IN THE UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT
Case No.: 19-2355

GREG BUSCEMI, KYLE KOPITKE and WILLIAM CLARK,	)
Appellants	)
Vs.	)
	)
KAREN BRINSON BELL in her official capacity as Executive Director of the North Carolina State Board of Elections and Ethics Enforcement,	)
Appellee	)

APPELLANTS' PETITION FOR REHEARING *EN BANC*

COME NOW, Appellants GREG BUSCEMI, KYLE KOPITKE, and WILLIAM CLARK and file this petition for rehearing *en banc* as grounds say:

I. JUSTIFICATION FOR REHEARING *EN BANC*.

Justification for a rehearing *en banc* is found in the facts that the panel opinion [Doc. 39] failed to properly interpret and apply the Supreme Court's holding in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) with respect to the constitutionality of the March petition signature submission deadline for unaffiliated candidates.

Furthermore, the decision of the panel failed to properly apply the evaluative standard established by the Supreme Court in *Anderson v. Celebrezze, supra,* and restated in *Burdick v. Takushi*, 504 U.S. 428 (1992). In particular, in its analysis of the burden prong of the *Anderson/Burdick* test, the panel analysis is at odds with the interpretative standards established by the Supreme Court in *Storer v. Brown,* 415

U.S. 724 (1974) and the Sixth Circuits in *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570 (6th Cir. 2016) and by this Court in *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995).

Furthermore, with respect to the petition signature requirement applicable to appellant and presidential candidate Kyle Kopitke, the decision of the panel failed to follow the dictates of *Mandel v. Bradley*, 432 U.S. 173 (1977) when it failed to consider the historical record regarding the inability of candidates to satisfy the requirements of N.C. Gen. Stat. § 163-122(a)(1).

Furthermore, in finding that the 71,545 unaffiliated presidential candidate petition signature requirement is constitutional, the panel created a conflict with the Eleventh Circuit which, in *Green Party of Ga. v. Kemp*, 674 Fed. Appx. 974 (11th Cir. 2017) affirming *per curium* the finding of the district court, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), holding that the requirement for 50,000 signatures was unconstitutionally burdensome.

Additional justification for a rehearing *en banc* is found in the fact that the panel decision was based on its weighing of "facts" that had never been properly introduced into evidence in the district court. In considering these "facts," the panel placed this Circuit in conflict with decisions by the Second and Ninth Circuits. [*British Airways Bd. v. Boeing Co.*, 585 F.2d 946 (9th Cir. 1978) *cert. denied*, 440 U.S. 981 (1979); *Kulhawik v. Holder*, 571 F.3d 296 (2nd Cir. 2009)]

II. SCOPE OF REQUESTED REHEARING:

This motion seeks only a rehearing with respect to the panel's determination that the unaffiliated presidential candidate petition signature requirements (71,545 for 2020) and filing date (date of the Presidential primary, March 3 in 2020) established by N.C. Gen. Stat. § 163-122(a)(1) are constitutional.

III. THE *ANDERSON/BURDICK* TEST AS IT RELATES TO STATUTES BURDENING BALLOT ACCESS BY UNAFFILIATED CANDIDATES FOR *PRESIDENT*:

The *general* standard for evaluating constitutional challenges to election laws was articulated in *Anderson v. Celebrezze, supra,* and restated in *Burdick v. Takushi, supra*. 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)

For purposes of this motion, it is particularly relevant that the *Anderson/Burdick* test requires a court to examine the "*legitimacy and strength*" of a state's justification for a statute and the extent to which those interests make a challenged statute

"*necessary*." As discussed *infra*, appellants contend that the panel did not correctly apply all the requirements of the *Anderson/Burdick* test.

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*.

> "[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 (Emphasis added).

Most recently, in *Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. 2014), the Eleventh Circuit 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). Even the district court in which this case originated has recognized this fact. See *Greaves v. State Bd. of Elections*, 508 F. Supp. 78 (E.D. N.C. 1980), where the court noted the "*special circumstances* present in the Presidential election." 508 F. Supp. at 83 (Emphasis added.).

The panel opinion [Doc. 39] gave lip-service to this principle [See Doc. 39, p: 20; fn 10] but nonetheless ignored it and relied on authorities involving non-presidential candidates when finding justification for the challenged statute. The panel's complete reliance on principles established in cases that did *not* involve presidential candidates is one of its many serious flaws.

IV. THE SUPREME COURT HAS HELD THAT MARCH FILING DATES FOR UNAFFILIATED CANDIDATES ARE UNCONSTITUTIONAL.

In *Anderson v. Celebrezze, supra,* the Supreme Court unambiguously held that Ohio's March petition filing deadline for a presidential candidate was unconstitutionally early in the election cycle. Although in *Anderson* the Court discussed issues relating to the interests of unaffiliated candidates vis-à-vis the dates on which parties nominated their candidates by primaries, **nothing in *Anderson* can be construed to mean that March unaffiliated candidate filing deadlines are only unconstitutional if they precede and the date of party primary elections.**[1]

[1] Concededly, in *Anderson* the Court did engage in a lengthy discussion of the importance of enabling independent candidates to seek ballot inclusion *after* they knew who had been nominated in party primaries. This aspect of *Anderson* related to its determination that the challenged statute violated Fourteenth Amendment principles of *equal protection*. However, this was not the sole basis on which Ohio's March filing deadline was stricken. The Court also held that Ohio's statute violated the *associational rights* of candidates and their supporters in violation of the First Amendment. On this issue, the Court held the March independent candidate filing date unconstitutional on grounds that were unrelated to the date of party primaries.

The relevant question is not whether unaffiliated candidates have to file their petitions before the party primary elections. To the contrary, the issue is whether unaffiliated candidates are required to file their petitions too far in advance of the *general election*. In its ruling, the panel evaluated the unaffiliated candidate petition filing deadline in comparison to the date of the primary election,[2] and this was improper.

The flaw in evaluating the constitutionality of the presidential candidate petition filing deadline relative to the date of the presidential primary is readily revealed when one considers the following.

First, presidential candidates are not chosen by state primaries. Rather, they are chosen by national party conventions held months after the last of the state primaries. Therefore, there is little relevance to evaluating unaffiliated candidate filing deadlines by reference to the date of a state primary.

Second, there is no meaningful relationship between the dates of primary elections and the dates by which unaffiliated candidates must file qualifying petitions. As recent history has shown, states now schedule their presidential primary elections primarily to have a significant impact on who party nominees will ultimately be. There is no relationship between this desire and anything relating to the date when unaffiliated candidates need to file their petitions o be on the November ballot.

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[2] See Doc. 39; p: 16: "We evaluate the appropriateness of a filing deadline in relation to the date of the primary election."

V. THE PANEL MISAPPLIED THE *ANDERSON/BURDICK* TEST:

Significantly, the analytical schema laid out in *Anderson* uses the word "***must***" in identifying the things the court is required to consider. As if to emphasize these requirements, the concluding sentence of the *Anderson* test states, "***[o]nly*** after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." There is no interpretive wiggly room in the *Anderson* test. Stated simply, the panel did not do all that *Anderson* mandates.

The *Anderson/Burdick* test unambiguously requires the court to make a determination of the "*legitimacy **and** strength*" of a proffered state interest. In analyzing the state's "justification" for the signature requirement established by N.C. Gen. Stat. 163-122 the panel found that the appellee justifications legitimate because they had been accepted by other courts. [Doc. 38; p: 19-20] This basis for affirming the district court's opinion is flawed in six respects.

First, as noted *supra*, cases involving presidential candidates must be evaluated under a different standard than other cases. However, *none of the cases the panel opinion cited involved presidential candidates*.

Second, in reaching its conclusion that the asserted state interest justified the burden that it imposed, the court relied entirely on interests asserted made *by counsel in legal memoranda*. However, none of counsel's assertions are supported by any admissible evidence – no affidavits, no statements from legislative hearings,

nothing. However, arguments of counsel are not evidence.[3] Therefore, the record is devoid of any *evidence* of the "state interest" to be weighed in applying the *Anderson/Burdick* test.[4]

It is also significant that the panel accepted the appellee's justifications for its statutes without the appellants having ever had an opportunity to question their veracity. Specifically, the district court dismissed the case before appellants had been permitted to conduct any discovery that might have established that the justifications asserted by counsel were fabrications. Therefore, the district court and the panel accepted threshold facts without the appellants having ever had an opportunity to dispute them.

Third, the *Anderson/Burdick* test requires a court to determine the "*legitimacy*" of the asserted interest. In the complete absence of any admissible evidence of the state's asserted interest, there is no basis for determining whether they are the *real* state interests for the challenged statutes or for considering their

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[3] *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), ("[l]egal memoranda and oral argument are not evidence.") *cert. denied*, 440 U.S. 981 (1979); *Kulhawik v. Holder*, 571 F.3d 296, 298 (2nd Cir. 2009) ("An attorney's unsworn statements in a brief are not evidence.")

[4] Rather that assume the truth of counsel's assertions, the panel should have ordered the case remanded for development of an evidentiary record and a ruling based on that record. *See Constitution Party of Pa. v. Cortes*, 877 F.3d 480 (3rd Cir. 2017) (Remanding case because the district court failed to make necessary factual findings prior to entering an injunction.)

legitimacy. In this respect, this case is indistinguishable from cases that have expressly rejected justifications for which no evidence was offered.[5]

Fourth, the *Anderson/Burdick* test requires a court to determine the "*legitimacy **and** strength*" of the asserted interest.[6] For as long as North Carolina had new party and statewide candidate petition requirements, the signatures were — until the party requirement as changed in 2018 — the same. Now, the party qualifying

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[5] 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.

[6] In *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016) *aff'd* 674 Fed. Appx. 974 (11th Cir. 2017), the court emphasized these requirements when it said:

> "[T]he court must consider the legitimacy and strength of each of those interests as well as the extent to which those interests make it necessary to burden the plaintiff's rights." 171 F. Supp at 1355-56.

and

> "If a court finds that plaintiffs' rights are not subject to severe restrictions … a court must still determine the legitimacy and strength of the State's interests and consider the extent to which those interests make it necessary to burden the [candidate's] rights." 171 F. Supp at 1366-67.

requirement if only one-sixth the requirement for statewide candidates and the appellee has not offered and justification for this distinction. Virtually by definition, this change is the relationship between party and candidate requirements means that the state interest in its statewide candidate petition signature requirement cannot be very strong. It may be presumed that the Supreme Court know what it was saying when it required consideration of both the legitimacy and strength of a state's asserted interest.

In the absence of *any record evidence* of the state's justification for its petition signature requirement, the court had no basis whatsoever for evaluating the legitimacy or strength of appellee's asserted justifications.

Fifth, the *Anderson/Burdick* test requires a court to examine the "*necessity*" for a challenged statute. In *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) the Sixth Circuit in addressed the requirement for a showing of necessity as follows:

> "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)

The record is devoid of any argument that requirements of the challenged statute are *necessary* to satisfy any state interest or any showing that its petition signature requirement is *necessary* to satisfy any objective that cannot be satisfied with a significantly lower signature requirement. On the contrary, uncontroverted evidence submitted by appellants [e.g., Dist. Ct. Doc. 15-2, exhibit attached to expert report of Richard Winger] unambiguously establishes that a 5,000-signature requirement is sufficient to satisfy and legitimate state interest.

Moreover, as to the petition filing date, in North Carolina *new parties* are not required to file there qualifying signature petitions until the first day of June N.C. Gen. Stat. §163-96 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." N.C. Gen. Stat. §163-98. Therefore, it is patiently obvious that (1) there is no necessity that unaffiliated candidates file their petitions by the date of the March primary election, and (2) the March filing date discriminates against unaffiliated candidates vis-a-vis the candidates of newly organized parties.

Furthermore, before 2016 the filing date for unaffiliated candidates was July 1, and that filing date did not cause any identifiable problem. Therefore, there was no necessity for moving the unaffiliated candidate filing date up to March. As to this point, it is relevant that in *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990) this court found that the requirement to file "statement of candidacy" in March was

unconstitutional because there was no problem with the pre-existing requirement for petitions to be filed in August. Inasmuch as the move of the unaffiliated candidate filing deadline to March was not necessary, the move was all burden and no benefit —and this is unconstitutional.

Sixth, in *Green Party of Ga. v. Kemp*, 674 Fed. Appx. 974 (11th Cir. 2017) the Eleventh Circuit affirmed *per curium* the finding of the district court, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), that Georgia's approximately 50,000 signature requirement for unaffiliated *presidential* candidates was unconstitutional. *Green Party of Ga. v. Kemp,* is particularly significant because its signature requirement was only approximately 2/3 of North Carolina's signature requirement even though Georgia has a greater population than North Carolina. [In *Green Party*, the court set the petition requirement at 7,500.],

VI. THE PANEL DID NOT PROPERLY ASSESS THE APPLICATION STRICT SCRUTINY TO THE REQUIREMENTS OF N.C. GEN. STATE §163-122 AS APPLIED TO PRESIDENTIAL CANDIDATES.

As argued in the appellants' initial brief, a state is obligated to provide a feasible means by which unaffiliated candidates can achieve ballot inclusion. [Doc. 19, pp: 30-31]. Specifically, 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.[7] 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. [Dist. Ct. Doc. 15.2] The fact that only one candidate——billionaire Ross Perot in 1992——has ever satisfied the requirements of N.C. Gen. Stat. §163-122(a) is strong evidence that it is overly burdensome.

Appellants then cited *Storer v. Brown*, for the proposition that:

> "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." *Id.* at 742

In *Mandel v. Bradley*, 432 U.S. 173 (1977) the Supreme Court reiterated what it had said in *Storer v. Brown*. *Id.* at 177. In *Storer v. Brown*, the court merely remanded the case for a determination as to whether the petition signature requirement was unconstitutionally burdensome. In *Mandel v. Bradley*, the court specifically

[7] 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.")

criticized the district court's analysis of the burden imposed by Maryland's candidate ballot access statute when it said:

> "It [the district court] did not analyze what the past experience of independent candidates for statewide office might indicate about the burden imposed on those seeking ballot access."

The Court then remanded the case to the district court with instructions to make a determination of the feasibility of satisfying Maryland's requirement based on an examination of past success in satisfying it.[8] Pursuant to the *Anderson* test, a court *must* make a specific determination of the burden imposed by a challenged statute.

Pursuant to *Mandel*, this court should, at a minimum, remand this case for an examination of evidence regarding the frequency with which *presidential* candidates have, or can be expected to, satisfy North Carolina's statewide candidate petition signature requirement.

In its opinion, the panel characterized as "modest"[9] the burden that N.C. Gen. Stat. imposes on statewide candidates [Doc. 39; p: 19] and on this basis stated:

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[8] On remand, the district court applied the analysis suggested by *Storer* and held that the challenged March candidate petition filing deadline was unconstitutional based on the historical record of lack of success of candidates meeting its requirements. *Bradley v. Mandel*, 449 F. Supp. 983 (D. Md. 1978).

[9] Significantly, the characterization of the petition signature burden as "modest" is derived from the court's prior decision in *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014) in which the court announced its conclusion without any examination to the historical record (in both North Carolina and nationwide) showing that North Carolina's signature requirement establishes a virtually insurmountable burden. Inasmuch as neither *Pisano* nor the panel decision in this case actually considered

> "… we do not apply strict scrutiny, and instead ask whether the Board has articulated an "important regulatory interest[]" to justify the modest burden. [Doc. 38; p: 19]

However, the determination that the signature burden imposed by N.C. Gen. Stat. §163-122 is only "modest" flies in the face of Supreme Court authority and recent decisions in other circuits establishing that strict scrutiny applies where an examination of the historical record establishes that a statute imposes a severe burden.

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)

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any *facts* in reaching its conclusion, the Supreme Courts decision in *Bradley v. Mandel* compels a rejection of the unsubstantiated conclusion that the challenged statute only imposed a "modest" burden.

The fact that only one candidate has ever satisfied the requirements of N.C. Gen. Stat. §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, N.C. Gen. Stat. §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.

VII. RELIEF REQUESTED

For all the reasons stated above, Appellants request that this cause be reconsidered/reheard *en banc*.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I HEREBY CERTIFY the foregoing includes 3,804 words and complies with the word limit imposed by Rule 35.

/s/ Alan P. Woodruff
Alan P. Woodruff, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was served on all parties by the Court's CM/ECF system on the 9th day of July, 2020.

/s/ Alan Woodruff

Alan P. Woodruff, Esq,