No. _____

In the
Supreme Court of the United States

KYLE KOPITKE,

Petitioner,

v.

KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit decision requiring *all* independent candidates to file their ballot access qualifying petitions by the date of North Carolina's March primary election impermissibly conflicts with this Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) in which the Court held that a March filing date for *presidential* candidates was unconstitutional.

II. Whether the Fourth Circuit erred in applying a litmus test in determining the constitutionality of the number of ballot access petition signatures required of a presidential candidate or other statewide candidate while failing to follow the Sixth and Eleventh circuits in evaluating the burden established by the statute by reference to the historical record of success in satisfying the statute's signature requirements.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner, presidential candidate KYLE KOPITKE, and respondent, KAREN BRINSON BELL, Executive Director of the North Carolina State Board of Elections, are the only parties having an interest in these proceedings[1]. Neither party is a corporation having a parent corporation or a publicly held corporation owning 10% or more of its stock.

[1] Gregory Buscemi and William Clark were also plaintiffs and appellants in the proceedings in the District Court and Fourth Circuit. However, neither of these parties has any interest in this Petition for Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kyle Kopitke respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated July 6, 2020.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit [Pet. App. A-1] is published at 964 F.3d 252. The opinion of the Fourth Circuit denying petitioners petition for rehearing *en banc* [Pet. App. A-33] is unpublished. The district court's memorandum opinion and order granting the State's motion to dismiss [Pet. App. A-22 and Pet. App. A-32] are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2020. [Petition Appendix A-1] A timely petition for rehearing *en banc* was denied on August 3, 2020. [*Id.* A-33] This petition is timely as it is within the time established by the Court's administrative order entered March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States . . . ."

> North Carolina General Statute § 163-122. Unaffiliated candidates nominated by petition.
>
> (a) Procedure for Having Name Printed on Ballot as Unaffiliated Candidate. - Any qualified voter who seeks to have the voter's name printed on the general election ballot as an unaffiliated candidate shall:

> (1) If the office is a statewide office, file written petitions with the State Board of Elections supporting the 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 day of the primary election and must be signed by qualified voters of the State equal in number to one and a half percent (1.5%) of the total number of voters who voted in the most recent general election for Governor.

STATEMENT OF THE CASE

This case was initiated on August 20, 2019, with the filing of a complaint in which Petitioner Kyle Kopitke and others challenged (among other things) the constitutionality of North Carolina General Statute (herein "NCGS") § 163-122(a)(1) which sets forth (a) the formula for determining the ballot access petition signature requirement for independent candidates to be voted on by the voters of the entire state and (b) the required filing date for those petitions. On September 10, 2019, the plaintiffs filed a motion for a preliminary injunction.

On October 1, 2019, North Carolina filed a response to the plaintiffs' motion for an injunction and filed a motion to dismiss wherein it asserted that the plaintiffs had failed to state a cause of action under Fed. R. Civ. P. 12(b)(6).[1] The primary basis for North Carolina's motion to dismiss was that Petitioners could not prevail on their claim because the Fourth Circuit had previously, in *Pisano v. Strach,* 743 F.3d 927 (4th Cir. 2014), upheld the constitutionality of an "analogous" statute governing the petition signature requirement and filing date requirement for the recognition of a *new political party*. The district and circuit courts both ruled for the State even

[1] North Carolina also argued that the plaintiffs lacked standing to bring this action. This contention was rejected by both the district court and the Fourth Circuit.

though the facts in this case are materially different from those presented in *Pisano* and the statute whose constitutionality was challenged in this case was different from the statute at issue in *Pisano.*[2]

In their pleadings for and against the grant of the State's motion to dismiss, all parties recognized the general applicability of the balancing test established in *Anderson v. Celebrezze,* 460 U.S. 780 (1983). However, the plaintiffs argued that because NCGS § 163-122(a)(1) imposed a *severe* burden on Mr. Kopitke's rights as a presidential candidate, the applicable standard of assessing his claims was *strict scrutiny*.

In an opinion dated November 22, 2019, the district court ruled that the Plaintiffs had standing. However, in reliance on *Pisano*, the district court concluded that the burden imposed by NCGS § 163-122(a)(1) was only "modest" and adopted the State's argument and dismissed the case. On November 25, 2019, the plaintiffs filed their timely notice of appeal.

On July 6, 2020, the Fourth Circuit entered its decision upholding the ruling of the district court. On July 9, 2020, plaintiff/appellants filed a petition for rehearing *en banc.* That petition was denied on August 3, 2020.

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[2] Significantly, the lower courts relied on *Pisano* is spite of the fact that the Fourth Circuit expressly held that comparing candidate and party qualifying requirements was like comparing apples to oranges *Buscemi v. Bell,* 964 F.3d 252, 265 (4th Cir. 2020). The impropriety of basing a *candidate* ballot access dispute on a decision involving a *party* ballot access question was specifically emphasized by the Fourth Circuit's recognition that "[t]he attempt to form a new political party and the act of seeking office as an unaffiliated candidate are entirely different endeavors." *Id.*

In support of the contention that the petition signature requirement for Mr. Kopitke is overly burdensome, Kopitke submitted evidence establishing that, of all the states where candidates actually qualify by petition, North Carolina has the second highest presidential candidate petition signature requirement in the nation, and its signature requirement is almost twice the requirement of the next highest state. Kopitke also submitted evidence (the expert report of Richard Winger) establishing that only one candidate had *ever* satisfied North Carolina's petition signature requirement.[3] Kopitke also submitted evidence that in the past one-hundred years only nine presidential candidates have <u>ever</u> satisfied <u>any</u> state's petition signature requirement in excess of 5,000 signatures.

REASONS FOR GRANTING THE WRIT

Introduction:

The right to vote is the most important right possessed by citizens in a democratic society. However, the right to vote means little if states are allowed to impose insurmountable barriers to any candidate's access to the ballot. Even conceding that reasonable barriers to ballot access are necessary and appropriate, states continue to impose ballot access barriers whose <u>only</u> real purpose is to limit voter choices to the candidates of recognized political parties. As discussed *infra*, the ability of states to exclude independent *presidential* candidates from their ballots is especially problematic. As the final arbiter of the constitutionality of ballot access statutes, this Court has a special responsibility to police state practices relating to ballot access by independent presidential candidates.

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[3] Billionaire presidential candidate Ross Perot qualified for inclusion on the North Carolina general election ballot in 1992.

The Development of the *Anderson* Test:

The modern history of Supreme Court decisions in ballot access cases is generally traceable to *Williams v. Rhodes*, 393 U.S. 23 (1968) in which the Court held that Ohio's petition signature requirement for the *recognition of a new party* was unconstitutional. In discussing the analytical requirements for assessing the constitutionality of the challenged statute the Court said:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." 393 U.S.at 30.

Three years later, in *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court upheld the constitutionality of a Georgia candidate ballot access statute that required candidates to submit petitions containing the signatures of five percent (5%) of the number of voters registered to vote for the office in question in the last general election. The *Jenness* standard was quickly applied to determinations of the constitutionality of *formula* for establishing signature petition requirements for both candidate ballot access and for recognizing new political parties. However, the courts did not completely abandon the "facts and circumstances" approach to constitutionality analysis, and as late as 1982 this Court continued to apply the somewhat nebulous "standard" applied in *Williams*.[4] Then, in *Anderson v. Celebrezze,* 460 U.S. 780 (1983),

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[4] *See e.g. Clements v. Fashing*, 457 U.S. 957 (1982)

> "Our ballot access cases … focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability

the Court announced a unifying standard for analyzing the constitutionality of ballot access statutes. The *Anderson* test provides that:

> "[The court] must first consider the character and magnitude of the asserted injury [5] to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." 460 U.S. at 789.

In announcing this procedural standard the Court expressly rejected the application of any litmus test in favor of an analysis of the facts applicable to each situation. Specifically, the *Anderson* balancing test is introduced with the statement that:

> "State's election laws [] cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." 460 U.S. at 789 (Citations omitted)

In making this statement it is clear that the Court was negating any reliance on prior decisions establishing "bright line" tests, such as the standard established in *Jenness v. Fortson* that distinguished constitutional from non-constitutional statutes. Moreover, the Court made it clear that courts are required to consider each element of its test. Specifically, in stating its balancing test the *Anderson* court repeatedly

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> of political opportunity.'"457 U.S. at 964 (plurality opinion), quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

5 For simplicity, the "character and magnitude of the asserted injury" is generally referred to, and is referred to herein as, the "burden" imposed by a challenged statute.

used the word "must" and stated that "[o]nly after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." 460 U.S. at 789. These facts establish that there is nothing elective about compliance with all the requirements of the *Anderson* test. However, in *Anderson* the Court recognized one significant fact affecting the application of its general test. Specifically, the Court explained:

> "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest for the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. 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. "460 U.S.at 794-95.

In making this statement, this Court established the principle that the constitutionality of ballot access statutes must be determined "as applied" when they are challenged by a presidential candidate.

Discussion:

In Re: Question #1:

The Fourth Circuit erred in failing to follow the holding in *Anderson v. Celebrezze* when evaluating the constitutionality of a March ballot access petition filing date for a *presidential* candidate.

In *Anderson v. Celebrezze, supra*, this Court expressly held that it is unconstitutional for Ohio to require *presidential* candidates to file their statements of candidacy in March because the filing date was unreasonably far in advance of the

national presidential nominating conventions. This holding was based on two related conclusions.

The first conclusion was that the constitutionality of statutes relating to ballot access by independent *presidential* candidates must be evaluated under standards that give less deference to the state than when the same statute is applied to other candidates. That is, in states such as North Carolina, where the same statute applies to both presidential candidates and other statewide candidates, the constitutionality of a statute has to be examined "as applied" when challenged by a *presidential* candidate such as Petitioner.

The second *Anderson* holding was that a March filing deadline for presidential candidates occurred too early in the election cycle and too far in advance of party *presidential nominating conventions*. In *Anderson*, the Court emphasized the importance of providing for the emergence of independent candidates *after* they know who the party candidates are and what the party platforms are. Petitioner Kyle Kopitke sought ballot access as an independent candidate and was, in all relevant respects, similarly situated to the Petitioner in *Anderson v. Celebrezze*.

In this case, the Fourth Circuit did not even acknowledge that *Anderson* had held March filing deadlines to be unconstitutional. Instead, it simply announced that: "We evaluate the appropriateness of a filing deadline in relation to the date of the [state] primary election." *Buscemi v. Bell,* 964 F.3d 252, 263 (4th Cir. 2020). This conclusory pronouncement by the Fourth Circuit lacks any references to any

authority[6] or any discussion justifying it. More importantly, this conclusory statement is inconsistent with *Anderson* in which the Court pointedly ignored the relationship between the March filing date and the date of the Ohio primary elections and based its analysis on the relationship between the March filing date and the dates of the presidential nominating conventions.

Furthermore, the Fourth Circuit ignored the existence of *Anderson*'s "presidential candidate exception" and its mandate that the constitutionality of a statute *as it is applied to presidential candidates* is subject to different considerations than when the constitutionality of the same statute is appraised *as it is applied to other candidates*. Therefore, rather than examine the constitutionality of presidential candidate filing date relative to *when national party candidates are nominated*, the Fourth Circuit only considered the constitutionality of the filing deadline based on the temporal relationship between the filing date and *the date of the state's primary election* which is the filing date for all candidates. In other words, the Fourth Circuit ignored the basis for the holding in *Anderson* and evaluated the "*facial"* validity of the challenged statute instead of conducting the mandatory "*as applied*" analysis based on the fact that this case involved a *presidential* candidate.

Finally, the Fourth Circuit ignored the fact that new parties have until June to become recognized and do not have to identify their candidates, including

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[6] Concededly, some states have independent candidate filing deadlines the coincide with the dates of their primary elections. However, none of those states hold primary elections as early as North Carolina and none of the cases considering the constitutionality of these practices involved president candidates.

presidential candidates, until July. That is, the court ignored the Petitioner's argument that requiring him to file his ballot access qualifying petitions by the date of the state's March primary violated principles of equal protection.

Only the Supreme Court has the authority to overrule the precedent established by its ruling in *Anderson*. *See United States v. Hatter,* 532 U.S. 557, 567 (2001) ("[I]t is this Court's prerogative alone to overrule one of its precedents.") In ruling as it did, e.g. ignoring the reasoning and holding in *Anderson*, the Fourth Circuit flouted the supremacy of this Court's ruling in *Anderson*. Accordingly, certiorari should be granted so that the Court can determine whether the Court's holding in *Anderson* compels reversal of the Fourth Circuit's ruling or whether the Court will adopt the ruling of the Fourth Circuit as a new standard.

In Re: Question #2:

The Fourth Circuit erred in ignoring the reasoning and holdings of the Eleventh and Sixth circuits and determining the constitutionality of North Carolina's candidate petition signature requirement based on the application of a litmus test while ignoring the historical record of demonstrating the burden of satisfying the statutory requirements.

In *Jenness v. Fortson*, *supra*, this Court upheld the constitutionality of a statute requiring a candidate to submit petitions containing the signatures of at least five percent of the number of registered voters at the last general election for the office in question. For almost five decades, the courts have measured the "burden" prong of the *Anderson* test exclusively by reference to the *formula* approved in *Jenness.* That is, notwithstanding *Anderson*'s rejection of a litmus test, the courts have placed significant emphasis on *Jenness* in determining the extent to which an

individual candidate petition signature requirement imposes an unconstitutional burden. In particular, in this case the Fourth Circuit concluded the challenged statute did not impose a severe burden solely because the *formula* in the challenged statute was less than the formula approved in *Jenness*. *See Buscemi v. Bell*, 964 F.3d at 264 ("Because North Carolina's 1.5% signature requirement falls below these acceptable thresholds, the state's signature requirement by itself does not constitute a severe burden."). Other circuits have also upheld candidate petition signature requirements solely because the challenged statute was found to be constitutional under the *Jenness* standard. *See, e.g., Miller v. Lorain County Bd. of Elections,* 141 F.3d 252 (6th Cir. 1998).

In *Green Party of Ga. v. Kemp,* 171 F. Supp. 3d 1340 (N.D. Ga. 2016), *aff'd per curium*, 674 Fed. Appx. 974 (11th Cir. 2017) the court analyzed the constitutionality of a Georgia statute that would have required presidential candidates to submit approximately 50,000 petition signatures. The court held that this represented a sever burden requiring the application of strict scrutiny. The court examined the historical record of success in satisfying Georgia's statute and held that the *number* of signatures required imposed an unconstitutional burden. Significantly, the statute that was held to be unconstitutional in *Green Party of Ga.* would have been constitutional if the Georgia court and the Eleventh Circuit had applied the holding in *Jenness v. Fortson.*

In a similar vein, in *Graveline v. Johnson*, 336 F. Supp. 3d 801 (E.D. Mich. 2018), *grant of preliminary injunction aff'd*, 747 Fed. Appx. 408 (6th Cir. 2018) the

court determined that Michigan's 30,000 petition signature requirement for a candidate to be voted on statewide imposed such a severe burden that strict scrutiny was required. Based on evidence that no candidate had satisfied the requirement in more than thirty years, the court determined that the statute was unconstitutionally burdensome and Michigan was enjoined from enforcing its statutory signature requirement.[7]

The North Carolina statute at issue in this case would have required statewide candidates to submit petitions containing 71,454 signatures—far more than the number *Green Party of Ga.* and *Graveline* held to be unconstitutionally burdensome and to require analysis under strict scrutiny. As was the case in *Green Party of Ga.* and *Graveline,* the historical record established that the North Carolina statute imposed a virtually impossible burden on statewide candidates[8].

Only this Court has the power to determine whether it is proper to evaluate the constitutionality of the burden imposed by a statute by reference to data analyzing the adequacy of lower signature requirements. Accordingly, certiorari should be granted so that the Court can address the conflict between the circuits and the proper standard for appraising the burden imposed by a candidate ballot access statute.

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[7] The district court subsequently entered a permanent injunction. *Graveline v. Benson,* 430 F. Supp. 3d 297 (E.D. Mich. 2019). That ruling in on appeal.

[8] Significantly, the same evidence—state and national compilations of historical evidence of ballot access—was relied on by the courts in *Green Party of Ga.* and *Graveline.* However, that same evidence was ignored by the lower courts in this case.

Equally relevant is the fact that the decisions below were based primarily on the standards established in *Jenness v. Fortson*. That is, the lower courts effectively ruled that *Jenness v. Fortson* constituted a litmus test even though the use of a litmus test was expressly rejected in *Anderson v. Celebrezze*. The lower courts' action is particularly egregious in light of the fact that (a) this case involved a *presidential* candidacy and (b) the Eleventh Circuit expressly rejected the application of the *Jenness* test when presidential candidacies are involved.

The significance of the "presidential candidate exception" was first recognized in *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985) in which the Eleventh Circuit reviewed a district court dismissal of a challenge to the petition signature requirements. The district court had relied on *Jenness v. Fortson*, 403 U.S. 431 (1971), and *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir.), *cert. denied*, 454 U.S. 865 (1981) which had upheld higher petition formula than were in place when *Bergland* was decided. However, the Eleventh Circuit emphasized that neither of the cases the lower court had relied on had involved a challenge by a *presidential candidate.* More importantly, the court said that the authorities the district court had relied on did "not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." 767 F.2d at 1554. That is, the Eleventh Circuit rejected the litmus test established by *Jenness v. Fortson* and held that the balancing test set forth in *Anderson v. Celebrezze* was the required standard. In other words, a prior decision holding a statute constitutional based on the application of *Jenness* <u>*is not a bar to a subsequent action*</u>

requiring analysis under the Anderson test.[9] A comparison of the Fourth Circuit's ruling in this case and the Eleventh Circuit's decision in *Bergland* establishes an additional conflict between the circuits regarding the significance of the *Anderson* standard as applied to *presidential* candidates.

Anderson unambiguously established that the constitutionality of statutes governing ballot access by presidential candidates must be analyzed under different standards than those that are applied to non-presidential candidates. However, while the Eleventh Circuit, in *Bergland*, emphasized the importance of this requirement, the Fourth Circuit ignored this mandate. Therefore, there exists a split in the circuits regarding the standard for analyzing the constitutionality of candidate petition signature requirements as they apply to independent presidential candidates.

It is Essential for This Court to Resolve the Questions Presented

The right to vote for the candidate of one's choice is arguably the most important right enjoyed by American citizens. In today's tumultuous political environment, few election-related issues are more frequently litigated than those relating to the rights of ballot access by new parties and independent candidates. Nonetheless, it has been almost forty years since this Court has considered a case involving ballot access and the constitutionality of impediments to ballot access.

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[9] *Bergland* is particularly significant because it involved a presidential candidate and it expressly rejected reliance on the *Jenness* litmus test standard and held that the *Anderson* test requires an analysis of the difficulty in satisfying a statutory ballot access requirement.

This Court has both the responsibility and authority to establish its primacy by enforcing its rulings when lower courts deviate from the substance and reasoning of a controlling opinion. Accordingly, it is essential that this Court address the Fourth Circuit's failure to acknowledge or be bound by this Court's holding, in *Anderson v. Celebrezze,* regarding the (un)constitutionality of March filing dates for independent presidential candidates.

This Court also has both the responsibility and authority to resolve conflicts that arise when different Circuits construe the Court's rulings in materially different ways. A fundamental principle of jurisprudence is that the same legal standard must mean the same thing wherever it is applied. For this reason, one of the primary roles of this Court is to establish national uniformity in the analytical procedures to be employed in federal courts. Splits in the circuits threaten the continuing viability of the *Anderson* test as the unifying standard for determining the constitutionality of ballot access statutes, and it is up to this Court to return uniformity to the application of the *Anderson* test.

This Case Is Uniquely Appropriate as the Vehicle for Resolving Issues of Great Public Importance.

As discussed *supra*, the *Anderson* test has accomplished its purpose of establishing the standard procedure for analyzing the constitutionality of statutes relating to the mechanics of party recognition and candidate ballot access. This fact is made evident by the fact that the Court has not seen fit to review the requirements of the *Anderson* test since they were announced almost forty years ago. However, there now exist differences between circuits regarding numerous critical aspects of

the *Anderson* test and how it is applied. The most significant ballot access issues on which the circuits are split are present in this case. Therefore, this case represents the ideal vehicle for addressing the issues on which there is a divergence in the lower courts and for re-establishing a uniform standard for constitutional analysis of election-related statutes.

CONCLUSION

The *Anderson* balancing test is almost uniformly accepted as the "go-to" standard for evaluating the constitutionality of ballot access statutes. However, significant differences exist in how the test has been applied by the various district and circuit courts. The need for national consistency in the application of a test which was obviously intended to be *the* standard for evaluating the constitutionality of ballot access statutes requires that the inconsistencies associated with the application of the test be resolved by this Court. This case represents the ideal vehicle for addressing these issues. All the issues on which there are splits in the circuits are present in this case, and a ruling by the Court on the issues presented will return uniformity to the analysis of ballot access statutes. Therefore, for the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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