QUESTIONS PRESENTED

1. Whether a signature requirement for ballot access that is numerically less than the five percent requirement upheld in *Jenness v. Fortson*, 403 U.S. 431 (1971), but freezes the political status quo and unduly burdens independent Congressional candidates, violates the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the Fourth Circuit erred in finding that North Carolina's four percent signature requirement, which has created a virtual bar to ballot access for independent Congressional candidates, was not a severe burden on Petitioners' ability to gain access to the ballot and was not therefore subject to strict scrutiny under the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

3. Whether this Court should reconsider the approach to ballot access issues set forth in *Anderson v. Celebrezze* and develop a more predictable and workable doctrine.

LIST OF PARTIES

The Petitioners are Bryan E. Greene, Jordan M. Greene, Todd Meister, and Intervenor Bradley Smith. None of the petitioners is a corporation that needs to make the disclosures required by the Court's Rule 29(6).

The Respondents are Gary O. Bartlett, Director of the North Carolina Board of Elections, and Board Members Larry Leake, Charles Winfree, Robert Cordle, Anita S. Earls, and Bill W. Peaslee.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Bryan E. Greene, Jordan M. Greene, Todd Meister, and Bradley Smith petition the Court for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fourth Circuit (entered October 13, 2011) affirming the District Court's denial of Petitioners' motion for summary judgment and granting Respondents' motion for summary judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported and is included in the Appendix at App. 1 through App. 4. The order of the United States District Court for the Western District of North Carolina is not reported and is reproduced in the Appendix at App. 5 through App. 19.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 13, 2011. (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble.

United States Constitution, Amendment XIV:

No state shall make or enforce any law which . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Gen. Stat. § 163-122 (a)(2):

Any qualified voter who seeks to have his name printed on the general election ballot as an unaffiliated candidate shall . . . [i]f the office is a district office under G.S. 163-182.4(b), file written petitions with the State Board of Elections supporting that voter's candidacy for a specified office. These petitions must be filed with the State Board of Elections on or before 12:00 noon on the last Friday in June preceding the general election and must be signed by qualified voters of the district equal in number to four percent (4%) of the total number of registered voters in the district as reflected by the voter registration records of the State Board of Elections as of January 1 of the year in which the general election is to be held.

STATEMENT OF THE CASE

In 2008, Petitioner Bryan Greene attempted to place his name on North Carolina's general election ballot as an unaffiliated candidate for the United States House of Representatives. He was unsuccessful. Petitioners Jordon Greene and Todd Meister were strong supporters of his candidacy. Bryan Greene sought election in North Carolina's Tenth Congressional District, which includes Avery, Caldwell, Burke, Mitchell, Catawba, Cleveland, Lincoln, and parts of Iredell, Rutherford, and Gaston Counties. N. C. Gen. Stat. § 163-201 (a) (2010).

In 2010, Petitioner Bradley Smith also tried and failed to qualify for the general election ballot as an independent candidate for Congress. Despite an eight month petition drive, Smith could not surmount North Carolina's ballot access laws to obtain access to the ballot. Smith sought election in North Carolina's Fifth Congressional District, which consists of Alexander, Alleghany, Ashe, Davie, Stokes, Surry, Watauga, Wilkes, and Yadkin counties and parts of Forsyth, Iredell, and Rockingham counties. N. C. Gen. Stat. § 163-201 (a) (2010).

North Carolina law requires that an unaffiliated candidate running for the House of Representatives must file a nominating petition signed by four percent of the total number of registered voters in the candidate's district in order to gain access to the general election ballot. N.C. Gen. Stat. § 163-122 (a)(2) (2010). For Petitioners Greene and Smith, this amounted to 16,547 and 18,123 signatures, respectively. Until 2010, no candidate in United States history had successfully gained access to the general election ballot for the United States House of Representatives when required to overcome a signature requirement in excess of 12,919. Ballot Access News, *Highest Signature Requirement Ever met by a U.S. House Candidate*, (July 1, 2009), http://www.ballot-access.org/2009/070109.html#12. The only candidate who managed to break the trend was bankrolled by the well-heeled Service Employees International Union, a resource that is unavailable to the average independent candidate. Ballot Access News, *Wentell Fant Won't Run as*

Independent for U.S. House in North Carolina, (June 25, 2010), http://www.ballot-access.org/2010/06/25/wendell-fant-wont-run-as-independent-for-u-s-house-in-north-carolina/.

Bryan Greene, Jordon Greene, and Todd Meister brought this 42 U.S.C. § 1983 action with jurisdiction under 28 U.S.C. §§ 1331 and 1343 against the five members of the North Carolina Board of Election and the executive director of the North Carolina Board of Elections on August 6, 2008. Plaintiffs alleged that North Carolina General Statute § 163–122(a)(2) violated the First Amendment of the United States Constitution because it places severe burdens on the ability of independent candidates for the United States House of Representatives to qualify for the general ballot. Petitioners also alleged that the law violated the Equal Protection Clause of the Fourteenth Amendment.

On July 15, 2010, Bradley Smith successfully intervened in the action, alleging the same claims as the original plaintiffs.

In the District Court, the Petitioners and Respondents both moved for summary judgment. The District Court granted the Respondents' motion, finding that Section 163-122(a)(2) was not unconstitutional because this Court has upheld a higher ballot access percentage requirement. (App. 19). The District Court also cited to the facts that one independent candidate for the United States House of Representatives in 2010 had met the four percent requirement and that, since 1992, over eighty candidates for other district offices (various local offices) had met the four percent requirement. (App. 18-9).

The Petitioners' Equal Protection claim was also rejected on the grounds that Petitioners failed to demonstrate that unaffiliated candidates for the United States House of Representatives were similarly situated to unaffiliated candidates for statewide offices, who are subject to only a two percent signature requirments. (App. 15).

On appeal, the Fourth Circuit affirmed based on the district court's reasoning with little discussion. (App. 4).

REASONS FOR GRANTING THE PETITION

I. It is a matter of national importance to reevaluate and clarify ballot access laws in light of the increasing number of independent voters and candidates and the American People's general disapproval of the two major political parties.

The importance of free, unrestricted, and fair elections spans history to the time of the Founding Fathers and beyond. Our Founding Fathers shared a fear that our republic would fail due to the influence of factions. The authors of the *Federalist Papers*, attempted to assuage those fears by showing that a large republic would be able to hold factions in check in order to keep the few from ruling the majority and the majority from taking away the rights of the few. But as two major political parties have developed at the expense of minor party and independent candidates, many of the fears of our Founding Fathers with regard to political factions have

been realized, and legislatures across the country have passed strict ballot access laws without fear of reversal by the courts.

Madison recognized that the people of his time were concerned that the majority would rule at the expense of the minorities. Madison stated that "the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." *The Federalist No. 10*, at 54 (James Madison) (Cosimo Classics, 2006). At the time, Madison believed that factions would not be a serious problem in our large republican nation because "the influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. . . . A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State." *The Federalist No. 10*, at 62 (James Madison) (Cosimo Classics, 2006). Although this was a reasonable belief at the adoption of the Constitution, our history has generally been dominated by two political factions. Entrenched legislatures composed of lawmakers with an inherent self-interest in greatly limiting independents' and third parties' participation in the electoral process. Those legislatures have enacted overly restrictive ballot access requirements that have generally been upheld by deferential judicial review. The fear of controlling political factions espoused by the Founding Fathers has come true in the political system where ballot access restrictions have burdened independent and minor party candidates in favor of the two major parties, despite the American Peoples' desire for more choice on the ballot.

The people of this country are clearly demonstrating their disapproval with the major parties. Congress' approval rating is at a record low of eleven percent. Frank Newport, *Congress Ends 2011 With Record-Low 11% Approval*, (Dec. 19, 2011), http://www.gallup.com/poll/151628/Congress-Ends-2011-Record-Low-Approval.aspx (reproduced at App. 26). Overall approval of the two major parties, the Republican Party and the Democratic Party, has fallen to forty-three percent and forty-two percent respectively. Jeffery M. Jones, *Republican, Democratic Party Images Equally Negative*, (Sept. 30, 2011), http://www.gallup.com/poll/149795/Republican-Democratic-Party-Images-Equally-Negative.aspx (reproduced at App. 31). There can be no questions that large portions of the population are demanding more choices when they enter the voting booth. The rise in popularity of the Tea Party is a prime example of this shift. In fact, a majority of Americans believe a third party is needed due to the poor performance of the two major parties. Jeffery M. Jones, *Support for Third U.S. Party Dips, but Is Still Majority View*, (May 9, 2011), http://www.gallup.com/poll/147461/support-third-party-dips-majority-view.aspx (reproduced at App. 35). It is time for this country's ballot laws to reflect the

political wishes of the people. As the law stands now, independent and third party candidates face steep climbs to get to the ballot.

Many respected journalists have discussed the need for alternative candidates on the ballot. "If competition is good for our economy, why isn't it good for our politics?" Thomas L. Friedman, *Third Party Rising*, N.Y. Times, October 2, 2010, at D3. Describing the modern two-party political system Friedman states "we basically have two bankrupt parties bankrupting the country, the parties cannot think about the overall public good and the longer term anymore because both parties are trapped in short-term, zero-sum calculations, where each one's gains are seen as the other's losses." *Id.* Matt Miller of the *Washington Post* points out the fatal flaw of the two party system -- that the two sides fail to compromise, enuring to the detriment of the country. "Parties act this way because their core constituencies have a stake in a failed status quo." Matt Miller, *Why we need a Third Party*, Washington Post, September 25, 2011 at D1.

The significance of this issue even goes beyond third party and independent candidates. Restrictions have become so severe that even major party candidates are having difficulty getting access to the ballot. Newt Gingrich and Rick Perry, two major Republican candidates in the coming presidential election, were unable to secure a place on the Virginia primary ballot due to a 10,000-signature requirement. Anita Kumar, *Gingrich, Perry disqualified from Va. primary ballot*, Washington Post, (Dec. 24, 2011 3:40 AM EST), http://www.washingtonpost.com/blogs/virginia-politics/post/perry-disqualified-from-va-primary-ballot/2011/12/23/gIQA3BZNEP_blog.html (reproduced at App. 23). Notably, shortly after Rick Perry filed a lawsuit challenging the restrictive signature requirement, the Virginia Attorney General and other officials spoke out in favor of reforming Virginia's ballot access laws to allow the disqualified candidates to appear on the ballot. Krissah Thompson, *Republican candidates may get another shot at Virginia ballot for Super Tuesday*, Washington Post, (Dec. 31, 2011), http://www.washingtonpost.com/politics/republican-candidates-may-get-another-shot-at-virginia-ballot-for-super-tuesday/2011/12/31/gIQApdz0SP_story.html/ (reproduced at App. 20). When major party candidates are disqualified, legal reform is trumpeted, while disqualified independent candidates find no such relief. If major party candidates with significant support and financial backing are unable to get access to the ballot due to a 10,000-signature requirement, there is little hope for independent candidates to overcome such a burden. Petitioners Greene and Smith faced a much higher bar of 16,547 and 18,123 signatures respectively. In fact, the historical record demonstrates that Section 163-122(a)(2) operates to exclude North Carolina's class of unaffiliated congressional candidates and throttles their supporters' participation in the electoral process. With a single exception, no unaffiliated congressional candidate has ever been able to meet the requirements of Section 163-122(a)(2) in North Carolina. (App. 18)

Alexander Hamilton recognized that "the electors are to be the great body of the people of the United States." *The Federalist No. 57*, at 371 (Alexander

Hamilton) (Cosimo Classics, 2006). For the electors to serve this purpose, there must be the possibility that all citizens' views will be represented. Our current system, which is being reinforced due to the current state of ballot access law, ensures that only two specific groups are represented in opposition to the express desires of the American people. When independent and multiple smaller factions are allowed reasonable access to the debate, "it creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny." *The Federalist No. 57*, at 373 (Alexander Hamilton) (Cosimo Classics, 2006). To uphold the rights and political will of all American Citizens, this Court must reevaluate the current state of ballot access law. Accordingly, certiorari is proper.

II. Circuit courts have experienced difficulty in determining the proper standard of review to apply under the *Anderson v. Celebrezze* balancing test, thus necessitating clarification of the applicable doctrine.

Long standing precedent requires that courts use a balancing test when evaluating the constitutionality of ballot access restrictions. 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.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). This balancing test is intended to aid the court in determining what level of scrutiny to apply. A proper evaluation of the burden imposed by the law is crucial. When a ballot access law imposes a severe burden, it will be subject to strict scrutiny, requiring the regulation to be "narrowly drawn to advance a State interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). However, if the restriction is reasonable, the State's regulatory interests will justify the law. *Anderson*, 460 U.S. at 788.

Little guidance has been provided to aid lower courts in determining when a burden is severe and when it is not. As a result, many courts have expressed confusion and frustration in determining what the proper standard of review should be. The Eighth Circuit has noted that "'[b]allot access statutes are not susceptible of easy analysis, nor is the appropriate standard of review always easy to discern.' [N]o opinion from . . . the Supreme Court . . . has clearly defined the appropriate

standard for reviewing these constitutional challenges." *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (internal citations omitted). The Seventh Circuit has classified the *Anderson* decision as "functional, not turning on the form of words, and [has] therefore held it important to follow what the Supreme Court does rather than attempt to articulate any formal methodology." *Citizens for John W. Moore Party v. Board of Election Commissioners of the City of Chicago*, 794 F.2d 1254, 1257 (7th Cir. 1986). Confusion regarding the *Anderson* test cannot be allowed to persist, as the standard of review will often be determinative of whether the law will be upheld or struck down. See *Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006) (two percent signature requirement was reasonable so it was upheld), *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768 (7th Cir. 1997) (five percent signature requirement was rational and was upheld), *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (ten percent signature requirement imposed a severe burden and was found unconstitutional), and *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010) (one percent signature requirement imposed only a minimal burden and was found constitutional).

The confusion is manifest in determining the severity of the burden imposed, particularly with regard to how much weight should be given to pre-*Anderson* decisions. For example, an evaluation of independent candidates' historical ability to gain access to the ballot was given great importance in evaluating the burden imposed on a candidate's rights prior to the *Anderson* decision. *Storer v. Brown*, 415 U.S. 724 (1974); *see also Crawford v. Marion County Election Board*, 553 U.S. 181, 204-09 (2008) (Scalia, J., concurring); *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). After *Anderson*, courts have been unsure as to how much weight to give history. Some courts place significant weight on the historical evaluation. See *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (compared the relative ability of independent candidates to access the ballot before and after the signature requirement was enacted). Others make only brief mention of history and seemingly give it little weight in the *Anderson* analysis. See *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988). A historical evaluation may be crucial to determine the burden imposed by the signature requirement, but the law as it stands now is unclear.

Another pre-*Anderson* decision however, is still given significant weight. One case, *Jenness v. Fortson*, 403 U.S. 431 (1971), is often heavily relied upon to determine when a burden will be considered severe. See *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Circ. 1988), and *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). Such steadfast adherence to one pre-*Anderson* decision while another is used or disregarded seemingly at will, illustrates the circuit courts' confusion with the *Anderson* test. The confusion is particularly keen because both *Jenness* and *Storer* were relied upon in the *Anderson* Court's decision.

As discussed above, the need for independent and minor party candidates on the ballot is an issue of growing importance to the people of this nation. This makes

the need for a standard that is easy to apply ever more necessary. Certiorari is proper to clarify the existing law.

III. Contrary to this Court's policy against using a "litmus-paper test" for deciding ballot access issues, *Jenness* has become a de facto bright line test for evaluating the constitutionality of ballot access signature requirements.

Challenges to ballot access laws "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789 (citing *Storer*, 415 U.S. at 730). This guidance has been repeatedly affirmed in post-*Anderson* Supreme Court jurisprudence. See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 at 213-4 (1986), and *Crawford v. Marion County Election Board*, 553 U.S. 181 at 190 (2008). This policy formed the foundation of the complex *Anderson* balancing test that has become the basis for evaluating ballot access restrictions. *Anderson*, 460 U.S. at 789. Despite this firmly established guidance, case law from numerous circuit courts indicates that in the view of many courts, a bright line rule for constitutionality was drawn in *Jenness*. As restrictions that are not found to be severe are routinely rubber-stamped as justified by state interests such as requiring candidates to demonstrate a certain level of support, *Jenness*, 403 U.S. at 442, or preventing voter confusion and ballot clutter, *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-6 (1986), the use of *Jenness* as a bright line rule has been severely detrimental to independent and minor party candidates in the United States.

Despite having been decided before the *Anderson* balancing test was established, *Jenness*, in which the court upheld the constitutionality of a five percent signature requirement, has repeatedly been cited as justification to uphold equal or numerically lower signature percentage requirements. In the Seventh Circuit an Illinois law was upheld which required a new political party to obtain signatures from five percent of voters in order to gain access to the general election ballot. *Libertarian Party of Illinois*, 108 F.3d at 771. The court gives a summary of the *Anderson* test, but goes on to discuss cases that "present[] facts strikingly similar to those before us," including *Jenness*. *Id.* at 774. The court reasoned that since *Jenness* upheld a five percent signature requirement, it must conclude that "in light of *Jenness* . . . the [Libertarian Party of Illinois] cannot argue that the 5% petitioning requirement is severe on its face." *Id.*

Similarly, the Eleventh Circuit provided a summary of the *Anderson* test, but the actual analysis of the burden placed on unaffiliated candidates merely cites to *Jenness* and other cases upholding numerically higher percentage requirements. *Swanson*, 490 F.3d at 902-4. The court determined that "the Supreme Court has upheld even more restrictive signature requirements than Alabama's three-percent requirement," so the court "must conclude that Alabama's three-percent signature requirement is . . . reasonable." *Id.* at 904. Again, the circuit court gave lip service to *Anderson*, but based its decision on the *Jenness* five percent benchmark.

Further evidence of a de facto *Jenness* test is revealed when the same Georgia law at issue in *Jenness* was again challenged thirty-one years later. *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002). The court relied solely on *Jenness* to determine that the five percent signature requirement is constitutional. *Id.* at 1140-42. The decision contains no discussion under the *Anderson* test despite the fact that the *Anderson* test was not in place when the law was first examined in *Jenness*. Nor is there any substantive discussion of the potential for a change in the burden on independent candidates given political and legal shifts in the intervening thirty-one years.

The Petitioners' case is yet another example of the *Jenness* de facto bright line test. As affirmed by the Fourth Circuit court, "§ 163-122(a)(2) was not unconstitutional under the First Amendment, primarily because the Supreme Court of the United States has upheld a more restrictive ballot access percentage requirement [in *Jenness*]." (App. 3).

This blind adherence to *Jenness* and its progeny as a bright line rule dictating that five percent or less is automatically constitutional is contrary to the very purpose and policy of the *Anderson* balancing test. Bright line tests have been expressly forbidden. *Anderson*, 460 U.S. at 789. Courts are tasked with evaluating the burden of a ballot access restriction on a case-by-case basis to determine whether a "reasonably diligent independent candidate [could] be expected to satisfy the signature requirement." *Storer*, 415 U.S. at 742. Clearly, the determination should be founded on the facts of the case at hand, not what courts have upheld in the past and in different states. While a four percent requirement like the one at issue here may not be a severe burden in Georgia, it may be impossible to overcome in North Carolina. The only way to determine if this is so is to evaluate the facts and circumstances of the case at hand, not to simply look to unrelated cases to find a bright line answer. To do otherwise prevents proper evaluation of the specifics of the case, locale, and community directly affected by the ballot access restriction at issue. Certiorari is accordingly proper.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

APPENDIX