

APPEAL NO: 08-16444

IN THE
*UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

RALPH NADER; et al.,

Plaintiffs – Appellants,

versus

KEVIN B. CRONIN, Chief Election Officer, State of Hawaii,

Defendant – Appellee.

*ON APPEAL FROM THE CIVIL JUDGMENT
IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF HAWAII
THE HONORABLE ALAN C. KAY, DISTRICT JUDGE PRESIDING
OVER TRIAL AND THE HONORABLE J. MICHAEL SEABRIGHT,
DISTRICT JUDGE PRESIDING OVER SUMMARY JUDGMENT
DISTRICT COURT CASE NO. 1:04-cv-00611-ACK-LEK*

**RALPH NADER’S AND PLAINTIFFS-APPELLANTS’
OPENING BRIEF**

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 42 U.S.C. § 1983 in that the case involves causes of action alleging civil rights violations of the Plaintiffs and violations of the Plaintiffs' federal constitutional rights.

The Ninth Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 because a district court within its circuit heard this case. On February 7, 2008, the Honorable District Judge J. Michael Seabright issued an Order dismissing the First Count of Plaintiffs-Appellants' Complaint on Summary Judgment. (R. 68; Excerpts, p. 4.) On May 1, 2008, and after a trial on the remaining count, the Honorable District Judge Alan C. Kay issued an Order disposing of the entire case. (R. 92.) Judgment was issued entered on May 2, 2008. (R. 93; Excerpts, p. 3.)

Plaintiffs-Appellants filed their timely notice of appeal on May 30, 2008 pursuant to Fed. R. App. P. 4(a)(1)(A). (R. 94; Excerpts, p. 1.)

STATEMENT OF THE ISSUES

I. Whether the district court erred by determining there was no severe burden on the Plaintiffs-Appellants' civil and constitutional rights after looking at the two challenged statutory provisions – that a Presidential candidate may form a new party and run for office or that a Presidential candidate may run independently –

individually, rather than looking at the statutes in conjunction with each other as required by *Storer v. Brown*, 415 U.S. 724, 737 (1974).

STATEMENT OF THE CASE

The Nature of the Case

This is a case involving the alleged violation of civil and constitutional rights. Plaintiffs-Appellants Ralph Nader, Peter Miguel Camejo, Michael Peroutka, and Chuck Baldwin were independent candidates for the Offices of President and Vice-President.¹ ((R. 57-9, Decl. of Robert H. Stiver, at ¶ 2) (attached as Exhibit 6 to the Affidavit of Eric A. Seitz, R. 57-3); (R. 57-10, Affidavit of David W. Porter, at ¶ 2) (attached as Exhibit 7 to the Affidavit of Eric A. Seitz, R. 57-3).) These candidates sought, with the assistance of Plaintiffs-Appellants David W. Porter and Robert H. Stiver, and were denied access to the 2004 ballot because the Defendant Kevin B. Cronin’s (“Cronin”) predecessor-in-office² determined that the candidates presented an insufficient number of signatures to qualify for the presidential ballot. (R. 57-9, at ¶ 6; R. 57-10, at ¶ 6.)

¹ The Plaintiffs-Appellants will be referred to collectively as (“Nader”) in this brief. Furthermore, Peter Camejo died on September 13, 2008.

² Cronin’s predecessor was Dwayne D. Yoshina who left office since the filing of the Complaint. The Defendant was sued in his official capacity and, consequently, Cronin maintains defense of the suit in his name. In this brief, the Defendant will be referred to as “Cronin” whether or not Mr. Yoshina actually did the act or held office at the time of the act.

Course of the Proceedings.

On October 8, 2004, a Complaint was filed alleging: first, that the statutes requiring a substantially higher number of signatures to place an independent candidate on the ballot compared to the small number of signatures to place a political party on the ballot and consequently, its partisan candidates on the ballot violated the First, Fifth, and Fourteenth Amendments to the Constitution; and, second, that Cronin arbitrarily and capriciously rejected valid signatures submitted on behalf of the candidates therefore violating the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution. (R. 1; Excerpts, p. 38.) The case was stayed on October 28, 2005 to allow the Hawaii Supreme Court to adjudicate a case on its docket. (R. 30.) The stay was lifted on November 1, 2007. (R. 50.)

On December 4, 2007, Cronin filed a motion to dismiss on summary judgment. (R. 53 and 54.) Nader opposed this motion and filed a cross-motion for summary judgment on January 10, 2008. (R. 56 and 57.) Cronin filed a reply in support of his motion for summary judgment on January 17, 2008. (R. 60 and 61.) A hearing was held on January 28, 2008 at which time the Court granted Cronin's motion for summary judgment as to Count One, but denied Cronin's motion for summary judgment as to Count Two. (R. 65.) A written Order articulating the reasons for the summary judgment order was issued on February 7, 2008. (R. 68; Excerpts, p. 4.)

Count Two was tried to the Court on March 10 and March 11, 2008. (R. 85 and 86.) The Court’s findings of fact and conclusions of law and decision was issued on May 1, 2008, (R. 92), and Judgment entered on May 2, 2008, (R. 93; Excerpts, p. 3). A timely Notice of Appeal was filed on May 30, 2008. (R. 94; Excerpts, p. 1.)

STATEMENT OF THE FACTS

The Nader/Camejo Campaign.

Ralph Nader and Peter Miguel Camejo were candidates for President and Vice-President, respectively, in the 2004 Presidential race. (R. 57-9, at ¶ 2.) Robert H. Stiver (“Stiver”) was a citizen, resident, and registered voter in the State of Hawaii and assisted the Nader/Camejo campaign in its quest for ballot access. *Id.* at ¶¶ 1-3. On September 3, 2004, approximately 5,600 signatures were submitted on behalf of the Nader/Camejo campaign. *Id.* at ¶ 4. Cronin advised Stiver that only 3,124 signatures were valid on September 24, 2004. *Id.* at ¶ 6.

The Peroutka/Baldwin Campaign.

Michael A. Peroutka and Chuck Baldwin were candidates for President and Vice-President, respectively, in the 2004 Presidential race. (R. 57-10, at ¶ 2.) David W. Porter (“Porter”) was a citizen, resident, and registered voter in the State of Hawaii and assisted the Peroutka/Baldwin campaign in its quest for ballot access. *Id.* at ¶¶ 1-3. On September 3, 2004, approximately 7,195 signatures were

submitted on behalf of the Peroutka/Baldwin campaign. *Id.* at ¶ 4. Cronin advised Porter that only 3,471 signatures were valid on September 24, 2004. *Id.* at ¶ 6.

Other Facts.

Hawaii Revised Stat. § 11-113 requires independent candidates for President to submit signatures in the amount at least equal to one percent of the votes cast in the prior Presidential election. (R. 54-1, at ¶ 5; R. 61, at ¶ 5.) Because 371,033 votes were cast in the 2000 Presidential election, independent candidates were required to submit at least 3,711 signatures to obtain ballot access. (R. 54-7, Decl. of Dwayne D. Yoshina, at ¶¶ 7-8.) Therefore, the valid signatures submitted by both campaigns were insufficient to obtain ballot access pursuant to Hawaii Revised Stat. § 11-113.

Hawaii Revised Stat. § 11-62 requires new political parties seeking ballot access to submit signatures in the amount at least equal to one-tenth of one percent of the total registered voters as of the last election. (R. 54-1, at ¶ 3; R. 61, at ¶ 3.) Because Hawaii had 676,242 registered voters as of the 2002 general election, political parties were required to obtain 677 signatures to obtain ballot access. (R. 54-7, at ¶¶ 4-5.) Therefore, the valid signatures submitted by both campaigns *were sufficient* at least as to the quantity necessary for a political party to obtain ballot access.

The deadlines to submit signatures on behalf of independent candidates and political parties differed. Political parties were required to submit the 677 signatures by April 1, 2004. (R. 54-7, at ¶ 6.) Independent candidates were required to submit the 3,711 signatures by September 3, 2004. (R. 54-7, at ¶ 8.) The election occurred on November 2, 2004 without any of the candidates' names on the ballot. (R. 68, at p. 10; Excerpts, p. 13.)

SUMMARY OF THE ARGUMENT

“[A] number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.” *Storer v. Brown*, 415 U.S. 724, 737 (1974). The Supreme Court so held when describing how to “assess[] the ‘totality’ of the election laws as they affect[] constitutional rights.” *Id.* The district court, when determining whether Nader suffered a severe burden on his constitutional rights, did not properly consider Nader’s equal protection claim by comparing the burdens created by both the independent candidate statute with the burden created by the political party statute in relation to each other – a method required by *Storer*. Rather, the district court only considered whether the statutory requirements imposed by the challenged statutes would constitute a severe burden had the statutes been challenged individually.

Nader challenged the independent statewide candidate ballot access signature requirement, (in this case one percent of the votes cast in the previous

presidential election), in light of the comparatively infinitesimal requirement for statewide political party ballot access, (which was and currently remains one-tenth of one percent of the registered voters in the previous gubernatorial election). It was these signature requirements in relation to each other that “produce[d] the impermissible barrier[] to constitutional rights,” *Storer*, 415 U.S. at 737, not solely the quantum of signature requirements standing alone.

Supreme Court precedent lies for this comparison. In *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (hereinafter “*Socialist Workers Party*”), an Illinois independent candidate signature requirement was struck down because it required a greater number of signatures than would have been required had the independent candidate sought to obtain political party recognition on the statewide ballot alone. The Supreme Court applied strict scrutiny in *Socialist Workers Party* because the two statutes at issue, when held up next to each other, were inconsistent notwithstanding the fact that the two statutes could have individually survived a facial constitutional challenge. How can any independent candidate be required to obtain ballot access signatures in an amount greater than a new political party needs statewide to obtain ballot access? The two statutes, when put side by side, made no logical sense and consequently, the plaintiffs in *Socialist Workers Party* suffered a severe burden on their constitutional rights.

The district court erred in this case by focusing solely on the fact that one-percent signature requirements were previously upheld as constitutional. The district court's analysis failed to consider the "totality of the election laws" as generally set forth in *Storer* and as specifically applied in a parallel context in *Socialist Workers Party*. Nader did not challenge the one-percent signature requirement standing alone; rather, Nader challenged the signature requirement as the *Socialist Workers Party* plaintiffs did, by comparing the independent candidate signature requirements to the statewide signature requirements for political party ballot access. Nader was entitled to summary judgment on Count 1 and is entitled to reversal of the district court order dismissing his facial challenge to the signature requirements for independent candidate ballot access.

ARGUMENT

Standard of Review

The question of whether a statute is facially unconstitutional is a pure question of law. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). This court reviews a district court's legal questions *de novo*. *See Caruso v. Yamhill County ex. rel. County Comm.'s*, 422 F.3d 848 (9th Cir. 2005). Factual findings by the district court are reviewed for clear error.

We review a district court's conclusion of law *de novo*. Given the special solicitude we have for claims alleging the abridgment of First Amendment rights, we review a district court's findings of fact when striking down a restriction on speech for clear error. Within this

framework, we review the application of facts to law on free speech questions de novo.

Brown v. California Dept. of Transportation, 321 F.3d 1217, 1221 (9th Cir. 2003)

(internal citations omitted).

This issue was raised in Nader’s brief in opposition to Cronin’s summary judgment motion and Nader’s cross-motion for summary judgment filed on January 10, 2008. (R. 56.)

As for the district court’s consideration of the summary judgment legal issues, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) is the seminal case governing statutory analysis. *See Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008).

[I]n considering a constitutional challenge to an election law, a court must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”

. . .

The Court clarified the standard in *Burdick v. Takushi*, 504 U.S. 428, 434 . . . (1992), when it held that the severity of the burden the election law imposes on the plaintiff’s rights dictates the level of scrutiny applied by the court. . . . The Court held that an election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest.

Nader, 531 F.3d at 1034-35.

Therefore, a court must “weigh the character and magnitude of the asserted injury” to the Plaintiffs “against the precise interests put forth by the State as

justification for the burden imposed by the rule.” *Id.* If the rule severely burdens the plaintiffs’ rights, strict scrutiny applies.

I. THE DISTRICT COURT ERRED WHEN DETERMINING WHETHER A SEVERE BURDEN ON NADER’S CIVIL AND CONSTITUTIONAL RIGHTS EXISTED BY CONSIDERING EACH OF THE TWO STATUTES GOVERNING BALLOT ACCESS BY POLITICAL PARTIES AND INDEPENDENT CANDIDATES INDIVIDUALLY RATHER THAN IN TANDEM.

The district court failed to properly consider the effect of the totality of the election laws on Nader’s equal protection claims. The district court relied on a line of cases which analyzed the respective plaintiffs’ burdens and states’ interests in equal protection cases involving independent candidates (or minor political parties) as against the two *major* political parties and ignored a line of cases which analyzed the respective burdens and interests in equal protection cases involving independent candidates as against *minor* political parties. Because the burdens new political parties and independent candidates face in obtaining ballot access are more alike when compared to the burdens faced by candidates of the two major political parties, the line of cases holding strict scrutiny applies to equal protection analysis of the relative burdens imposed on obtaining ballot access by new political parties and independent candidates makes logical sense. The district court ignored these cases in its legal analysis when ordering summary judgment. This fundamental error resulted in the district court’s erroneous conclusion that there

was no severe burden on Nader's First and Fourteenth Amendment rights. The burden was severe and strict scrutiny was appropriate.

Cronin's stated claim in the district court that the later deadline justified the higher signature requirements imposed on independent candidates does not align itself well with legislative history. The Legislature's decision to lower the political party ballot access signature requirement was to open up political debate and increase the participation of more minority viewpoints. The Legislature's decision, however, perversely and proportionally multiplied the relative burden on independent candidates who seek ballot access as against the burden on new political parties without any justification as to how the higher burden is narrowly tailored to promote a compelling state interest.

A. Cronin's Claim Before the District Court That the Additional Signature Requirements Required of Independent Presidential Candidates Are Justified By the Additional Time Given Those Candidates to Submit Their Signatures Does Not Align Well With Statutory History.

The higher signature requirements necessary for the ballot access of independent Presidential candidates as compared to the ballot access for new political parties is not justified by the additional five months those candidates have to submit their signatures. Statutory history belies the claim. Prior to the Hawaii Legislature's enactment of one-tenth of one percent of registered voters in the prior general election requirement for political party ballot access in 1999, *see* Act 205,

§ 2, Session Laws of Hawaii, Twentieth State Legislature, Regular Session of 1999, R. 57-7 (attached as Exhibit 4 to the Affidavit of Eric A. Seitz, R. 57-3), the Hawaii Revised Stat. § 11-62 required signatures totaling a full one percent of the registered voters in the prior general election, *see* Act 34, § 4, Session Laws of Hawaii, Twelfth State Legislature, Regular Session of 1983, R. 57-6 (attached as Exhibit 3 to the Affidavit of Eric A. Seitz, R. 57-3).³

After the 1983 Act, the deadlines remained the same in all material respects. *Compare* the 1983 Act, §§ 4 and 14 *with* the current versions of Hawaii Revised Stat. §§ 11-62 and 11-113. In 1983, political parties were required to submit their signatures 150 days before the primary election date and independent parties were required to submit their signatures 60 days before the general election. Since 1999, political parties were required to submit their signatures 170 days before the primary election and the independent candidate deadline remained 60 days before the general election.⁴ The deadlines are substantially similar before and after 1999.

³ The 1983 Act and the 1999 Act referred to in this paragraph are included in the district court record at R. 57 and will be referred to as the “1983 Act” and the “1999 Act” elsewhere in this brief.

⁴ The respective burdens placed on political parties and independent candidates in relation to each other by the deadlines are substantially similar before and after the 1999 Act notwithstanding the 20-day change to the political party deadline. The deadline change, which occurred at some time between 1983 and 1999 is dwarfed by the 90% reduction in total signatures required to obtain statewide political party ballot access as a result of the 1999 Act.

Before 1999, even though the deadline to submit political party ballot access signatures was approximately five months before independent candidates, political parties also had to submit a substantially higher number of signatures. The denominators used to calculate the signature requirements for political parties versus independent candidates were different. The political party calculation is based on the number of registered voters in the previous general election and the independent presidential candidate calculation is based on the number of votes cast in the previous presidential election. Because it is all but guaranteed the number of registered voters will outnumber the number of votes cast in an election (because everyone does not vote), before 1999, independent candidates not only had more time to submit signatures, but also were required to submit less signatures than political parties for ballot access. *Compare* the 1983 Act, §§ 4 and 14 *with* the current versions of Hawaii Revised Stat. §§ 11-62 and 11-113.

This pre-1999 system sits well with existing Supreme Court precedent. In 1979, the Supreme Court struck down an Illinois statute based on an equal protection argument that required an independent candidate to submit more signatures for ballot access than a statewide candidate or political party needed to acquire ballot access. *See Socialist Workers Party*, 440 U.S. 173.

Socialist Workers Party basically held that the benchmark for determining whether a candidate's (or local political party's) signature requirement violates

equal protection is the statewide political party and candidate's ballot access requirements. "The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement." *Id.* at 186 (referring to the statewide ballot-access signature requirement at issue in that case). As the district court in *Socialist Workers Party* held: "Any greater requirement than [the statewide ballot-access signature requirement] cannot be said to be the least drastic means of accomplishing the state's goals [of restricting ballot access to nominal or frivolous candidacies], and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents." *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F.Supp. 11, 20 (N.D. Ill. 1977) (quoted in *Socialist Workers Party*, 440 U.S. at 179). Hawaii's pre-1999 election system did not violate *Socialist Workers Party* because independent candidates were not required to submit signatures greater in number than statewide candidates and political parties were required to do.

If the pre-1999 one-percent rule had remained in effect as to new political parties in Hawaii, their signature requirement on the facts of this case would have been 6,763. The Hawaii Legislature, however, thought this too burdensome for new political parties and passed the 1999 Act. The 1999 Act's purpose was borne out in the Standing Committee Reports of both houses of the Hawaii Legislature.

See Senate Standing Committee Report 854, J. of the Senate of the Twentieth Legislature of the State of Hawaii, Regular Session of 1999, and House Standing Committee Report 1469, Journal of the House of Representatives of the Twentieth Legislature, State of Hawaii, Regular Session of 1999, R. 57-8, (attached as Exhibit 5 to the Affidavit of Eric A. Seitz) (hereinafter the “Senate Report” and the “House Report,” respectively).

The Senate Report and House Report make clear that the purpose of the differences between the signature requirements created by the 1999 Act did not have any relation to the deadlines that were already in place. Rather, the Reports show a conscious decision to re-value (or, in the Supreme Court’s vernacular, to “determine”) the state’s “interest in avoiding overloaded ballots in statewide elections” in light of competing policy considerations. *Socialist Workers Party*, 440 U.S. at 186. In relevant part the Senate Report and House Report read as follows:

The purpose of this bill is to make it easier for a political party to qualify and operate in Hawaii. Specifically, this is accomplished by lowering the number of required signatures needed to qualify as a party from one per cent to one-tenth of one per cent of the registered voters at the last general election. . . . **Your Committee finds that the voting public may increase its participation in the electoral process if it has a greater choice in political parties.** An informed electorate that participates in the electoral process can better understand the workings of government and reduce the current cynicism about politicians and government bureaucracy.

Senate Report (emphasis added).

The purpose of this bill is to make it easier for a political party to qualify and operate in Hawaii. Specifically this is accomplished by lowering the number of required signatures on the petition to be filed with the Chief Elections Officer from one per cent to one-tenth of one per cent of registered voters at the last general election in order to qualify as a political party. . . . **Your Committee finds it is important to encourage and facilitate the participation of new political parties to ensure the exchange of ideas through the political process.**

House Report (emphasis added).

These Reports are clear. The Legislature made a policy decision through this legislation to give greater weight to the benefits found in encouraging political debate and expanding the marketplace of ideas than previous legislatures by redefining how those previous legislatures defined non-meritorious campaigns. The Legislature failed to consider, however, how this change affected the rights of independent candidates and their supporters who are just as likely as new political parties to posit valuable ideas into the political debate. Requiring significantly more ballot access signatures for independent candidates makes no sense when the change was made to expand the marketplace of ideas. Where before the 1999 Act, the statutes were in harmony with Supreme Court precedent and the relative burdens placed on new political parties and independent candidates, the statutes now create an unconstitutionally severe burden on the First and Fourteenth Amendment rights of independent candidates and their supporters.

Cronin's claim in the district court that the difference in the deadlines support the higher signature requirement is unavailing after a close analysis of the statutory history. The deadlines did not change with the passage of the 1999 Act, nor were they considered by the Legislature. The real reason independent candidates have additional time to submit their signatures is to satisfy the constitutional concerns expressed in *Anderson*, mainly "to serve important safety-valve purposes not adequately served by major party candidacies alone, or by the availability of write-in candidacies." *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990) (citing *Anderson*, 460 U.S. at 790-94, 799 n.26).

An independent candidate ballot access signature deadline equal to a new political party ballot access signature deadline would violate *Anderson*. Allowing a higher signature requirement for independent candidates than required for new political party ballot recognition would allow Hawaii to negate the positive public policy and constitutional protections *Anderson* promotes by enforcing a signature requirement substantially higher than required for new political parties. The later deadline is not a sufficient justification to allow a higher signature requirement in this case.

B. Strict Scrutiny Applies to These Statutes Because, When Taken in Context of Each Other, the Higher Signature Requirement for an Independent Candidate In Relation to the Signature Requirement for Statewide Political Party Ballot Access Constitutes a Severe Burden on the Rights of Independent Candidates.

The district court erroneously relied on *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) and several other cases involving the relative burdens placed on candidates for minor political parties and independent candidates as against major political parties. The district court ignored *Socialist Workers Party* and other cases involving the analysis of the relative burdens of independent candidates and minor political parties which consistently find that a severe burden exists.

Jenness and *Socialist Workers Party* are important because both cases involve the constitutionality of a five percent signature requirement for independent candidates' and/or minor political parties' ballot access. How can the Supreme Court uphold one five percent requirement as it did in *Jenness* and strike down another five percent requirement as it did in *Socialist Workers Party* without looking to the cases for distinguishing facts that support the seemingly opposite holdings? That is exactly what the district court did (or failed to do) when it ignored all of the cases factually similar to *Socialist Workers Party*.

1. *The District Court Erroneously Determined That Strict Scrutiny Was Inappropriate By Primarily Relying on Cases That Involved the Comparison of the Rights and Burdens on Independent Parties or Minor Political Parties Versus the Rights and Burdens of Major Political Parties.*

Storer established the rule that two facially valid statutes, taken in context with each other, could constitute a severe burden on a person or political party. “The concept of ‘totality’ is applicable only in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.” *Storer*, 415 U.S. 724, 737 (1974). The Supreme Court’s comment regarding the analysis of statutes “in tandem” was done to explain the extent of *Williams v. Rhodes*, 393 U.S. 23 (1968) which established for the first time that election laws should be examined “as a whole.” *Williams*, 393 U.S. at 34. Recognizing that States have “broad powers to regulate voting, which may include laws relating to the qualification and functions of electors,” *id.*, the court found that “the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause,” *id.* Consequently, in *Storer*, the Supreme Court articulated the scope of the “totality” concept by holding it only applies when the challenged statutes are otherwise facially valid, but the effect of their intersection produces “impermissible barriers.” *Storer*, 415 U.S. at 737.

In *Storer*, after articulating the “totality” concept, the Court held that the statute in question was “an absolute bar to candidacy” and therefore “[did] not change its character when combined with other provisions of the electoral code.” *Id.* It is important to note here that *Storer* was not primarily an equal protection case. The statute at issue in *Storer* was whether it was constitutional for California to require independent candidates to be unaffiliated with any political party for the immediate one year prior to the filing of the declaration of candidacy. *Id.* at 1280. This was not an equal protection problem, however, because partisan candidates were similarly barred from filing declarations of candidacy for their current political party if they had been associated with any other political party during the same one-year period. Because the burdens were virtually identical, there was no equal protection problem. *Id.* Thereafter, the Supreme Court analyzed the statute for an unconstitutional burden directly and without regard to other statutes: “there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates.” *Id.* at 736.

The district court in this case missed this fundamental concept. Nader challenged the statutes below under the equal protection clause, and unlike *Storer*, the burdens placed on partisan candidates of new political parties are not virtually identical. Rather, the burdens are substantially different, and consequently,

whether a severe burden exists is a question that must be answered by looking at all of the relevant statutes in light of each other. The district court pointed out some minor differences between independent candidates and political parties, ie. that political parties might be required to hold conventions or primary elections, (R. 68, p. 16; Excerpts, p. 19), but failed to account for the very practical and material fact that these differences are insignificant when applied to new political parties.⁵ This distinction is borne out by the cases relied on by the district court all of which consistently involved the rights of independent candidates or minor political parties versus major political parties.

At the forefront, is *Jenness*, 403 U.S. at 442, (cited by the district court at R. 68, pp. 14-15; Excerpts, p. 17-18), wherein the Supreme Court approved a statute requiring a five percent signature requirement for independent candidate ballot access. The five percent signature requirement was held not to be inherently more difficult than surviving a major party (Democrat or Republican) political presidential primary.

This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures

⁵ Commenting on dangers that are “theoretically imaginable,” the *Williams* Court held that “[n]o such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case.” *Williams*, 393 U.S. at 33. These insignificant differences are exactly what the *Williams* court was referring to when it referred to the “theoretically imaginable” and the “remote dangers.” *Id.* The use of extremely unlikely hypotheticals are inappropriate when measuring the severity of the challenged statutes’ burdens on constitutional rights.

of 5% of the total eligible electorate than it is to win the votes of a majority in a [Presidential Democratic or Republican] party primary. That is a premise that cannot be uncritically accepted.

Jenness, 403 U.S. at 440.

See also American Party of Texas v. White, 415 U.S. 767 (1974), (cited by the district court at R. 68, p. 4; Excerpts, p. 7) (involving the rights of new minor political parties' and independent candidates' ballot access requirements versus major party requirements).⁶

There is one case cited by the district court that compares the ballot access requirements of independent candidates with the ballot access requirements of minor political parties. That case is *Nader v. Connor*, 332 F.Supp.2d 982, 987 (W.D. Tex. 2004) (cited at R. 68, p. 16; Excerpts, p. 19). In that case, the Western District of Texas District Court held that requiring independent candidates to obtain more signatures in less time than minor political parties for ballot access was not a severe burden on the independent candidate. *Nader v. Connor*, as well

⁶ The district court quoted *Lubin v. Panish*, 415 U.S. 709, 718 (1974), (cited at R. 68, p. 15; Excerpts, p. 18), but the quotation was only favorably citing *American Party of Texas* as a general example of a State's right to impose some reasonable hurdle to gain access to the ballot. The *Lubin* case itself involved whether a state may deny an indigent from the ballot for failing to pay the declaration of candidacy filing fee. The district court's quotation of *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), (cited at R. 68, p. 15-16; Excerpts, p. 18-19), was similarly used by *Munro* to support a general example of the State's ability to regulate the ballot by favorably citing *Jenness*. The *Munro* case involved whether Washington's "blanket primary" system (allowing voters to vote across party lines in a primary election) was unconstitutional.

as the district court in this case, however, failed to address the significant line of cases directly opposing this rule, as will be discussed immediately below.

2. *The District Court Failed to Address a Line of Cases Holding that Strict Scrutiny Applies to the Analysis of Whether a Severe Burden Exists as Between Independent Candidates and Minor Political Parties.*

Nader brought to the district court's attention several cases which persuasively hold contrary to *Nader v. Connor*. Just like *Nader v. Connor*, however, the district court failed to address why the reasoning in those cases did not apply to the present scenario. The reasoning in *Nader v. Connor* is not persuasive when held next to the reasoning of *Greaves*, *Cromer*, and *Socialist Workers Party*.

In *Greaves v. State Bd. of Elections of North Carolina*, 508 F.Supp. 78 (E.D.N.C. 1980), the district court dealt with a signature requirement for Presidential independent candidates. Similar to the Hawaii statutes at issue in this case, the independent presidential candidates faced a substantially higher signature requirement for ballot access than the formation of new political parties required. The *Greaves* Court recognized this problem, applied strict scrutiny, *id.* at 80, and rejected the independent party signature requirement, *id.* at 82.

[T]he court notes that North Carolina grossly discriminates against those who choose to pursue their candidacies as independents rather than forming a new political party. A group of voters seeking a place on the ballot as a new party must submit petitions signed by only 10,000 voters, less than one sixteenth the number required of an

independent candidate. . . . **The state has asserted no rational basis, much less a compelling interest, for this disparate treatment.**

Id. at 82 (emphasis added).

The factual similarities between this case and *Greaves* should not go unnoticed. In both instances, the independent candidate ballot access signature requirement was and should be compared to the statewide political party ballot access signature requirement. It is also important to note that unlike *Nader v. Connor* and the district court's summary judgment order, (R. 68; Excerpts, p. 4), the *Greaves* Order cited relevant portions of *Socialist Workers Party*, which will be discussed below.

The Fourth Circuit has also spoken in a general fashion about the comparative burdens on independent candidates and new political parties in *Cromer*, 917 F.2d 819. In *Cromer*, the issue before the court was whether the independent candidate deadline for declaring one's candidacy was unconstitutionally too early. In the course of the Fourth Circuit's discussion, the circuit court made important remarks relevant to consideration of this case.

[A]s between new (third) party candidacies and independent candidacies, **independent candidacies must be accorded even more protection than third party candidacies.** This flows from the states' heightened interest in regulating the formation of new parties having the potential not possessed by independent candidacies for long-term party control of government, *see Storer v. Brown*, 415 U.S. [at] 745 . . . (1974), in combination with the peculiar potential that independent

candidacies have for responding to issues that only emerge during or after the party primary process. *Anderson*, 460 U.S. at 790-92.

Cromer, 917 F.2d at 823.⁷

Cromer's citation to *Storer* is relevant because that case involved whether a "disaffiliation" rule⁸ imposed on independent candidates and all political party candidates alike violated the equal protection clause. *Storer*, 415 U.S. 724. The Fourth Circuit found the fact that independent candidates needed more protection than minor parties relevant when analyzing different deadlines to submit ballot access signature deadlines. The same idea is relevant here when discussing the differences between signature requirements.

The Supreme Court has also spoken on the issue of whether an independent candidate ballot access signature requirement may exceed a statewide political party ballot access requirement for political parties. *See Socialist Workers Party*, 440 U.S. 173. The most reasonable rule to glean from *Socialist Workers Party* is that a statewide signature requirement for new political parties creates a benchmark that the state cannot exceed without violating the candidates' and his or her

⁷ This quotation is also important because one of the main justifications Cronin suggested for the higher signature requirement for independent candidates was the extended time period allowed to obtain the signatures. *See Cromer*, 917 F.2d at 823 (citing *Anderson*, 460 U.S. at 790-94, 799 n.26).

⁸ The "disaffiliation" rule at issue in *Storer* barred independent and partisan candidates from running for office if they were officially affiliated with any political party, in the case of independent candidates, or any other political party, in the case of partisan candidates, within the prior year. *Storer*, 415 U.S. at 733-34.

supporters' voting, associational, and speech rights unless the state can show the regulation is narrowly tailored to promote a compelling state interest. The reason that the statewide signature requirement creates a benchmark is set forth in *Socialist Workers Party*: "The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the [statewide] signature requirement." *Socialist Workers Party*, 440 U.S. at 186. Here, the Hawaii Legislature "determined that its interest in avoiding overloaded ballots in statewide elections" was served by requiring political parties to obtain only one-tenth of one percent of the total registered voters. *Id.* That benchmark was broken in this case by requiring independent candidates to obtain 3,711 signatures, but requiring new political parties to obtain only 677, a difference of almost five-and-one-half times.⁹

In the district court, Cronin suggested that a presidential independent candidate has an additional five months to collect signatures without any

⁹ The fervor presented by President Obama's Presidential campaign this last election cycle only exacerbates the problem going into the 2012 election cycle. As the percentage of registered voters that actually vote increases, the burden on independent candidates increases. In the last election cycle, there were 691,356 registered voters and 456,064 votes cast in the Presidential race in Hawaii. That means the burden on political parties has risen to 692 signatures to achieve ballot access (an increase of only 25 signatures from the 2004 levels or 3.7%), but the burden on independent Presidential candidates will be 4,561 in the 2012 campaign (an increase of 850 signatures or 22.9%). The figures in this footnote are from the Hawaii Secretary of State's "Final Summary Report" found at <http://hawaii.gov/elections/results/2008/general/files/histatewide.pdf>.

explanation of how the minimum quantum of statewide support needs to be 5.5 times as high on September 3 as is required on April 1 for new political parties. The goal of signature requirements is most logically to avoid frivolous candidacies from cluttering the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (discussing whether a state must make a particular showing of “actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions.”) Yet Cronin fails to articulate why submitting only 677 signatures for a new political party that could possibly survive *ad infinitum* and name candidates to the ballot potentially indefinitely is considered sufficient evidence of substantial community support to warrant recognition, but an independent candidate’s 677 signatures is insufficient to warrant a one-time appearance on the ballot.¹⁰ This does not even meet the rational basis test, much less the strict scrutiny test that must be met as to this statute.

This equal protection issue is controlled by *Socialist Workers Party*. In *Socialist Workers Party*, the Supreme Court struck down an Illinois statute requiring signatures totaling 5% of the total number of persons that voted in the

¹⁰ The fact that this case involves the race for President does not warrant a higher signature requirement over and above the statewide threshold for political party ballot access. The Supreme Court has held that a “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.” *Anderson*, 460 U.S. at 795.

previous election to obtain ballot access. In Cook County, there were over 700,000 persons that had voted in the previous election, which, in turn, required independent candidates to collect over 35,000 signatures to qualify for the ballot in the subsequent election. *Socialist Workers Party*, 440 U.S. at 183. Another statute, however, allowed independent candidates or new political parties to gain statewide ballot access if they obtained 25,000 signatures. *Id.* at 186. The district court in *Socialist Workers Party* succinctly relied on an Eastern District of Arkansas decision as the basis to strike down the statute. *Id.* at 179.

On the merits of appellees' equal protection challenge, the [district] court found "[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D. Ark. 1977). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents."

Id. (quoting *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F.Supp. 11, 20 (N.D. Ill. 1977)).

"The Illinois Legislature has determined that its interest in avoiding overloading ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Socialist Workers Party*, 440 U.S. at 186. The district court ignored *Socialist Workers Party* which

struck down a five percent signature requirement in its reasoning when it granted summary judgment in favor of Cronin. Rather, the district court relied heavily on *Jenness* which upheld a five percent signature requirement without distinguishing the two cases.

“[A] number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.” *Storer*, 415 U.S. at 737. In *Socialist Workers Party*, the Supreme Court struck down a five percent signature requirement, which under the district court’s theory, should have been upheld by *Jenness*, which itself upheld a five percent signature requirement. *Socialist Workers Party* did not overrule *Jenness* because the equal protection analysis is different than an isolated challenge to the statute’s burdens. The district court failed to consider this fact.

It further is of no consequence that *Socialist Workers Party* was dealing with a geographic sub-division of Illinois and this case involves the same geographic district: a statewide district. The salient fact is that there are different ballot access signature requirements for the same district. Cronin must still set forth a compelling reason, just like *Socialist Workers Party* required, for the higher signature requirement. He will have to point to some unique fact regarding Presidential elections as compared to solely Hawaii intra-state elections or concerns that a political party’s ballot access recognition would raise to justify the

additional burden on Presidential ballot access by independent candidates. That will be difficult to do given the fact that Hawaii has a lesser interest in the Presidential election than it does with solely Hawaii intra-state elections.

Anderson, 460 U.S. at 795.

Because there is no basis to conclude that a higher signature requirement for a Presidential independent candidate is appropriate when compared to statewide new political parties, the higher signature requirement violates equal protection and summary judgment issued in Nader's favor.

C. Because These Regulations Constitute Severe Burdens on the Voting, Associational, Equal Protection, and Speech Rights of All of the Plaintiffs-Appellants, Cronin is Left to Show How the Statutes Are Narrowly Tailored to Promote a Compelling State Interest – An All But Impossible Task Indeed.

The *Socialist Workers Party* line of cases establish that strict scrutiny is appropriate when comparing the election regulations of independent candidates to new political parties. *See Greaves*, 508 F.Supp. 78; *Cromer*, 917 F.2d 819; and, *Socialist Workers Party*, 440 U.S. 173. On the other hand, the cases relied on by the district court upholding various election laws involved the comparison of independent candidates or new or minor political parties to the major established parties. *See American Party of Texas*, 415 U.S. 767; *Jenness*, 403 U.S. 431; *Lubin*, 415 U.S. 709; and, *Munro*, 479 U.S. 189. Indeed, this factual distinction is important because a minor or new political party is much more similar in character

to an independent candidate than a major political party. The major political parties control the keys to the ballot because they hold the necessary legislative and executive positions in government to pass laws establishing ballot access rules, and it is the minority interests of both independent candidates and minor parties that are at risk of extinction by severe burdens to ballot access. The district court's reliance on cases analyzing statutes comparing independent party and minor party burdens to the burdens imposed on major political parties and candidates was misplaced. The district court should have addressed the cases analyzing statutes imposing relative burdens on independent candidates as against minor political parties. The fact that independent parties and minor political parties are so similar in character justifies the fact that strict scrutiny is consistently applied to the analysis. Therefore, the district court erred by failing to apply strict scrutiny to the statutory analysis.

Here, the first reason posited by Cronin in the district court to justify the higher signature requirement for independent candidates as opposed to new political parties was the fact that independent candidates were different than minor political parties. Of course, neither *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989) and *American Party of Texas v. White*, 415 U.S. 767 (1974), both of which were cited by Cronin to support this idea, (R. 53-3, p. 15), involved statutory schema requiring independent candidates to obtain 5.5 times as many signatures

for ballot access as political parties needed to achieve ballot access recognition statewide.

The second and only other reason posited by Cronin to justify the higher signature requirement was the fact that the deadlines are different. That difference, however, is justified by the unique “safety-valve” aspect independent candidates can provide. *Cromer*, 917 F.2d at 823 (citing *Anderson*, 460 U.S. at 790-94, 799 n.26). Allowing Hawaii to nullify the public policy reasons and constitutional protections promoted by the later independent candidate deadline would constitute a violation of *Anderson*, and consequently cannot be a narrowly tailored justification for the difference in signature requirements.

Similarly, no case cited by the district court, except for *Nader v. Cromer*, 32 F.Supp.2d 982 which Nader has distinguished above, involved a situation where independent candidates were required to get substantially more signatures for ballot access than new political parties. (Of course, Nader understands the district court was only looking for a rational basis justification to support the statute rather than a justification satisfying strict scrutiny.) In fact, the district court actually cited to one case that can only be interpreted to require differences between the signature requirements to be less burdensome for the independent candidate. “A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than one individual becoming an independent

candidate to run for a particular office.” *Arutunoff v. Oklahoma State Election Bd.*, 687 F.2d 1375, 1380 (10th Cir. 1982) (cited at R. 68, p. 19; Excerpts, p. 22).

Arutunoff’s statement justifies a significantly higher burden for political parties – who can offer a slate of candidates into the future *ad infinitum* – to obtain ballot access over individual candidates in a single one-time election. It does not justify imposing a higher burden on the single individual who wants to appear once on the ballot.

Based on all of the foregoing, there is no explanation that Hawaii could posit justifying a higher signature requirement for independent candidates’ ballot access over new political parties’ ballot access that is narrowly tailored to promote a compelling state interest.

CONCLUSION

For all of the foregoing reasons, Nader prays for an Order reversing the judgment, reversing the district court’s summary judgment dismissal of Count One, and remanding with instructions to impose judgment in favor of Nader on summary judgment as to Count One.

Dated at Milwaukee, Wisconsin, on this the 13th day of October, 2009.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 8,045 words including footnotes.

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Dated: October 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 13, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I hereby certify that a four (4) copies of the Records Excerpts were served this day on the Ninth Circuit Court of Appeals by mailing same via first-class mail to the Clerk of Court. Furthermore, one (1) copy of the Records Excerpts were mailed via first class mail to the following addresses:

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ADDENDUM

Hawaii Revised Statutes § 11-62. Qualifications of political parties; petition.

(a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as provided in this section. The petition for qualification as a political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred seventieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;
- (3) Contain the name, signature, residence address, date of birth, and other information as determined by the chief election officer of currently registered voters comprising not less than one-tenth of one per cent of the total registered voters of the State as of the last preceding general election;
- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and
- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the twentieth business day after the petition has been filed. The chief election officer may extend the objection period up to an additional ten business days, if the group of persons desiring to qualify as a political party is provided with notice of extension and the reasons therefor. If no objections are raised by 4:30 p.m. on the twentieth business day, or the extension thereof, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the objection or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party, having first qualified as a political party by petition under this section, and having been qualified as a political party for three consecutive general elections by petition or pursuant to [section 11-61\(b\)](#), shall be deemed a political party for the following ten-year period. The ten-year period shall begin with the next regularly scheduled general election; provided that each party qualified under this section shall continue to field candidates for public office during the ten-year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in [section 11-61](#), or requalify under this section 11-62.

Hawaii Revised Statutes § 11-113. Presidential ballots.

(a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A “national party” as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for President and Vice President of the United States shall be qualified for inclusion on the general election ballot under either of the following procedures:

(1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:

(A) The name and address of each of the two candidates;

(B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;

(C) A statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection.

(2) In the case of candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:

(A) A sworn application which shall include the information required under paragraph (1)(A) and (B), and (C) where applicable;

(B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for President or Vice President of the United States on the general election ballot in the State of Hawaii. Such statements may be withdrawn by a prospective candidate for Vice President and an alternative candidate for Vice President be substituted anytime prior to the notification of qualification or disqualification provided in subsection (d). Any such substitutions shall be accompanied by a notice of substitution satisfying subparagraph (A), a statement of intent as required by this paragraph, and a letter by the candidate for President endorsing the substitute candidate for Vice President. Upon receipt of a notice of substitution and all other required documents, the substitute shall replace the original candidate for Vice President on the general election ballot. The petitions issued in the names of the original candidates will remain valid for the purposes of this section.

(d) Each applicant, and the candidates named, shall be notified in writing of the applicant's or candidate's eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth business day after filing. The chief election officer may extend the notification period up to an additional five business days, if the applicants and candidates are provided with notice of the extension and the reasons therefore.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the

request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion of the hearing.