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## NOTES

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TALE OF TWO ANDERSONS: *ANDERSON V. SOUTH CAROLINA ELECTION COMMISSION* AND *ANDERSON V. CELEBREZZE* – AN EXAMINATION OF THE CONSTITUTIONALITY OF SECTION 8-13-1356 OF THE SOUTH CAROLINA CODE OF LAWS FOLLOWING THE 2012 PRIMARY BALLOT ACCESS CONTROVERSY

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TABLE OF CONTENTS

I. INTRODUCTION .....	224	R
II. <i>ANDERSON V. SOUTH CAROLINA ELECTION COMMISSION</i> AND THE 2012 SOUTH CAROLINA PRIMARY CONTROVERSY ..	228	R
A. <i>Title 8, chapter 13, section 1356 of the Code of Laws of South Carolina</i> .....	228	R
B. <i>Anderson v. South Carolina Election Commission</i> ..	228	R
C. <i>Subsequent Challenges in the South Carolina Supreme Court</i> .....	232	R
D. <i>Subsequent Challenges in Federal Court</i> .....	233	R
1. <i>Somers v. South Carolina State Election Commission</i> ..	233	R
2. <i>Smith v. South Carolina State Election Commission</i> ..	234	R
E. <i>Legislative Pushback</i> .....	237	R
III. <i>RITTER V. BENNETT: A MISSED OPPORTUNITY?</i> .....	239	R
A. <i>Title 36, Chapter 25, Section 15 of the Code of Alabama</i> ..	239	R
B. <i>Ritter v. Bennett</i> .....	240	R

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IV. A HYPOTHETICAL CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 1356 IN THE CONTEXT OF THE 2012 SOUTH CAROLINA PRIMARIES . . . . . 244 R

A. *Procedural, Standing, and Form of Pleading Issues* . . . . . 244 R

1. Subject Matter Jurisdiction . . . . . 244 R

2. Standing . . . . . 245 R

3. Form of Pleading . . . . . 246 R

B. *Substantive Law Governing Ballot Access* . . . . . 247 R

1. *Anderson v. Celebrezze* . . . . . 247 R

2. Legal Principles Governing Ballot Access . . . . . 248 R

C. Would a Constitutional Challenge be Successful? . . . . . 251 R

1. Preliminary Injunction Analysis . . . . . 252 R

a. *Likelihood of Success on the Merits* . . . . . 252 R

b. *Irreparable Injury* . . . . . 257 R

c. *Balance of the Equities* . . . . . 257 R

d. *Public Interest* . . . . . 259 R

V. CONCLUSION: THE MURKY FUTURE OF SECTION 1356 . . . . . 260 R

*“We’ve got a pretty exclusive men’s club here that became a little more exclusive yesterday . . . I’ll bet you any amount of money, the most exclusive organization in all 50 states right here in South Carolina . . . I think it’s a black day in South Carolina.”<sup>1</sup>*

I. INTRODUCTION

Election laws that are facially preferential towards incumbent candidates have become an increasing area of study in the realm of constitutional law.<sup>2</sup> What is most concerning is that the laws regarding elections and ballot access are drafted by legislators with motives for self-dealing and protecting their political interests by drafting pro-incumbent laws.<sup>3</sup> Many scholars have raised concerns about the democratic legitimacy of elections in which the political process is distorted by pro-incumbent influence.<sup>4</sup> Indeed, “a system in which few incum-

<sup>1</sup> Meg Kinnard, *Court Rejects Request for Rehearing of S.C. Election Case*, INDEP. MAIL (May 3, 2012), <http://www.independentmail.com/news/2012/may/03/court-nixes-request-rehearing-sc-election-case/> (quoting Sen. Greg Ryberg).

<sup>2</sup> See Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 647 (2011-2012) (“In recent years, commentators and judges have expressed heightened concern about electoral provisions that appear to be motivated by ‘political’ interests, designed to promote particular outcomes on partisan or incumbent-protecting grounds (or both).”).

<sup>3</sup> See *id.* at 650 (“Because election law is made by political actors, such as the state legislature, all practices are subject to partisan or incumbent-protecting motivations.”).

<sup>4</sup> *Id.* at 647.

bents are confronted by meaningful challenge cannot be said to ensure democratic accountability, a fundamental commitment of the democratic process.”<sup>5</sup>

In May 2012, following a South Carolina Supreme Court ruling<sup>6</sup> interpreting title eight, chapter thirteen, section 1356 of the Code of Laws of South Carolina (“section 1356”), which required all non-incumbent candidates to file a statement of economic interest simultaneously with their statement of candidacy,<sup>7</sup> eighty-seven Republican candidates and ninety-five Democratic candidates were initially removed from the South Carolina primary ballots<sup>8</sup> for failing to comply with a South Carolina statute<sup>9</sup> requiring “candidates to turn in the economic interest form, intended to show voters any potential conflicts of interests, when they file their candidacy.”<sup>10</sup> Fifty-five of these purged candidates were seeking their party’s nomination for a state house or senate seat.<sup>11</sup> The chaos continued as more candidates were disqualified in the weeks following the South Carolina Supreme Court’s decision in *Anderson v. South Carolina Election Commission*.<sup>12</sup> County by county, many elections commissions were required to remove a substantial number of candidates from their ballots in the weeks following the South Carolina Supreme Court’s ruling.<sup>13</sup> In fact, Oconee County

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<sup>5</sup> *Id.* at 648.

<sup>6</sup> *Anderson v. S.C. Election Comm’n*, 725 S.E.2d 704 (S.C. 2012), *reh’g denied* Order No. 2012-05-03-05, 2012 S.C. LEXIS 99 (S.C. May 3, 2012).

<sup>7</sup> S.C. CODE ANN. § 8-13-1356(A)-(B) (West Supp. 2011).

<sup>8</sup> Seanna Adcox, *With Dozens Off SC Ballot, Some Seeking 2 Offices*, POST AND COURIER (Charleston) (May 21, 2012 12:51 AM), <http://www.postandcourier.com/article/20120521/PC16/120529876/with-dozens-off-sc-ballot-some-seeking-2-offices>.

<sup>9</sup> § 8-13-1356 (West 2012).

<sup>10</sup> Adcox, *With Dozens Off SC Ballot, Some Seeking 2 Offices*, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> See Gina Smith, *Latest SC Court Ruling Claims More Candidates*, THE STATE (June 7, 2012), <http://www.thestate.com/2012/06/07/2305980/latest-court-ruling-claims-more.html> (stating that more than twenty more candidates were removed after a subsequent South Carolina Supreme Court Decision, *Florence County Democratic Party v. Florence County Republican Party*); see also Tim Flach, *Two Lexington County GOP Candidates Latest to be Booted from Primary Ballot*, THE STATE (June 7, 2012), <http://www.thestate.com/2012/06/07/2306917/two-lexington-county-gop-candidates.html> (stating that Republican candidates Wes Howard and Brian Duncan were told they were being removed from the ballots for Lexington County Council for failing to comply with the simultaneous filing requirement of section 1356).

<sup>13</sup> See *Sheriff Running Unopposed Following Court Ruling: Upheaval Continues Statewide*, NEWS CHANNEL 7, WSPA, <http://www2.wspa.com/news/2012/jun/07/16/primary-election-canceled-oconee-co-no-candidates—ar-3928194/> (last updated June 8, 2012) (stating that two Greenville County Republican candidates were removed from the ballot on June 7, 2012, five candidates were removed from the Anderson County Republican pri-

cancelled its primaries altogether after eleven candidates were disqualified on June 6, 2012.<sup>14</sup> These subsequent disqualifications brought the total number of disqualified candidates to around 200.<sup>15</sup> The *Augusta Chronicle* put the number at 247.<sup>16</sup>

Following the disqualification of these candidates and removal of their names from the primary ballots, a number of lawsuits were filed asserting various claims, including estoppel theories based on the premise that county party officials told the disqualified candidates that they were complying with South Carolina law, Equal Protection claims, Substantive Due Process, Procedural Due Process, and violations of the pre-clearance requirements of section 5 of the Voting Rights Act.<sup>17</sup> No disqualified candidates filed claims alleging that section 1356 was an unconstitutional barrier to ballot access in violation of the First and Fourteenth Amendments to the United States Constitution.<sup>18</sup> This article will explore the possibility that disqualified candidates missed an opportunity to successfully challenge the constitutionality of section 1356 and will explore the procedural issues, substantive law, and remedies that would have applied in such a hypothetical action. Although this article will primarily focus on the constitutionality of section 1356, a similar situation to the one that arose in the 2012 South Carolina Primaries could very easily happen in other states with ballot access laws that are facially preferential to incumbent candidates.

In Part II, I will examine the facts and lawsuits surrounding the 2012 South Carolina primaries and the removal of over 200 candidates from the primary ballots for failing to comply with a South Carolina statute that required non-exempt<sup>19</sup> candidates to file their statement of

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mary ballot on June 7, 2012, and eleven candidates were removed from ballots in Oconee County on June 6, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> See *id.*; see also Adcox, *With Dozens off SC Ballot, Some Seeking 2 Offices*, *supra* note 8.

<sup>16</sup> Seanna Adcox, *SC Ballot Chaos Opens Path for Petition Candidates*, *AUGUSTA CHRONICLE* (June 16, 2012), <http://chronicle.augusta.com/news/government/elections/2012-06-16/sc-ballot-chaos-opens-path-petition-candidates> (noting that 130 Republicans and 117 Democrats were disqualified).

<sup>17</sup> 42 U.S.C.A. §§ 1973-1973aa-6 (West 2012); *Smith v. S.C. Election Comm'n*, No. 3:12-CV-1543-CHH-CMC-JMC, 2012 WL 2311839, at \*5 (D.S.C. 2012).

<sup>18</sup> *Smith*, 2012 WL 2311839 at \*5.

<sup>19</sup> Incumbent candidates were exempt from the requirement that a candidate file a statement of economic interest at the same time as their statement of candidacy. See S.C. CODE ANN. § 8-13-1356(A)-(B) (West 2012).

economic interest simultaneously, and with the same official, as their statement of candidacy.<sup>20</sup>

In Part III, I will analyze *Ritter v. Bennett*,<sup>21</sup> a federal district court case involving an Alabama statute<sup>22</sup> that is similar to section 1356 because it contains a requirement that candidates must file a statement of economic interest at the same time they become a candidate.<sup>23</sup> I will compare the 2012 South Carolina primary and the South Carolina simultaneous filing requirement to Alabama's simultaneous filing requirement. The vast majority of analysis of the constitutionality will be done in Part V.

In Part IV, I will apply *Anderson v. Celebrezze*,<sup>24</sup> *Burdick v. Takushi*,<sup>25</sup> and other relevant case law, standards of scrutiny, and balancing tests, and apply the guidance of the *Ritter* court to determine how a federal district court would have analyzed the constitutionality of section 1356 if a candidate had challenged it on First and Fourteenth Amendment ballot access grounds. I will analyze the procedural issues the candidate-plaintiff would have to address, the substantive law governing the constitutional claim, and the issue of what remedies would be appropriate.

Finally, in Part V, I will explore the future of section 1356 in order to determine whether this statute will present problems in the future or whether the South Carolina Supreme Court's ruling in *Anderson v. South Carolina Election Commission* has prevented problems like this from happening in the future—albeit at the expense of over 200 potential candidates for South Carolina office—whose lives and campaigns were disrupted by their exclusion from the ballots.

It is my hope that this article will clarify some of the rules regarding the constitutionality of ballot access laws and provide information for scholars, legislators, and potential candidates if a similar situation arises in South Carolina or elsewhere in the future. Finally, I also intend to provide useful information for practitioners seeking to chal-

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<sup>20</sup> *Id.*

<sup>21</sup> *Ritter v. Bennett*, 23 F. Supp. 2d 1328 (M.D. Ala. 1998).

<sup>22</sup> ALA. CODE § 36-25-15(a) (1975).

<sup>23</sup> Compare S.C. CODE ANN. § 8-13-1356(A) (exempting incumbent candidates from the simultaneous filing requirement), with ALA. CODE § 36-25-15(a) (requiring all candidates to file a statement of economic interest at the same time they become a candidate).

<sup>24</sup> 460 U.S. 780 (1983).

<sup>25</sup> 504 U.S. 428 (1992).

lenge ballot access laws in a manner that allows a court to apply a stricter scrutiny than the traditional rational basis test used in many Due Process and Equal Protection cases.

II. *ANDERSON V. SOUTH CAROLINA ELECTION COMMISSION AND THE 2012 SOUTH CAROLINA PRIMARY CONTROVERSY*

A. *Title 8, chapter 13, section 1356 of the Code of Laws of South Carolina*

South Carolina law requires a candidate for political office to “file a statement of economic interests for the preceding calendar year at the same time and with the same official with whom the candidate files a declaration of candidacy or a petition for nomination.”<sup>26</sup> Public officials that currently have a disclosure statement on file with their supervisory office are exempted from this simultaneous filing requirement.<sup>27</sup> Public officials are “elected or appointed official[s] of the State, a county, a municipality or a political subdivision thereof, including candidates for the office.”<sup>28</sup> Elected officials are required to file a statement of economic interests with their appropriate supervisory office before taking the oath of office.<sup>29</sup> Elected officials must subsequently update their statement of economic interests every year by April 15, “listing any addition, deletion, or change in his economic status.”<sup>30</sup> Therefore, because elected officials running for reelection already have a statement of economic interests on file with the Election Commission, they are not subject to the simultaneous filing requirement that applies to candidates that wish to challenge an incumbent.<sup>31</sup> However, “many challengers were confused because lawmakers passed a law in 2010 that required candidates to file their statements of economic interest online via the State Ethics Commission’s website.”<sup>32</sup>

B. *Anderson v. South Carolina Election Commission*

As is often the case in South Carolina politics,<sup>33</sup> there is some controversy as to the origins of the lawsuit that led to the disqualification

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<sup>26</sup> S.C. CODE ANN. § 8-13-1356(B) (West 2012).

<sup>27</sup> *Id.* § 8-13-1356(A).

<sup>28</sup> *Id.* § 8-13-1300(28).

<sup>29</sup> *Id.* §§ 8-13-1110(A), (B)(10).

<sup>30</sup> *Id.* § 8-13-1140.

<sup>31</sup> *See id.* § 8-13-1356(A).

<sup>32</sup> Adam Beam, *SC Senate Struggles With Primary Confusion*, MYRTLE BEACH ONLINE (May 7, 2012), <http://www.myrtlebeachonline.com/2012/05/07/2815944/senate-struggles-with-primary.html>.

<sup>33</sup> *See, e.g.*, Tim Padgett, *Sanford’s Sex Scandal: Assessing the Damage*, TIME, June 25, 2009, <http://www.time.com/time/politics/article/0,8599,1907036,00.html> (discussing

of over 250 primary candidates in the 2012 primaries in South Carolina.<sup>34</sup> Many insiders in South Carolina politics have suggested that State Senator Jake Knotts, no stranger to controversy,<sup>35</sup> was behind the eligibility lawsuit.<sup>36</sup> In fact,

[O]ne of the plaintiffs in the eligibility lawsuit that disqualified [Katrina] Shealy [a candidate challenging Sen. Knotts in the 2012 primary] and the others had worked once for Knotts' campaign. Also, a Charleston attorney, a longtime friend of Knotts, came to Columbia to argue against Shealy as she tried to persuade the state GOP executive committee to reinstate her at a hearing.<sup>37</sup>

Although Senator Knotts denied that he was behind the lawsuit leading to the disqualifications,<sup>38</sup> he did vote against the proposed Senate Bill (after the *Anderson v. South Carolina Election Commission* decision) that would have reinstated the disqualified candidates to the ballot.<sup>39</sup> Additionally, Knotts faced no opposition in his primary race in 2012.<sup>40</sup> Regardless of the origins of the *Anderson v. South Carolina Election Commission* lawsuit, the decision by the South Carolina Supreme Court had a profound impact on the landscape of South Carolina politics for many years to come.

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former Governor Mark Sanford's unannounced disappearance to visit his mistress in Argentina under the guise of hiking the Appalachian Trail).

<sup>34</sup> See Andrew Shain, *Collecting Petitions on a Primary Day Gone Bust*, THE STATE, June 13, 2012, <http://www.thestate.com/2012/06/12/v-print/2313539/collecting-petitions-on-a-primary.html> ("The fight to represent Senate District 23, which covers an area from Cayce to Batesburg-Leesville, was behind a lawsuit that booted more than 250 candidates statewide from Tuesday's primary.").

<sup>35</sup> See, e.g., Eric Dondero, *Nikki Haley Called a "Raghead" By Mark Sanford Opponent Sen. Jake Knotts*, ZIMBIO June 4, 2010, <http://www.zimbio.com/Governor+Mark+Sanford/articles/ceOjeLlsPyj/Nikki+Haley+called+raghead+Mark+Sanford+opponent> (describing an event where Sen. Knotts said the following, referring to then gubernatorial candidate Governor Nikki Haley (of Sikh descent), during a radio interview, "[w]e already got one raghead in the White House, we don't need a raghead in the governor's mansion.").

<sup>36</sup> See, e.g., Shain, *supra* note 34 ("'[Senator Knotts] engaged in dirty politics,' the wife of U.S. Rep. Joe Wilson, R-Springdale, said Tuesday while helping collect petition signatures for her sister, who now wants to run for Lexington County clerk of court as an independent after being tossed off the GOP primary ballot.").

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See S. JOURNAL 119th Sess. No. 70 (S.C. 2012) ("Senator CAMPSSEN from the Committee on Judiciary submitted a majority favorable with amendment and Senator KNOTTS and FORD a minority unfavorable report on S. 1512."); see also Beam, *supra* note 32 ("The rules of the [South Carolina] Senate are such that it only takes one senator to kill legislation.").

<sup>40</sup> Shain, *supra* note 34.

In *Anderson v. South Carolina Election Commission*, a case brought by voters in South Carolina senate district 23,<sup>41</sup> the South Carolina Supreme Court was asked to construe the meaning of section 1356 in an action seeking declaratory relief within the court's original jurisdiction.<sup>42</sup> The court first addressed the issues of subject matter jurisdiction and justiciability before analyzing the merits of the case.<sup>43</sup> The court first found that it did have subject matter jurisdiction over the claim, because the cause of action involved only the statutory construction of section 1356 rather than judicial intervention in a "disputed legislative election."<sup>44</sup> Next, in addressing the justiciability of the dispute at bar, the court noted that "[t]here is a question of whether this dispute is ripe for review, as no harm has been incurred because an unqualified candidate has not been elected."<sup>45</sup> The court found that the issue was ripe for judicial review, however, because "[a]bsent relief, plaintiffs, as voters, face the substantial likelihood that they will be presented with a slate of candidates, of whom one or more may not be certified after the election. This is a matter of *great* public importance. Integrity in elections is *foundational*."<sup>46</sup>

Addressing the statutory construction of section 1356, the court found that the language of the statute was unambiguous in requiring that a non-exempt (e.g., non-incumbent) candidate must file a statement of economic interest at the same time they file their statement of candidacy.<sup>47</sup> The court applied the plain meaning doctrine and rejected the arguments of the South Carolina Republican and Democratic parties that filing a statement of economic interest online<sup>48</sup> with the State Ethics Commission satisfies the requirement of section 1356.<sup>49</sup> Accordingly, the court upheld the simultaneous filing requirement and held that "the names of any non-exempt individuals who did not file with the appropriate political party an SEI simultaneously with an SIC were improperly placed on the party primary ballots and must

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<sup>41</sup> *Id.*

<sup>42</sup> *Anderson v. S.C. Election Comm'n*, 725 S.E.2d 704, 705 (S.C. 2012).

<sup>43</sup> *Id.* at 706.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.* at 707-08.

<sup>48</sup> See S.C. CODE ANN. § 8-13-365 (West 2012) (requiring candidates to file their Statement of Economic Interests online with the South Carolina State Ethics Commission).

<sup>49</sup> *Anderson*, 725 S.E.2d at 707 ("Filing an SEI with the State Ethics Commission cannot excuse noncompliance with § 8-13-1356(B).").

be removed.”<sup>50</sup> The court ordered the political parties to submit the names of candidates who complied with section 1356 by noon on May 4, 2012.<sup>51</sup>

It seems that the South Carolina Supreme Court felt it necessary to acknowledge the serious repercussions of their decision. They noted, in a *per curiam* decision, that:

We fully appreciate the consequences of our decision, as lives have been disrupted and political aspirations put on hold. However, the conduct of the political parties in their failure to follow the clear and unmistakable directives of the General Assembly has brought us to this point. Sidestepping the issue now would only delay the inevitable.<sup>52</sup>

Finally, the court did not reach the State Election Commission and Lexington County Commission of Registration and Elections’ requests for reimbursement for future costs of changes to ballots and handicapped accessible audio ballots.<sup>53</sup> This denial was without prejudice, so those parties could have sought reimbursement after ascertaining or expending the costs of actual revisions to the ballots. The South Carolina Supreme Court denied a request for a rehearing and a request by the Sumter County Democratic Party for permission to file an *amicus curiae* brief on May 3, 2012.<sup>54</sup>

In the days and weeks following the *Anderson v. South Carolina Election Commission* decision, there was some legislative pushback<sup>55</sup> and the South Carolina Supreme Court and the United States District Court for the District of South Carolina would be asked to intervene in the primary ballot controversy and to address issues ranging from statutory construction to Voting Rights Act violations.<sup>56</sup> Yet, no challenger asserted that section 1356 was an unconstitutional violation of potential

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<sup>50</sup> *Id.* at 708.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Anderson v. S.C. Election Comm’n*, Order No. 2012-05-03-05, 2012 S.C. LEXIS 99, at \*1 (S.C. May 3, 2012).

<sup>55</sup> See Robert Behre, *Lawmakers, Lawyers Scramble to Address Ballot Ruling*, POST AND COURIER (Charleston) (May 8, 2012), <http://www.postandcourier.com/article/20120508/PC16/120509293>.

<sup>56</sup> See *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 727 S.E.2d 418 (S.C. 2012); *In re June 12, 2012 S.C. Elections*, No. 3:12-cv-01191-JFA, 2012 WL 1578336 (S.C. May 4, 2012).

candidates' First and Fourteenth Amendment rights by preferentially treating incumbents in a constitutionally impermissible manner.<sup>57</sup>

C. *Subsequent Challenges in the South Carolina Supreme Court*

On June 5, 2012, the South Carolina Supreme Court ruled that a number of Florence County Republicans must be removed from the June 12, 2012 primary.<sup>58</sup> The Florence County Democratic Party filed the underlying lawsuit in the South Carolina Supreme Court alleging that the Florence County Republican Party ignored the South Carolina Supreme Court's earlier decision, *Anderson v. South Carolina Election Commission*, and allowed candidates who had not filed their statement of economic interests at the same time as their statement of candidacy to be put on the June 12, 2012 Republican primary ballot.<sup>59</sup>

The court accepted the Florence County Democratic Party's argument and ordered that the Florence County Republican Party file a list of candidates that filed both forms at the same time with the court, the Florence County Election Commission, and the South Carolina State Election Commission by 10 A.M. on June 6, 2012.<sup>60</sup> In so finding, the court noted that:

[A]lthough the [Florence] County Republicans were not parties in *Anderson v. South Carolina Election Commission*, they knew that, like all of the political parties in this State, they were bound by the decision in the case, yet they *deliberately* chose to disregard the Court's clear dictates . . . [w]e are disappointed in the [Florence] County Republicans for failing to diligently perform this duty and for presenting an inaccurate statement to this Court concerning their actions in certifying candidates for the party primary.<sup>61</sup>

Furthermore, the court ordered the Florence County Election Commission to correct the primary ballots before the primary election, if possible, or to post signs at all polls that provide voters with the names of candidates who were on the ballot improperly and with instructions that votes cast for those improperly certified candidates would not be counted.<sup>62</sup> The court ordered the Florence County Republican Party

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<sup>57</sup> See *Florence Cnty. Democratic Party*, 727 S.E.2d 418; *June 12, 2012 South Carolina Elections*, 2012 WL 1578336.

<sup>58</sup> *Florence Cnty. Democratic Party*, 727 S.E.2d at 420; see also *Supreme Court Tosses Florence GOP Candidates Off Ballot*, THE STATE, June 5, 2012, <http://www.thestate.com/2012/06/05/v-print/2304148/supreme-court-tosses-florence.html>.

<sup>59</sup> *Florence Cnty. Democratic Party*, 727 S.E.2d at 419.

<sup>60</sup> *Id.* at 421.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.*

to pay all of the costs associated with these changes.<sup>63</sup> Finally, the court mandated that Florence County not count votes cast for candidates who were improperly certified.<sup>64</sup> Most strikingly, the court ended the opinion with the ominous warning that “[t]o the extent other county political parties have improperly certified candidates, those parties ignore the decisions of this Court at their own peril.”<sup>65</sup>

#### D. *Subsequent Challenges in Federal Court*

##### 1. *Somers v. South Carolina State Election Commission*

On May 4, 2012, Columbia, South Carolina attorney Todd Kincannon filed a pleading with the United States District Court for the District of South Carolina, Columbia Division, requesting an emergency hearing on a Temporary Restraining Order.<sup>66</sup> In what he describes as both “one of the strangest cases in the history of American election law” and “Kafkaesque,” Kincannon brought an action on behalf of Amanda Somers, a candidate initially disqualified by the *Anderson v. South Carolina Election Commission* decision, seeking both declaratory and equitable relief.<sup>67</sup> Somers was a candidate for South Carolina Senate District 5 and brought this action on behalf of herself and all other properly filed candidates as well as *ex rel.* on behalf of “All Persons Entitled to Vote Under the Uniformed and Overseas Citizens Absentee Voting Act” against all improperly filed candidates and the South Carolina State Election Commission.<sup>68</sup> Essentially, Somers claimed that her due process and equal protection rights were violated by her initial exclusion from the ballot, that none of the changes in election practice in South Carolina were pre-cleared by the United States Justice Department, as is required by Section 5 of the Voting Rights Act, and that South Carolina violated the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) and the Military and Overseas Empowerment Act (“MOVE Act”) by not sending out the absentee ballots at least 45 days before the election, as is required by Federal law.<sup>69</sup>

Somers eventually abandoned her efforts to get all of the disqualified candidates back on the primary ballot. She narrowed her claims

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *In re* June 12, 2012 S.C. Elections, No. 3:12-cv-01191-JFA, 2012 WL 1578336 (S.C. May 4, 2012).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶¶ 8-11.

and sought relief on two grounds that would only result in a possible delay of the primary so that South Carolina election officials could comply with the preclearance requirements of the Voting Rights Act.<sup>70</sup> First, she sought “relief under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) (“Section 5”), based on allegations that the state’s procedures for transmitting ballots to military and overseas voters were changed without obtaining preclearance from the United States Department of Justice.”<sup>71</sup> Second, she sought “relief under 42 U.S.C. § 1983 based on allegations that variations in transmission dates of state primary ballots to UOCAVA voters by different county election commissions resulted in violation of equal protection rights guaranteed by the United States Constitution.”<sup>72</sup> On May 16, 2012, the court issued an opinion and order on Somers’ “Memorandum Re Standing and Merits of UOCAVA Claim”<sup>73</sup> dismissing Somers’ remaining two claims for lack of standing.<sup>74</sup> The court found that she had no standing under Section 5 to bring the action as a candidate because she alleged no particularized injury related to the transmission of ballots overseas.<sup>75</sup> The court also found that Somers had no standing to bring an equal protection claim because she did not allege an injury in fact or how she was denied equal protection.<sup>76</sup> Finally, the court found that Somers had no standing as a third party to bring a claim on behalf of UOCAVA voters because she did not allege a “close relationship to any UOCAVA Voter” and “has not shown that any UOCAVA Voter wishes to assert his or her rights and is unable [to].”<sup>77</sup> Therefore, the court dismissed all of Somers’ remaining claims.<sup>78</sup>

## 2. *Smith v. South Carolina State Election Commission*

On June 11, 2012, five individuals who were disqualified for failing to comply with section 1356, and other candidates “similarly-situated,” filed a motion for a temporary restraining order in United States District Court for the District of South Carolina seeking “either to have

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<sup>70</sup> Somers v. S.C. State Election Comm’n, No. 3:12-CV-1191-CHH-CMC-JMC, 2012 WL 1754094, at \*1, (D.S.C. May 16, 2012).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Memorandum Re Standing and Merits of UOCAVA Claim, *In re* June 12, 2012 S.C. Elections, No. 3:12-cv-1191-CMC-CHH-JMC (D.S.C. May 11, 2012), ECF No. 23.

<sup>74</sup> Somers, 2012 WL 1754094 at \*4-5.

<sup>75</sup> *Id.* at \*4.

<sup>76</sup> *Id.* at \*5.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*6

their names restored to the ballot for the June 12, 2012 primary election or to postpone the election until [the] [court could resolve the issues raised in] [the] action.”<sup>79</sup> “A three-judge court<sup>80</sup> was empaneled, heard oral argument telephonically, and denied the motion on the afternoon of June 11, 2012.”<sup>81</sup>

The Plaintiffs alleged three causes of action in their initial pleading: (1) Plaintiffs alleged “a violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, based on a failure to pre-clear changes to voting practices” that were affected by the South Carolina Supreme Court’s decisions<sup>82</sup>; (2) Plaintiffs alleged that section 1356 is “unconstitutional and violates [their right to] equal protection”<sup>83</sup> because “application of this cumbersome and labyrinthic procedure [the requirements of section 1356] only to non-incumbents has no measurable justification for the burden it imposes – i.e., the fundamental loss of a right to participate in the electoral process via being a candidate for office”<sup>84</sup> and “the manner in which it is being applied is inconsistent throughout the State;”<sup>85</sup> and (3) Plaintiffs sought attorney’s fees pursuant to 42 U.S.C. § 1988.<sup>86</sup>

The court first determined that the candidate-plaintiffs had standing to bring a claim under the Voting Rights Act.<sup>87</sup> The court next found that all of the candidate-plaintiffs had standing to assert their facial constitutional challenge to section 1356 because they were all non-incumbents, but the court found that three candidate-plaintiffs did not have standing to assert an *as applied* challenge to section 1356.<sup>88</sup> However, the purpose of this article is to address a hypothetical facial challenge to the constitutionality of section 1356, so the reasoning for the court’s conclusions on standing for the *as applied* challenge is not relevant to this article.

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<sup>79</sup> Smith v. S.C. Election Comm’n, No. 3:12-CV-1543-CHH-CMC-JMC, 2012 WL 2311839, at \*1 (D.S.C. June 18, 2012).

<sup>80</sup> Clyde H. Hamilton, Senior Circuit Judge, Cameron McGowan Currie, District Judge, and J. Michelle Childs, District Judge, were the judges on the panel. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at \*5.

<sup>83</sup> *Id.* (quoting Brief for the Petitioners, *Smith*, 2012 WL 2311839).

<sup>84</sup> *Id.* (quoting Brief for the Petitioners, *Smith*, 2012 WL 2311839).

<sup>85</sup> *Id.* at \*6.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*7.

Though the court rejected Plaintiffs' Voting Rights Act claim for various reasons,<sup>89</sup> the court found that Plaintiffs did not have a likelihood of success on the merits of their constitutional claims,<sup>90</sup> and an examination of the court's analysis is instructive for the purposes of considering a similar constitutional challenge—albeit one grounded in the First Amendment. Although Plaintiffs moved for a temporary restraining order, the court treated their motion as if it was a preliminary injunction.<sup>91</sup> Accordingly, the court made findings of fact<sup>92</sup> regarding whether: (1) Plaintiffs were likely to succeed on the merits; (2) Plaintiffs were likely to suffer irreparable harm absent injunctive relief; (3) a balance of the equities favors granting injunctive relief; and (4) a preliminary injunction or temporary restraining order is in the public interest.<sup>93</sup>

After cautioning about the extraordinary circumstances that must be present to warrant injunctive relief,<sup>94</sup> the court addressed the likelihood of success on the merits of Plaintiffs equal protection claims.<sup>95</sup> The court rejected both the facial and *as applied* challenges because "Plaintiffs have not suggested any theory as to how their rights to due process and equal protection have been violated by the different filing requirements for incumbents and non-incumbents"<sup>96</sup> and "the bases of their constitutional claims are not entirely-clear."<sup>97</sup> The court also found that Plaintiffs' reliance on *Bush v. Gore*<sup>98</sup> was in error because of the narrow holding of *Bush v. Gore* to the circumstances of that case and the different factual scenario that the court faced in South Carolina.<sup>99</sup> Finally, the court dismissed Plaintiffs' allegations of inconsistent application of section 1356 by different county political parties and election commissions because those county parties and commissions were not named as parties in the action.<sup>100</sup>

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<sup>89</sup> *Id.* at \*11.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*13 n.15.

<sup>92</sup> The Court in this case made findings of fact on all four factors even though it was not required to do so. See *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985) ("[A district court must] make specific findings concerning each of these four factors, unless fewer are dispositive of the issue.").

<sup>93</sup> *Smith*, 2012 WL 2311839, at \*11 n.15; see also FED. R. CIV. P. 65.

<sup>94</sup> *Smith*, 2012 WL 2311839, at \*11 n.15.

<sup>95</sup> *Id.* at \*11-12.

<sup>96</sup> *Id.* at \*11.

<sup>97</sup> *Id.*

<sup>98</sup> 531 U.S. 98 (2000).

<sup>99</sup> See *Smith*, 2012 WL 2311839, at \*12.

<sup>100</sup> *Id.*

As to the second preliminary injunction factor—irreparable harm—the court found that the Plaintiffs did not show that they would be irreparably harmed “because they have failed to demonstrate that they are eligible to be on the ballot.”<sup>101</sup> Essentially, the court found that no irreparable injury occurred because the Plaintiffs were not likely to succeed in showing that section 1356 was unconstitutional.<sup>102</sup>

Next, the court found that the balance of the equities favored the South Carolina Election Commission rather than the disqualified candidates based primarily on the “equitable doctrine of laches.”<sup>103</sup> The Plaintiffs could have moved for injunctive relief right after the *Anderson v. South Carolina Election Commission* decision on May 2, 2012, but instead waited until the day before the June 12, 2012 primary.<sup>104</sup> The court found “that Plaintiffs have unreasonably delayed in filing [the] action and that the only relief available at [that] late date would prejudice Defendants.”<sup>105</sup> Accordingly, the court found that, in light of the doctrine of laches, the balance of equities tipped in the South Carolina Election Commission’s favor.<sup>106</sup>

Finally, the court found that “[t]he public has an interest in ensuring that State’s primary election is conducted pursuant to state law and that only qualified candidates appear on the ballot.”<sup>107</sup> Adding the Plaintiffs’ names to the ballot or postponing the primary election would not be in the public interest especially “at the last minute and without an adequate legal basis.”<sup>108</sup> Therefore, the court denied Plaintiffs’ motion for a temporary restraining order and the South Carolina primary continued as planned on June 12, 2012.<sup>109</sup>

#### E. *Legislative Pushback*

Although the *Anderson v. South Carolina Election Commission* ruling was overwhelmingly pro-incumbent, even Senator Robert Ford (D-Charleston), who ran for reelection unopposed because his two challengers were subsequently disqualified from the ballot for failing to require their forms in the proper manner, spoke out prior to the pri-

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<sup>101</sup> *Id.*

<sup>102</sup> *See id.* at \*11-12.

<sup>103</sup> *Id.* at \*13.

<sup>104</sup> *Id.* at \*1, \*12.

<sup>105</sup> *Id.* at \*13.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

mary election about the need for a legislative response to the *Anderson v. South Carolina Election Commission* fallout.<sup>110</sup> Senator Ford noted, “[y]ou cannot tell the public that, because of some technicality that nobody is familiar with, you’re going to take somebody off the ballot. You can’t do that.”<sup>111</sup> Sen. Ford made these remarks despite the fact that he would have faced two primary challengers had South Carolina passed legislation putting these disqualified candidates back on the primary ballots.<sup>112</sup>

Indeed, a Senate Bill was introduced on May 3, 2012, by seventeen South Carolina Senators to enable candidates disqualified by the *Anderson v. South Carolina Election Commission* decision a means to return to the ballot.<sup>113</sup> The express purpose of this bill was “to provide any person prohibited from appearing on the June 2012 primary ballot as a result of their failure to file a Statement of Economic Interests with an opportunity to file, etc., respectfully.”<sup>114</sup> Among other things, Senate Bill 1512 proposed amending section 1356 to require all candidates, whether incumbent or challenger, to electronically file a statement of economic interests, or update the statement of economic interests that they already have on file in the case of incumbents, prior to filing a statement of candidacy or petition for nomination.<sup>115</sup> The proposed bill also included a proposed joint resolution that would allow all candidates who were disqualified pursuant to the *Anderson v. South Carolina Election Commission* to “file a Statement of Economic Interests with the proper officials between 8:00 am and 8:00 pm on Friday, May 18, 2012.”<sup>116</sup> Unfortunately, Senate Bill 1512 died on the floor of the South Carolina Senate and there was no legislative solution for the disqualified candidates.<sup>117</sup> Even if Senate Bill 1512 had passed the House and Senate and was signed by Governor Nikki Haley, a federal court or the United States Justice Department would have to give

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<sup>110</sup> Behre, *supra* note 55.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> S. 1512, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See S. JOURNAL 70, 119th Sess., at 8 (S.C. 2012) (“Senator CAMPSEN from the Committee on Judiciary submitted a majority favorable with amendment and Senator KNOTTS and FORD a minority unfavorable report on: S. 1512.”); see also Beam, *supra* note 32 (“The rules of the [South Carolina] Senate are such that it only takes one senator to kill legislation.”).

preclearance to any changes to the ballots or elections procedures.<sup>118</sup> This would have been difficult given the fact that absentee ballots were being printed and mailed out at the time.<sup>119</sup> It is noteworthy that Senator Robert Ford, running as an incumbent, made strongly worded comments, referenced above, after the South Carolina Supreme Court's decision in *Anderson v. South Carolina Election Commission* that indicated that he supported legislation that would allow disqualified candidates to be reinstated to the ballot. He later voted against Senate Bill 1512, which would have done exactly that.<sup>120</sup>

### III. *RITTER v. BENNETT*: A MISSED OPPORTUNITY?

#### A. *Title 36, Chapter 25, Section 15 of the Code of Alabama*

Alabama law requires that all candidates for office at any level of government “shall file a completed statement of economic interests for the previous calendar year with the appropriate election official *simultaneously* with the date he or she becomes a candidate . . . or the date such candidate files his or her qualifying papers . . . whichever date occurs first.”<sup>121</sup> This law imposes a similar requirement as South Carolina's statute in that both require some candidates to file their statement of economic interest simultaneously with their statement of candidacy.<sup>122</sup> The Alabama statute applies to *all* candidates, however, whereas the South Carolina statute only applies to those candidates who are non-exempt—i.e., non-incumbents.<sup>123</sup> The inclusiveness of the Alabama statute and its lack of classifying candidates based on their characteristics was a factor prominently noted in a federal court decision interpreting the Alabama statute.<sup>124</sup> This distinct difference between the Alabama and South Carolina statutes is the primary reason

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<sup>118</sup> Behre, *supra* note 55.

<sup>119</sup> *See id.*

<sup>120</sup> *Compare id.* (“You cannot tell the public that, because of some technicality that nobody is familiar with, you’re going to take somebody off the ballot. You can’t do that.”) *with* S. JOURNAL 70, 119th Sess. (S.C. 2012) (noting that Senator Ford voted against Senate Bill 1512 in committee).

<sup>121</sup> ALA. CODE § 36-25-15(a) (1975) (emphasis added).

<sup>122</sup> S.C. CODE ANN. § 8-13-1356 (West 2012); ALA. CODE § 36-25-15 (1975).

<sup>123</sup> *Compare* Ala. Code § 36-25-15(a) (“Candidates at *every level of government* shall file a completed statement of economic interests for the previous calendar year with the appropriate election official simultaneously with the date he or she becomes a candidate.”) (emphasis added) *with* S.C. CODE ANN. § 8-13-1356(A) (“This section does not apply to a public official who has a current disclosure statement on file with the appropriate supervisory office.”).

<sup>124</sup> *Ritter v. Bennett*, 23 F. Supp. 2d 1328 (M.D. Ala. 1998).

that purged candidates might have prevailed on a First and Fourteenth Amendment ballot access claim.<sup>125</sup>

### B. Ritter v. Bennett

A U.S. District Court for the Middle District of Alabama faced a situation very similar to the circumstances surrounding the 2012 South Carolina Primary ballot purge.<sup>126</sup> In *Ritter v. Bennett*, four individuals who sought to run as independent candidates in a general election in Alabama filed a suit in the Middle District of Alabama claiming that the Alabama simultaneous filing requirement statute<sup>127</sup> “place[d] an unconstitutional burden on ballot access, in violation of the first and fourteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. § 1983.”<sup>128</sup> One of the candidates sought to be an independent candidate for Lauderdale County District Attorney while the other three candidates sought to be independent candidates for three different Alabama House of Representatives seats.<sup>129</sup> The Alabama Secretary of State made a determination that these four candidates could not appear on the ballot because they did not comply with section 15(a) of the Alabama Code, which requires that potential candidates must file a statement of economic interests simultaneously with the date that the person becomes a candidate.<sup>130</sup> Potential candidates may even request a five-day extension for good cause.<sup>131</sup>

Three of the four independent candidate-plaintiffs filed their statement of economic interests after filing their petition for ballot access with the Secretary of State. One of the four independent candidates had not filed a statement of economic interest at the time the *Ritter* decision was issued.<sup>132</sup> None of the four plaintiffs sought an ex-

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<sup>125</sup> See *id.* at 1333 (noting that Alabama’s filing requirement did not discriminate against independent candidates and applied equally to all candidates); see also S.C. CODE ANN. § 8-13-1356(A) (exempting incumbent candidates from the simultaneous filing requirement).

<sup>126</sup> See generally *Ritter*, 23 F. Supp. 2d 1328.

<sup>127</sup> ALA. CODE § 36-25-15(a).

<sup>128</sup> *Ritter*, 23 F. Supp. 2d at 1330.

<sup>129</sup> *Id.*

<sup>130</sup> See ALA. CODE § 36-25-15(c) (“[I]f a candidate does not submit a statement of economic interests in accordance with the requirements of this chapter, the name of the person shall not appear on the ballot and the candidate shall be deemed not qualified as a candidate in that election.”).

<sup>131</sup> See *id.* (“[T]he commission may, for good cause shown, allow the candidate an additional five days to file such statement of economic interests.”).

<sup>132</sup> *Ritter*, 23 F. Supp. 2d at 1331.

tension for filing their statement of economic interest, nor were any statements of economic interests received from any of these candidates within the maximum five-day window an extension would provide. Accordingly, “[t]he [Alabama] Secretary of State’s Office reasoned that the plaintiffs became candidates within the meaning of [chapter 17, section 22A-2 of the Alabama Code] when they filed their petitions for ballot access, and therefore should have filed their statements of economic interests at that time.”<sup>133</sup> The Secretary of State ordered that the plaintiffs’ names be stricken from the November ballots for failing to comply with the simultaneous filing requirement.<sup>134</sup> Subsequently, the four plaintiffs filed a complaint against the Alabama Secretary of State, Alabama Attorney General, Alabama Ethics Commission, and “the probate judges<sup>135</sup> of the counties in which the plaintiffs are running for office.”<sup>136</sup> The plaintiffs sought declaratory relief as well as injunctive relief under 42 U.S.C.A. § 1983.

The plaintiffs claimed that their right to vote and right to associate pursuant to the First and Fourteenth Amendments were violated because of the burden imposed by the simultaneous filing requirement.<sup>137</sup> Indeed, as an initial matter, the *Ritter* court acknowledged that these two rights are fundamental and important when considering a constitutional challenge involving ballot access.<sup>138</sup> The court also noted that “where such [ballot access] restrictions keep candidates or parties off of the ballot, the State impairs the voters’ ability to express their political preferences.”<sup>139</sup> The plaintiffs further contended that because fundamental constitutional rights were implicated in the case, the court should apply strict scrutiny to the simultaneous filing statute which would require the State of Alabama to “show that it [the simultaneous filing requirement] is narrowly tailored to achieve a compelling

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1331-32.

<sup>135</sup> The Alabama Secretary of State sent a letter “to the probate judges of the counties in which the plaintiffs were running for office, stating that the plaintiffs’ names should not appear on the November ballots.” *Id.*

<sup>136</sup> *Id.* at 1332.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (quoting *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)) (“Restrictions on access to the ballot burden two distinct and fundamental rights, ‘the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.’”).

<sup>139</sup> *Id.* (internal quotation marks omitted).

state interest” in order for the statute to be constitutional.<sup>140</sup> However, the *Ritter* court relied on *Burdick v. Takushi* and held that not all ballot access restrictions are subject to strict scrutiny.<sup>141</sup> The *Ritter* Court adopted a balancing test standard where it weighs “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.”<sup>142</sup>

In evaluating this balancing test, the court noted that when a potential candidate’s First and Fourteenth Amendment rights are “subjected to severe restriction,” strict scrutiny will apply and the statute must be narrowly tailored to advance a compelling state interest.<sup>143</sup> However, if the restrictions on ballot access are reasonable and nondiscriminatory on the constitutional rights of the potential candidates, the State’s interests in regulating elections are typically sufficient.<sup>144</sup>

Applying these rules to the facts of the four independent candidates’ attempts to get on the ballot, the *Ritter* Court found that the State of Alabama’s interests justified the simultaneous filing restriction because it was reasonable and nondiscriminatory.<sup>145</sup> The court found that the plaintiffs did not make a clear showing of why the simultaneous filing requirement is burdensome.<sup>146</sup> The court also found that the plaintiffs had not “asserted that the requirement discriminates against them as independent candidates.”<sup>147</sup> Because potential candidates had the option to fill out the statement of economic interest “well in advance of the deadline for filing petitions for ballot access,”

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“Election laws will invariably impose some burden upon individual voters . . . [and] to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

<sup>142</sup> *Ritter*, 23 F. Supp. 2d at 1332; see also *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982) (“In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. *Only after* weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.”) (emphasis added).

<sup>143</sup> *Ritter*, 23 F. Supp. 2d at 1333.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1334.

<sup>146</sup> *Id.* at 1333.

<sup>147</sup> *Id.*

the court found that the simultaneous filing was not unduly burdensome.<sup>148</sup>

Next, the court addressed whether the simultaneous filing requirement was discriminatory against independent candidates.<sup>149</sup> Because the Alabama statute applied to *all candidates*, rather than just independent candidates, the court found that it was not discriminatory.<sup>150</sup> In fact, the court determined that “individual [sic] [independent] candidates have considerably more time than major party candidates in which to complete their statements of economic interests.”<sup>151</sup> The court noted that, in 1998, the deadline for a major party candidate to qualify to run for political office, and file their statement of economic interest, was April 3, while the deadline for an independent candidate to qualify to run for political office was July 6.<sup>152</sup> This gave an independent candidate more than three extra months to complete and file their statements of economic interests.<sup>153</sup> For those reasons, the court found that the simultaneous filing requirement was a “‘reasonable, nondiscriminatory restriction’ on ballot access rights.”<sup>154</sup>

Although the court found that there was no undue burden and that the simultaneous filing requirement was reasonable and nondiscriminatory, they still assessed “the State’s justifications for the simultaneous-filing requirement and balance[d] them against the burdens imposed by it.”<sup>155</sup> The court found a substantial state justification in giving “voters insight into financial interests that could influence how a candidate, if elected, would perform.”<sup>156</sup> The court even made this finding despite the fact that the State did not submit evidence to support that justification.<sup>157</sup> The court instead relied on “common sense” in reaching this justification.<sup>158</sup> Thus, the court then denied plaintiffs’ challenge to constitutionality of the Alabama statute.<sup>159</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1333-34.

<sup>157</sup> *Id.* at 1334.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

Quite interestingly, *Ritter v. Bennett* has never been cited by any subsequent U.S. district court or appellate court decisions. Although *Ritter v. Bennett* is a district court case with no binding precedential authority in South Carolina, it proves quite useful in analyzing a constitutional challenge to section 1356.

#### IV. A HYPOTHETICAL CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 1356 IN THE CONTEXT OF THE 2012 SOUTH CAROLINA PRIMARIES

Before addressing the substantive law of a candidate-plaintiff's claim, this note will address a number of procedural, standing, and form of pleading issues that are vital to ensure that the candidate-plaintiff is able to properly seek the proper relief—a permanent injunction placing him and other candidates on the 2012 South Carolina primary ballots.

##### A. *Procedural, Standing, and Form of Pleading Issues*

Because the *Anderson v. South Carolina Election Commission* decision was issued only slightly over a month before the June 12, 2012 primaries, a candidate-plaintiff would have only had a short period of time to properly challenge the constitutionality of section 1356. Additionally, the candidate-plaintiff would have had to deal with a myriad of procedural issues, including what form of pleading to file in order to get an expedited trial, issues of jurisdiction, and issues of standing.

##### 1. Subject Matter Jurisdiction

A federal district court would have subject matter jurisdiction over a challenge to the constitutionality of section 1356 pursuant to 28 U.S.C.A. § 1331, which confers subject matter jurisdiction to District Courts to hear “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>160</sup> A challenge to the constitutionality of section 1356 would satisfy the “federal question” requirement of 28 U.S.C.A. § 1331 because 42 U.S.C.A. § 1983 provides for a cause of action for “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . [is subjected] to the

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<sup>160</sup> *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006) (quoting 28 U.S.C. § 1331 (2006)).

deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>161</sup>

## 2. Standing

As a threshold issue in any challenge to the constitutionality of section 1356, a candidate-plaintiff would be required to show that they have standing to bring the cause of action.<sup>162</sup> In this case, a candidate-plaintiff suffered concrete and particularized harm by being removed from the primary ballot for failing to comply with what they allege is a statute that unconstitutionally infringes on their First and Fourteenth Amendment rights. This harm—disqualification—is real and immediate because after *Anderson v. South Carolina Election Commission*, a candidate-plaintiff bringing a lawsuit would have already been removed from the ballot<sup>163</sup>—harm that is in no way hypothetical. A candidate-plaintiff would also be able to show causation because it is the application of the South Carolina Supreme Court’s interpretation of section 1356 that led to their disqualification for failing to simultaneously file a statement of economic interest and statement of candidacy.<sup>164</sup> Although county election commissions were the entities functionally responsible for removing candidates’ names from the ballots, they only did so at the direction of the South Carolina Supreme Court’s rulings in *Anderson v. South Carolina Election Commission* and *Florence County Democratic Party v. Florence County Republican Party*.<sup>165</sup> Finally, a candidate-plaintiff would be able to make a sufficient showing that a district court could order a mandatory injunction requiring the election commissions to add the candidate-plaintiff’s name to the primary ballot if section 1356 is found to be unconstitutional. Even the South Carolina

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<sup>161</sup> 42 U.S.C.A. § 1983 (West 2012); *see also* *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005) (“This provision [28 U.S.C. § 1331] for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law (*e.g.*, claims under 42 U.S.C.A. § 1983).”).

<sup>162</sup> *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an *essential and unchanging* part of the case-or-controversy requirement of Article III.”) (emphasis added).

<sup>163</sup> *See* *Anderson v. S.C. Election Comm’n*, 725 S.E.2d 704 (S.C. 2012).

<sup>164</sup> *Id.* at 708.

<sup>165</sup> *See id.* (holding non-exempt individuals who failed to file a statement of economic interest at the same time as a statement of candidacy should be removed from the ballot); *see also* *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 727 S.E.2d 418, 421 (S.C. 2012) (holding candidates who did not file a statement of economic interest and a statement of candidacy simultaneously should be removed from the ballot by the Florence County Election Commission).

Election Commission acknowledged that a court could order the June 12th primaries to be delayed to consider legal arguments and possibly add candidates' names back onto the ballot.<sup>166</sup> For these reasons, a candidate disqualified under section 1356 would almost certainly be able to satisfy the Article III standing requirements.

### 3. Form of Pleading

Initially, a candidate-plaintiff should have filed a complaint for a non-jury trial in order to allow them to file the appropriate motions for injunctive relief concurrently with their pleading.<sup>167</sup> A candidate-plaintiff should have filed a motion for a preliminary injunction<sup>168</sup> in order to properly challenge the constitutionality of the simultaneous filing requirement of section 1356. However, it is also possible, and quite likely, that the district court would have consolidated the hearing on the preliminary injunction and the full hearing on the merits, made an expedited binding determination on the merits of the candidate-plaintiff's claim, and entered a permanent injunction if appropriate.<sup>169</sup> In the case of the constitutionality of a statute, there would be no fact or lay witnesses, and the issue would be fully briefed at the preliminary injunction stage so it would be logical and economical for the court to consolidate the hearing on the merits and the hearing on the preliminary injunction in order to expedite and resolve the constitutional conflict before the June 12, 2012 primaries.<sup>170</sup> For instance, in *New Alliance Party of Alabama v. Hand*, the Eleventh Circuit Court of Appeals noted that the district court in the opinion below held "[a] consolidated hearing on the request for preliminary injunction and trial on the merits" on the constitutionality of an Alabama statute requiring

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<sup>166</sup> See Behre, *supra* note 55 ("[South Carolina State Election Commission Spokesperson] Whitmire said a court could order the June 12 primaries delayed as it considers such arguments.").

<sup>167</sup> See *Budlong v. Graham*, 488 F. Supp. 2d 1245, 1246 ("Contemporaneous with their pleading, Plaintiffs filed a motion for preliminary injunction and asked the Court, pursuant to Rule 65(a)(2), to consolidate the hearing on the preliminary injunction with the hearing on the final disposition of the case."); see also FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

<sup>168</sup> FED. R. CIV. P. 65(a).

<sup>169</sup> See FED. R. CIV. P. 65(a)(2).

<sup>170</sup> *Singleton v. Anson Cnty. Bd. of Educ.*, 387 F.2d 349, 351 (4th Cir. 1967) ("Fed. R. Civ. P. 65(a)(2) wisely permits the district court in an appropriate case to hear a motion for preliminary injunction and conduct a hearing on the merits at the same time. Civil rights cases are especially suitable for such simultaneous development. The district judge may sometimes advance the litigation and save court time by pursuing such a course on his own motion where . . . the litigants have not moved him to do so.").

minor party candidates to file qualifying petitions seven months prior to the election.<sup>171</sup> The *New Alliance Party of Alabama* Court also allowed the parties to submit evidence subsequent to the hearing as long as it was submitted during the post-trial briefing period “due to the expedited nature of the proceedings.”<sup>172</sup>

### B. Substantive Law Governing Ballot Access

Although there are no cases directly addressing the issues that disqualified candidates from the 2012 South Carolina primaries faced, there is a great deal of Supreme Court jurisprudence on the constitutionality of ballot access statutes.<sup>173</sup> Indeed, the court in *Ritter v. Bennett*,<sup>174</sup> a case with very similar facts to those faced by disqualified candidates in the South Carolina primaries, relied on this line of cases, primarily *Anderson v. Celebrezze*<sup>175</sup> and its progeny, in finding that section 15 of the Code of Alabama was a constitutional ballot access statute. A brief summary of *Anderson v. Celebrezze* and *Burdick* will be followed by a general overview of the case law that a district court would use in examining a First and Fourteenth Amendment challenge to the constitutionality of section 1356.

#### 1. *Anderson v. Celebrezze*

In *Anderson v. Celebrezze*, the Supreme Court of the United States reversed the Sixth Circuit Court of Appeals by holding that Ohio’s early filing deadline that only applied to independent candidates was an unconstitutional barrier to the election process.<sup>176</sup> Petitioner, John Anderson, was an independent candidate for the 1980 Presidential Election who successfully gathered the required number of signatures to be placed on the Ohio Presidential ballot.<sup>177</sup> Although Anderson was able to meet all of the “substantive requirements for having his name placed on the ballot for the general election in November 1980 in all fifty States and the District of Columbia,” he filed his statement of candidacy after the statutory deadline for filing in Ohio.<sup>178</sup> The Court was faced with the question of whether this statutory early filing dead-

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<sup>171</sup> *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1569 (11th Cir. 1991).

<sup>172</sup> *Id.* at 1569 n.1.

<sup>173</sup> *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983).

<sup>174</sup> *Ritter v. Bennett*, 23 F. Supp. 2d 1328 (M.D. Ala. 1998).

<sup>175</sup> 460 U.S. 780 (1982).

<sup>176</sup> *Id.* at 806.

<sup>177</sup> *Id.* at 782.

<sup>178</sup> *Id.*

line was an unconstitutional barrier to ballot access that unconstitutionally burdened the “voting and associational rights” of Anderson and his supporters.<sup>179</sup> The Court held that the

State’s asserted interest in protecting political stability was not sufficient to justify the early filing deadline and found that the extent and nature of the burdens Ohio has placed on the voters’ freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State’s minimal interest in imposing a March deadline.<sup>180</sup>

Although *Anderson v. Celebrezze* involved a Presidential election and independent candidates, the general legal principles governing a First Amendment challenge to a ballot access statute are quite succinctly stated. The situation in South Carolina is similar to the circumstances of *Anderson v. Celebrezze* because the Court in *Anderson v. Celebrezze* faced a statutory filing deadline that was favored towards major party candidates over independent candidates; much like how the South Carolina simultaneous filing statute favored incumbents over challengers and resulted in many challengers becoming independent, petition candidates.<sup>181</sup> Though the factual circumstances in the two cases are quite different, the First and Fourteenth Amendment analysis is largely the same because the Court is faced with a statute that is facially prejudicial against a political group with very little power compared to their opponent—whether it be an independent candidate and major party candidate or a challenger and incumbent.

## 2. Legal Principles Governing Ballot Access

As *Anderson v. Celebrezze* indicates, a First and Fourteenth Amendment challenge to the constitutionality of a ballot access law affects both the candidate, who is directly affected by the requirements of the statute, and the voters who support that candidate, whose associational rights guaranteed by the First Amendment may be infringed upon by an unconstitutional statute.<sup>182</sup> The Supreme Court noted that their “primary concern is with the tendency of ballot access restrictions to

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 806 (internal quotation marks omitted).

<sup>181</sup> See Adcox, *SC Ballot Chaos Opens Path for Petition Candidates*, *supra* note 16; Kinnard, *supra* note 1.

<sup>182</sup> See *Anderson*, 460 U.S. at 786 (“Nevertheless, as we have recognized, ‘the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.’”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

limit the field of candidates from which voters might choose.”<sup>183</sup> Constitutional rights are certainly implicated by candidate eligibility and ballot access restrictions.<sup>184</sup>

Because voters can only demonstrate their preferences for those who govern by voting for a candidate or engaging in a political party via their nominating process or primary, it is vital to ensure that any barriers to candidate access comply with the constitution.<sup>185</sup> There can exist a concrete constitutional violation when the ballot access restriction burdens the electorate’s right to vote when they can only cast for a major party candidate or other candidates who managed to petition onto the ballot, who no doubt spent valuable time gathering signatures for their petition rather than campaigning.<sup>186</sup>

A federal district court typically faces a challenge to the constitutionality of a ballot access statute that relates to independent candidates, but a statute that only affects non-incumbent candidates, as in South Carolina, is quite similar because disqualified candidates were then forced to run as petition, independent candidates without the backing of either of the major political parties, or not run at all.<sup>187</sup> Therefore, the electorate’s First Amendment associational rights may be unconstitutionally burdened by a statute, such as section 1356, that relegates candidates with significant backings who had legitimate chances to win their parties’ primaries to independent status.

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<sup>183</sup> *Id.* (internal quotations omitted).

<sup>184</sup> *Id.* at 786-87 (“Writing for a unanimous Court in *NAACP v. Alabama*, Justice Harlan stated that ‘it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.’”) (internal citations omitted) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

<sup>185</sup> *Id.* at 787 (“As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. ‘It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.’”) (quoting *Lubin v. Panish*, 415 U.S. 709 (1974)).

<sup>186</sup> *See id.* at 787-88 (“The right to vote is ‘heavily burdened’ if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot. The exclusion of candidates also burdens voters’ freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens.”) (internal quotation marks omitted) (internal citations omitted).

<sup>187</sup> *See id.* at 790-91.

The court acknowledges that there must be some amount of regulation, however, in order to conduct orderly elections.<sup>188</sup> In fact, these “important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”<sup>189</sup> Therefore, the *Anderson v. Celebrezze* Court used the following analytical structure to examine a constitutional challenge to a state election law.<sup>190</sup>

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.<sup>191</sup>

Unlike an equal protection claim based on independent/major party or challenger/incumbent dichotomy, which would likely be held to a rational basis standard of scrutiny, a challenge to a state election requirement based on the First and Fourteenth Amendment will be subject to a heightened scrutiny set out above.<sup>192</sup> Indeed, the Supreme Court noted in *Clements v. Fashing* that “[o]ur ballot access cases, however, do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’”<sup>193</sup>

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<sup>188</sup> *Id.* at 788 (“Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates. We have recognized that, ‘as 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.’”) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

<sup>189</sup> *Id.*

<sup>190</sup> *See id.* at 789.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

The court should consider the facts of each situation and the law in each case closely in making any constitutional determinations.<sup>194</sup> The court should also consider the realistic effect of the ballot restriction on the candidates, but more importantly, the effect on the voters and their right to associate with a candidate that most closely represents their political views in our democratic society.<sup>195</sup> Therefore, the court in a hypothetical action brought by a candidate-plaintiff would use the balancing test from *Anderson v. Celebrezze* and *Ritter v. Bennett* to determine if the justifications for section 1356 outweigh the burden to candidates who were disqualified as a result of the South Carolina Supreme Court's decision in *Anderson v. South Carolina Election Commission*.

### C. *Would a Constitutional Challenge Be Successful?*

Although a candidate-plaintiff would be seeking permanent injunctive relief, in the form of a consolidated hearing, the discussion below will also analyze all of the factors of the preliminary injunction test, in addition to the likelihood of success on the merits, in the event that the court wishes to address the preliminary injunction independent of the full merits of a candidate-plaintiff's claims. As demonstrated below, a candidate-plaintiff would be likely to succeed on the merits of his constitutional claims under the current Supreme Court case law governing ballot access claims and given the factual situation surrounding the 2012 South Carolina primaries. The remainder of the preliminary injunction factors would also be satisfied because a violation of one's constitutional rights always constitutes an irreparable injury,<sup>196</sup> the balance of the equities always tips in favor of correcting a constitutional violation even if it burdens the agency tasked with doing so,<sup>197</sup> and it is in the public interest to make sure that all ballot access statutes in South Carolina are constitutional and do not violate potential candidates' First Amendment freedom of association.<sup>198</sup>

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<sup>194</sup> *Id.* at 963 (“Decision in this area of constitutional adjudication is a matter of degree and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions.”).

<sup>195</sup> *Bullock v. Carter*, 405 U.S. 134, 143 (“In approaching candidate restrictions, it is essential to examine in a *realistic light* the extent and nature of their impact on voters.”) (emphasis added).

<sup>196</sup> *Anderson*, 460 U.S. at 805-06.

<sup>197</sup> *Id.* at 806.

<sup>198</sup> *See Bullock*, 405 U.S. at 149.

### 1. Preliminary Injunction Analysis

If a candidate-plaintiff had brought a motion for a preliminary injunction in federal court, the court would consider four factors in determining whether injunctive relief would be appropriate.<sup>199</sup> First, the court will look at whether the candidate-plaintiff would likely succeed on the merits of his First and Fourteenth Amendment claims.<sup>200</sup> Second, the court will determine whether the candidate-plaintiff would likely suffer irreparable harm absent the grant of injunctive relief.<sup>201</sup> Third, the court will balance the equities and determine whether the public interest favors granting injunctive relief.<sup>202</sup> Finally, the court will determine whether a preliminary injunction is in the public interest.<sup>203</sup> District courts have considerable discretion in applying these factors, but “its discretion is not unlimited and must be guided by the traditional principles of equity.”<sup>204</sup> Although the United States Supreme Court has characterized a preliminary injunction as “an ‘extraordinary and drastic remedy . . . [that] is never awarded as of right,’”<sup>205</sup> “[t]he four considerations applicable to preliminary injunction decisions are factors *to be balanced*, not prerequisites that *must be met*.”<sup>206</sup>

#### a. *Likelihood of Success on the Merits*

In considering a motion for a preliminary injunction, or a consolidated hearing on the merits for a permanent injunction, the district court should adopt the approach used in *Ritter* and *Anderson v. Celebrezze* in order to determine whether application of “strict scrutiny, which is not automatically triggered in ballot access cases,”<sup>207</sup> is appro-

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<sup>199</sup> FED. R. CIV. P. 65.

<sup>200</sup> *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *A.L.K. Corp. v. Columbia Pictures Indus.*, 440 F.2d 761, 763 (3d Cir. 1971).

<sup>205</sup> *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal citations omitted) (quoting 11A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, p. 129 (2d ed. 1995)) (citing *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

<sup>206</sup> *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003) (emphasis added).

<sup>207</sup> *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“Election laws will invariably impose some burden upon individual voters . . . [but] to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”); *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972) (“The existence of such barriers [to ballot access] does not of itself compel

priate. First, the district court would have to “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate-]plaintiff seeks to vindicate.”<sup>208</sup> If the injury to a candidate-plaintiff’s First and Fourteenth Amendment rights is severe, “strict scrutiny” applies and the ballot access restriction “must be narrowly tailored to advance a compelling state interest” in order to be affirmed as constitutional.<sup>209</sup> However, if the ballot access restriction is reasonable and nondiscriminatory, “rational basis” review applies and the State’s interest will very likely be sufficient.<sup>210</sup> The following discussion will show that the district court should have determined that a candidate-plaintiff was likely to succeed in showing that section 1356 severely injured the First and Fourteenth Amendment rights of disqualified candidates and should have been subject to “strict scrutiny” review and invalidated as unconstitutional.

The burden imposed by section 1356 on non-incumbent candidates in the 2012 South Carolina primary was significant—especially in light of the confusion regarding filing statements of economic interest online and the contradictory instructions given by state and county party officials. Well over 200 candidates were disqualified for failing to comply with a hyper-technical statutory filing requirement.<sup>211</sup> Most of the disqualified candidates filed their statements of economic interest soon after filing their statement of candidacy, which has been standard practice in South Carolina primary elections for many years. It is unlikely that a potential candidate would familiarize himself with the hyper-technical requirement of section 1356 when his own party officials were instructed in the manner that had been standard practice for many years.<sup>212</sup> Although the court in *Ritter* noted, “the court does not perceive the simultaneous-filing requirement to impose a burden any greater than the burden posed by the requirement of filing the

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strict scrutiny. In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.”) (citations omitted).

<sup>208</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>209</sup> *Ritter v. Bennett*, 23 F. Supp. 2d 1328, 1333 (M.D. Ala. 1998).

<sup>210</sup> *See id.* (“But ‘when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”) (quoting *Anderson*, 460 U.S. at 788).

<sup>211</sup> Adcox, *With Dozens Off SC Ballot, Some Seeking 2 Offices*, *supra* note 8.

<sup>212</sup> *Id.*

statement-of-economic-interests form in the first instance,” the statute in *Ritter* applied to all candidates, including incumbents.<sup>213</sup>

The burden on the disqualified South Carolina primary candidates is much greater, especially in light of the factual scenario surrounding the 2012 primaries and the confusion and contradictory instructions given by party officials regarding when and where to file the statement of economic interest form. In *New Alliance Party of Alabama*, the Eleventh Circuit Court of Appeals referenced the testimony of Dr. Allen J. Lichtman, a professor of history at American University, and noted that “minor party organizers must spend much, if not all, of their time collecting signatures and cannot spend time on fund raising [sic] or on voter education.”<sup>214</sup> Although the reference was to minor and independent parties and the challenges they face compared to major party candidates,<sup>215</sup> candidates disqualified by section 1356 faced the same struggles; they spent time collecting signatures to run in the general election rather than spending time to raise money and campaign.<sup>216</sup> Additionally, even if a disqualified candidate were able to get enough signatures to secure a spot on the general election ballot, it is likely that he would split the party vote with the member of his party that won the party primary, likely an incumbent, which would allow the opposing party to win the general election.

Certainly there is a compelling reason to require candidates to file a statement of economic interest—primarily so that voters can make an informed judgment about whom they elect to public office. However, the disqualified candidates in South Carolina were not removed from the ballot for failing to file a statement of economic interest.<sup>217</sup> Rather, they were disqualified for failing to file it *simultaneously* with their statement of candidacy.<sup>218</sup> Moreover, this requirement only applies to non-incumbent candidates,<sup>219</sup> who are already typically at a significant disadvantage because they are challenging an incumbent

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<sup>213</sup> *Ritter*, 23 F. Supp. 2d at 1328.

<sup>214</sup> *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1572 (11th Cir. 1991).

<sup>215</sup> *Id.*

<sup>216</sup> *See Adcox, SC Ballot Chaos Opens Path for Petition Candidates*, *supra* note 16 (describing the time consuming process of collecting enough signatures to be placed on the general election ballot).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> This fact alone distinguishes section 1356 from the statute at issue in *Ritter*. *Ritter v. Bennett*, 23 F. Supp. 2d 1328 (M.D. Ala. 1998).

politician.<sup>220</sup> Section 1356 is clearly facially discriminatory because it only applies to non-exempt (non-incumbent) candidates, whereas the statute in *Ritter* applied to all candidates.<sup>221</sup> In fact, the independent candidate-plaintiffs in *Ritter* actually had a longer time to file a declaration of candidacy (and simultaneously file their statement of economic interest) than their major party candidate counterparts.<sup>222</sup> In stark contrast, a non-incumbent candidate-plaintiff who was disqualified from the South Carolina primary ballot was subject to much stricter filing requirements than their incumbent counterparts by a discriminatory statute that did not impose reasonable and nondiscriminatory restrictions.<sup>223</sup>

This facial discrimination severely infringes upon the constitutional rights of a candidate-plaintiff who was disqualified for failing to comply with a hyper-technical filing requirement that did not apply to their incumbent counterpart. Even if the district court determined that section 1356 imposed a reasonable burden on a candidate-plaintiff, which is unlikely in light of the factual circumstances surrounding the 2012 South Carolina primary, the statute is still facially discriminatory. Accordingly, the burdens imposed by section 1356 cannot be said to be reasonable and nondiscriminatory and the district court should have applied a “strict scrutiny” standard to section 1356 and required that the South Carolina State Election Commission and the State of South Carolina have a compelling interest for this discriminatory filing requirement that is narrowly tailored to achieve that objective.<sup>224</sup>

Second, the district court would have to “identify and evaluate” the precise interests that the State put forward as justifications for the burden on non-incumbents.<sup>225</sup> The district court would then have to “determine the legitimacy and strength of each of those interests” and “consider the extent to which those interests make it necessary to burden the [candidate-]plaintiff’s rights.”<sup>226</sup> As the court noted in *Ritter*, “[t]he justification for the requirement of simultaneous filing is self-evident. The information provided on the statement-of-economic-interests form gives voters insight into financial interests that could influ-

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<sup>220</sup> See S.C. CODE ANN. § 8-13-1356 (West 2012).

<sup>221</sup> See *id.*; *Ritter*, 23 F. Supp. 2d at 1333.

<sup>222</sup> *Ritter*, 23 F. Supp. 2d at 1333.

<sup>223</sup> See § 8-13-1356.

<sup>224</sup> See *id.*

<sup>225</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>226</sup> *Id.*

ence how a candidate, if elected, would perform.”<sup>227</sup> In fact, the *Ritter* Court took judicial notice of this purported state interest.<sup>228</sup> Finally, the *Ritter* Court noted that this financial disclosure becomes important as soon as an individual becomes a candidate so that voters can be informed on the candidates running for public office.<sup>229</sup>

However, the *Ritter* Court balanced those state interests against the “minimal burden imposed” in that case in finding that the Alabama statute was constitutional.<sup>230</sup> In the case of the 2012 South Carolina primary disqualifications, the burden imposed was much more severe and outweighs any state interests in financial transparency in elections. Financial transparency in elections is certainly a quite compelling state interest, but requiring only non-incumbent candidates to adhere to a hyper-technical filing requirement is not the most narrowly tailored means to achieve that goal. Section 1356 is not the most narrowly tailored means to financial disclosure in elections if it only applies to non-incumbent candidates. If the state’s proffered interest is to have full financial disclosure immediately upon filing for candidacy, the only way to achieve that goal is to ensure that the simultaneous filing requirement applies to all candidates who are filing to run for public office. Although an incumbent candidate already has a statement of economic interest on file from their time in office,<sup>231</sup> the state’s interest in full disclosure demands that incumbents be required to file a statement of economic interest simultaneous to the filing of their statement of economic interest in order to reflect any changes in their finances since their last statement of economic interest was filed. Absent this equal facial application of a simultaneous filing requirement, a candidate-plaintiff would be likely to show that section 1356 is not narrowly tailored to achieve a compelling government interest. Even if the district court determined that full financial disclosure at the time of filing to run for political office was a compelling state interest, section 1356 is not narrowly tailored to achieve that objective because it only requires non-incumbents to fully disclose all of their financial interests *at the time* of filing for candidacy.<sup>232</sup> Accordingly, a

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<sup>227</sup> *Ritter*, 23 F. Supp. 2d at 1333-34.

<sup>228</sup> *Id.* at 1334 (“Admittedly, the defendants have not submitted evidence to support this justification for the simultaneous-filing requirement. However, whereas here, the justification is one based upon common sense, such evidence need not be provided.”).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See S.C. CODE ANN. § 8-13-1356 (West 2012).

<sup>232</sup> *Id.*

candidate-plaintiff would likely prevail on the initial injunction factor of likelihood of success on the merits.

b. *Irreparable Injury*

The factor of irreparable injury is entirely dependent on the court's determination of the likelihood of success on the merits. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, *unquestionably* constitutes irreparable injury."<sup>233</sup> Therefore, if the court determines that a candidate-plaintiff has a likelihood of succeeding on the merits of his constitutional claim, there would be a *per se* irreparable injury and this factor would be satisfied.<sup>234</sup>

c. *Balance of the Equities*

Although the court in *Smith v. Election Commission* addressed the third preliminary injunction factor, balance of the equities, and found that the balance tipped in the favor of the South Carolina State Election Commission,<sup>235</sup> a candidate-plaintiff challenging section 1356 immediately after the South Carolina Supreme Court's ruling in *Anderson v. South Carolina Election Commission* would likely prevail on this factor.<sup>236</sup> The equitable doctrine of laches would not weigh as heavily against a candidate-plaintiff who filed a lawsuit immediately after the South Carolina Supreme Court's decision.<sup>237</sup> The *Smith* Court's conclusion on this factor was, in fact, tipped in the South Carolina Election Commission's favor because of the Plaintiffs' "lack of diligence, defined as an inexcusable or unreasonable delay in filing suit, prejudices Defendants."<sup>238</sup>

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<sup>233</sup> *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion of Brennan, J.) (emphasis added); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.").

<sup>234</sup> *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.").

<sup>235</sup> *Smith v. S.C. Election Comm'n*, No. 3:12-CV-1543-CHH-CMC-JMC, 2012 WL 2311839, at \*12 (D.S.C. June 18, 2012).

<sup>236</sup> *See id.* ("Plaintiffs could have brought this action as early as May 2, 2012, when the South Carolina Supreme Court issued its decision . . .").

<sup>237</sup> *Id.* at \*13 (noting that the Plaintiffs in the *Smith v. South Carolina Election Commission* case filed their lawsuit the day before the primary which would have prejudiced the South Carolina Election Commission because of the unreasonable delay).

<sup>238</sup> *Id.*

Therefore, it is quite likely that if a candidate-plaintiff filed a suit in the days following the *Anderson v. South Carolina Election Commission* decision, the court would have found that the timeliness and diligence of the filing tipped the balance of equities in the candidate-plaintiff's favor.<sup>239</sup> Although there would still be a burden to the South Carolina State Election Commission if a preliminary injunction were granted, the hardship suffered by the candidate-plaintiff absent injunctive relief would be far greater. The candidate-plaintiff would be forced to engage in a signature based write-in campaign for the general election rather than have the opportunity to challenge the constitutionality of the simultaneous filing statute and avail himself to the resources available to a candidate that prevails in a party primary.<sup>240</sup> This signature-based process would be lengthy and time consuming and detract from campaigning and fundraising.<sup>241</sup> Although disqualified candidates could still potentially earn a spot as an independent candidate on the general election ballot, it is often the resources available to party nominees that win elections.<sup>242</sup>

Even though the primary process would likely be disrupted by a court's granting a preliminary injunction and "[a]s explained by the Fourth Circuit in *Perry v. Judd*, 'applications for a preliminary injunction granting ballot access have been consistently denied when they threaten to disrupt an orderly election,'"<sup>243</sup> if a candidate-plaintiff was diligent and filed a timely action, this disruption would be minimal.<sup>244</sup>

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<sup>239</sup> See *id.* ("[T]he doctrine of laches tips the balance of equities in Defendants' favor.").

<sup>240</sup> *Id.* at \*13 n.9.

<sup>241</sup> See Adcox, *With Dozens Off SC Ballot, Some Seeking 2 Offices*, *supra* note 8 ("The petition process [for the state legislatures] requires gathering the signatures of at least 5 percent of a district's registered voters. The petitions – complete with signers' printed names, addresses and precinct information – must be turned in by noon July 16. Election officials must determine by Aug. 15 whether they earned a spot on the ballot.").

<sup>242</sup> For a discussion of the broader issue of whether a two-party system prevents independent candidates from getting elected, see, e.g., J. Karl Miller, *Two-party System Might Not Be Perfect, But It Works*, *MISSOURIAN* (Feb. 1, 2012) <http://www.columbiamissourian.com/stories/2012/02/01/j-karl-miller-two-party-system-may-not-be-perfect-it-works/> ("Additionally, it would range from difficult to impossible for a third party to match the organization and finances necessary to threaten the two major parties over the long haul. Take exception as you will, but it takes donors with deep as well as shallow pockets to finance elections.").

<sup>243</sup> *Smith* 2012 WL 2311839 at \*13 (quoting *Perry v. Judd*, No. 12-1067, 2012 WL 120076 (4th Cir. Jan. 17, 2012)).

<sup>244</sup> *Perry*, No. 12-1067, 2012 WL 120076, at \*3 ("[P]laintiffs could have brought their constitutional challenge to Virginia's residency requirement for petition circulators as soon as they were able to circulate petitions in the summer of 2011, but instead chose to

If, as suggested above, the court were to find that a candidate-plaintiff was likely to succeed on the merits of his claim, the balance of the equities certainly should tip in his favor because he was disqualified by a statute that was likely unconstitutional. Although it may burden the South Carolina State Election Commission to reprint ballots with the disqualified candidates' names reinstated and to correct absentee ballots, compliance with the Constitution is paramount and those administrative burdens do not outweigh ensuring a fair and free association of candidates with their political parties through the primary process. As the Sixth Circuit Court of Appeals aptly noted, "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to interfere in its enjoyment."<sup>245</sup>

d. *Public Interest*

The *Smith* Court briefly addressed the fourth preliminary injunction factor in its decision and found that the public interest favored the Defendants.<sup>246</sup> The court's reasoning was that "[t]he public has an interest in ensuring that the State's primary election is conducted pursuant to state law and that only qualified candidates appear on the ballot."<sup>247</sup> However, the public also has an interest in ensuring that the Constitution is being complied with and that the constitutional right of association is protected.<sup>248</sup> In fact, "it is always in the public interest to prevent the violation of a party's constitutional rights."<sup>249</sup> For these

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wait until after the December 22, 2011 deadline before seeking relief. The district court concluded this delay 'displayed an unreasonable and inexcusable lack of diligence' on plaintiffs' part that 'has significantly harmed the defendants.' Specifically, it determined that the delayed nature of this suit has already transformed the Board's orderly schedule for printing and mailing absentee ballots 'into a *chaotic attempt* to get absentee ballots out on time.'" (emphasis added).

<sup>245</sup> *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001).

<sup>246</sup> *Smith*, 2012 WL 2311839, at \*13.

<sup>247</sup> *Id.*

<sup>248</sup> *See, e.g., Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883-884 (3d Cir. 1997) ("In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights, including the voting and associational rights of alternative political parties, their candidates, and their potential supporters.").

<sup>249</sup> *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("Finally, the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties. Thus, the public interest would be advanced by issuance of a preliminary injunction enjoining enforcement of those portions of the challenged statutes that are of questionable con-

reasons, as long as the court determined that there was a likelihood of success on the merits, this preliminary injunction factor would be satisfied because of the importance of ensuring compliance with the Constitution.

#### V. CONCLUSION: THE MURKY FUTURE OF SECTION 1356

This Note focuses on the facial constitutionality of section 1356 in the context of the 2012 South Carolina primary and hypothesizes that a hypothetical candidate-plaintiff could have prevailed on all four injunction factors, but the same analysis may be somewhat different if a future challenge to the constitutionality of the simultaneous filing requirement is brought because the circumstances of the 2012 South Carolina primary were so unique—most notably due to the fact that such a large number of candidates removed from the ballot.<sup>250</sup> It seems quite likely that both the Republican and Democratic Parties will ensure that their county commissioners instruct candidates who are filing to run in primaries of the proper application procedures.

Despite the fact that a large scale purge of candidates for failing to comply with the simultaneous filing requirement is unlikely to occur again in South Carolina, it is possible that a similar situation could arise in another state with a similar statute or in the context of a different ballot access statute, which treats incumbents and non-incumbents or independent candidates and major party candidates in a different manner. For these reasons, I hope that this Note encourages election law practitioners to consider First Amendment challenges to ballot access laws, as opposed to the Equal Protection, Due Process, and Voting Rights Act claims typically brought in ballot access cases.

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stitutionality.”); *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 538 (S.D. Ohio 2004) (noting that the public interest weighed in favor of a preliminary injunction preventing an Ohio statute that allowed voter challengers into precincts, in violation of African American voters’ rights).

<sup>250</sup> See Adcox, *With Dozens Off SC Ballot, Some Seeking 2 Offices*, *supra* note 8.