RECORD NO. 13-1368

In The

United States Court Of Appeals

For The Fourth Circuit

AL PISANO; NORTH CAROLINA CONSTITUTION PARTY; NORTH CAROLINA GREEN PARTY; NICHOLAS TRIPLETT,

Plaintiffs – Appellants,

v.

GARY O. BARTLETT, as Executive Director of the North Carolina Board of Elections; JOSH HOWARD, as Member of the North Carolina Board of Elections; RHONDA AMOROSO, as Member of the North Carolina Board of Elections; PAUL FOLEY, as Member of the North Carolina Board of Elections; MAJA KRICKER, as Member of the North Carolina Board of Elections; JOSHUA MALCOLM, as Member of the North Carolina Board of Elections,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-1368 Caption: Pisano, et al. v. Bartlett, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Al Pisano
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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

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

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Jason Huber Date: March 27, 2013

Counsel for: Appellants

CERTIFICATE OF SERVICE

****

I certify that on March 27, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s Jason Huber (signature) March 27, 2013 (date)

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No. 13-1368 Caption: Pisano, et al. v. Bartlett, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Constitution Party
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s Jason Huber Date: March 27, 2013

Counsel for: Appellants

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No. 13-1368 Caption: Pisano, et al. v. Bartlett, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Green Party
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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

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

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Jason Huber Date: March 27, 2013

Counsel for: Appellants

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No. 13-1368 Caption: Pisano, et al. v. Bartlett, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nicholas Triplett
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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

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

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Jason Huber Date: March 27, 2013

Counsel for: Appellants

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JURISDICTIONAL STATEMENT

On April 6, 2012, Appellants filed an amended complaint in the United States District Court for the Western District of North Carolina seeking declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988 asserting that North Carolina General Statute Sections 163-96(b)(3) and 163-96(a)(2) violate their First and Fourteenth Amendments rights to participate in the electoral process. This is an appeal from the district court's order denying Appellants' Rule 56(d) motion entered on October 18, 2012, and the final judgment and order entered on March 1, 2013, granting summary judgment to Appellees on all of Appellants' claims. Appellants filed their Notice of Appeal on March 20, 2013. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, and 1343(3). This Court has jurisdiction to hear and decide this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it denied Appellants' Rule 56(d) motion requesting that the court defer or deny ruling on Appellees' motion for summary judgment in order to allow the Appellants an opportunity to engage in discovery regarding essential information that was specifically identified, relevant, and existed, and that was within the knowledge and control of the Appellees.

2. Whether North Carolina's May 17 signature petition filing deadline for formation of new political parties violates the First and Fourteenth Amendments to the United States Constitution because, without justification by any sufficient governmental interest, the deadline imposes severe restrictions on new parties' ability to gather voter signatures and obtain a place on the presidential general election ballot.

3. Whether North Carolina's May 17 signature petition filing deadline for formation of a new political party violates the Equal Protection Clause of the Fourteenth Amendment because it places an additional, substantial burden on new parties that is not imposed on independent candidates or the major parties by requiring new parties to submit their petitions three and a half months before the major parties select their candidates and one month before independent candidates must submit their petitions.

STATEMENT OF THE CASE

Appellants North Carolina Constitution Party and Al Pisano filed their original complaint on March 27, 2012, in the District Court for the Western District of North Carolina. The North Carolina Green Party and Nicholas Triplett joined the action when the Plaintiffs-Appellants filed their amended complaint on April 6, 2012. The Plaintiffs-Appellants, asserted that North Carolina General Statute Sections 163-96(b)(3) and 163-96(a)(2) violate the First and Fourteenth

Amendment rights of new political parties and their supporters to meaningful and equal participation in the electoral process. The Appellants sought injunctive and declaratory relief.

Simultaneously with the filing of the original complaint, Plaintiffs-Appellants moved for a preliminary injunction against enforcement of a May 17th filing deadline for petitions by new party presidential candidates to qualify for the general election ballot. Appellees filed a responsive memorandum. The district court entered an order denying the Motion for Preliminary Injunction on May 10, 2012.

On May 29, 2012, Appellees-Defendants filed an Answer and Affirmative Defenses alleging that Sections 163-96(b)(3) and 163-96(a)(2) do not violate the Constitution of the United States.

On June 11, 2012, the parties filed their Certification and Report of Initial Attorney Conference pursuant to Fed. R. Civ. P. 26(f) and Local Rule 16.1(A). ("Report") J.A. 62. The Report states the Plaintiffs' desire to engage in discovery concerning the "potential burden on the State of North Carolina, the State Board of Elections, the County Boards of Elections and voters that would result from extending the May 17th deadline for filing signatures for new party ballot access and other matters relevant [to] the Plaintiffs' claim in their First Amended Complaint." J.A. 62.

During the conference Appellees indicated their desire to file a Motion for Summary Judgment. Appellants responded that any such motion would be premature as the parties have yet to engage in discovery and they would therefore file, in response, a Rule 56(d) request asking the district court to delay ruling on Appellees' summary judgment motion until the Appellants had an opportunity to develop a factual record. As a result, the parties agreed "discovery would not commence until after the Court rules on the Defendants' Motion for Summary Judgment or on the Plaintiff's Rule 56(d) motion which they anticipate filing by the end of June." J.A. 62.

Appellees then filed a Motion for Summary Judgment as to all claims on June 28, 2012, to which Appellants filed a timely responsive memorandum in which they asserted their Rule 56(d) arguments with the required supporting affidavits where Appellants Pisano and Triplett declared the need, at a minimum, to depose defendant Bartlett and to seek access to documents and data, within the defendants' control, concerning past efforts by minor political parties to gain access to North Carolina's general election ballot. J.A. 72 ¶ 4; 76 ¶ 4. After a conference call with the district court clerk, which is not in the record, where the clerk indicated that the plaintiffs should present their Rule 56(d) position in a motion rather than in their summary judgment response, Appellants then filed a separate Rule 56(d) motion and memorandum of law on August 23, 2012,

reiterating their need for discovery and referencing the same previously filed declarations which Local Rule 7.1(C)(3) permits.

The district court entered an order denying Appellants' Rule 56(d) Motion on October 18, 2012. Finding that Sections 163-96(b)(3) and 163-96(a)(2) were constitutional, the district court on March 1, 2013, granted Appellees' Motion for Summary Judgment on all claims and on the same day the clerk entered final judgment. Appellants timely filed their Notice of Appeal on March 20, 2013.

STATEMENT OF THE FACTS

Appellant North Carolina Constitution Party ("Constitution Party") is an organized political party that is affiliated with the national Constitution Party. J.A. 8 ¶ 3. Appellant Al Pisano is a member of, and Chairperson for, the state's Constitution Party. J.A. 9 ¶ 4. Appellant North Carolina Green Party ("Green Party") is an organized political party affiliated with the Green Party of the United States. J.A. 9 ¶ 5. Appellant Nicholas Triplett is a member of, and a Vice Chairperson for, the state's Green Party. J.A. 9 ¶ 6. Appellants sought to obtain a place on the North Carolina presidential ballot and to run presidential candidates for their respective political parties. J.A. 42 ¶ 3; 47 ¶ 3.

When Appellants filed their amended complaint, Appellee Gary O. Bartlett was the Executive Director of the North Carolina State Board of Elections (the "Board"), Appellee Larry Leake was the Chairman and a member of the Board,

Appellee Robert Cordle was the Secretary and a member of the Board. And Appellee Charles Winfree and Ronald G. Penny were also members of the Board. J.A. 9 ¶ 8-11. After Appellants filed their Notice of Appeal, the Board's composition changed. Josh Howard, Rhonda Amoroso, Paul Foley, Maja Kricker and Joshua Malcolm are the current Board members. And on May 15, at the expiration of Appellee Bartlett's term, Kim Westbrook Strach will replace him. On May 6, 2013, Appellants moved to substitute these parties accordingly.

North Carolina General Statutes Sections 163-96(a)(2) and (b)(3) provide the requirements that an organization must meet to qualify as a new political party through a petition process. The new party must collect signatures from registered and qualified North Carolina voters "equal in number to 2% of the entire vote cast in the State for Governor or for presidential electors," and the signators must include registered voters from each of at least four congressional districts in the state. N.C. Gen. Stat. § 163-96(a)(2). The petitions must be submitted to the county boards of elections by May 17 so they can be verified and submitted to the Board by June 1. N.C. Gen. Stat. §§ 163-96(a)(2), (b)(3). In the 2012 presidential election, the required number of signatures was 85,379. J.A. 17 ¶ 6.

In 1988, a letter from the North Carolina Office of the Attorney General recommended that the Board extend the filing deadline for new parties because the May 17 deadline could not pass constitutional muster. J.A. 37. The author took

into account the usual presumption of validity provided to state statutes and yet was compelled to conclude that the deadline was unconstitutional. J.A. 37. On April 8, 1988, in response to the Assistant Attorney General's assessment, the Board suspended the May 17 filing deadline and moved it to July 28. J.A. 38-39. The Board also resolved to recommend to the General Assembly that it modify the law in accordance with that extension. J.A. 38-39.

During the 2012 election cycle, Appellants were actively engaged in the signature gathering process in an attempt to meet the statutory petitioning requirements. J.A. 47-49 ¶¶ 4, 8; J.A. 42-45 ¶¶ 4, 8, 10. The Green Party has an estimated 250 official members in North Carolina, some of whom are not active, which reduces the total number of potential signature gatherers. J.A. 46 ¶ 2. The Green Party does not accept contributions from corporations or from Political Action Committees and thus cannot afford to pay petitioners but must rely on unpaid volunteers. J.A. 47 ¶ 5.

In its petitioning drives, the Constitution Party collects an average of only four to five signatures an hour because voters are often unfamiliar with their party and its platform. J.A. 44 ¶ 8. The Green Party estimates that a good signature gatherer can collect approximately twenty signatures an hour. J.A. 48 ¶ 6. Typically, only about 75% of signatures collected are valid. J.A. 48 ¶ 6.

Considerable explanation is usually required to inform potential signators about what they are signing. J.A. 42 ¶ 4. Many do not want to spend the time listening to lengthy explanations. J.A. 42 ¶ 4. Or the voter may believe that they have to vote for the petitioning party if they sign the petition, making them reluctant to sign. J.A. 48 ¶ 6. Signators must disclose their name, address, and birth date, which also adds to their reluctance. J.A. 48 ¶ 6; J.A. 44 ¶ 9. To make matters more difficult, the state disregards many signatures as invalid, which ultimately means Appellants must collect much more than the minimum number in order to meet the statutory requirements. J.A. 48 ¶ 6. The May 17 deadline prevents Appellants from gathering signatures when the public's interest in politics is at its peak and when the weather and summertime outdoor events create optimum conditions for petitioning. J.A. 47-48 ¶ 6; J.A. 43 ¶ 7.

Since institution of the current signature requirement in 1983, the Libertarian Party has qualified for the ballot by petition five times, in 1992, 1996, 1998, 2002, and 2008. J.A. 25 ¶ 7. The only other parties to qualify for the ballot since 1993 have been the Natural Law Party in 2000, the Reform Party in 2000 and 2004, and Americans Elect in 2012. J.A. 18 ¶ 9. The only new party that qualified for the 2012 presidential ballot was American's Elect. J.A. 18 ¶ 9. However, American's Elect spent more than $10,000,000 in 2012 on the petition process in multiple states. *Amended and Restated Bylaws of*

Americans Elect, Appendix A, at 21 (March 5, 2012), http://web.archive.org/web/20120328190453/http://static.americanselect.org/sites/files/official-documents/bylaws_2012-03-05.pdf.[1]

In 2012, the Republican candidate for president was nominated at the Republican National Convention, which was held on August 27 through August 30. J.A. 11 ¶ 23. The Democratic candidate for president was nominated at the Democratic National Convention, which was held on September 4 through 6. J.A. 11 ¶ 23.

SUMMARY OF THE ARGUMENT

A court must not grant summary judgment where the non-moving party has not had the opportunity to engage in discovery that is essential to its opposition of the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). Granting a party's Rule 56(d) motion for time to conduct discovery is appropriate where the party seeks information that is within the knowledge or control of the opposing party. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002). Additionally, a Rule 56(d) motion should be granted when "the party opposing summary judgment makes (1) a timely application which (2) specifically identifies (3) relevant information, (4) where there is some basis for

[1] The webpage Appellants originally cited to has since been removed following the 2012 election. The cited webpage is a cached version of that same page as it appeared on March 23, 2012.

believing that the information sought actually exists." *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir. 2006).

The district court's decision denying Appellants' Fed. R. Civ. P. 56(d) motion to deny or delay summary judgment constituted an abuse of discretion and should be reversed. Prior to the court's summary judgment ruling, Appellants had no opportunity to discover information that was essential to its opposition of Appellee's summary judgment motion. Such information included records and data regarding other new political parties that have attempted to gain ballot status for the presidential election, specifics regarding the State's justification for the May deadline, and exploration of possible alternative measures, namely later filing deadlines, that would enable the State to meet its interests without so heavily burdening Appellants' rights. At a minimum the court should have afforded Appellants the opportunity to depose defendant Bartlett to fully explore assertions made in his conclusory and self-serving affidavits. The information sought is undoubtedly relevant, actually exists, is within the Appellees' knowledge and control, and Appellants specifically and timely identified the information necessary to make their case in the parties' Rule 26(f) report, in their responsive memorandum to Appellees' motion for summary judgment, and in their Rule 56(d) motion and memorandum of law with supporting declarations.

Without it, the court crippled Appellants' ability to oppose Appellees' motion for summary judgment. Accordingly, the district court's denial of Appellants' Rule 56(d) constituted an abuse of discretion.

Laws that regulate ballot access implicate the rights to political expression and association protected by the First Amendment and incorporated in the Fourteenth Amendment's Due Process Clause. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). When a ballot access law imposes a heavy burden on those rights, the law must be narrowly drawn to advance a compelling state interest in order to survive constitutional scrutiny. *Burdick v. Takushi*, 504 U.S. 428 (1992).

Sections 163-96(a)(2) and (b)(3) of the North Carolina General Statutes violate the First Amendment because they create a substantial and unnecessary barrier to ballot access for new political parties seeking a place on the presidential election ballot. The Sections require new parties to submit their signature petitions to the county boards of elections by May 17 of the year of the presidential general election. Very few political parties have been certified for the ballot since the statute's enactment. Parties' historical ability, or as here, lack of ability, to obtain a place on the ballot is an important measure of the burden the deadline places on new parties. *Storer v. Brown*, 415 U.S. 724, 738, 742 (1974).

The early filing deadline imposes a severe burden on new parties' ability to successfully gather the required number of signatures. The petitioning process is

already extremely difficult for parties of limited resources and time. Considerable canvassing time must be devoted to explaining the parties' positions and purposes to potential signators. J.A. 44 ¶ 8; J.A. 48 ¶ 6. Voters are often reluctant to sign, believing that they must change their political affiliation or must vote for the candidate as a result of signing the petition. J.A. 48 ¶ 6. Many voters are also reluctant to sign because they must disclose personal information, such as their date of birth and home address. J.A. 48 ¶ 6; J.A. 44 ¶ 9. The early filing deadline also prevents parties from petitioning during the height of the election season, when political interest among voters is at its peak. J.A. 47-48 ¶ 6; J.A. 43 ¶ 7. As a result, the early filing deadline poses a heavy burden on Appellants, a burden that is not justified by any legitimate state interest.

The State has no compelling interest in maintaining such an early filing deadline. The weight of the State's interest in regulating a national election ballot is less than in controlling state and local elections. *Anderson*, 460 U.S. at 795. The traditionally relied upon interests in preventing ballot clutter, voter confusion, and requiring parties to demonstrate a modicum of support are more than sufficiently served by North Carolina's two percent signature requirement, one of the nation's highest. The State has offered no explanation as to how these interests are better served by requiring new parties to file their petitions nearly six months prior to the general election. The State's interests in regulating the national election

ballot thus do not justify the burden placed on new parties by the early filing deadline. Accordingly, the district court's grant of summary judgment in favor of Appellees should be reversed.

In addition, the early filing deadline applied to new parties violates the Equal Protection Clause of the Fourteenth Amendment because it places a substantial and needless burden on new parties that is not similarly imposed on independent candidates or major parties. While new parties must submit their signature petitions for review by May 17, independent candidates have a full month longer to do the same. In every other respect, the petition requirements are identical for new parties and independent candidates. *Compare* N.C. Gen. Stat. § 163-96 (new party petitioning requirements) *and* N.C. Gen. Stat. § 163-122 (independent candidate petitioning requirements). Both new party and independent presidential candidates seek placement on the ballot, both groups face the same petitioning difficulties, yet the State inexplicably and arbitrarily requires new party candidates to submit their signatures a full month early.

The early filing deadline also violates the Equal Protection Clause because it treats new parties differently than it does the major political parties without legitimate justification. The major political parties generally do not nominate their candidates until late August or early September, as little as two months before the general election. J.A. 11 ¶ 23. New parties, however, must solidify their place on

the ballot by May 17, nearly six full months before the general election. Given that the State allows the county boards of elections just two weeks after the petition deadline to verify and validate the 85,000+ signatures needed to obtain statewide ballot access, it is difficult to see why the state requires new party signature petitions to be submitted six months prior to the election. There is simply no legitimate reason to treat these groups so differently.

The State's mid-May deadline imposes, without justification, additional and heavy burdens on new parties that independent candidates and major party candidates do not have to bear. The early filing deadline in Sections 163-96(a)(2) and (b)(3) thus violates the Equal Protection Clause of the Fourteenth Amendment. At a minimum, the competing declarations of the parties create a genuine dispute of material fact and therefore the district court's summary judgment in favor of Appellees should be reversed.

ARGUMENT

STANDARDS OF REVIEW

This court reviews a district court's denial of a Fed. R. Civ. P. 56(d) motion to deny or delay discovery using an abuse of discretion standard. *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995).

This court reviews a district court's grant of summary judgment *de novo* and applies the same legal standard used by the district court. *EEOC v. Fairbrook Med.*

Clinic, P.A., 609 F.3d 320, 327 (4th Cir. 2010). In doing so, the court should only grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In making this determination the court must "view the facts and draw reasonable inferences in the light most favorable" to the non-moving party. *Id.* at 23.

DISCUSSION

I. The district court abused its discretion when it denied Appellants' Rule 56(d) motion to defer or deny ruling Appellees' motion for summary judgment in order to allow the Appellants an opportunity to engage in discovery.

"Summary judgment must be refused where the non-moving party has not had the opportunity to discover information that is essential to its opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). When reviewing a district court's denial of a Rule 56(d)[2] motion for more time to engage in discovery, the appropriate standard of review is abuse of discretion. *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195 (2006) (*citing Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995)). When there is a clear abuse of discretion or prejudice to

[2] The 2010 Amendments to the Federal Rules of Civil Procedure moved the subdivision on a motion to defer or deny summary judgment from 56(f) to 56(d), but did not significantly alter the provision's application. "Subdivision (d) carries forward without substantial change the provisions of former subdivision (f)." *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 563 (4th Cir. 2010) (*quoting* Fed. R. Civ. P. 56, advisory committee's note).

the moving party by the court's denial, then the denial will be reversed. *Ingle*, 439 F.3d at 195 (*citing Strag v. Bd. of Trustees*, 55 F.3d 943, 954 (4th Cir. 1995)). A district court is required to permit a party to engage in discovery where the information sought is essential to a party's summary judgment opposition, is within the knowledge and control of the opposing party, and where the party seeking discovery timely identifies the existing and relevant information. *Ingle*, 439 F.3d 196.

A. Considering the intensely factual nature of the applicable constitutional analysis of the Appellants' First and Fourteenth Amendment claims, the sought after information is essential to their ability to opposed summary judgment.

In *Ingle*, this Court held that the district court should have granted the plaintiff's 56(f) motion "[b]ecause th[e] evidence represented [the plaintiff's] principal opportunity to contradict the assertion that the district court found dispositive, the court should have allowed discovery." 439 F.3d at 196; *compare Nader*, 549 F.3d at 962 (because the information that plaintiff sought was not implicated in opposing summary judgment, the lower court did not abuse its discretion in denying the Rule 56(f) motion for additional discovery).

As more thoroughly developed in Part II.A., *infra*, the proper analysis in determining the constitutionality of an election law requires a careful balancing that must assess the character and magnitude of the burden created by the regulation, "must identify and evaluate the precise interests put forward by the

State as justifications for the burden," and must also "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *accord*, *e.g.*, *Norman v. Reed*, 502 U.S. 279, 289 (1992). This inquiry is obviously fact intensive and compels a party challenging or defending an election regulation to build a complete record to enable the court to conduct the required analysis.

The evidence Appellants sought to acquire through discovery focused on the three prongs of the *Anderson* analysis. First, Appellants wanted to obtain records and data regarding other minor parties that have attempted to obtain ballot status for presidential candidates. The relevance of such evidence is obvious; it would indicate the magnitude of the burden created by the May deadline, for the best measure of a law's restrictiveness is whether third parties have had a difficult or easy time meeting its requirements. *E.g.*, *Storer v. Brown*, 415 U.S. 724, 738, 742 (1974); *Mandel v. Bradley*, 432 U.S. 173, 177 (1977); *see also Crawford v. Marion County Elections Board*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring). The information gathered from such a probe could well have countered the district court's cavalier assumption that North Carolina's system that allows parties to begin gathering petition signatures at any time prior to the deadline minimizes the impact of the early deadline.

Second, Appellants wanted to depose defendant Gary Bartlett about the State's justifications for the May deadline. Appellants could hardly "evaluate the precise interests," including their "legitimacy and strength," *Anderson*, 460 U.S. at 789, without the ability to explore beyond the State's conclusory affidavits. And third, Appellants wanted to conduct discovery to determine whether alternative measures, namely much later filing deadlines, would enable the State to meet its interests without so heavily burdening petitioning rights, and why North Carolina continues to insist, when virtually no other state does, on the mid-May deadline for presidential candidates. The evidence sought by Appellants had, at a minimum, the potential to create a genuine issue of fact sufficient to defeat the defendant's summary judgment motion. It simply cannot be overlooked that Appellants had absolutely no opportunity to conduct discovery in a fact-sensitive case before the district court granted summary judgment.

Further, the district court could not properly determine the burden imposed by the May 17 deadline with an incomplete factual record. Not only were Appellants unable to gather evidence and question Appellee Bartlett about the assertions made in his affidavit, they also were denied the chance to demonstrate fully the burdens which the May 17 deadline impose because they were unable to discover facts about the success or failure of other minor party candidates to reach

the ticket. Appellants Triplett and Pisano both explained this in their supporting declarations the necessity of engaging in this discovery. J.A. 72, 73, 76, 77.

B. The information necessary to oppose summary judgment was within the Appellees' knowledge and control.

Granting a party's Rule 56(d) motion is appropriate when the party seeks information that is within the knowledge and control of the opposing party. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002); *accord Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005). In *Willis*, a plaintiff alleged that she had been unconstitutionally banned from a concert hall after town officials charged that her dancing was sexually provocative and offensive. *Id.* at 254-55. The plaintiff asserted numerous constitutional violations, including an equal protection claim that she had been arbitrarily singled out for banishment. *Id*. at 255. The plaintiff sought additional discovery following the defendant's motion for summary judgment, identifying in her supporting affidavit that she needed information relating to the existence of complaints made to the town regarding other dancers. *Id.* at 263. The lower court denied her motion for more time to engage in discovery. *Id.* at 256. On appeal, this Court reversed, holding that summary judgment was premature because the plaintiff had not been afforded the opportunity to demonstrate that others similarly situated to her had been treated differently. *Id.* at 263. Because the information she needed to prove her case – the dearth of other banished patrons or, if they existed, their identities --

was within the knowledge and control of the defendants, the Court concluded that the lower court abused its discretion in denying the motion for additional discovery. *Id*. at 263-64.

Similarly here, Appellants needed discovery to obtain, among other things, information within the knowledge and control of the Appellees as both Appellants Triplett and Pisano explained in their declarations. Most telling is the fact that the court denied Appellants the simplest and most straightforward method of discovering essential information—the opportunity to depose Appellee Bartlett about any State interests that purportedly justify North Carolina's unusually early filing deadline. J.A. 72 ¶ 4; J.A. 76 ¶ 4.

In addition, Appellants sought documents and data from the Appellees regarding other minor political parties' attempts to gain access to the North Carolina general election ballot. J.A. 72 ¶ 5; J.A. 76 ¶ 5. Appellees' agency, the North Carolina Board of Elections, is the repository for the State's election records, thus making Appellees *the* source for information about minor party efforts to seek ballot status. No other agency or entity would have comprehensive records regarding such electoral efforts.[3]

[3] If the Appellees lack such records, that fact could also be an important revelation. If there are few or no records indicating that minor parties have attempted to submit petitions, that would be evidence that the State's petitioning process is burdensome, even to the point that it convinces third parties not to even try. If the State does not maintain records of minor parties who attempt to petition but fail, that would be

C. In their declarations, the Appellants specifically identified sought after information that was relevant and existent.

Here, Appellants timely filed their Memorandum in Opposition to Summary Judgment with supporting declarations from Appellant Triplett and Pisano, establishing the motion was premature for all of the reasons stated above. J.A. 5. Thereafter Appellants again reiterated their need for discovery by filing a Rule 56(d) motion referencing, as permitted by local rule, their earlier declarations. J.A. 6. And even before summary judgment, Appellants stated in the Rule 26(f) report their need for discovery concerning "potential burden on the State of North Carolina, the State Board of Elections, the County Boards of Elections and voters that would result from extending the May 17 deadline for filing signatures for new party ballot access and other matters relevant [to] the Plaintiffs' claim in their First Amended Complaint." J.A. 62.

So on multiple occasions Appellants identified the specific information sought concerning any involved state interest and attendant burdens a later filing deadline would impose, relevant documentary and empirical evidence concerning minor political parties' success in petition gathering (or lack thereof) and requested, at a minimum, what is only fair—an opportunity to depose the key defendant. Having been denied this opportunity, the district court exposed

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evidence that the State lacks a factual basis for many of its assertions in this case.

Appellants to summary judgment by ambush and in so doing, abused its discretion. This court should therefore reverse the district court's order denying Appellants' request for discovery.

II. North Carolina's May 17 signature filing deadline for new political parties imposes a severe restriction on new party candidates' ballot access that is not justified by a sufficiently compelling government interest and therefore violates the First and Fourteenth Amendments to the United States Constitution.

A. Constitutional Framework

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Supreme Court provided the analysis courts should use when assessing ballot access restrictions. In doing so a 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.

Id. at 789. This Court later clarified this test to show that the scrutiny to which the law will be subject varies according to the severity of the burden on the rights in issue. While states are granted significant latitude in structuring their election laws, this power is not unfettered. When the state severely restricts individuals' First and Fourteenth Amendment rights, the "regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S.

428, 428 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Furthermore, even a rational law can fail if it advances only a minor state interest while imposing a moderate burden. *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215, 1221, n. 6 (4th Cir. 1995). Because election regulations are often cumulative and interrelated, "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974).

Following this Court's precedent in *McLaughlin*, 65 F.3d at 1221,[4] and as developed below, the district court appropriately identified strict scrutiny as the standard to apply to the early filing deadline at issue here. J.A. 95. Accordingly, the early filing deadline contained in Section 163-96 must be found unconstitutional if the law is not narrowly drawn to advance a compelling state interest that necessitates and outweighs the severe burdens placed on Appellants' First and Fourteenth Amendment rights.

[4] *See also, Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993) (strict scrutiny applies to laws that "make it difficult, but not impossible, for a new political party to obtain a position on the ballot.")

B. The early filing deadline imposes severe and undue burdens on the ability of new political parties to access the ballot by aggravating the inherent difficulties of signature gathering; burdens that are reflected in the historic rarity of new political parties qualifying for the presidential ballot in North Carolina.

i. *The early filing deadline compounds the inherent difficulties of signature gathering by preventing new political parties from collecting signatures at the height of the political season.*

Organizing a petition drive is a long, labor intensive process. Early filing deadlines that occur before the major parties and most minor parties[5] have announced their nominations for the presidential electoral ballot ignore the reality that political campaigning is a dynamic process. *See generally, Anderson*, 460 U.S. at 790. "[S]everal important third party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions." *Id*. at 792. New political parties, like Appellants here, are typically formed by "disaffected voters whose political beliefs run counter to the major parties' platforms." *Id*. at 793; *Accord, Council for Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997). Thus, the support necessary for gathering the requisite number of signatures often does not develop until the heat of campaign season when issues are more clearly defined and opposing candidates are identified. *Anderson*, 460 U.S. at 792.

[5] For example, in this case the Constitution Party did not nominate its candidates until mid-April 2012 – just a month before the North Carolina deadline. J.A. 11 ¶ 22. The Green Party did not hold its nominating convention until July 13-15 – two months after the deadline.

Early filing deadlines require new parties to petition when the election is remote, which makes it difficult to engage voters who are not yet focused on the campaigns. *Council*, 121 F.3d at 880. As the Supreme Court pointed out when striking down the March filing deadline in *Anderson*, "volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson*, 460 U.S. at 792.

The difficulties recognized in *Anderson* are precisely those that befall new parties in North Carolina as a result of the early filing deadline in Section 163-96. To qualify for the ballot under the North Carolina General Statutes, new political parties must collect signatures from registered and qualified North Carolina voters "equal in number to two percent (2%) of the entire vote cast in the State for Governor or for presidential electors." N.C. Gen. Stat. § 163-96(a)(1). The new party must submit at least 200 signatures from each of at least four congressional districts in the State. N.C. Gen. Stat. § 163-96(a)(2). The signatures must be submitted to the county board of election by May 17 so they may be verified before submission to the State Board of Elections by June 1. N.C. Gen. Stat. § 163-96(a)(2), (b)(3). In 2012, this meant that each new party had to collect at least 85,379 signatures. J.A. 17 ¶ 6.

The major political parties do not select their candidates for presidential office until the national conventions, which in 2012 occurred in August and September. J.A. 11 ¶ 23. The May 17 deadline for new parties to qualify for the ballot is well before most of the presidential candidates have been identified and well before the political platforms of the presidential candidates are defined. The middle of May is remote from the height of political campaign season making it difficult to engage voters as needed to meet the signatory requirement.

That signature gathering must be completed so far in advance of the presidential election serves to compound the inherent difficulties of the petitioning process. The Green Party estimates that a good volunteer petitioner can obtain about 20 signatures per hour.[6] J.A. 48 ¶ 6. Then, taking into account the fact that typically only 75% of signatures gathered are valid, at least 5,692 man-hours are needed to meet the statutorily required number of signatures. J.A. 48 ¶ 6. The Green Party has only an estimated 250 official members in the State, and as with any political party, not all members are active, further diminishing the pool of willing signature gatherers. J.A. 46 ¶ 2. As a result, the pool of potential petitioners is generally very small for a new political party in relation to the number of signatures they must gather. New parties typically cannot afford to pay

[6] The Constitution Party faces the additional challenge of voters who are unfamiliar with their party and platform. J.A. 44 ¶ 8. Therefore the Constitution Party estimates that their petition gathering efforts only secure four to five signatures per hour. J.A. 44 ¶ 8.

signature gatherers for their efforts. The Green Party does not accept corporate or Political Action Committee contributions, meaning they must rely almost exclusively on the efforts of unpaid volunteers to collect signatures. J.A. 47 ¶ 5..

Successful canvassing also requires a great deal of explanation to inform potential signators regarding what they will be signing. J.A. 42 ¶ 4. Many do not want to spend the time listening to a lengthy explanation. J.A. 42 ¶ 4. Often solicited voters mistakenly believe that they are committing themselves to voting for the party whose petition they are signing. J.A. 48 ¶ 6. Others do not like the idea of giving out their birthdate and other personal information on a petition. J.A 48 ¶ 6; J.A. 44 ¶ 9. All of these factors serve to increase the difficulty of petition gathering and reducing the number of valid, verifiable signatures actually collected. These innate difficulties in the petitioning process are only exacerbated by an unreasonably early filing deadline.

Appellants recognize, and do not challenge, the constitutionality of the signature requirement, which was upheld in *McLaughlin*, 65 F.3d at 1226. It is also established, however, that "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer*, 415 U.S. at 737. The extraordinarily burdensome early filing deadline at issue here, when combined with the constitutionally valid signature requirement, creates a unconstitutional restriction on Appellants' First and Fourteenth

Amendment rights. The early filing deadline must be struck down in order to remedy this burden.

ii. *The historical rarity of new parties qualifying for the presidential ballot in North Carolina evidences the severity of the burden placed on new parties.*

The Supreme Court recognizes that "[p]ast experience will be helpful, if not always an unerring, guide" to determine whether "a reasonably diligent independent candidate [could] be expected to satisfy the ballot access requirements." *Storer*, 415 U.S. at 743. This historical evaluation has been used across the circuits to determine whether ballot access restrictions are unduly burdensome by looking at the practical effect on independent candidates and new parties and the likelihood that they may gain access to the general election ballot. *See, McLaughlin*, 65 F.3d at 1221 (history reveals the burden imposed by North Carolina regulatory requirements); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008) (focusing on the state's inability to present a history of candidates able to meet the deadline); *Mandel v. Bradley*, 432 U.S. 173, 178 (1977) (Supreme Court remanded, directing the lower court to analyze whether past candidates were able to meet the requirements); *Council of Alternative Political Parties v. Hook*, 179 F.3d 64 (3d Cir. 1999) (upholding a filing deadline where numerous independent party candidates had appeared on the ballot).

In *Hook*, the Third Circuit Court of Appeals upheld a filing deadline for minor party nominations that fell fifty-four days after the filing deadline for major party nominations. *Id*. at 66. The court pointed to several factors supporting the deadline including that the state's interest in regulation was greater because the statutory requirement dealt with candidates for local or state office rather than national presidential office. *Id*. at 77-78. The court also relied heavily on the "empirical evidence demonstrat[ing] that . . . candidates were not hindered in their ability to satisfy the statutory requirements," that "over 100 alternative political party candidates appeared on the general election ballot," and that "from 1993 through 1996, 231 alternative party candidates" satisfied the deadline requirements. *Id*. At 77. History illustrated to the court that new parties and independent candidates were afforded a reasonable means to obtain a place on the ballot.

Even when some new parties and independent candidates have successfully met the qualifying requirements a deadline may still be found unconstitutional. The Eleventh Circuit Court of Appeals struck down an April 6 petition deadline for minor parties even though the State pointed to three electoral years when various numbers of minor parties qualified for the general election ballot. *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1575 (11th Cir. 1991).

In North Carolina, new parties rarely appear on the ballot. Since institution of the current signature requirement in 1983, the Libertarian Party has qualified by

petition five times, in 1992, 1996, 1998, 2002, and 2008. J.A. 25 ¶ 7. Aside from the Libertarian Party, the only other new parties to qualify for the presidential ballot since 1993 have been the Natural Law Party in 2000, the Reform Party in 2000 and 2004, and Americans Elect in 2012. J.A. 18 ¶ 9. The sparseness of new parties appearing on the presidential ballot points to the extreme difficulty of obtaining the required signatures in time to meet such an early deadline.

American Elect's recent appearance on the 2012 presidential ballot could be interpreted as evidence that the early filing deadline is not so onerous as to be insurmountable. In fact, Americans Elect is an outlier in North Carolina ballot access history. The group spent more than $10,000,000 in 2012 to gain ballot access in multiple states. *Amended and Restated Bylaws of Americans Elect*, Appendix A, at 21(March 5, 2012) http://web.archive.org/web/20120328190453/http://static.americanselect.org/sites/files/official-documents/bylaws_2012-03-05.pdf.

Few, if any other new parties have anything close to that level of resources to expend on signature gathering. As discussed *supra*, the Green Party does not accept donations from corporations or Political Action Committees. J.A. 47 ¶ 5. Instead they must rely on donations from individuals or the personal wealth of their presidential nominees, income streams that may be lacking prior to the deadline for securing a place on the ballot. J.A. 47 ¶ 5. It remains clear that new parties rarely

place their presidential nominees on the North Carolina general election ballot, and it is a reasonable inference that that sparsity can be attributed in significant measure to North Carolina's unusually early filing deadline.

iii. *The purported mitigating factors the district court relied upon do not serve to lessen the burden North Carolina's early filing deadline imposes on the Appellants.*

The district court relied heavily on several factors that it perceived as mitigating the burden placed on Appellants to such an extent that the burden is rendered negligible. These factors are that North Carolina: (1) sets no time limit on the time period in which signatures could be gathered; (2) does not preclude voters from signing petitions based on party affiliation; (3) does not restrict new parties seeking signatures from obtaining signatures from persons who signed other petitions; (4) does not restrict how many signatures could come from a specific geographic area; (5) does not restrict how many signatures can be submitted to attempt to meet the two-percent requirement; and (6) allows unlimited time to conduct the petitioning. J.A. 96-97.

First, factors one and six are the same point; that is, there is no time limit placed on when new parties can begin to gather signatures. That is true, but it means very little because for most all of the time period between elections, voter interest and knowledge about a far-off election are *de minimis*. In the years prior to the election year, no one knows who the major parties' likely nominees will be, no

minor party petitioner knows even his or her own candidates, no one knows what the election's issues are going to be, and there is no ability for new parties to engage in effective petitioning and no point to invest limited resources in the effort. Furthermore, as discussed *supra*, the early deadline itself severely limits when signatures may be gathered. New parties are prevented from gathering signatures during the height of election season, when interest in new parties is highest and petitioning can most effectively be done. Saying that they can start three years before that time is simply no mitigation for the early cut-off.

Second, North Carolina is hardly unique in permitting voters to sign any petition regardless of their party affiliation. In fact, no states limit petition signing according to the signer's political party. The only recent law that attempted to impose such a limitation, a regulation in Arizona that prohibited members of major parties from signing nominating petitions for an independent candidate, was struck down as unconstitutional in 1999. *Campbell v. Hull*, 73 F. Supp. 2d 1081 (D. Ariz. 1999).[7] (*Campbell* also invalidated Arizona's June 27th filing deadline for presidential candidates.) The *Campbell* court analogized the law before it to laws that require voters to change their party affiliation in order to nominate

[7] The only other such law that has existed was in Louisiana from 1918 to 1949. During that time, "no independent or third-party statewide or federal candidate, including a 1924 Progressive Party candidate who appeared on the ballot in every other state, was able to get a place on the Louisiana ballot." *Campbell*, 73 F. Supp. 2d at 1090.

independents or minor party candidates, laws that have regularly been ruled unconstitutional. *Id*. at 1091-92 (compiling cases). The ease or reasonableness of ballot access in North Carolina cannot be established, or even supported, by the fact that the State does not impose some onerous unconstitutional restriction that nowhere exists. This supposed mitigating factor is, in fact, no such thing.

Third, contrary to the district court's assertion, North Carolina does impose certain geographical restrictions on petitions. Section 163-96(a)(2) of the North Carolina General Statutes requires that the petitions "be signed by at least 200 registered voters from each of at least four congressional districts in North Carolina." While this restriction may be reasonable, its existence nevertheless rebuts the assertion that North Carolina has no geographical signature requirements and certainly does not serve to mitigate the burden caused by the early filing deadline.

The remaining two factors the district court relied upon are also unpersuasive as examples of North Carolina's beneficence in providing reasonable ballot access. The third factor, that North Carolina does not limit voters to signing one or a fixed number of petitions, and the fifth, that the State does not limit the number of signatures that may be submitted, simply refer to onerous or silly requirements that are rarely imposed anywhere. Indeed, only three states impose a cap on the number of signatures that a party or candidate can submit during the petitioning

process,[8] and appellants are aware of no case in which a cap has been enforced to limit a petitioner's access to the ballot. (That is, caps on the number of signatures, silly to begin with, would be difficult to enforce. How can a State tell a candidate whose submitted signatures did not produce the required minimum of valid signatures that he or she cannot either gather or submit more signatures? That would fail even the rational basis test.)

The district court's reasoning can thus be reduced to a *non sequitur*: North Carolina has not adopted other particularly burdensome procedures or the most burdensome scheme possible, so the current system is inherently reasonable and acceptable. Moreover, in looking at the totality of North Carolina's petitioning process, the district court totally ignored its most telling feature – that the State combines one of the earliest presidential deadlines in the country with one of the highest petition signature requirements. That combination is deadly to new parties' presidential aspirations.

iv. *Early filing deadlines similar to North Carolina's May 17 deadline have been struck down as unconstitutionally burdensome on candidates' First and Fourteenth Amendment rights.*

The Supreme Court and numerous other courts have overturned filing deadlines comparable to North Carolina's in presidential elections. *See Anderson v.*

[8] 10 Ill. Comp. Stat. 5/7-10(a); Cal. Elec. Code § 8062(a); Ohio Rev. Code Ann. § 3513.257(A) (West).

Celebrezze, 460 U.S. 780, 806 (1983) (March 20 filing deadline was not justified by state's minimal interest); *Greaves v. State Board of Elections of North Carolina*, 508 F. Supp. 78, 84 (E.D.N.C. 1980) (April 15 presidential filing deadline unconstitutionally burdened independent candidates' rights); *Nader v. Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2008) (June 9 deadline was successfully challenged); *LaRouche v. Burgio*, 594 F. Supp. 614, 616 (D.N.J. 1984) (April 10 presidential election filing deadline was struck down); *Anderson v. Morris*, 636 F.2d 55, 58-59 (4th Cir. 1980) (March 3 filing deadline for presidential candidates was overturned); *McCarthy v. Noel*, 420 F. Supp. 799, 803-04 (D.R.I. 1976) (August 12 presidential filing deadline was unfair and unnecessarily burdened candidates' rights*); MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977) (February 11 deadline was constitutionally deficient); *Anderson v. Hooper*, 498 F. Supp. 898, 905 (D.N.M. 1980) (March 4 deadline was unsupported by any state interest); and *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 110 F. Supp. 2d 1201, 1208 (D.S.D. 2000) (June 20 deadline for presidential petitions is unconstitutional); *Campbell, supra* (June 27 deadline was unconstitutional).

These cases demonstrate a judicial consensus that deadlines as early as North Carolina's, and sometimes far later, are unduly burdensome on the rights of minor party candidates and are therefore unconstitutional. In keeping with this long line of cases, North Carolina's early filing deadline must be struck down.

C. The severe burdens placed on Appellants' rights by the early filing deadline are not outweighed by the State's interests in avoiding voter confusion, ballot clutter, and ensuring efficiency in preparing the ballot in a presidential election, a reality previously acknowledged by the State Attorney General's Office.

i. *The North Carolina Office of the Attorney General has previously recognized that the early filing deadline is unlikely to pass constitutional muster.*

In a 1988 letter from the Office of the Attorney General to the North Carolina State Board of Elections, an Assistant Attorney General recommended that the Board extend the filing deadline for new parties because the May 17 deadline "simply will not pass constitutional muster." J.A. 37. The assessment was supported by ample federal case law that, even "tak[ing] into account the usual presumption of the constitutionality of state statutes, . . . virtually compell[ed] the conclusion that the [filing deadline] must give way to superseding federal consideration." J.A. 37. On April 8, 1988, in response to the Assistant Attorney General's constitutional assessment, the Board suspended the filing deadline until July 28, 1988. J.A. 38-39. In addition, the Board resolved to recommend to the General Assembly that it modify the law in accordance with the Board's extension. J.A. 38-39.

Appellees may argue that the Assistant Attorney General's letter should not be given weight because it was written in the context of a timely request by a new political party to extend the deadline after the party had already collected over

40,000 unverified signatures, a situation that is not analogous to that before this Court here. However, this argument ignores the fact that the Assistant Attorney General's determination that the deadline is unconstitutional is wholly unqualified or limited to the facts before him at the time. J.A. 37. Furthermore, the Assistant Attorney General recommended "that the State Board accept new party petitions *from any source* and afford ballot access to the candidates of *any qualifying new party* if adequate petitions are received by the [Board] by the [proposed] extended deadline." J.A. 37 (emphasis added).

Based on the Assistant Attorney General's letter, and the Board's subsequent suspension of the early filing deadline, it is clear that the May 17 deadline has long been on shaky constitutional grounds and that no recognized state interest is sufficient to justify the severe burdens placed on new parties' rights.

ii. *The State's interests in regulating the presidential election ballot are diminished.*

Elections of national significance such as the presidential and vice presidential election implicate broader public interest concerns that exceed the State's interest in regulating local or statewide elections. The president and vice-president

> are the only elected officials who represent all of the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. 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. . . . '[T]he pervasive national interest in the selection of candidates for national office . . . is greater than any interest of an individual State.

Anderson, 460 U.S. at 795. In essence, when a national election is concerned, the State's interest in regulating that election are diminished and subrogated to overriding national interests.

States have a recognized interest in requiring candidates to make a preliminary showing of "a significant modicum of support" in order to earn a place on the ballot. *Id*. at 788. While this is a recognized interest, it would seem that this interest is sufficiently served by the showing of support reflected in North Carolina's 2% signature requirement. It is difficult to comprehend how this interest is advanced by the State's early filing deadline, where the substantial signature requirement along with a later filing deadline would serve the same interest in a more narrowly tailored manner—a difficulty which the district court exacerbated by denying Appellants the opportunity to discovery relevant information entirely within Appellees' control.

States also have an interest in regulating ballot access to prevent ballot clutter, voter confusion, and to minimize frivolous candidates. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). These are generally recognized interests, but Appellees have advanced them with only a single, conclusory affidavit in support, and the

district court outright denied Appellants an opportunity to explore the validity of these interests through the discovery process. Moreover, the State's failure to produce actual evidence of voter confusion in North Carolina creates an inference that no such evidence exists. Finally, when applying a heightened scrutiny analysis, the onus is on the State to prove its case. "The burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). A court cannot be faithful to strict scrutiny by blithely accepting a State's summarily asserted interests as sufficient to outweigh fundamental rights. There must be evidence. *Id*.

III. North Carolina's May 17 early filing deadline for new party candidates violates the Equal Protection Clause of the Fourteenth Amendment because it places an additional, substantial burden on new parties that is not imposed on independent candidates or the major parties.

A. Regardless of whether new parties are similarly situated to established political parties for all purposes, the State has no legitimate reason for requiring new political parties to submit their petitions three and a half months before the established political parties select their candidates and nearly six months prior to the general election.

When considering an independent candidate filing deadline for a United States Senate election, this Court has said that a State may subject parties and independent candidates to burdens that are "similar in degree." *Woods v. Meadows*, 207 F.3d 708, 712 (4th Cir. 2000). Similar in degree means that the restriction must not substantially disadvantage nor favor one group over the other. *Id*. This reasoning logically extends to the differing ballot regulations between new and

established political parties. North Carolina's regulations place new parties at a significant disadvantage compared to established political parties.

Election Day for the President of the United States is held on the next Tuesday after the first Monday in November. 2 U.S.C. § 7. The major political parties, the Democratic Party and the Republican Party, generally hold their national conventions to nominate their presidential candidate in August or September prior to the general election. In 2012, the Republican National Convention was held on August 27 through August 30. J.A. 11 ¶ 23. The Democratic National Convention in 2012 was held on September 4 through September 6. J.A. 11 ¶ 23. With only two months between the last presidential candidate being selected and the general election, the State manages to make all necessary ballot preparations. Yet North Carolina requires new political parties to solidify their place on the ballot by May 17, nearly six months prior to the general election. Even taking into account the difficulties of petition signature validation, ballot preparation, and the general stringencies of conducting a statewide election, it is difficult to see why the Board requires six months of leeway.[9] This extensive gap in time is particularly perplexing given that only two weeks are required to verify all 85,000+ submitted signatures. N.C. Gen. Stat. § 163-96(b)(3).

[9] As discussed in depth *supra*, Appellants were not afforded the opportunity to explore this aspect of the case through discovery. Information regarding the uses to which the Board puts this time is wholly within the knowledge of the Appellees.

Furthermore, numerous states have new party petition deadlines far closer to the general election and yet they still manage to hold orderly elections. In fact, many new party filing deadlines are very close to the major parties' nominating conventions. *See* Alaska Stat. § 15.30.025 (early August. Ninety days before the presidential general election); D.C. Code § 1-1001.08(d) (early August. Ninety days before the general election); W. Va. Code §§ 3-5-24(a) and 3-5-22 (August 1 preceding the general election); Va. Code Ann. § 24.2-543 (late August. Seventy-fourth day before the presidential election); Tenn. Code Ann. § 2-13-107(a)(2) (early August. Ninety days prior to the date of the general election); R.I. Gen. Laws § 17-1-2(9)(iii) (August 1 of the same year as the general election); Or. Rev. Stat. § 248.008 (early August. Ninety days prior to the general election); Neb. Rev. Stat. § 32-716(1) (August 1 of the same year as the general election); Md. Code. Ann. § 4-102(c)(2)(i)(2) (early August. Not after the first Monday in August before the general election); Iowa Code § 44.4 (early August. Allowing non-party political organizations to be placed on the ballot eighty-one days before the general election); Idaho Code Ann. § 34-501(1)(c)(D) (petition must be filed on or before August 30 of even numbered years); Del. Code Ann. § 3301(e) (August 15 in the year of a general election). Even with only a few weeks, or mere days between the new party filing deadline and major party nominations, these States are still able to carry out orderly elections.

While the State may have some minimal interest in requiring new parties to qualify for the ballot slightly earlier than the date by which major parties must select their candidates, the State has no legitimate reason to require such drastically different deadlines.

B. Regardless of whether new parties are similarly situated to independent candidates for all purposes, the State has no legitimate reason for imposing a more stringent deadline on new parties to qualify for a place on the ballot as compared to independent candidates, who must follow an otherwise identical petitioning process.

The process by which independent candidates qualify for the presidential ballot is in almost every respect identical to the process applicable to new parties. To qualify for the ballot, an independent candidate's petitions "must be signed by qualified voters of the State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor."[10] N.C. Gen. Stat. § 163-122(a)(1). The independent candidate's "petition must be signed by at least 200 registered voters from each of four congressional districts in North Carolina."[11] *Id*. In a manner identical to that applied to new party candidates, "[n]o later than 5:00 p.m. on the fifteenth day preceding the date the

[10] Compare the new party petitioning requirement, where the petition must be "signed by registered and qualified voters in this State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor." N.C. Gen. Stat. § 163-96(a)(2).

[11] Compare the new party petitioning requirement, where "the petition must be signed by at least 200 registered voters from each of four congressional districts in North Carolina." N.C. Gen. Stat. § 163-96(a)(2).

[independent candidate's] petitions are due to be filed with the State Board of Elections, each petition shall be presented to the chairman of the board of elections of the county in which the signatures were obtained."[12] *Id*. The only discernible difference between the ballot access scheme applying to independent candidates is that the signatures must be turned in to the Board by "the last Friday in June."[13] *Id*. In 2012, this meant that independent candidate petitions had to be turned in to the county boards of elections by June 14, 2012, almost a full month after the May 17, 2012, deadline for new party petitions.

Given that the ballot access scheme for new party candidates is identical to the one governing independent candidates, there appears to be no rational reason why the State would require new parties to turn in their petitions a full month earlier than independent candidates. The early filing deadline is an arbitrary, baseless requirement that places a severe burden on new parties that is not present for independent candidates. The early filing deadline prevents new parties from petitioning in late May and early June when the weather is

[12] Compare the new party petitioning requirement, where the new party "shall submit the petitions to the chairman of the county board of elections in the county in which the signatures were obtained no later than 5:00 P.M. on the fifteenth day preceding the date the petitions are due to be filed with the State Board of Elections." N.C. Gen. Stat. § 163-96(b)(3).

[13] Compare the new party petitioning requirement, where validated signatures must be submitted to the Board by "the first day of June." N.C. Gen. Stat. § 163-96(a)(2).

ideal for outdoor petitioning, most colleges are still in session, and when some of the last presidential primaries are taking place resulting in increased public political interest. The State has no legitimate interest in denying such opportunities to one group of aspiring presidential candidates, while granting them to another.

The differential treatment also undercuts any argument by the State that it needs a May 17 deadline to accomplish any legitimate purpose.

CONCLUSION

The district court abused its discretion in denying Appellants' Rule 56(d) motion, depriving Appellants of the opportunity to engage in necessary discovery. Appellants were entitled to, and timely asked for, an opportunity to seek information that was essential to opposing Appellees' motion for summary judgment; information that was within Appellees' knowledge and control. The sought-after information was specifically identified, relevant, and existent, and could have been obtained through depositions and other discovery. For these reasons, this court should reverse the district court's denial of Appellants' Rule 56(d) and remanded instructing the district court to afford Appellants a reasonable opportunity to conduct discovery.

This Court should also reverse the district court on the merits because it erred in granting summary judgment to Appellees. Sections 163-96(a)(2) and 163-96(b)(3)'s early filing deadline for formation of new political parties imposes a heavy and unconstitutional burden on Appellants' First and Fourteenth Amendment rights to meaningful and fair participation in the electoral process. Furthermore, North Carolina's early filing deadline irrationally discriminates against new parties by forcing them to secure their place on the ballot far earlier than independent candidates and well before major parties are required to nominate their candidates in violation of the Equal Protection Clause. Even absent discovery, the competing declarations at the least create a genuine dispute of material fact concerning the parties' competing interests. For these reasons, the court should reverse the district court's judgment and remand this case for further proceedings.

REQUEST FOR ORAL ARGUMENT

In light of the significant burdens placed upon new political parties created by Sections 163-96(b)(3) and 163-96(a)(2) of the North Carolina General Statutes, the importance of First and Fourteenth Amendment ballot access rights that are at stake, and the essential information that will be gained through the discovery process in this case, Appellants respectfully request oral argument.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Dated: May 13, 2013

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I hereby certify that on May 13, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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