2d at 782. (Emphasis added)

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[24] The facts on which the *Burdick* rested are not present in North Carolina. For example, one of the principle grounds on which *Burdick* held Hawaii's outright ban on write-in voting was that Hawaii did not have a "sore loser" statute. However, North Carolina has sore loser statutes – see NCGS §163-122(a)(4) banning primary losers from being unaffiliated candidates and §163-123(e) banning primary losers from being write-in candidates.

Also, Hawaii requires only 25 petition signatures for independent candidates to be voted on statewide to be listed on the ballot. [Dkt. 15.1] Therefore, virtually anyone can get on the ballot and there is no practical need for a write-in provision. Considering that North Carolina requires over 70,000 signatures to be listed on the ballot, there is such a great difference between the Hawaii and North Carolina ballot access statutes that the reasoning in *Burdick* has no relevance to an analysis of North Carolina's practice.

Finally, it is relevant that Hawaii had an "open primary" system under which anyone would vote for a candidate in the primaries. However, voting in primaries in North Carolina is limited to voters being registered as voters of that party. Therefore, unlike Hawaii, in North Carolina voters registered as "unaffiliated" are barred from participating in the selection of candidates and can only express their preference for someone else via a write-in vote.

Lastly, it is significant that *appellee has not offered any justification for North Carolina's practice of not counting votes for candidates who have not satisfied the requirements of NCGS §163-123*. In the absence of *any* justification for not counting such votes, application of the *Anderson/Burdick* test compels a finding that its practice is unconstitutional.

V-D-3: In Re: COUNT III:

In count III of their complaint, appellants contend that the requirement that unaffiliated candidates file their petitions by the date of the primary election on March 3, 2020, is unconstitutional. The district court never squarely addressed this argument and instead relied on *Pisano v. Strach* in which this court upheld the constitutionality of a *much later* filing deadline for *parties* to submit their signature petitions. In doing so, the court ignored the overwhelming body of authorities, *including previous holdings by the Supreme Court*, establishing that a March filing date for *candidates* is unconstitutional. The district court also ignored judicial analysis regarding *why* early filing dates for candidates are unconstitutional. These grievous flaws in the district court's opinion are examined below.

First: No court has ever upheld a *candidate* filing deadline earlier than May,[25] and in *Anderson v. Celebreze, supra*, the Supreme Court specifically held that a

[25] *See e.g. Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Striking March deadline for filing statement of candidacy and nominating petition by independent

March deadline such as North Carolina's is unconstitutional. As the Eleventh Circuit explained in *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568 (11th Cir. 1991).

> "[n]o one can seriously contend that a deadline for filing … *seven months* prior to the [general] election is required to advance legitimate state interests." *Id* at 1576.(Emphasis added)[26]

However, under North Carolina's statutory schema, unaffiliated candidates are required to file their petitions *eight months* before the general election.

Second: This case does not represent the first instance in which the district court was required to consider the constitutionality of unaffiliated candidate filing deadlines. In *Greaves v. State Bd. of Elections*, *supra*, the court considered (and held unconstitutional) the unaffiliated candidate petition filing deadline. Under the law as it existed at that time, NCGS §163-122 required that unaffiliated candidate petitions had to be submitted to the Board by the last Friday in April. In holding the statute

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candidates.); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3rd Cir. 1997) (Holding New Jersey's April filing deadline unconstitutional.); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (Holding Alabama's April filing deadline unconstitutional.); *Libertarian Party of Nevada v. Swackhamer,* 638 F.Supp. 565 (D. Nev. 1986) (Holding Nevada's April filing deadline unconstitutional.); *Staddard v. Quinn*, 593 F.Supp. 300 (D. Me. 1984) (Holding Maine's April filing deadline unconstitutional.); *Lendall v Bryant*, 387 F. Supp. 397 (E.D. Ark. 1974) (Holding Arkansas's April filing deadline unconstitutional.); *McCarthy v Kirkpatrick*, 420 F. Supp 366 (W.D. Mo. 1966) (Holding Missouri's April filing deadline unconstitutional.).

[26] *See also Tucker v. Salera*, 424 U.S. 959 (1976), *summarily affirming* 399 F.Supp. 1258 (ED Pa. 1975) in which a three-judge court declared unconstitutional a Pennsylvania law setting the deadline for an independent candidate to gather signatures to obtain a place on the ballot 244 days before the general election.

unconstitutional, the Court particularly analyzed the challenged statute by comparing its requirements to those relating to the designation of the candidates of newly recognized parties. Of particular significance, when *Greaves* was decided, to qualify as a recognized party, a *new party* was required to file its signature petitions with the State Board of Elections "before 12:00 noon on the first day of June preceding the day on which is to be held the first general State election in which the new political party desires to participate" and the candidates of newly recognized parties were required to satisfy the applicable candidate requirements "not later than the first day of July prior to the general election." NCGS §163-98. In *Greaves,* the court said:

> "North Carolina grossly discriminates against those who choose to pursue their candidacies as independents rather than by forming a new political party." 508 F. Supp. at 82.

The court went on to explain:

> "The state's interest in ensuring the integrity of the ballot is presumably fully served by requiring new parties to choose their candidates by July 1; *no reason for imposing substantially more burdensome requirements on independent candidates has been presented*." 508 F. Supp. at 83. (Emphasis added)

The same conditions that caused *Greaves* to hold that an April filing date for unaffiliated candidates was unconstitutional exist today. If newly recognized party candidates have until July to satisfy the requirements to appear on the general election ballot, there is absolutely no reason why unaffiliated candidates should have to qualify by filing their petitions in March.

Third: Unaffiliated candidates are generally candidates who are dissatisfied with the candidates of a recognized party and do not make the decision to seek office until after the candidates of recognized parties have been chosen through their primary elections.[27] Therefore, requiring unaffiliated candidates to file their signature petitions before the primary election is over deprives them of information that is vital to their decision to become a candidate.[28]

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[27] The reason why primary date and pre-primary filing deadlines for independent candidates are unconstitutionally burdensome was explained in *Anderson v. Celebreze* where the Supreme Court said:

> "An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns … the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; *they may also create opportunities for new candidacies.*" 460 U.S. at 790-91

[28] In *Storer v. Brown, supra*, the Supreme Court particularly noted that early filing deadlines for unaffiliated candidates requires that …

> "such candidates must make that decision [to become candidates] at a time when, as a matter of the realities of our political system, they cannot know either who will be the nominees of the major parties, or what the significant election issues may be. *That is an impossible burden to shoulder*." 415 U.S. at 758 (Emphasis added)

Requiring unaffiliated candidates to file their signature petitions before the primary election is over also deprives *voters* who are dissatisfied with the candidates nominated by primaries of the right to rally around an independent candidate. As the court explained in *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980), "it is

In *Anderson v. Celebreze, supra*, the court emphasized the importance of providing for a newly emergent independent candidate who could serve as the focal point for a group of voters who decide *after the primaries* that they are dissatisfied with the choices within the two major parties. 460 U.S. at791. Likewise, in *Cromer v. South Carolina*, *supra*, this court also emphasized "the potential that independent candidacies have for responding to issues that only emerge during or *after the party primary process*." 917 F.2d at 823. On this point, *Anderson v. Celebrezze*, *supra* is particularly significant for its observation that:

> "Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future, and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." 460 U.S. at 792

Furthermore, it is significant that in *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990), this court upheld the district court ruling that South Carolina's March candidacy filing date for independent candidates was unconstitutional stating;

> "In practical terms this means that as of March 30, the emergence of independent candidacies to respond to newly emerging issues, or to

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important that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and *for some time after the selection of candidates by party primary."* (Emphasis added)

> major party or candidate shifts in position … *are effectively precluded*." 917 F.2d at 183 (Emphasis added)

Fourth: Prior to the 2017 amendments, NCGS §163-122(a) required that unaffiliated candidate petitions be filed by "the last Friday in June." This filing date had been in effect for decades, and there is no evidence that there was any problem with it that necessitated moving the unaffiliated candidate filing date up by almost four months.[29], [30] In the absence of any justification for accelerating the filing date for unaffiliated candidates, the new filing date must be found to be unconstitutional.

In *Cromer v. South Carolina*, the Court addressed an analogous issue in which South Carolina amended its independent candidate petition filing statute deadline

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[29] The *Anderson/Burdick* tests requires a state to also show that a statute is "*necessary*" to satisfy an identified state interest. In *Obama for Am. v. Husted,* 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit specifically emphasized the word "necessary" in its summary statement of the *Anderson/Burdick* test requirements. *Id.* at 433. There, the court emphasized that the State had failed to produce any *evidence* that there were any problems with its pre-existing system for early voting that would be cured by the challenged statute and the new statute was therefore not necessary.

[30] In its ruling, the district court said that North Carolina did not have to justify its petition filing deadline because "North Carolina is constitutionally empowered to regulate the times, places, and manner of elections and is not required to seek judicial pre-clearance before changing its filing deadlines." [Appendix p-25] The absurdity of this statement is found in two facts. First, if the statement were true, the courts could never hold a ballot access statute unconstitutional. Second, the constitutional power to regulate the "time, place and manner" of conducting elections is found in the "Elections Clause" of the Constitution, Art. 1, Sec. 4, cl., 1, which, by is express terms, only applies to the regulation of the election of senators and U.S. representatives and does *not* grant states the power to establish requirements relating to the election of the *president*.

(August 1) to require independent candidates to file a "statement of candidacy" – which was not previously required of independent candidates – by March 30. Because there was no evidence of a problem with the August deadline, the court held the South Carolina statute to be unconstitutional. In further support for its holding, this court emphasized that the March filing requirement limited the potential for independent candidates to "respond[]to issues *that only emerge during or after the party primary process*." 917 F.2d at 183 (Emphasis added) (Citations omitted)

NCGS §163-122(a) suffers from the same defect as the South Carolina statute because it requires unaffiliated candidates to undertake the task of satisfying the petition signature requirements of the statute long before the primary elections and before they know who the candidates of the major parties are.

Fifth: Lastly, it is significant that in *Wood v. Meadows,* 207 F.3d 708 (4th Cir. 2000) this court stated:

> "[A] filing deadline for independent candidates on the day of the party primaries *could* pose an unconstitutional burden when operating in conjunction with a very early primary date [or] very high signature requirements." 207 F.3d at 713 (Emphasis added)

Although the court found that these concerns were not applicable in the case because the statutory schema at issue did not present these concerns, *they are both present in the North Carolina schema challenged in this case*. Thus, although the cited statement was *dicta* in *Wood v. Meadows*, it is clearly applicable in this case and

mandates a finding that the March filing deadline for Unaffiliated Candidates is unconstitutional.

VI: RELIEF REQUESTED

Appellants request that the court enter its order reversing the district court's order dismissing this case and remanding the case with instructions to enter a ruling: (a) finding that the signature requirements for unaffiliated candidate petition and the filing date established by NCGS §163-122(a)(1) are unconstitutional; (b) directing appellee to count all votes for write-in candidates regardless of whether or not they have satisfied the requirements of NCGS §163-123 and (c) directing appellee to include appellant Kyle Kopetik on the 2020 general election ballot as an unaffiliated candidate for president.[31]

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[31] The Supreme Court and numerous lower courts have ruled that the proper relief from the burden imposed by an unconstitutional statute is granting ballot inclusion. *See Williams v. Rhodes*, 393 U.S. 23 (1968) (ordering Independent Party candidate placed on the ballot after finding the state election law provisions failed to provide a constitutionally proper means of access to the ballot.); *McCarthy v. Briscoe,* 429 U.S. 1317 (1976) (Upholding lower court order placing a plaintiff's name on the ballot as an appropriate remedy where the State has failed to provide constitutionally appropriate means of access to the ballot.) Following the Supreme Court's decision in *McCarthy v. Briscoe*, district courts in three other states ordered Presidential candidate Eugene McCarthy's name placed on the ballot. *See McCarthy v. Noel*, 420 F.Supp. 799 (D. R.I. 1976); *McCarthy v. Tribbitt*, 421 F.Supp. 1193 (D. Del. 1976); *McCarthy v. Askew*, 420 F.Supp. 775 (N.D. Fla. 1976). *See also Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980) (Ordering that John Anderson be included on the ballot on a finding that Maine's filing deadline was unconstitutional.); *Goldman-Frankie v. Austin,* 727 F.2d 603 (6th Cir. 1984) (placing

Appellee will undoubtedly argue that the proper form of relief upon a finding that the petition signature requirement and petition filing date impose unconstitutional burdens is to direct the district court to determine *sua sponte* a petition signature requirement and filing date. While appellant concedes that other courts have done what appellee is likely to suggest, the court should reject this alternative relief for the reasons discussed below.

VI-A: Facts Unique to This Case Require a Ruling Granting Kopetik and Buscemi Ballot Inclusion:

Two facts that are unique to this case make the relief sought by appellants appropriate.

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candidates name on ballot after Michigan legislature failed to correct a constitutional defect in its statutory provision of providing ballot access to independent candidates.): *Libertarian Party of Ohio v. Bruner,* 567 F.Supp.2d 1006 (S.D. Ohio 2008) (Ordering the name of the candidates for president and U.S, Representative candidate placed on the ballot.); *Daly v. Tennant*, 216 F. Supp. 3d 699 (S.D. W.Va. 2016) (Granting candidates' motion to appear on West Virginia's November general election ballot as candidates of unrecognized parties because the candidate filing deadline was overly burdensome and unconstitutional.)

These authorities establish that the court *can* order ballot inclusion as relief upon a finding that North Carolina's challenged statutes are unconstitutional. The Supreme Court has twice, in *Williams v. Rhodes* and *McCarthy v. Briscoe* determined that a *presidential* candidate is entitled to ballot inclusion as relief for an unconstitutional ballot access requirement and the court is bound by these decisions as to appellant Kopetik.

First: The calendar is the enemy. At this point in time, it is not possible to conceive of any circumstances under which any candidate signature requirement and filing date established by the court can be satisfied in time to enable appellant Kopetik and Buscemi to qualify for the 2020 ballot.[32] As the court explained in *Barr v. Galvin*, 584 F. Supp. 2d 316, 321 (D. Mass. 2008), "[n]o damages or other legal remedy can compensate for a missed election."

Second: As discussed *supra*, in this case the appellee has not offered any justifications for its ballot access restrictions that may properly be considered by the court.

Any barrier to ballot inclusion – whether established by a state or by the court – requires *some* justification. As discussed *supra*, the appellee never offered admissible evidence of *any* justification (that can be properly considered by the court) for either its unaffiliated candidate petition signature requirement or the March filing deadline. The Supreme Court has stated that a court is *not* permitted to "supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). *See also Belitskus v. Pizzingrilli,* 343 F.3d 632, 646 (3rd Cir. 2003) ("In conducting this [*Anderson/Burdick*] analysis, we

[32] Given the short time remaining before the 2020 general election, any achievable provisions the court might set would have to be so liberal that they would set a bad precedent.

cannot speculate about possible justifications for the challenged statute, but instead must identify and evaluate the precise interests put forward by the [Commonwealth] as justifications for the burden imposed by its rule.") If the court is barred from supplementing any *properly asserted* justification for a requirement, it certainly cannot find a justification where the state has not put forth *admissible evidence* of *any* state interest.

VI-B: The Court is Not Qualified to Establish a Petition Signature Requirement:

In *McLaughlin v. North Carolina Bd. of Elections*, *supra*, this court specifically said:

> "[I]t is *beyond judicial competence* to identify, as an objective and abstract matter, the precise numbers" of petition signatures required to serve a state interest." 65 F.3d at 1222 (Emphasis added)

This statement is particularly true where there is no basis for determining what objective [e.g., state interest] the petition requirement is intended to promote.

VI-C: The Court Lacks Authority to Constructively Re-Write NCGS §163-122(a)(1)

In *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988), the Supreme Court said, "we will not rewrite a state law to conform it to constitutional requirements." *Id*. at 397. More recently, this court said, in *Toghill v. Clarke*, 877 F.3d 547 (4th Cir. 2017),

> "[F]ederal courts must also remain mindful that our constitutional mandate and institutional competence are limited and that we should

> restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* at 552 (Citing *American Booksellers*)

In *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), the Supreme Court warned against being drawn into the trap where a legislature establishes an unconstitutional requirement and relies on the courts to tell it what is constitutional because "[t]his would substitute the judicial for the legislative department of the government." *Id* at 330.

These authorities establish that a court should *not*, as a remedy upon a finding that a statute (or scheme) is unconstitutional, constructively rewrite a statute in a way that will make its requirements constitutional.

VI-D: Precedent in This Circuit Requires the Relief Requested by Appellants:

In *Cromer v. South Carolina*, *supra*, this court considered the appeal of a district court ruling that (a) the South Carolina requirement Cromer file a "statement of candidacy" in March was unconstitutional because there was no problem with the pre-existing requirement for petitions to be file in August and (b) as relief awarded Cromer a place on the ballot. This court upheld that ruling in all respects.

It is particularly significant that, in *Cromer*, the court awarded ballot inclusion based on a finding that the filing deadline *alone* was unconstitutional. If as simple an issue as an unconstitutional filing deadline is sufficient to justify the placement of a candidate's name on the ballot, a court's finding that *both* the petition signature

requirement *and* the filing deadline are unconstitutional indisputably warrants placing the names of Kopetik and Buscemi on the ballot.

VII: STATEMENT REGARDING ORAL ARGUMENT

Appellants do not request oral argument.

Respectfully submitted this 20th day of December, 2019.

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