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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2355

GREGORY BUSCEMI; KYLE KOPITKE; WILLIAM CLARK,

Plaintiffs - Appellants,

v.

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

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Terrence W. Boyle, Chief District Judge. (7:19-cv-00164-BO)

Submitted: May 18, 2020 Decided: July 6, 2020

Before MOTZ, KEENAN, and HARRIS, Circuit Judges.

Affirmed as modified by published opinion. Judge Keenan wrote the opinion, in which Judge Motz and Judge Harris joined.

Alan P. Woodruff, LAW OFFICES OF ALAN WOODRUFF, Southport, North Carolina, for Appellant. Joshua H. Stein, Attorney General, Paul M. Cox, Special Deputy Attorney General, Nicholas S. Brod, Assistant Solicitor General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

BARBARA MILANO KEENAN, Circuit Judge:

To regulate its elections and the placement of candidates' names on election ballots, North Carolina has established certain qualification requirements for candidates not affiliated with a political party (unaffiliated candidates) and for candidates whose names are not printed on the ballot (write-in candidates). *See* N.C. Gen. Stat. §§ 163-122, -123.[1] Unaffiliated candidates who wish to have their names appear on the general election ballot in North Carolina must (1) be "qualified voter[s]," (2) collect a certain number of signatures of other qualified voters, and (3) submit those signatures to the state Board of Elections by the date of the primary election. *Id.* § 163-122(a). Write-in candidates also must collect a minimum number of voters' signatures before the general election, and any votes cast for a write-in candidate who has failed to collect the required number of signatures will not be counted. *Id.* § 163-123.

The plaintiffs, two unaffiliated candidates and one voter seeking to cast votes for write-in candidates, argue that these requirements violate their First and Fourteenth Amendment rights. The district court dismissed the complaint for failure to state a claim. The court concluded that the challenged requirements impose only a modest burden on the rights of candidates and voters, which is justified by the state's important interest in regulating elections.

Upon our review, we hold that the plaintiffs lack standing to challenge two requirements at issue, namely, that an unaffiliated candidate be a "qualified voter" and that

[1] The North Carolina statutes at issue were recodified after the complaint was filed. We cite the current versions of the relevant state statutes.

a write-in candidate submit a certain number of signatures before votes cast for that write-in candidate will be counted. And, although two plaintiffs have standing to challenge North Carolina's signature requirements and filing deadline for unaffiliated candidates, we agree with the district court that these election laws impose only a modest burden that is justified by the state's interest in regulating elections. We therefore affirm the district court's judgment dismissing the plaintiffs' claims, relying in part on different reasons than those expressed by the district court.

I.

We begin with an overview of the North Carolina election laws that are material to this case. To be placed on the general election ballot as a candidate for public office, an unaffiliated candidate must satisfy three requirements. *See* N.C. Gen. Stat. § 163-122. First, the candidate must be a "qualified voter" (the qualified voter requirement). *Id.* § 163-122(a). Although the statute does not define the term "qualified voter," the plaintiffs allege in their complaint that the term refers to a person who lives, and is registered to vote, in North Carolina.

Second, an unaffiliated candidate must collect a minimum number of signatures from individuals who are qualified to vote for a given office. *See id.* § 163-122(a)(1)-(2). An unaffiliated candidate in a statewide election, including an election for President of the United States, must collect the signatures of at least 1.5% of the total number of voters who voted in the last gubernatorial election. *Id.* § 163-122(a)(1). An unaffiliated candidate in a districtwide election, including an election for the United States House of

Representatives, must collect the signatures of at least 1.5% "of the total number of registered voters in the district." *Id.* § 163-122(a)(2). Third, an unaffiliated candidate must submit these signatures by the date of the primary election, which this year was held on March 3, 2020. *Id.* §§ 163-1(b), -122(a)(1)-(2), -213.2.

Write-in candidates for public office in North Carolina face different requirements. *See id.* § 163-123. Among those requirements, the state only will count votes cast for candidates who have collected a certain number of voter signatures before the general election (the write-in candidate signature requirement). *Id.* § 163-123(f). These numerical requirements fall in a range between 100 and 500 signatures, depending on the office at issue. *Id.* § 163-123(c).

Three individuals initiated the present case in the district court. Plaintiff Kyle Kopitke is a Michigan resident seeking placement on the 2020 general election ballot in North Carolina as an unaffiliated candidate for President of the United States. Plaintiff Gregory Buscemi is a North Carolina resident seeking placement on the same ballot as an unaffiliated candidate for the United States House of Representatives. And finally, plaintiff William Clark is a North Carolina resident who wishes to cast votes for write-in candidates for every office in North Carolina's general election.

Kopitke, Buscemi, and Clark (collectively, the plaintiffs) filed a complaint in the district court under 42 U.S.C. § 1983 against Karen Bell, in her official capacity as the Executive Director of the North Carolina State Board of Elections (the Board). The complaint contained three main allegations. First, Kopitke and Buscemi alleged that the signature requirements and the filing deadline for unaffiliated candidates place an

unconstitutional burden on their First and Fourteenth Amendment rights. Next, Kopitke asserted separately that the qualified voter requirement violates the Constitution by effectively barring out-of-state residents from running for federal office. *See* U.S. Const. art. II, § 1, cl. 5; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Finally, Clark alleged that the signature requirement for write-in candidates places an unconstitutional burden on Clark's right to vote.

The plaintiffs moved for a preliminary injunction, asking the district court to enjoin the Board from enforcing the challenged requirements and to direct the Board to include Kopitke and Buscemi on the November 2020 general election ballot. In response, the Board moved to dismiss the case for lack of jurisdiction and for failure to state a claim. The district court granted the Board's motion to dismiss. The court held that the plaintiffs had standing but had failed to state a valid claim. Because the court found that the plaintiffs could not succeed on the merits of their claims, the court also denied the plaintiffs' motion for a preliminary injunction. The plaintiffs now appeal from the district court's dismissal of their electoral law challenges; they have not appealed the court's denial of their request for injunctive relief.

II.

We begin with the question whether the plaintiffs have standing to bring their claims. Although typically we will not address issues raised by an appellee that has not filed a cross-appeal, *see Am. Roll-On Roll-Off Carrier, LLC v. P & O Ports Balt., Inc.*, 479 F.3d 288, 295-96 (4th Cir. 2007), we must assure ourselves of subject matter jurisdiction

and may address standing sua sponte,[2] *see Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011). Accordingly, we review de novo the legal question whether a plaintiff has standing to bring a claim. *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019). In making this assessment, we accept all allegations in the complaint as true and construe those allegations "in the light most favorable to the plaintiff." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017).

Article III of the Constitution provides that federal courts may consider only "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. To establish an injury sufficient to confer standing to bring suit under Article III, a plaintiff must plausibly allege: (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These requirements for standing ensure that the plaintiff has "a personal stake in the outcome of the controversy." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In the present case, we focus on the first and third requirements for Article III standing, namely, injury in fact and redressability.

First, the plaintiff's "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The "threatened injury must be certainly impending," and "[a]llegations of possible future injury" are

[2] In its response brief, the Board argues that the plaintiffs lack standing, but has not filed a cross-appeal on that basis.

insufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks and citation omitted). An injury "reli[ant] on a highly attenuated chain of possibilities[] does not" qualify as being "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).

When a plaintiff challenges the constitutionality of a statute, the plaintiff must show that "there is a 'realistic danger' that" the plaintiff "will 'sustain[] a direct injury' as a result of the terms of the" statute. *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 241 (4th Cir. 2019) (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "[A] credible threat of enforcement is critical" to establishing an injury in fact. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018). And prior enforcement of the challenged statute is "[t]he most obvious way to demonstrate a credible threat of enforcement in the future." *Id.*

Next, regarding redressability, a plaintiff must show that the court has the power to grant the plaintiff's requested relief, and that such relief would redress the plaintiff's injury. *See K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 116-17 (4th Cir. 2013) (concluding that the appellant's injury was not redressable, because the Court was "powerless to provide the very relief" the appellant requested, namely, reversing a preliminary injunction directed against both the appellant and a non-appealing party); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion); *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) ("[T]here is no redressability if a federal court lacks the power to issue [the plaintiff's requested] relief."). When determining the scope of a "court's remedial power," "we assume that [a] claim has legal merit." *M.S.*, 902 F.3d at 1083

(citation omitted); *see White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460-61 (4th Cir. 2005). With these principles in mind, we turn to address each of the plaintiffs' claims.

A.

We look first to whether Michigan resident and aspiring presidential candidate Kopitke has alleged a sufficiently concrete injury to challenge the qualified voter requirement. Kopitke argues that North Carolina General Statute § 163-122(a), which requires that an unaffiliated candidate be a "qualified voter," is unconstitutional as applied to his candidacy for the presidency. Although the statute does not define the term "qualified voter," *see id.* § 163-122, Kopitke alleges that a "qualified voter" is an individual "who satisfies the statutory requirements to vote in North Carolina and has registered to vote." Kopitke is registered to vote in Michigan and, thus, maintains that he is not a "qualified voter" who can satisfy the requirements for being placed on the ballot as an unaffiliated candidate for President. Kopitke accordingly contends that the qualified voter requirement conflicts with the candidacy requirements for federal office enumerated in the Constitution. *See* U.S. Const. art. II, § 1, cl. 5; *U.S. Term Limits, Inc.*, 514 U.S. at 805.

In response, the Board agrees that if Kopitke's definition of "qualified voter" is accurate, the statute would be unconstitutional because states may not impose requirements on candidates for federal office other than those mandated by the Constitution. However, the Board submits that the term "qualified voter," as used in Section 163-122(a), is not limited only to voters registered to vote in North Carolina. And the Board further contends

that Kopitke lacks standing,[3] because the Board never has enforced the qualified voter requirement to exclude unaffiliated candidates from appearing on the ballot due to their nonresident status.

We agree with the Board that Kopitke lacks standing to challenge the qualified voter requirement as applied to him, because he has failed to allege "a credible threat of enforcement." *Abbott*, 900 F.3d at 176. The Board has stipulated that it has not prevented, and will not prevent, Kopitke from appearing on the ballot because of his nonresident status. The Board already has accepted Kopitke's request for a petition to collect voters' signatures, despite his nonresident status. And, crucially, Kopitke has not alleged that the Board ever has interpreted the qualified voter requirement to exclude nonresident, unaffiliated presidential candidates. To the contrary, Ross Perot, an unaffiliated candidate for President in 1992, appeared on North Carolina's general election ballot, although he was not a North Carolina resident. Given this history, as well as the Board's present assurances that it will not enforce such a requirement against Kopitke, Kopitke has failed to allege "a credible threat of enforcement" to demonstrate standing to challenge the qualified voter requirement. *Abbott*, 900 F.3d at 176. Thus, we conclude that Kopitke lacks standing to assert this claim.

[3] The Board did not challenge Kopitke's standing to pursue this claim in the district court, and the court did not address this issue. Instead, the court credited the Board's assertion that individuals other than North Carolina residents may run for federal office as unaffiliated candidates, and dismissed Kopitke's claim. We ordered supplemental briefing addressing the question whether Kopitke has standing to challenge the qualified voter requirement.

B.

Next, we consider whether Clark, a registered voter who wishes to cast his votes for write-in candidates, has standing to challenge the signature requirement for such candidates. Under North Carolina General Statute § 163-123, only write-in candidates who have collected a certain number of voter signatures will be approved to have their votes counted. Clark argues that this requirement infringes on his constitutional rights generally, and suggests that he has a right to cast a "protest vote" that will be counted.

We conclude that Clark lacks standing to advance this claim. Clark's generalized allegation of harm is too speculative to constitute an "actual or imminent" injury necessary to confer Article III standing. *Lujan*, 504 U.S. at 560. Notably, Clark does not allege that he wishes to vote for any particular write-in candidates who have failed to secure the required number of signatures. Nor does Clark allege that votes he previously cast were not counted because he voted for specific write-in candidates who failed to comply with state law requirements. Thus, Clark's claim of injury fails because it depends on the speculative proposition that he may wish to support yet unknown candidates who might fail to secure the number of signatures required by Section 163-123.

Our conclusion that Clark lacks standing is not affected by the Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). There, the Supreme Court addressed the merits of a plaintiff's claim that his inability to cast a "'protest vote' for Donald Duck" infringed on his right to vote. *Id.* at 438. The plaintiff in *Burdick* had standing to make that claim because Hawaii had banned all write-in votes and, thus, the plaintiff's vote for Donald Duck would not be counted. *Id.* at 430, 432. In rejecting the merits of the plaintiff's

claim, the Court explained that the plaintiff's right to vote was unaffected because a "protest vote" is not cast for the purpose of electing a candidate, but merely "to voice . . . generalized dissension from the electoral process." *Id.* at 441.

Unlike the plaintiff in *Burdick*, Clark has not alleged that all write-in votes will not be counted. And, based on the allegations in his complaint, Clark ultimately may cast his votes for candidates who have complied with the write-in candidate signature requirement, eliminating any claimed injury.[4] Therefore, we conclude that Clark's alleged injury is too speculative to constitute an "actual or imminent" injury in fact to establish standing. *Lujan*, 504 U.S. at 560. Accordingly, we conclude that Clark has failed to plead sufficient facts to establish standing.

Dismissal for lack of standing, however, requires that a complaint be dismissed without prejudice because a court that lacks jurisdiction necessarily lacks the "power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013). Accordingly, we affirm the district court's judgment, but modify the dismissal of Clark's claim and Kopitke's "qualified voter" claim to reflect a dismissal without prejudice. *See Moore v. Frazier*, 941 F.3d 717, 725 (4th Cir. 2019) ("[W]e can affirm [the district court's] decision to dismiss the complaint on any ground apparent on the record."); *Thomas v.*

[4] Because Clark does not allege a past injury, we need not address his reliance on our decision in *Dixon v. Md. State Admin. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989), *abrogated in part by Burdick*, 504 U.S. at 432. The plaintiffs in *Dixon* had suffered the injury of having their write-in votes rejected, *id.* at 778, whereas Clark's injury may never occur.

Salvation Army S. Territory, 841 F.3d 632, 642 (4th Cir. 2016) (modifying a judgment to reflect a dismissal without prejudice).

C.

We next consider the claims of Kopitke and Buscemi challenging North Carolina's signature requirements and filing deadline for unaffiliated candidates. They seek a court order directing the Board to place their names on the general election ballot without meeting any signature requirement or filing deadline, contending that a lesser signature requirement and a later filing date would be inadequate remedies for their injuries.

As an initial matter, we reject the Board's contention that the plaintiffs lack standing to assert these claims. Contrary to the Board's contention, the asserted injuries are redressable, because the district court has the power to grant the relief sought.[5] It is well-settled that a court has equitable authority to order that a candidate's name be placed on an election ballot. *See McCarthy v. Briscoe*, 429 U.S. 1317, 1322-23 (1976); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). Although a court should consider whether a candidate has "community support" before ordering that the candidate's name be added to a ballot, the court has broad equitable authority to order such relief. *McCarthy*, 429 U.S. at 1323. The appropriateness of any remedy will be decided after a determination of the merits of the claim. *See id.* at 1322-23; *Williams*, 393 U.S. at 34-35. Accordingly, regardless

[5] We agree with the parties that, with respect to these claims, Kopitke and Buscemi have satisfied the other two requirements for standing, namely, that they have alleged injuries in fact, and that their injuries are traceable to the Board's conduct.

whether Kopitke and Buscemi ultimately obtain relief on the merits, we conclude that their injuries are redressable for purposes of establishing standing.

Addressing the merits of their claims, Kopitke and Buscemi contend that North Carolina's signature requirements and filing deadline for unaffiliated candidates place an unconstitutionally severe burden on their First and Fourteenth Amendment rights to run for office. Conceding that they cannot meet any reduced signature requirement by any date, they contend that the signature requirement of 1.5% of the relevant voter population is too high, and that the filing deadline on the date of the primary election is too early. They argue that the Board has failed to advance precise state interests that would justify imposition of these burdens.

In response, the Board contends that the challenged requirements for unaffiliated candidates impose only a modest burden, because courts have upheld higher signature requirements and equivalent filing deadlines. According to the Board, this modest burden is justified by the state's important regulatory interest in preventing ballot overcrowding. We agree with the Board's position.

We review de novo a district court's ruling on a motion to dismiss for failure to state a claim.[6] *McCaffrey v. Chapman*, 921 F.3d 159, 163 (4th Cir. 2019). In conducting our analysis, we construe all "facts in the light most favorable to the plaintiff[s]." *Id.* at 164 (citation omitted).

[6] The plaintiffs argue that the district court improperly treated the motion to dismiss as a motion for summary judgment by addressing the merits of the plaintiffs' claims. We disagree with the plaintiffs' assessment of the record and conclude that the district court applied the correct standard for a motion to dismiss.

We begin with a review of the relevant legal principles. Any restrictions on access to the ballot necessarily "implicate substantial voting, associational[,] and expressive rights protected by the First and Fourteenth Amendments." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995). However, states have the power to regulate the time, place, and manner of their own elections, *see* U.S. Const. art. 1, § 4, cl. 1, to ensure that "some sort of order, rather than chaos, . . . accompan[ies] the democratic processes," *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Accordingly, in evaluating a challenge to a ballot-access law, courts

> must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 434 (citation omitted).

When election laws "impose a severe burden on ballot access," those laws "are subject to strict scrutiny," and will be upheld only if the laws are "narrowly drawn" to support a compelling state interest. *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (citation omitted). Election laws that impose only a "modest" burden will be upheld if the state can "articulate" its "important regulatory interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 716, 719 (4th Cir. 2016) (citations omitted). A "state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). "When deciding whether

a state's filing deadline is unconstitutionally burdensome, we evaluate the combined effect of the state's ballot-access regulations." *Pisano*, 743 F.3d at 933.

In *Pisano,* we upheld a North Carolina law requiring a group of voters seeking to establish a new political party (1) to obtain signatures of at least 2% of the total number of voters who voted in the last gubernatorial election, and (2) to meet this requirement by mid-May, one week after the state's primary election. *Id.* at 929-30. We held that, when viewed together, these two requirements were permissible because they imposed only a "modest" burden on ballot access. *Id.* at 936. In explaining our decision, we drew a distinction "between filing deadlines [occurring] well in advance of the primary and general elections[,] and deadlines falling closer to the dates of those elections," and noted that courts more often have invalidated filing deadlines that well precede the state's primary election. *Id.* at 935 (citation omitted). With these principles in mind, we turn to address the parties' arguments.

i.

We first address the challenges brought by Kopitke and Buscemi to the filing deadline for unaffiliated candidates. North Carolina's filing deadline for unaffiliated candidates was March 3, 2020, the date of the primary election. N.C. Gen. Stat. §§ 163-1(b), -122(a)(1)-(2), -213.2. We evaluate the appropriateness of a filing deadline in relation to the date of the primary election. *See Pisano*, 743 F.3d at 935. The March filing deadline at issue here fell early in the calendar year, but the deadline was not "well in advance of the primary [election]." *Id.* Instead, the March filing deadline ensured that unaffiliated

candidates in North Carolina were able "to engage voters during the height of the primary season" when voters had greater awareness of the upcoming election. *Id.*

Although a filing deadline on the day of a primary election may place a burden on unaffiliated candidates who decide to run after the primary has occurred, *see Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (upholding a signature filing deadline for unaffiliated candidates the day before the March primary election), the Supreme Court has placed "little weight" on "the interest the candidate . . . may have in making a late rather than an early decision to seek independent ballot status." *Id.* (quoting *Storer*, 415 U.S. at 736). Accordingly, under the circumstances presented, we conclude that North Carolina's filing deadline posed only a modest burden on unaffiliated candidates and that, therefore, the district court did not err in holding that Kopitke and Buscemi failed to state a claim on this basis. *See Wood v. Meadows*, 207 F.3d 708, 712 (4th Cir. 2000) (upholding Virginia's requirement that independent candidates file petitions on primary election day).

ii.

Next, we consider North Carolina's requirement that unaffiliated candidates for statewide office obtain the signatures of at least 1.5% of voters who voted in the last gubernatorial election. N.C. Gen. Stat. § 163-122(a)(1). We also consider the requirement that unaffiliated candidates for districtwide office obtain the signatures of 1.5% of registered voters in that district. *Id.* § 163-122(a)(2).

Such signature requirements generally are justified by the "important state interest in requiring some preliminary showing of a significant modicum of support before printing" a candidate's name on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The Supreme Court has held that requiring unaffiliated candidates to submit petitions with "signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face." *Am. Party of Tex. v. White*, 415 U.S. 767, 789 (1974); *see also Jenness*, 403 U.S. at 438-39 (upholding statute requiring unaffiliated candidates to collect signatures of at least 5% of registered voters for the candidates' names to be placed on the ballot). And, as discussed above, we recently upheld a 2% signature requirement for new political parties in *Pisano*, 743 F.3d at 929-30. 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. *See White*, 415 U.S. at 789.

The present election format includes several of the same "alleviating factors" that we relied on in *Pisano* in concluding that the ballot-access laws at issue were only modestly burdensome. 743 F.3d at 934. For example, both new political parties and unaffiliated candidates for statewide office can begin collecting signatures after the previous gubernatorial election, a time period that provides those candidates more than three years to accomplish this task. *See* N.C. Gen. Stat. §§ 163-96(a)(2), -122(a)(1); *Pisano*, 743 F.3d at 930, 934. Also, voters in North Carolina may sign a candidate's petition regardless of the voters' party affiliation and may sign multiple petitions. *Pisano*, 743 F.3d at 930, 934-35. These liberal requirements set by North Carolina support a conclusion that the state's election format poses only a modest burden on unaffiliated candidates.

Notably, the challenged restrictions contain none of the additional requirements that prompted us in 1995, in our decision in *McLaughlin,* to label North Carolina's prior election scheme as severely burdensome. 65 F.3d at 1221. There, the Libertarian Party of

North Carolina challenged the statutory requirement that a political party must receive at least 10% of the votes cast in the previous election to retain its status as an established political party. *Id.* at 1219-20. Under that provision, if a party failed to receive the required number of votes in the previous election, the party had to become certified again as a new political party by submitting a petition with signatures of at least 2% of voters. *Id.* at 1219. At that time, North Carolina law also required the petitioner to submit a notarized affidavit and a verification fee accompanying each signature. *Id.* at 1218. We categorized these election requirements existing before *Pisano* as severe burdens. *Id.* at 1221. None of these former requirements presently constrain unaffiliated candidates seeking ballot placement in North Carolina. *See* N.C. Gen. Stat. § 163-122; *see also Pisano*, 743 F.3d at 934.

Kopitke and Buscemi argue, nevertheless, that the current 1.5% signature requirements for unaffiliated candidates impose a severe burden when considered in comparison to the current .25% signature requirement for new political parties. *Compare* N.C. Gen. Stat. § 163-122(a)(1)-(2), *with* § 163-96(a)(2). This comparison is unavailing because it essentially asks us to compare apples to oranges. The attempt to form a new political party and the act of seeking office as an unaffiliated candidate "are entirely different" endeavors. *Storer*, 415 U.S. at 745. A new political party "contemplates a statewide, ongoing organization with distinctive political character," *id.*, whereas an unaffiliated candidate merely seeks election for one office.

Because of these differences, a group of voters seeking recognition as a new political party must satisfy additional requirements to attain and retain such recognition. *See* N.C. Gen. Stat. § 163-96. For example, new political parties must "inform the signers of the

general purpose and intent of the new party." *Id.* § 163-96(b). Also, candidates of a new political party must receive at least 2% of the vote in the next general election or the party will be terminated. *Id.* §§ 163-96(a)(1), -97. These additional burdens on new political parties help explain why new political parties have an initial signature requirement lower than the signature requirement for an unaffiliated candidate. And, despite these additional burdens, we approved a 2% signature requirement for new political parties in our decision in *Pisano*, 743 F.3d at 929-30.

We conclude that, taken together, the present filing deadline and signature requirements pose only a modest burden on unaffiliated candidates. As we stated in *Pisano*, "[e]lection law schemes with modest signature requirements and filing deadlines falling close to or after the primary election . . . do not impose severe burdens."[7] *Id.* at 935; *see also Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) (upholding election scheme as not severely burdensome when it required unaffiliated candidates to file a petition with signatures of at least 3% of qualified voters by its primary election date). Therefore, we do not apply strict scrutiny, and instead ask whether the Board has articulated an "important regulatory interest[]" to justify the modest burden.[8] *Pisano*, 743 F.3d at 933.

[7] This Court in *Wood* held open the possibility that "a filing deadline for independent candidates on the day of the party primaries could pose an unconstitutional burden when operating in conjunction with a very early primary date, very high signature requirements, or other particularly burdensome provisions." 207 F.3d at 713. However, as discussed above, the March 3, 2020 primary date is not "very early," the 1.5% signature requirement is not "very high," and there are no "other particularly burdensome provisions." *Id.*

[8] To the extent that the plaintiffs argue that this election scheme is not necessary to satisfy the state's interests, the plaintiffs apply the wrong standard of review. The Board

The requirement that states articulate their asserted regulatory interests "is not a high bar." *Alcorn*, 826 F.3d at 719. The Supreme Court has "expressly approved a state's interest in limiting the number of candidates on the ballot . . . and in conditioning ballot access on a showing of a modicum of support among the potential voters for the office." *Wood*, 207 F.3d at 715.[9] Similarly, we have upheld "the important state interest of reducing voter confusion." *Alcorn*, 826 F.3d at 719. Under this precedent, the Board's stated interests in preventing ballot overcrowding and voter confusion easily constitute important regulatory interests sufficient to justify the modest burden of the state's election scheme.[10] Accordingly, the Board adequately has articulated its interests in protecting the integrity of its elections, and we affirm the district court's judgment that Kopitke and Buscemi failed to state a claim regarding the election law signature requirements for unaffiliated candidates.

III.

In summary, we hold that Kopitke lacks standing to challenge North Carolina's "qualified voter" requirement, and that Clark lacks standing to challenge the signature

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is not required to show that less restrictive means could advance its interests. *See Wood*, 207 F.3d at 716-17.

[9] Citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986); *Anderson*, 460 U.S. at 788 n.9; *Lubin v. Panish*, 415 U.S. 709, 714-15 (1974); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Jenness*, 403 U.S. at 442; *Williams*, 393 U.S. at 32-34.

[10] Although "a state has a less important interest in regulating Presidential elections than statewide or local elections, . . . states maintain an interest in regulating presidential elections." *Pisano*, 743 F.3d at 937 (citation omitted).

requirement for write-in candidates. Although we conclude that Kopitke and Buscemi have standing to challenge North Carolina's election law signature requirements for unaffiliated candidates, we hold that they have failed to state a claim challenging those requirements, which impose only a modest burden advancing important regulatory interests. Accordingly, we affirm the district court's order dismissing this action, but modify the dismissal of Clark's claim and Kopitke's "qualified voter" claim to reflect a dismissal without prejudice.

AFFIRMED AS MODIFIED[*]

[*] This opinion is published without oral argument pursuant to this Court's Standing Order 20-01, www.ca4.uscourts.gov/docs/pdfs/amendedstandingorder20-01.pdf (amended Apr. 7, 2020).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:19-cv-164-BO

GREGORY BUSCEMI, et al.,

Plaintiffs,

v.

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

Defendant.

ORDER

This cause comes before the Court on defendant's motion to dismiss [DE 24] and plaintiffs' motions for preliminary injunction [DE 12], to expedite ruling [DE 29], to file surreply [DE 31], and for a hearing [DE 34]. For the reasons stated below, defendant's motion to dismiss [DE 24] is GRANTED. Plaintiffs' motion for preliminary injunction [DE 12] is DENIED. Plaintiffs' motions for a hearing, to file surreply, and to expedite rulings [DE 29, 31, 34] are DENIED AS MOOT.

BACKGROUND

Plaintiffs are three individuals challenging North Carolina's laws governing ballot access for unaffiliated and write-in candidates. Plaintiff Kyle Kopitke is a Michigan resident seeking placement on the 2020 general election ballot as an unaffiliated candidate for President of the United States. Plaintiff Gregory Buscemi is a North Carolina resident seeking placement on the 2020 general election ballot as an unaffiliated candidate for U.S. Representative for North

Carolina's Seventh Congressional District. William Clark is a North Carolina resident and registered voter who wishes to cast write-in votes for all offices.

In North Carolina, to have one's name printed on the general election ballot, an unaffiliated candidate for statewide office must file a written petition with the State Board of Elections. N.C. Gen. Stat. § 163-122. This petition must be signed by qualified voters in the state equal in number to 1.5% of the total number of voters who voted in the most recent general election for Governor. *Id.* Consequently, for his name to appear on the November 2020 ballot, Mr. Kopitke must submit a petition with 71,545 signatures.

An unaffiliated candidate for a district office must file a petition containing signatures of qualified voters of the district equal in number to 1.5% of the total number of registered voters in the district as of January 1 of the election year. *Id.* The exact total is not yet known, but defendant estimates Mr. Buscemi would be required to collect about 8,276 signatures to qualify for the 2020 ballot.

These petitions must be submitted by the date of the primary election, which for this cycle is March 3, 2020.

Candidates may also seek election via write-in. Aspirants seeking to qualify as a write-in candidate—so that the votes cast for them will actually be counted—must file a declaration of intent and a petition. § 163-123. These petitions must be submitted 90 days before the general election and must include 500 and 250 signatures for statewide office and district office, respectively. *Id.*

On August 30, 2019, plaintiffs filed this lawsuit challenging the ballot access laws described above. DE 1. Specifically, plaintiffs claim that: (1) North Carolina's signature requirement for unaffiliated candidates for statewide office imposes an unconstitutional burden

on Mr. Kopitke; (2) North Carolina's signature requirement for unaffiliated candidates for district office imposes an unconstitutional burden on Mr. Buscemi; (3) the March filing deadline is unconstitutional; and (4) North Carolina's laws governing write-in candidates unconstitutionally prevent Mr. Clark from casting write-in votes. *See* DE 1; DE 27 at 9–10.

On September 10, 2019, plaintiffs moved for preliminary and permanent injunctions, asking the Court to prevent defendant from enforcing the above requirements against them and requesting that the Court order defendant to include Mr. Koptike and Mr. Buscemi on the ballot for the 2020 general election. DE 12. Defendant moved to dismiss the suit. DE 24. Plaintiffs then moved for an expedited ruling from this Court and for a hearing. The Court held oral argument at Elizabeth City, North Carolina on November 8, 2019.

DISCUSSION

Plaintiffs move for a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Defendant moves to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), alleging plaintiffs do not have standing, and for failure to state a claim under Rule 12(b)(6). Article III standing requires an injury-in-fact that is traceable to the defendant's conduct and redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). To survive a motion under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

I. Standing

Defendant moves to dismiss for lack of standing. Defendant argues that Mr. Kopitke and Mr. Buscemi lack standing to seek mandatory injunctive relief because the Court cannot order them on the ballot and plaintiffs have not demonstrated that they could meet even a lower signature requirement.[1] Defendant argues Mr. Clark lacks standing because his injury is limited to a desire to cast write-in candidates for all offices. Because Mr. Clark has not identified specific write-in candidates, defendant calls Mr. Clark's injury speculative.

The Court finds that plaintiffs have standing to pursue their claims. Mr. Kopitke's and Mr. Buscemi's injuries are concrete, actual, traceable to defendant, and could be remedied by a decision from this Court. Simply stated, defendant administers and enforces signature requirements and deadlines that impede plaintiffs stated ends of having their names printed on North Carolina's 2020 general election ballot. Courts have remedied these types of injuries in a number of ways, including lowering signature requirements. With respect to Mr. Clark, defendant administers a law that deprives him of his asserted right to cast write-in votes for whomever he wants—and to have those votes counted. Defendant's argument that Mr. Clark must identify specific candidates misses the point. Mr. Clark wants the freedom to walk into a voting booth in November 2020 and cast a write-in vote for whomever he chooses at that moment, regardless of whether that individual has declared themselves a candidate, and to have that vote counted. Mr. Clark's injury is that defendant will not count his "protest votes." This is an injury-in-fact sufficient for standing.

[1] Defendant includes an additional standing argument about plaintiffs' inability to challenge fee-related requirements. Plaintiffs clarified that they are not challenging this requirement. Accordingly, this standing argument need not be addressed.

II. Claims for Relief and Likelihood of Success on the Merits

The Constitution empowers states to prescribe the "times, places, and manner" of their own elections. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing Art. I, § 4, cl. 1). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* While the Constitution establishes the qualifications for the offices at issue here—President and U.S. Representative—state requirements for printing names on the ballot are a distinct concept. It is quite obvious that a state with no requirements for printing names on its ballot—a state that prints the names of all aspirants—runs the risk of an unwieldy ballot, leading to voter confusion and election disorder.

But it is also true that "ballot-access restrictions implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments." *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014) (internal quotations omitted). As such, courts must weigh the impact of a ballot regulation on the aspirant's constitutional rights against the state's interests in regulating its elections. *See Burdick*, 504 U.S. at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). When performing this inquiry, courts evaluate "the combined effect of the state's ballot-access regulations." *Pisano*, 743 F.3d at 933.

"Qualified Voter"

To start, plaintiffs challenge § 163-122 and § 163-123 as applied to Mr. Kopitke because these two provisions seem to restrict ballot access to "qualified voters." Section 163-122 states: "any qualified voter who seeks to have the voter's name printed on the general ballot as an unaffiliated candidate shall [comply with the petition and signature requirements]." Section 163-123 states: "[a]ny qualified voter who seeks to have write-in votes for him counted in a general

election shall file a declaration of intent . . .." Plaintiffs contend that the phrase "qualified voter" excludes non-residents, like Mr. Kopitke, and therefore, renders § 163-122 and § 163-123 unconstitutional as applied to him.

Were this the case, plaintiffs would be correct. However, defendant clarifies that § 163-122 and § 163-123 are not limited to in-state residents with respect to candidates for President. Defendant represents that "qualified voter" does not mean "registered voter" and that the phrase "qualified voter" would not restrict Mr. Kopitke's petition from being considered. While defendant does not define "qualified voter," the Court is assured that the phrase would not preclude Mr. Kopitke from submitting an otherwise compliant unaffiliated candidate or write-in petition. Accordingly, the Court rejects plaintiffs' claim with respect to the phrase "qualified voter."

Petition Requirements for Unaffiliated Candidates—Statewide Office

For statewide office, North Carolina requires unaffiliated candidates to submit petitions containing signatures amounting to 1.5% of the total number of votes cast in the previous Governor's race, or 71,545 signatures. These petitions must be filed by March 3, 2020. Plaintiffs contend that the number of signatures required (71,545) and the March deadline are unconstitutionally burdensome. Plaintiffs support their argument by contrasting the signature requirement for unaffiliated candidates with the signature requirement for new political parties and comparing the March deadline to the former May deadline, which changed when North Carolina changed the date of its primary elections.

This case is easily analogized to the Fourth Circuit's decision in *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014). There, the court considered the constitutionality of North Carolina's requirements for new political parties to achieve recognition under the election laws and thus

nominate candidates for office. At the time, a new political party seeking recognition was required to submit a petition signed by registered and qualified voters equal in number to 2% of the total number of voters who voted in the most recent general election for Governor, which amounted to 85,379 signatures. *Id.* at 930. The submission deadline for the signatures was May 17. *Id.* Plaintiffs alleged that the May 17 deadline, in conjunction with the signature requirement, created an impermissible barrier to ballot access in violation of their First and Fourteenth Amendment rights.

The court rejected plaintiffs' challenge outright, going as far as saying that plaintiffs had "not shown that North Carolina's scheme burdens them in any meaningful way." *Id.* at 935. The court noted that plaintiffs had three and a half years to collect the required signatures and characterized the plaintiffs' burden as "modest." *Id.* at 936.

The Court sees little difference between the combined effect of the requirements upheld in *Pisano* and the one at issue here. Mr. Koptike has about the same amount of time to collect 14,000 fewer signatures. With *Pisano* as a marker, the Court concludes Mr. Kopitke's burden is modest. *See id.* at 934–36. Accordingly, defendant's asserted regulatory interests in minimizing voter confusion and focusing voter attention on the general election after conclusion of the primary are sufficiently weighty to justify the requirements. *See* DE 25 at 21–22 (citing *Burdick*, 504 U.S. at 439).

Plaintiffs point to the lower signature requirement for new party recognition—which now stands at .25%—and attempt to draw a direct comparison with unaffiliated candidates, arguing the disparity between the signature requirements is unconstitutional. DE 15 at 6; DE 27 at 14. This comparison fails. Courts have repeatedly sanctioned different requirements for party-affiliated and unaffiliated candidates to achieve ballot access. *See, e.g.*, *Jenness v. Fortson*, 403

U.S. 431, 441 (1971); *Greene v. Bartlett*, 449 F. App'x 312, 314 (4th Cir. 2011). The groups are simply not similarly situated. An unaffiliated candidate is an individual seeking ballot access for himself whereas the new party is a group of individuals seeking recognition in order to nominate candidates for office. New party candidates must go on to win their party's nomination at convention. Critical distinctions undercut plaintiffs' comparison.

Plaintiffs also attack the March deadline, arguing that the constitutional infirmity is not the sufficiency of the time available for signature collection, but the date itself. DE 27 at 19–20. Plaintiffs contend that North Carolina has not offered a sufficient justification for moving up the deadline from May and that March is *per se* unconstitutional. *Id.* Again, plaintiffs' arguments fail. North Carolina is constitutionally empowered to regulate the times, places, and manner of elections and is not required to seek judicial pre-clearance before changing its filing deadlines.

In sum, the burdens here closely track those upheld in *Pisano*. Plaintiffs have not stated a claim upon which relief can be granted and, correspondingly, have not shown likely success on the merits.

Petition Requirements for Unaffiliated Candidates—District Office

Plaintiffs adopt by reference the same arguments as above—the signature requirement and March deadline—in their challenge for ballot access in the Seventh Congressional District. DE 15 at 15. For the same reasons as above, the Court rejects these arguments as they apply to Mr. Buscemi's candidacy for Congress. Plaintiffs have not stated a claim upon which relief can be granted and, therefore, have not shown likely success on the merits.

Write-in Candidacy

Plaintiffs also challenge North Carolina's law for write-in candidates requiring a petition accompanied by 500 and 250 signatures for statewide and district office, respectively. Plaintiffs

argue (1) there is no justification for each write-in candidate to separately satisfy the requirement, because once one write-in candidate qualifies, the ballot line for a write-in will be included on the ballot, and (2) the write-in requirements impede voters' rights to vote for whomever they choose. DE 15 at 16–17.

The Supreme Court has already upheld a complete prohibition on write-in candidates. *Burdick*, 504 U.S. at 436–40. Here, North Carolina's requirements to qualify as a write-in candidate are *de minimis* and provide an easy avenue for aspirants to qualify as candidates. The obvious justification for requiring each candidate to collect the small number of signatures is to treat all write-in candidates—who are similarly situated—equally. And while voters certainly have a right to have their votes counted, they only have a right to vote for actual, declared candidates for office. *See Burdick*, 504 U.S. at 437–38. Mr. Clark's asserted right to compel the state to count his "protest vote" has already been rejected by the Supreme Court and has no merit. *See Burdick* 504 U.S. at 438 (rejecting an argument that the state is required to count a "protest vote" for Donald Duck).

With respect to the laws governing write-in candidates, plaintiffs have not stated a claim upon which relief can be granted and have not shown likely success on the merits.

CONCLUSION

Plaintiffs have failed to state a claim upon which relief can be granted for any of their four counts. Defendant's motion to dismiss [DE 24] under Rule 12(b)(6) is GRANTED. Consequently, plaintiffs have not shown likely success on the merits, and their motion for preliminary and permanent injunction [DE 12] is DENIED. Plaintiffs' remaining motions [DE 29, 31, 34, 37] are DENIED AS MOOT. Plaintiffs' complaint is DISMISSED. The Clerk is DIRECTED to close the case.

SO ORDERED, this 22 day of November, 2019.

Terrence Boyle

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

GREGORY BUSCEMI et al, Plaintiffs, v. KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections, Defendant.	)	JUDGMENT IN A CIVIL CASE CASE NO. 7:19-CV-164-BO

Decision by Court.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss [DE 24] under Rule 12(b)(6) is GRANTED. Consequently, plaintiffs have not shown likely success on the merits, and their motion for preliminary and permanent injunction [DE 12] is DENIED. Plaintiffs' remaining motions [DE 29, 31, 34, 37] are DENIED AS MOOT. Plaintiffs' complaint is DISMISSED. The Clerk is DIRECTED to close the case.

This Judgment Filed and Entered on November 22, 2019 with service on:
Alan P. Woodruff (via CM/ECF NEF)
Gregory Buscemi (via CM/ECF NEF)
Paul M. Cox (via CM/ECF NEF)

11/22/2019

PETER A. MOORE, JR., CLERK

(By): Donna Rudd, Deputy Clerk

FILED: August 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2355
(7:19-cv-00164-BO)

GREGORY BUSCEMI; KYLE KOPITKE; WILLIAM CLARK

Plaintiffs - Appellants

v.

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

Defendant - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk