

No. \_\_\_\_\_ 08 - 6 4 8 NOV 13 2008

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In The

**Supreme Court of the United States**

—◆—  
JANICE BREWER,  
in her official capacity as Secretary of State of Arizona,

*Petitioner,*

vs.

RALPH NADER and DONALD N. DAIEN,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**  
—◆—

TERRY GODDARD  
Attorney General of Arizona  
MARY R. O'GRADY\*  
Solicitor General  
BARBARA A. BAILEY, *of counsel*  
Assistant Attorney General  
1275 West Washington Street  
Phoenix, Arizona 85007-2926  
(602) 542-3333

*\*Counsel of Record*

*Counsel for Petitioner*

**QUESTIONS PRESENTED**

Did the Ninth Circuit err in holding – in conflict with the Eighth Circuit – that Arizona’s requirement that candidate nomination petition circulators be residents of the State was subject to strict scrutiny and failed to meet that standard under *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Court expressly left open the question?

Did the Ninth Circuit err in holding – in conflict with the Arizona Supreme Court – that Arizona’s nomination petition filing deadline for independent presidential candidates is subject to strict scrutiny review under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in absence of a showing that the filing deadline imposes any burden – severe or otherwise – on the candidate?

## **PARTIES TO THE PROCEEDING**

The Respondents are the Plaintiff-Appellants Ralph Nader and Donald N. Daien. This petition refers to them collectively as "Respondents."

The Petitioner is the Defendant-Appellee Janice Brewer, Arizona Secretary of State. The petition refers to her as the "Secretary."

The Complaint also named as plaintiffs Peter Camejo and Kendle H. Greenlee, who were dismissed before summary judgment was granted in the district court and who were not parties to the appeal below. Dorothy Schultz intervened in the district court and was dismissed before summary judgment was granted. Intervenor Schultz was not a party to the appeal below.

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**OPINIONS BELOW**

The decision of the Ninth Circuit Court of Appeals is reported: *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Nader v. Brewer*, No. CV-04-1699-PHX-FJM, 2006 WL 1663032 (D. Ariz. June 8, 2006). It is included as Appendix B.

The order of the Ninth Circuit denying the petition for panel rehearing and for rehearing en banc is included as Appendix C.

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**STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Ninth Circuit issued its panel decision on July 9, 2008. The Ninth Circuit denied Defendant-Appellee's Petition for Panel Rehearing or Rehearing En Banc on August 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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**CONSTITUTIONAL AND  
STATUTORY PROVISIONS****U.S. Const. amend. I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes (A.R.S.) §§ 16-101, 16-311(A), 16-321, and 16-341 are set forth in Appendix D.

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### STATEMENT OF THE CASE

The Arizona Secretary of State asks the Court to grant certiorari to settle a dispute among the federal courts about whether state residency requirements for circulators of petitions are subject to, or survive, strict scrutiny review. The Secretary seeks review of the Ninth Circuit's holding that Arizona's requirement that petition circulators be qualified to register to vote in Arizona imposes a severe burden on speech and therefore is subject to strict scrutiny. The Court also should review, if necessary, the court of appeals' holding that Arizona's residency requirement is not narrowly tailored to achieve a compelling state interest.

The Secretary further asks the Court to grant certiorari to resolve a conflict resulting from a separate holding of the Ninth Circuit, which struck down Arizona's nomination petition filing deadline with regard to independent presidential candidates. The court of appeals' decision directly conflicts with a decision of the Arizona Supreme Court, which upheld

the requirement under the principles set forth by this Court in *Anderson*.

#### **A. Material Facts.**

In Arizona, candidates for any office have four options for getting on the ballot. One of those options is to run as an independent candidate. In the case of presidential candidates, the governing statutes include provisions that pertain to presidential electors, who, in turn, elect the candidate of their choice. A.R.S. § 16-341(G). Independent candidates must obtain signatures on nominating petitions to establish a modicum of support for their candidacy. Under Arizona law, the required number of signatures for presidential candidates is three percent of the number of registered voters who are not registered as members of a recognized political party. *Id.* § 16-341(E). In 2004, the number of signatures needed to support an independent presidential candidate was 14,694. (App. A at 5a.)

There is no limitation on when either independent or party candidates may begin collecting signatures for their nominations. They all must file their nominating papers at least ninety days, and no more than 120 days, before the primary election. A.R.S. §§ 16-341(C), 16-311(A), 16-344(A).<sup>1</sup> In 2004, that

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<sup>1</sup> In the case of presidential electors, recognized parties are not required to obtain nomination signatures but instead must appoint candidates for the office of presidential elector and file

(Continued on following page)

filing deadline fell on June 9, 2004. (App. A at 6a.)<sup>2</sup> Signatures on nomination petitions must be those of registered voters. A.R.S. § 16-321(B). Those signatures must be verified by a person before whom they were written. *Id.* § 16-321(D). Any person may circulate nominating petitions to place his or her candidate of choice on the ballot; the signatures must be witnessed and verified, however, by a person qualified to register to vote. *See id.* To be qualified to register to vote in Arizona, a person must be, among other things, a resident of the State twenty-nine days preceding the election. *Id.* § 16-101.

Within ten court days after the filing deadlines, an elector may challenge the nominations. *See id.* § 16-351(A) (setting out the procedures for judicial challenges to nominations). Under those procedures, a judicial challenge may be heard and decided in the superior court within approximately four weeks after the filing deadline. *Id.* If the matter is appealed, the state supreme court must decide the matter “promptly.” *Id.*

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nomination papers for each candidate with the Secretary by the same deadline as for other candidates. A.R.S. § 16-344(A).

<sup>2</sup> The primary election fell on September 7, 2004, and the general election fell on November 2, 2004. (App. A at 6a.) At the time this case was brought, state law provided that the primary election date was to be held on the eighth Tuesday before the general election. *See* A.R.S. § 16-201 (2006). A 2007 amendment to that provision moved the State’s primary election to the ninth Tuesday before the general election. *See* Ariz. Sess. Laws 2007, Ch. 168, § 1 (amending A.R.S. § 16-201).

Ballots must be printed and distributed in time for early voting, which begins thirty-three days before the general election. *See id.* § 16-545(B). Early voting for the general election began on September 30, 2004. (App. A at 6a.) Sample ballots must be printed no later than forty-five days before the election. A.R.S. § 16-461(A). In 2004, the deadline for proofing and finalizing the ballot for the general election was September 18, 2004. (App. A at 6a.) The special paper for the ballots is ordered well before the September proofing deadline, and the preparation of that ballot begins in August and is completed shortly after the primary election. (Dkt. 46, ex. 3, ¶¶ 10, 19.) The printing of the general election ballots is completed on a tight deadline, which also must incorporate time within which to translate the ballots into Spanish. (*Id.*, ¶ 14.) In 2004, the candidate filing deadline fell 113 days before voting began in the general election. (Dkt. 59 at 8 [App. B at 12b].)

Nader ran for President and was on the ballot in Arizona in 2000 as a third party candidate. (Dkt. 1 [Complaint], ¶ 5.) In 2004, Nader again sought to get on the Arizona ballot, this time as an independent presidential candidate. (App. B at 1b.) Although he announced his candidacy in February 2004, his campaign did not attempt to gather any signatures to support his candidacy until April. (*Id.* at 12b-13b.) His campaign gathered more than ninety percent of its signatures within the two-week period immediately preceding the June 9th deadline for filing nomination petitions. (*Id.* at 13b.) Shortly after he

filed his nomination petitions, Nader's nomination was challenged in the Arizona Superior Court of Maricopa County. (*Id.* at 1b-2b.) The challengers claimed that, of the approximately 21,185 signatures on the petitions filed by Nader, 15,467 of them were invalid. (App. B at 1b; dkt. 46, ex. 11, ¶¶ 112-113.) Nader withdrew his petitions based on his statement that he had failed to collect a sufficient number of signatures to place his name on the ballot. (App. B at 2b.) Nader withdrew his candidacy in Arizona on July 2, 2004. (App. A at 7a.)

#### **B. Course of Proceedings.**

On August 16, 2004, Nader, along with his vice-presidential running mate, a Texas elector, and an Arizona elector, sued the Secretary in this case under 42 U.S.C. § 1983 for alleged violations of the First and Fourteenth Amendments. (Dkt. 1 [Complaint], ¶¶ 1-6.) The plaintiffs challenged Arizona's law providing that nomination petitions for candidates, which include independent candidates for President, be filed no fewer than ninety days before the primary election. (*Id.*, ¶ 13 (citing A.R.S. § 16-311), ¶ 17.) The plaintiffs also challenged Arizona's law providing that only persons qualified to register to vote in Arizona (and who therefore were residents of the State) are permitted to verify nomination petition signatures. (*Id.*, ¶¶ 14-16.)

The plaintiffs sought a preliminary injunction to order that Nader's name be placed on the Arizona

ballot as a presidential candidate for the 2004 election. (*Id.* at 11-12, ¶¶ (2), (3).) The district court denied the preliminary injunction and the 2004 election proceeded without Nader as a candidate in Arizona. The Ninth Circuit affirmed that order. *Nader v. Brewer*, 386 F.3d 1168 (9th Cir. 2004). Following the preliminary injunction proceedings, two of the plaintiffs – the vice-presidential candidate and the Texas elector – sought and were granted dismissal from the case. (Dkt. 44.) The remaining parties subsequently filed cross-motions for summary judgment. (Dkt. 45, 47.) The district court denied Nader’s motion and granted the Secretary’s motion on June 8, 2006. (App. B.)

The district court reviewed the filing deadline and circulator residency requirements under the principles set forth in *Anderson* and *Meyer v. Grant*, 486 U.S. 414 (1988). The court acknowledged that circulating petitions for ballot access involves “core political speech” under *Meyer*. (App. B at 5b.) The court further explained that *Anderson* requires courts to review ballot access regulations by weighing the “character and magnitude of the asserted injury” to the plaintiffs’ rights against the “precise interests put forward by the State as justifications” for the burden imposed. (*Id.* at 5b-6b (*quoting Anderson*, 460 U.S. at 789).) The court also noted that only severe restrictions on First Amendment freedoms are subject to strict scrutiny; whereas slight burdens should generally be upheld if rationally related to a legitimate interest. *Id.* at 6b.



The district court initially noted that Nader failed to offer any evidence to establish the significance of the burden imposed by either the residency requirement or the filing deadline. (*Id.* at 2b n.1.) The court also noted that, given that independent candidates have access to approximately 3.7 million Arizona residents who are eligible to circulate petitions, any burden on the rights of Nader or his supporters was limited and justified by the State's compelling interest in protecting the integrity of the election process. (*Id.* at 9b.) Even under a strict scrutiny review, however, which would have been warranted had Nader shown a severe burden, the district court found that both of the challenged regulations were narrowly tailored to achieve the State's compelling interests. (*Id.* at 8b-13b.) With regard to the requirement that individuals who verify petition signatures be state residents, the court found that Arizona had a compelling interest in protecting the petition circulation process from fraud and abuse and that the residency requirement ensures that circulators would be subject to the State's subpoena power to achieve that interest. (*Id.* at 8b-9b.) The court also found that Arizona's filing deadline was not more burdensome than necessary to achieve the State's compelling interest in allowing sufficient time to hear and resolve challenges to nominations and to print and distribute ballots in time for early voting. (*Id.* at 13b.)

The Ninth Circuit reversed. (App. A.) The court held that the circulator residency requirement imposed a severe burden as a matter of law under

*Buckley* because it necessarily decreased the number of potential circulators. (App. A at 16a.) The court acknowledged that the *Buckley* Court “expressly did not decide the validity of the separate residency requirement because it was not challenged in that case.” (App. A at 15a.) The court further acknowledged that the Eighth Circuit “came to the opposite conclusion [from that of the Ninth Circuit] and upheld a residency requirement for initiative-petition circulators” in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). (App. A at 18a.) The Ninth Circuit held that the residency requirement did not withstand strict scrutiny because it found that the requirement was not narrowly tailored to achieve the State’s interest of preventing fraud in the petition circulating process. (App. A at 20a.)

With regard to the filing deadline, the Ninth Circuit held that *Anderson* was controlling on the issue of the severity of the burden on Nader’s rights and required a finding of a severe burden. (App. A at 22a.) The court further held that the absence of any independent presidential candidate on Arizona’s ballot since 1993, when the filing deadline was shortened to seventy-five days before the primary election, “suggests that the regulations impose a severe burden that has impeded ballot access.” *Id.* Accordingly, the Ninth Circuit applied strict scrutiny to the filing deadline requirement and held that the State did not show that it needed all of the statutorily allotted time to achieve the State’s interest of preparing and

distributing ballots in time for the general election. (App. A at 24a-25a.)

Although not part of the record before the courts below, Nader successfully sought to get on Arizona's ballot as an independent presidential candidate in the 2008 general election.

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## REASONS FOR GRANTING THE WRIT

### I. The Residency Requirement.

The Court should grant certiorari to resolve the conflict among circuits about whether state residency requirements for petition circulators are subject to strict scrutiny and, if so, whether those requirements withstand such scrutiny. In *Buckley*, the Court applied strict scrutiny to, and struck down, Colorado's requirement that circulators of initiative petitions be registered to vote. *Buckley*, 525 U.S. at 192 & n.12, 195. The Court expressly left open the question whether a requirement that such circulators be state residents is subject to the same scrutiny or whether it would withstand such review if strict scrutiny were applied. *Id.* at 197.

Since *Buckley*, both federal district and appellate courts and state courts have addressed the question left open in that case. The courts have reached differing conclusions regarding the appropriate standard of review of restrictions on the residency of petition circulators and whether such a requirement survives

strict scrutiny. That disagreement results in some States, but not others, being permitted to prevent fraud in the petition process by requiring that those who attest to the validity of the signatures on the petitions be state residents and thus be subject to the State's subpoena power.

The Ninth Circuit erred by holding that strict scrutiny must be applied to Arizona's residency requirement without evaluating the magnitude of the burden imposed by the requirement on Nader or his supporters.

**A. The *Buckley* Court Expressly Left Open the Question Whether a Residency Requirement Is Constitutional.**

In *Buckley*, the Court left open the question whether a requirement that individuals who circulate petitions be state residents is subject to strict scrutiny or would survive such scrutiny. The Court stated:

In sum, assuming that a residence requirement would be upheld as a needful integrity-policing measure – a question we, like the Tenth Circuit, see 120 F.3d, at 1100, have no occasion to decide because the parties have not placed the matter of residence at issue – the added registration requirement is not warranted.

*Buckley*, 525 U.S. at 197.

In his concurring opinion, Justice Thomas stated that he assumed, as did the Tenth Circuit, “that the

State has a compelling interest in ensuring that all circulators are residents.” *Buckley*, 525 U.S. at 211. He further stated that Colorado’s voter registration requirement was not narrowly tailored because many Colorado residents were not registered voters “and the State’s asserted interest could be more precisely achieved through a residency requirement.” *Id.*

The Court thus not only left open the issue of the constitutionality of a state residency requirement for petition circulators, but suggested that such a requirement may be upheld as a “needful integrity-policing measure.” *Id.* at 197, 211. Particularly given the split among federal courts that have addressed the issue, the Court now should decide the question left open in *Buckley*.

**B. Federal Courts Have Reached Conflicting Decisions on Whether State Residency Requirements Are Subject to, or Survive, Strict Scrutiny.**

The Ninth Circuit held that, although *Buckley* did not decide the constitutionality of petition circulator residency requirements, strict scrutiny of such a requirement was “mandated” by *Buckley* because the requirement necessarily reduced the number of individuals eligible to circulate petitions for a presidential candidate in Arizona. (App. A at 16a.) The Ninth Circuit disagreed with the district court’s analysis, which weighed the severity of the burden

shown by the challenger against the interests of the State and justifications for the regulation.

The Ninth Circuit's decision deepens an existing circuit conflict on the issue of the constitutionality of state residency requirements. Like the Ninth Circuit, the Seventh Circuit applied strict scrutiny to, and invalidated, an in-district residency requirement for petition circulators that operated as a state residency requirement in a statewide race. *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). The Tenth Circuit similarly applied strict scrutiny to a municipal residency requirement for petition circulators under the reasoning of *Buckley and Meyer. Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). The *Chandler* court, however, acknowledged that the constitutionality of a state residency requirement was not the issue before it. *Chandler*, 292 F.3d at 1244.

Since the Ninth Circuit's decision, the Sixth Circuit applied strict scrutiny to, and invalidated, an Ohio law that, as applied, required that circulators of candidate nomination petitions be registered voters and Ohio residents. *Nader v. Blackwell*, No. 07-4350, \_\_\_ F.3d \_\_\_, 2008 WL 4722584 (6th Cir. Oct. 29, 2008). The court found that the residency requirement served no compelling state interest. *Id.* at \*14.

The Eighth Circuit took a different approach and reached the opposite conclusion in *Jaeger*, which addressed North Dakota's state residency requirement for petition circulators. The *Jaeger* court upheld the requirement under *Buckley* because the

requirement did not “unduly hinder the circulation of petitions” and was a reasonable regulation designed to ensure the integrity of the petition circulating process. *Jaeger*, 241 F.3d at 615. In so holding, the *Jaeger* court followed the Supreme Court’s “flexible” standard that applies strict scrutiny only where a severe burden has been shown and applies a lower level of scrutiny where “lesser burdens” are shown. *Id.* at 616 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)).

The Second Circuit applied strict scrutiny to, and struck down, a New York local residency requirement for nomination petition circulators. *Lerman v. Bd. of Elections*, 232 F.3d 135, 146-50 (2d Cir. 2000). The court stated, however, that the state’s interest protecting the integrity of the signature collection process was served by the “less burdensome requirement[.]” of a state residency requirement. *Id.* at 150.

Other courts either have upheld state residency requirements or have suggested that such requirements may be constitutional under *Buckley*. See *Hart v. Sec’y of State*, 715 A.2d 165, 167-68 (Me. 1998) (upholding a state residency requirement for petition circulators against a First Amendment challenge and analyzing the effect of *Meyer* and *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff’d* by *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)); *Kean v. Clark*, 56 F. Supp. 2d 719, 730-33 (S.D. Miss. 1999) (applying strict scrutiny to, and upholding,

Mississippi's state residency requirement for initiative petition circulators); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 904 (E.D. Pa. 2002) (holding an in-district residency requirement unconstitutional but suggesting that a state residency requirement may be constitutional).

As the Sixth Circuit noted in *Nader v. Blackwell*, "sister circuits have heeded the Court's warning against litmus-paper tests, have carefully examined any challenged residency and registration requirements, and have divided as to their constitutionality." 2008 WL 4722584, at \*15. The Court should resolve the residency requirement issue at this time.

**C. The Ninth Circuit Erred in Applying Strict Scrutiny to Arizona's Residency Requirement Where the Burden Was Not Shown to Be Severe.**

The Ninth Circuit reasoned that Arizona's residency requirement created a severe burden on Nader's speech and associational rights because there was a smaller pool of potential circulators as a result of the requirement. (App. A at 16a.) Thus, according to the court, the residency requirement would limit the size of the audience that could hear the proponents' message. (App. A at 15a.) Accordingly, the court applied strict scrutiny and held that, although the State had a compelling interest in preventing election fraud and ensuring the integrity of elections, the



residency requirement was not narrowly tailored to achieve that interest. (App. A at 18a-20a.)

The Ninth Circuit should not have applied strict scrutiny because there was no evidence that the residency requirement imposed a severe burden (or, indeed, *any* burden) on the rights of Nader or his supporters. *Buckley* does not require strict scrutiny of a requirement any time that requirement results in a smaller number of potential petition circulators, no matter how large the existing pool of circulators and no matter whether the restriction, in fact, severely burdens the challengers' ability to convey their message. Instead, review of a restriction such as the state residency requirement should include consideration of the extent of the available pool of circulators and the extent to which the requirement reasonably affects the challengers' ability to communicate their message or to gain access to the ballot.

Such an approach would be consistent with the Court's decisions in cases involving candidates' speech and association rights and those of their supporters. *See, e.g., Timmons*, 520 U.S. at 358 (stating that the court weighs the character and magnitude of the burden imposed by the state regulation against the interests put forward by the state for the burden, and noting that lesser burdens are subject to less exacting scrutiny); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (same); *Anderson*, 460 U.S. at 789 (stating that only after weighing the character and magnitude of the asserted injury to the challenger's constitutional rights against the interests put

forward by the state as justifications for the law can a court decide whether the challenged law is constitutional); *cf. Buckley*, 525 U.S. at 192 (“We have several times said ‘no litmus-paper test’ will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon ‘no substitute for the hard judgments that must be made.’”) (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Although the *Buckley* Court applied strict scrutiny to Colorado’s registration requirement, it did so after finding that many thousands of the state’s residents would be prohibited from circulating petitions for initiatives within their state. The challengers in *Buckley* had offered evidence that “large numbers” of those who were willing to circulate initiative petitions in Colorado on behalf of the challengers were not registered to vote. *Buckley*, 525 U.S. at 194.

Unlike the law at issue in *Buckley*, Arizona’s residency requirement permits every Arizona citizen, who is otherwise eligible to register to vote, to verify petition signatures. Nader never made any showing that the residency requirement restricted his ability to garner supporters willing to convey his message to the citizens of Arizona in support of his candidacy. Neither did he make any showing that the residency requirement hindered his ability to gain access to Arizona’s ballot or to associate with his supporters. Indeed, Nader succeeded in making the 2008 Arizona ballot. Respondents did not even offer any evidence in the district court of a single individual who desired to

circulate petitions for Nader but who could not do so because of the residency requirement. Although Nader argued that he would be prohibited from circulating petitions for his own candidacy, he never offered any evidence that he or any other non-Arizona resident would do so but for the restriction. The Ninth Circuit's *per se* rule that any decrease in the number of potential circulators mandates the application of strict scrutiny is not required by *Buckley* and is not consistent with the Court's jurisprudence on review of state election regulation.

Even if strict scrutiny were the appropriate standard of review of this integrity-policing measure, the Ninth Circuit erred in concluding that the residency requirement did not withstand that review. The Ninth Circuit recognized Arizona's compelling interest in protecting the integrity of the petition circulating process to prevent fraud. (App. A at 18a); accord *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). The Ninth Circuit erred, however, in holding that Arizona's residency requirement was not narrowly tailored to achieve the State's interest in preventing petition circulator fraud.

The State demonstrated that the residency requirement was necessary to ensure that individuals who verified petition signatures would be subject to the State's subpoena power in the event such

individuals were necessary to nomination challenge proceedings. The Ninth Circuit did not question that the residency requirement served the State's purpose. Instead, the Ninth Circuit speculated that the State could meet its purpose by requiring individuals who verify petition signatures to consent to jurisdiction in Arizona. (App. A at 18a-19a.) No evidence supports such conclusion, however. Arizona's nomination challenge proceedings take place within a very short time period after the nomination petition filing deadline. Without the ability to subpoena individuals to appear in the state court, within days of service of a subpoena, the State cannot ensure that such individuals will be compelled to appear and be examined regarding the validity of signatures or the circumstances of the verification of nomination petitions. There was no evidence that requiring out-of-state individuals to submit to jurisdiction in Arizona would have ensured that the State could locate and subpoena them and compel their appearance within days in an Arizona court proceeding.

The Ninth Circuit also noted that the State failed to "contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents." (App. A at 20a.) The Ninth Circuit thus disregarded the evidence of petition circulation fraud in Arizona, because the record did not link such fraud to out-of-state circulators. (See dkt. 46, ex. 10.) The Ninth Circuit's approach, however, is contrary to the Court's decision in *Crawford v. Marion County Election*

*Board*, 128 S. Ct. 1610 (2008). In *Crawford*, the Court upheld Indiana's prophylactic measures to prevent in-person voter fraud at the polls, even though there was no evidence of any history of in-person voter fraud in Indiana. *Crawford*, 128 S. Ct. at 1613, 1618-19. Instead, the only evidence of historical voter fraud in Indiana existed in the context of absentee balloting. *Id.* at 1619. The Court nonetheless upheld Indiana's interest in enacting measures to prevent in-person fraud, rather than waiting for such fraud to occur or be detected. *Id.* at 1623-24. In light of the principles set out in *Crawford*, the court erred in requiring the State to prove specific instances of out-of-state circulator fraud.

## **II. The Filing Deadline.**

### **A. The Ninth Circuit's Decision on the Constitutionality of Arizona's Candidate Filing Deadline Conflicts with the Decision of the Arizona Supreme Court on the Same Issue.**

The Ninth Circuit's holding that Arizona's nomination petition deadline is unconstitutional directly conflicts with the holding of the Arizona Supreme Court in *Browne v. Bayless*, 46 P.3d 416 (Ariz.), *cert. denied*, 537 U.S. 1088 (2002). Although the Ninth Circuit did not distinguish or even mention *Browne*, that court addressed the constitutionality of, and upheld, Arizona's requirement that independent presidential candidates (as other candidates) file their

nomination petitions no fewer than ninety days before the primary election. *Browne*, 46 P.3d at 417.

Like the Ninth Circuit panel, the *Browne* court analyzed the constitutionality of Arizona's filing deadline under the principles and holding of *Anderson*. Contrary to the Ninth Circuit's holding and analysis, however, the *Browne* court held that strict scrutiny was not appropriate under *Anderson*'s reasoning because any burden imposed by the filing deadline on the rights of independent voters was not severe. *Id.* at 419. The *Browne* court's conclusion was based on the court's findings that the deadline in Arizona was significantly closer to the date for voting in the general election and that "the national political process has evolved toward a system of ever-earlier presidential primary elections," which results in an earlier determination of the identities and positions of the major party candidates. *Id.* Thus, the court determined that, under Arizona's filing deadline, independent voters would have sufficient time to coalesce around a viable independent candidate. *Id.*

Because the filing deadline did not severely burden the rights of independent voters, the court held, the requirement was constitutional if it was reasonable and nondiscriminatory. *Id.* at 420. The court held that the filing deadline requirement met that standard and was rationally related to the State's important regulatory interests in conducting fair and orderly elections. *Id.* The filing deadline served those interests by affording sufficient time to prepare and print early ballots, distribute overseas

ballots, translate ballots into other languages, and complete judicial review of election challenges. *See id.* at 419-20.

**B. The Ninth Circuit Erred in Deciding that Arizona's Filing Deadline Is Subject to Strict Scrutiny.**

The Ninth Circuit based its determination that the filing deadline imposed a severe burden on Nader, which in turn triggered strict scrutiny, on two grounds. First, the court found that *Anderson* mandated a finding of a severe burden. Second, the court believed that Arizona's historical experience, in which no independent presidential candidates have been on the State's ballot since 1993, "suggests that the regulations impose a severe burden that has impeded ballot access." (App. A at 22a.) Neither of those grounds is supported by *Anderson*.

*Anderson* involved a challenge to Ohio's independent candidate filing deadline, which in 1980 fell on March 20th – 229 days before the general election. *Anderson*, 460 U.S. at 783 n.1. The Court did not purport to apply strict scrutiny to the filing deadline at issue in *Anderson*. Instead, the Court first "consider[ed] the character and magnitude of the asserted injury" to First and Fourteenth Amendment rights, and then evaluated "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 789. There was no dispute that Ohio's filing deadline burdened Anderson's ability to

be a candidate because the filing deadline predated his announcement of his candidacy and he obtained and submitted the requisite number of signatures after the filing deadline. *Id.* at 782.<sup>3</sup>

The Court recognized that “as a practical matter, there must be 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.* at 788 (quoting *Storer*, 415 U.S. at 730). The Court stated that “the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Id.* Although the *Anderson* Court struck down Ohio’s filing deadline, it did so only after weighing the burden on Anderson and his supporters against the state interests put forward as justifications for the filing deadline. *Id.* at 796-806.

The Ninth Circuit began its analysis by noting that the *Anderson* Court “concluded that none of the state’s asserted interests justified the ‘extent and nature’ of the burden imposed by the March filing deadline.” (App. A at 21a.) From that accurate, but unremarkable, observation, the Ninth Circuit concluded that Arizona’s filing deadline necessarily

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<sup>3</sup> This Court has consistently required challengers to bear the burden of showing that the restriction at issue burdens them. *See, e.g., Crawford*, 128 S. Ct. at 1623 (“[O]n the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”).



imposed a severe burden because “*Anderson* remains binding Supreme Court authority.” (App. A at 22a.) But the Ninth Circuit did not undertake to do what *Anderson* requires – to weigh the nature and magnitude of the injury caused by the challenged restriction against the interests put forward by the State – before concluding that there was a severe burden imposed on Nader’s rights. Instead, the court began with the notion that the ultimate outcome in *Anderson* required a finding of a severe burden and the application of strict scrutiny. Based on that faulty premise, the court believed that unless the State could demonstrate the need for precisely 113 days between the candidate filing deadline and the start of early voting in the general election, such a requirement could not be constitutional.

Unlike the filing deadline struck down in *Anderson*, which fell twice as many days before voting in the general election as Arizona’s filing deadline in 2004, Arizona’s deadline is necessary to accommodate the State’s interests in conducting fair and efficient elections. Those interests include allowing sufficient time for the candidate nomination challenge process and the translating, printing and distributing of the ballots in accordance with state law requirements for early voting. In contrast, the *Anderson* Court specifically noted that “Ohio [did] not suggest that the March deadline [was] necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed.” *Anderson*, 460 U.S. at 800. In this case, the State

supported its interests with evidence – which was un rebutted before the district court – establishing the need for its June filing deadline.

And unlike Anderson’s demonstration that Ohio’s deadline burdened his ability to be a candidate, neither Nader nor his supporters made a showing of any burden, severe or otherwise, that was imposed on their First Amendment freedoms by Arizona’s filing deadline. The district court found, and the Ninth Circuit did not disagree, that the filing deadline was not the reason for Nader’s failure to get on the ballot. Instead, despite having announced his candidacy for President in February 2004, his campaign did not attempt to collect any signatures until April 2004 and, in fact, waited until two weeks before the deadline to collect the vast majority of those signatures. (App. B at 12b-13b.) Nader voluntarily withdrew his petitions based on his assertion that he had not collected a sufficient number of valid signatures. (*Id.* at 2b.)

Thus, in holding that the filing deadline as applied to independent presidential candidates imposed a “severe burden” on Nader’s rights, the Ninth Circuit implicitly ruled that no showing of any actual burden on the challenger was necessary. Because such a holding contradicts the principles set out in *Anderson* and its progeny, the Court should grant certiorari to resolve the conflict created by the Ninth Circuit’s decision.



**CONCLUSION**

The Court should grant this petition for certiorari.

Respectfully submitted,

TERRY GODDARD

Attorney General of Arizona

MARY R. O'GRADY\*

Solicitor General

BARBARA A. BAILEY, *of counsel*

Assistant Attorney General

1275 West Washington Street

Phoenix, Arizona 85007-2926

(602) 542-3333

*\*Counsel of Record    Counsel for Petitioner*