

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**No. 13-1368**

**AL PISANO; NORTH CAROLINA CONSTITUTION PARTY;  
NORTH CAROLINA GREEN PARTY; NICHOLAS TRIPLETT,**  
*Plaintiffs – Appellants,*

**v.**

**KIM WESTBROOK STRACH, 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.*

**Appeal from the United States District Court for the  
Western District of North Carolina, at Charlotte.  
Graham C. Mullen, Senior District Judge. (3:12-cv-00192-GCM).**

**PETITION FOR REHEARING OR  
REHEARING *EN BANC***

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## Introduction

The plaintiffs are petitioning for a rehearing or a rehearing *en banc* because this court's February 27, 2014, opinion affirming the district court's denial of the plaintiffs' Rule 56(d) discovery request is in direct conflict with two of its published opinions—a conflict which this court never addressed.

### I. Argument

The plaintiffs wage an as-applied First and Fourteenth Amendment challenge to North Carolina's May 17 deadline by which new political parties must submit their petitions to the North Carolina Board of election in order to form a new political party.

Assessing the burdens which North Carolina's May 17 deadline impose, and the state's regulatory interest it purportedly serves, is an intensely fact based inquiry; one that requires a careful balancing of the parties' respective interests and asserted injuries. Anderson v. Celebreeze, 460 U.S. 780, 789 (1983).

In order to meet its burden, the plaintiff sought discovery on the following: (1) production of any state records regarding minor parties' attempts to gain ballot access for presidential candidates in North Carolina; (2) a deposition of Gary Bartlett, then Executive Director of the North Carolina State Board of Elections, in order to flesh out the states' asserted justifications for the May 17 deadline; and (3)

information from officials in other states concerning the impact of later filing dates on the election process.

This court found the district court did not abuse its discretion in denying the plaintiffs discovery because: (1) the record contained some evidence of minor parties' ballot access efforts but the plaintiffs "simply want more"; (2) the existence of unsuccessful minor party attempts to gain ballot status, "by itself would not create a genuine issue of material fact"; (3) the plaintiffs' belief that defendant Bartlett's self-serving and conclusory affidavit statements provides only ephemeral support for the May 17 deadline does not warrant exploration in a deposition because that "goes to the merits of their claim" not whether the district court properly denied discovery; and (4) the district court provided the plaintiffs time to attempt to collect affidavits from other states' election officials.

However, this court's dismissive discovery rationale directly conflicts with two very recent opinions which the plaintiffs brought to the court's attention in two Rule 28(j) letters. (Doc: 31 and 40).

First, in Greater Balt. Ctr. For Pregnancy Concerns, Inc., 721 F.3d 264 (2014) this court found the district court abused its discretion in denying the defendants' discovery request concerning the plaintiffs' First Amendment challenge to a municipal ordinance requiring limited service pregnancy centers to provide clients

with a disclaimer that a center does not provide referrals for abortion or birth control services.

There, like here, the First Amendment analysis required the development of a sufficient factual record in order for the defendants to demonstrate a genuine dispute of material fact. Further, this court found the district court erred when it “merely accepted the Center’s description of itself, and then assumed that all limited-service pregnancy centers share the Center’s self-described characteristics.” 721 F.3d at 282.

This error is strikingly similar to the district court’s reliance on defendant Bartlett’s conclusory statements concerning North Carolina’s interests and electoral regulatory burdens concerning the May 17<sup>th</sup> deadline. It is a similarity which this court did not discuss.

Second, in McCray v. Maryland Department of Transportation, Maryland Transit Admin., 741 F.3d 480 (2013), the plaintiff brought an action alleging her termination violated the Americans with Disability Act--an action requiring, like the plaintiffs’ claims here, the development of a factual record. But the district denied her Rule 56(d) discovery request and dismissed her claim. In reversing, this court noted the plaintiff did not have the opportunity to depose her supervisors and had no information on how they chose to keep some positions and terminate

others. And, “Without such information, it would be impossible for her to make an argument that she was fired because of discriminatory reasons.” 741 F.3d at 484.

These words have equal force here. It was “impossible” for the plaintiffs to fully explore North Carolina’s purported interests and burdens without the benefit of compulsory discovery. This court is correct, that the plaintiffs “simply want more” because it is more evidence that they need in order to make their case.

Further, it is of no significance that the district court provided the plaintiffs with time to collect affidavits from other states’ election officials. Relying on the benevolent intentions of distant, non-party state election officials is simply not a discovery surrogate.

And while providing the plaintiffs’ discovery would have imposed burdens of time and expense on the defendants, the district court had plenty of tools at its disposal to limit the same. By comparison, consider how the district court handled discovery regarding the plaintiffs’ challenge to Virginia’s resident witness requirement for nominating petitions in Libertarian Party of Virginia v. Judd, 718 F.3d 308 (2014). There, despite the fact that the dispute was time-sensitive, the district court still granted the plaintiffs’ a thirty day discovery period. Here, even absent a time sensitive nature of the plaintiffs’ claims, the district court did the exact opposite.

## II. Conclusion

Therefore this court should grant the Plaintiffs' Petition for Rehearing or Rehearing En Banc, because its opinion conflicts with the above cases and this conflict was never resolved.

/s/ Jason E. Huber

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### **Certificate of Filing and Service**

I hereby certify that on March 13, 2014, 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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