NO. 24-_____

In the Supreme Court of the United States

MARK MILLER, ET AL.,

Petitioners,

v.

JANE NELSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is undisputed that a state may not condition participation in its elections on the payment of a fee. In this case, the uncontroverted evidence establishes that a minor political party or independent candidate for statewide office must spend substantial funds—hundreds of thousands of dollars or more—to comply with the requirements to appear on the general election ballot in Texas.

The Questions Presented Are:

1. Whether a statutory scheme that compels candidates and political parties to spend substantial funds to qualify for the ballot violates the First and Fourteenth Amendments?

2. Whether a statutory scheme that compels candidates and political parties to spend substantial funds to qualify for the ballot imposes a "severe" burden under the *Anderson-Burdick* framework?

PARTIES TO THE PROCEEDINGS

Petitioners
(Plaintiff-Appellees/Cross-Appellants below)

- Mark Miller
- Scott Copeland
- Laura Palmer
- Tom Kleven
- Andy Prior
- America's Party of Texas
- Constitution Party of Texas
- Green Party of Texas
- Libertarian Party of Texas

Respondents
(Defendant-Appellants/Cross-Appellees below)

- Jane Nelson, in her official capacity as the Secretary of State of the State of Texas
- Jose A. Esparza, in his official capacity as the Deputy Secretary of State of the State of Texas

CORPORATE DISCLOSURE STATEMENT

Petitioners Mark Miller, Scott Copeland, Laura Palmer, Tom Kleven and Andy Prior are individuals.

Petitioners America's Party of Texas, Constitution Party of Texas, Green Party of Texas and Libertarian Party of Texas do not have parent corporations and no publicly held corporation owns 10 percent or more of their respective stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 23-50537

Mark Miller et al., Plaintiffs-Appellees/ Cross-Appellants v. *Jane Nelson*, Defendants-Appellants/ Cross-Appellees.

Date of Final Opinion: September 10, 2024

Published: 116 F.4th 373 (5th Cir. 2024)

U.S. District Court, WD Texas

No. 1:19-CV-700-RP

Mark Miller et al., Plaintiffs v. *Jane Nelson*, Defendants

Date of Final Order: June 26, 2023

Available at: 634 F.Supp.3d 340 (W.D. Tex. 2022)

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PETITION FOR A WRIT OF CERTIORARI

In the decision below the Fifth Circuit upheld Texas's ballot access requirements, finding Petitioners failed to demonstrate a severe burden on their First and Fourteenth Amendment rights, even though the uncontested evidence establishes that a minor political party ("Minor Party") or independent candidate ("Independent") for statewide office must spend hundreds of thousands of dollars or more to comply with those requirements. That decision cannot be reconciled with this Court's long-standing precedent prohibiting states from making wealth a condition of participation in their electoral processes. It also deepens a conflict among the lower courts as to whether state election laws that impose substantial costs are unconstitutional. Yet the Fifth Circuit treated its decision as if it were a straightforward application of settled precedent.

The Fifth Circuit's decision is undoubtedly wrong, but it exemplifies the lower courts' persistent difficulty in adjudicating claims that state election laws violate the fundamental rights of the voters, candidates and political parties subject to them. To resolve such claims, this Court has directed lower courts to apply a balancing test pursuant to which they must "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434

(1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this *Anderson-Burdick* analysis, restrictions that impose "severe" burdens are subject to strict scrutiny, whereas lesser burdens are subject to less exacting review. *See Burdick*, 504 U.S. at 434.

But lower courts have struggled to apply the *Anderson-Burdick* analysis with consistency from its inception. *See, e.g.*, *Republican Party of Ark. v. Faulkner County, Ark.*, 49 F.3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); *Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988) ("The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal clarity"). The problem, as the Seventh Circuit has observed, is that "much of the action takes place at the first stage" of the analysis—measuring the severity of the burden a state election law imposes—but this Court has never explained how that is to be done. *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014). The Court has neither established a methodology nor identified a substantive standard to guide the inquiry.

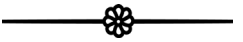
Not surprisingly, lower courts are divided as to if and when a burden crosses the line into unconstitutionally severe. Several circuits have held ballot access requirements unconstitutional even though they are less restrictive and less expensive to comply with than Texas's, while other circuits have held, consistent with the Fifth Circuit, that the substantial cost of complying with such requirements is not a severe burden. At least two circuits are internally divided: they have entered conflicting decisions holding in one

case that such costs are a severe burden, and in another case that they are not.

In addition to reaching conflicting results, lower courts have also begun to fashion their own conflicting standards for analyzing the severity of burdens imposed by ballot access requirements. In the decision below, for instance, the Fifth Circuit found that Texas's statutory scheme was not severely burdensome because the necessary cost of complying with it was not a "*consequential* burden" to Petitioners. App.11a (emphasis original). No other court appears to have invoked this novel standard, and this Court certainly has not. Similarly, however, the Seventh Circuit has recently concluded that the approximately $500,000 cost of complying with Indiana's ballot access requirements was not a severe burden because the case was not otherwise "a close one." *Indiana Green Party v. Morales*, 113 F.4th 739, 747, 751 (7th Cir. 2024); *but see Anderson*, 460 U.S. at 789 (rejecting litmus test analyses) (citation omitted). And the Sixth Circuit has concluded that the cost of complying with ballot access requirements is not a severe burden unless it amounts to "exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). The lower courts' reliance on such *sui generis* and inconsistent standards makes it all but certain that the divide between them will grow unless this Court intervenes.

Anderson-Burdick is the standard by which lower courts must analyze the constitutionality of state election laws, but as one jurist recently opined, its "hallmark is standardless standards." *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring). That cannot be the guiding principle on a question so pervasive and vitally important as

the validity of our nation's election laws. The time has come for this Court to provide lower courts the guidance they so clearly need, by establishing workable standards to inform their *Anderson-Burdick* analysis. This case is the right vehicle for the Court to do that. The facts are undisputed, the evidence is uncontested and, because this is a rare election law case that did not arise in an emergency posture, the record is robust and spans five decades of electoral history in Texas. The questions presented were also squarely raised and decided in the proceedings below. For the reasons set forth below, this Court should grant certiorari.



OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit (App.1a) is published at 116 F.4th 373 (5th Cir. 2024). The District Court's Opinion (App.29a) is published at 634 F.Supp.3d 340 (W.D. Tex. 2022).

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 2024. App.18. On December 3, 2024, Justice Alito extended the time within which to file a petition for certiorari to and including January 8, 2025. *See* No. 24A525. On January 2, 2025, Justice Alito further extended that time, such that the petition is timely filed on February 7, 2025. *See id.*; Sup. Ct. R. 30.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Legal and Historical Background

This case raises a constitutional challenge to "an entangling web of election laws" that effectively forecloses Texas's general election ballot to non-wealthy Independents and Minor Parties. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Douglas, J., concurring). The material facts are not in dispute. App.38a. They are supported by the "comprehensive evidentiary record" that Petitioners presented to the District Court, which spans five decades of Texas's electoral history. App.38a, 51a. Those facts establish that Independents and Minor Parties cannot qualify for the ballot in Texas unless they have substantial funds to hire petition circulators to gather tens of thousands of signatures in an exceedingly short time. App.41a. They also establish that the cost of doing so now is in the hundreds of thousands of dollars or more. App.41a. Those astronomical costs are caused by Texas's high signature requirements—the second highest in the nation—in combination with Texas's short petitioning periods, its obsolete and inefficient 120-year-old petitioning procedures, and other unique restrictions and requirements. Taken together, these provisions interpose a near-absolute barrier to non-wealthy Independents and Minor Parties.

1. Texas's Ballot Access Requirements Are the Most Burdensome and Expensive in the Nation.

In 2022, a statewide Independent was required to collect 83,434 valid signatures in just 107 days, while a Minor Party was required to collect the same number in just 75 days. *See* Tex. Elec. Code §§ 142.004-06, 142.007(1), 142.009 (establishing Independent requirements); §§ 181.005(a), 181.006(a),(b) (establishing Minor Party requirements). In 2024, a presidential Independent was required to collect 113,151 valid signatures in just 68 days. *See* §§ 192.032(c),(g); 41.007(c). No other state requires so many signatures in such a short time. App.40a. As a result, statewide petition drives cannot succeed in Texas today unless paid petition circulators are hired—indeed, the record demonstrates that volunteer-led petition drives have not succeeded in decades, if ever. App.40a-41a.

As Texas's signature requirements have steadily risen over the years (because they are based on a percentage of votes cast in the most recent Gubernatorial or Presidential elections), while its petitioning periods remain fixed, the cost of conducting a statewide petition drive has skyrocketed. For the last two decades, any successful statewide petition drive has cost well over $100,000, and most cost hundreds of thousands of dollars.[1] SUMF ¶¶ 69, 72. In 2010, a statewide petition drive cost more than $500,000. *Id.* ¶ 91. By 2018, the cost had risen to $587,500 if there were no

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[1] Where the lower courts' opinions omit material facts, Petitioners cite to the Statement of Undisputed Material Facts submitted in support of their Motion for Summary Judgment ("SUMF") (Dkt. 59).

run-off primary and $797,000 if there were, *id.* ¶ 117, and in 2022, the cost ranged from $882,000 to $1.375 million. App.41a. These costs are not just staggering, they are insurmountable for the non-wealthy, including Petitioners. App.43a-45a.

Texas has not updated or improved its petitioning procedures in the 120 years since it first adopted them in 1905. App.63a. The uncontested evidence demonstrates that collecting signatures by hand on paper petitions is inherently laborious, time-consuming, inefficient and expensive. App.40a-42a. To demonstrate the requisite modicum of support, for example, it is necessary to exceed the signature requirement by approximately 50 percent—or tens of thousands of signatures—due to the large proportion of signatures that are deemed invalid. App.51a. Thus, while Texas's petitioning procedures may have been adequate in 1906, when Texas only required 2,802 signatures for statewide ballot access, SUMF ¶ 12, they are grossly inadequate to the task today, when Texas's signature requirements have increased exponentially.

Texas also imposes additional requirements and restrictions that make petitioning more difficult there than any other state. App.41a. Chief among them are its "primary screenout" provisions, which prohibit Independents and Minor Parties from collecting signatures until after the Major Parties' primary elections and prohibit voters who voted in a primary from signing their petitions. *See* §§ 181.006(j), 181.063, 142.009(1); §§ 181.006(g), 142.009(2). This makes petitioning in Texas more time-consuming and expensive than any other state, because it reduces the number of eligible signers, increases the number of invalid signatures collected, and makes petitioning on primary election

day—which is by far the most productive day of a petition drive—impossible. App.41a. Texas also, unlike any other state, requires that petition circulators recite a lengthy and legalistic oath to each potential petition signer, to confirm that they have not voted in a primary, which dissuades many people from signing the petition. App.42a.

Several additional factors compound the burden Texas imposes on Independents. For instance, Independents do not know when their petitioning period will begin, because they cannot petition until after the run-off primary, if there is one. App.36a. But all petitions are due 30 days after the run-off primary date. *Id.* As a result, Independents in a race with a Major Party run-off primary have only 30 days to collect the required number of signatures. *Id.* Texas also requires more signatures from Independents in presidential races, in less time, than it requires of Independents in races for statewide offices, App.37a, 40a, even though "the State has a less important interest in regulating Presidential elections than statewide or local elections. . . ." *Anderson*, 460 U.S. at 795.

Finally, while this case was pending, Texas began requiring, for the first time in its history, that Minor Party candidates pay filing fees to be eligible to be nominated at their parties' conventions. *See* § 181.0311. The fees are equal to those that Major Party candidates pay to appear on the primary election ballot, but while the state permits the Major Parties to retain the fees their candidates pay, the state retains the fees that Minor Party candidates must pay—even though Minor Parties pay for their own conventions and the state plays no role whatsoever in administering them. App.13a.

Texas thus *profits*, financially, from Minor Parties' participation in its electoral processes. SUMF ¶ 60.

2. Texas Guarantees Major Parties Ballot Access at Taxpayer Expense.

Major Parties face no such burdens, financial or otherwise. Major Parties are entitled to place their nominees on the general election ballot automatically once they are selected in taxpayer-funded primary elections. *See* §§ 172.116; 172.117(a); 172.120(a),(h); 172.122; 173.001 *et seq*. In each election cycle since 1972, Texas has spent millions of dollars in taxpayer funds to pay for the Major Parties' primaries, and in 2020 alone it paid approximately $18 million. SUMF ¶ 37. Texas has also adopted modern, electronic procedures to facilitate the Major Parties' administration of their primary elections. *See* §§ 172.029(b); 172.116, 172.117(a), 172.122. Yet Texas has made no attempt to explore alternatives that could ease the heavy burdens its statutory scheme imposes on Independents and Minor Parties—and on the election officials who must administer and enforce that scheme. App.63a.

B. Facts and Procedural History

This action commenced on June 11, 2019, when Petitioners Mark Miller, Scott Copeland, Laura Palmer, Tom Kleven, Andy Prior, America's Party of Texas, Constitution Party of Texas, Green Party of Texas, and Libertarian Party of Texas filed suit against the Secretary of State of the State of Texas and Deputy Secretary of State of the State of Texas (together, "the Secretary"), who are named in their official capacities only. Petitioners asserted claims pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments. They alleged that the challenged provisions of the

Texas Election Code are unconstitutional as applied in combination with one another.[2]

As the District Court recognized, the "thrust" of Petitioners' claims is that the necessary cost of complying with Texas's statutory scheme is an impermissible financial barrier to their participation in the electoral process.[3] App.54a. In support of those claims, Petitioners submitted a "comprehensive evidentiary record" spanning five decades of Texas's electoral history, App.51a, which demonstrates the increasing burdens Texas's statutory scheme imposes as the number of signatures required has increased exponentially while the time for collecting them remains fixed. App.56a; SUMF ¶¶ 11-14, 21-31, 61-73. The District Court acknowledged that "it is expensive, perhaps prohibitively expensive, to comply with" that statutory scheme, but concluded that Petitioners nonetheless failed to establish a severe burden on their rights because "none of the Plaintiffs is suffering from that burden, even if it is a severe burden." App 56a.

At the same time, the District Court recognized that Texas's antiquated and obsolete petitioning procedures are "not reasonably related to the State's interest in ensuring candidates demonstrate a significant modicum of support to qualify for the ballot." App.60a.

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[2] Each challenged provision is identified and summarized in the Appendix. App.74a-84a.

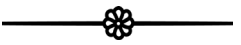
[3] Petitioners also asserted that certain aspects of Texas's statutory scheme are unconstitutional on independent grounds. For example, they asserted that the primary screenout provisions, filing fees imposed pursuant to § 181.0311, and shortened and indeterminate petitioning periods for Independents violate Equal Protection, and that the more restrictive requirements imposed on presidential Independents are unconstitutional under *Anderson*.

That "inefficient and laborious process" did not further the state's asserted interests but rather measured the extent to which Independents and Minor Parties were able to marshal sufficient funds and resources in a short time. App.60a. The District Court also found Texas's petitioning procedures unequally burdened Petitioners because the state "allows Major Parties to use electronic methods as part of their procedures for accessing the ballot," but requires Independents and Minor Parties to follow the same procedures it originally adopted in 1905. App.62a.

On October 4, 2022, the District Court entered its Amended Order granting summary judgment in part to Petitioners. App.29a-64a. The District Court held Texas's statutory scheme unconstitutional as applied to Petitioners insofar as it requires or necessitates the use of paper nomination petitions, but granted summary judgment to the Secretary on all other claims. App.63a-64a. On June 26, 2023, the District Court entered its Order and Final Judgment enjoining the Secretary from enforcing Texas's statutory scheme against Petitioners insofar as it "contemplates, relies upon, or requires paper nomination petitions or a paper nomination petitioning, verification, or submission process." App.27a. Without objection from Petitioners, the District Court stayed that Order pending appeal. App.65a.

On July 26, 2023, the Secretary appealed to the Fifth Circuit, and Petitioners cross-appealed. App.6a-7a. The Fifth Circuit ruled for the Secretary on all claims and issues. It affirmed the District Court except insofar as the District Court held Texas's statutory scheme unconstitutional as applied, and reversed that ruling. App.16a-17a. In a single paragraph, the Fifth Circuit

concluded that the cost of complying with Texas's statutory scheme did not constitute a severe burden as applied to Petitioners, because no Petitioner was actively incurring that cost during the proceedings below. App.10a-11a. The undisputed facts establish, however, that no Petitioner can afford the cost of a petition drive, that the prohibitive cost deterred some Petitioners from trying, and that all Petitioners were harmed by their inability to bear that cost. App.43a-46a.



REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Opinion Violates This Court's Precedent Prohibiting States from Conditioning Participation in Elections on Wealth and Deepens a Conflict Among Courts of Appeals as to Whether State Election Laws That Impose Substantial Costs Are Unconstitutional.

It has been settled law for at least half a century that states may not measure a citizen's qualification or entitlement to participate in their electoral processes on the basis of wealth. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax of $1.50); *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down "patently exclusionary" candidate filing fees); *Lubin v. Panish*, 415 U.S. 709 (1974) (striking down "moderate" candidate filing fees in the absence of a non-monetary alternative). "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," because "[w]ealth, like race, creed, or color, is not germane to

one's ability to participate intelligently in the electoral process." *Harper*, 383 U.S. at 668. Similarly, "[f]iling fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office." *Lubin*, 415 U.S. at 717. Wealth, in short, is "extraordinarily ill-fitted" as a criterion for regulating access to the ballot. *Bullock*, 405 U.S. at 146.

It is also well-settled that "a constitutional prohibition cannot be transgressed indirectly . . . any more than it can be violated by direct enactment." *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (quoting *Bailey v. Alabama,* 219 U.S. 219, 239 (1911). "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). A state therefore may not take action that "produce[s] a result which the State could not command directly." *Speiser*, 357 U.S. at 526.

Against these settled principles, the unconstitutionality of Texas's ballot access scheme is manifest. The uncontroverted record establishes that a Minor Party or Independent for statewide office must spend hundreds of thousands of dollars or more to comply with that scheme. App.38a, 41a, 51a, 54a, 56a. But just as the Constitution forbids Texas from imposing such a cost by direct enactment, *see Harper*, 383 U.S. at 668-670; *Bullock*, 405 U.S. at 149; *Lubin*, 415 U.S. at 718, it also forbids Texas from doing so indirectly, as Texas has done here by adopting a statutory scheme so burdensome, laborious and inefficient that the exorbitant cost of complying with it "inevitably

follow[s]" from the state's legislative choice. *NAACP*, 357 U.S. at 461; App.40a-42a. In so doing Texas has impermissibly made wealth a necessary condition of an Independent's or Minor Party's participation in its electoral processes.

Because wealth has "no relation" to a citizen's qualification to participate in a state's electoral processes, this Court has unfailingly applied strict scrutiny to election laws that infringe First Amendment rights or discriminate on the basis of wealth. *See Harper*, 383 U.S. at 670; *Bullock*, 145 U.S. at 144; *Lubin*, 415 U.S. at 719 (Douglas, J., concurring). "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . . " *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (citations omitted). In either case, "exacting scrutiny" is required. *Id.*

A. The Fifth Circuit's Opinion Upholding Texas's Statutory Scheme Under Deferential Review Conflicts with This Court's Precedent.

The Fifth Circuit analyzed Texas's statutory scheme under the *Anderson-Burdick* framework, *see infra* Part II, but it remained bound by this Court's decisions in *Harper*, *Bullock* and *Lubin*. The Fifth Circuit was similarly constrained to accept as true the undisputed fact that Independents and Minor Parties must incur substantial financial burdens to comply with that statutory scheme. App.38a, 51a, 54a, 56a. The Fifth Circuit therefore could not, consistent with this Court's precedent, uphold Texas's statutory scheme

under a deferential standard of review. Yet that is what the Fifth Circuit did. It found Texas's statutory scheme imposes no burden on Petitioners whatsoever, and rejected their claims under *Harper*, *Bullock* and *Lubin* without further analysis. App.10a-11a.

To justify this disposition, the Fifth Circuit invoked a novel legal concept that has no antecedent in the precedent of this Court or any other: the "*consequential* burden" on constitutional rights. App.11a (emphasis original). According to the Fifth Circuit, because Petitioners did not allege that they were actively incurring the costs of complying with Texas's statutory scheme—*i.e.*, that they were conducting a petition drive during the pendency of the proceedings below—Petitioners "failed to establish that the costs amount to a *consequential* burden in this case." App.11a (emphasis original). Therefore, the Fifth Circuit concluded, Petitioners failed to "show that the State is impermissibly conditioning [Petitioners'] participation in the electoral process on their financial status," or "that they have been impacted by the alleged burden, even if we were to hold that the burden is severe." App.11a.

The Fifth Circuit's analysis is as remarkable as it is wrong. It is remarkable because the conclusion that the constitutionality of Texas's statutory scheme can be properly analyzed without regard for the financial burden it imposes defies more than 50 years of settled precedent. And it is wrong because the constitutionality of that scheme does not depend on whether Petitioners have been personally "impacted" by that burden. As Justice Scalia has explained, this Court's "precedents refute the view that individual impacts are relevant to determining the severity of the burden [an election law] imposes." *Crawford v. Marion Cnty. Election Bd.*,

553 U.S. 181, 205 (2008) (Scalia, J., concurring). Instead, when measuring "the magnitude of burdens" that election laws impose, the Court does so "categorically and [without] consider[ing] the peculiar circumstances of individual voters or candidates." *Id.* (citations omitted) ("The Indiana law affects different voters differently, but what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters.") (emphasis original). The Fifth Circuit thus committed a category error: it incorrectly excused the impermissible financial burden that Texas's statutory scheme imposes because it concluded—also incorrectly, *see* App.43a-46a—that Petitioners were not personally impacted by that burden during the proceedings below.

In *Harper*, *Bullock* and *Lubin*, this Court did not hold that the financial burdens state election laws impose are "*consequential*" only as to the particular voters, candidates or parties they directly impact. On the contrary, *Harper* categorically held poll taxes unconstitutional because "wealth or fee paying has . . . no relation to voting qualifications." *Harper*, 383 U.S. at 670. The Court did not consider whether the three voter plaintiffs were impacted by the poll tax—whether they paid it, or did not, or whether they could afford it, or could not—but rather emphasized that its conclusion was "the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Id.* at 668. The impact of the poll tax on a particular plaintiff was wholly irrelevant to the constitutional analysis.

The Court similarly assessed the burden imposed by the filing fees in *Bullock* without even addressing

their impact on the individual plaintiffs. *See Bullock*, 405 U.S. at 143-144. The Court's concern was that "the very size of the fees" made it inevitable that candidates "lacking both personal wealth and affluent backers" would be excluded, and that this exclusion would harm voters by limiting "their choice of candidates," with "the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community . . . ." *Id.* The Court's assessment of these burdens—*not* any impact on the individual plaintiffs—justified its conclusion that the filing fees must be as "closely scrutinized" as the poll taxes in *Harper*. *Id.* at 144 (quoting *Harper*, 383 U.S. at 670).

So too, in assessing the burdens imposed by the filing fees in *Lubin*, the Court emphasized that "the interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and *it is this broad interest that must be weighed in the balance*." *Lubin*, 415 U.S. at 716 (emphasis added). Thus, even though the filing fees at issue directly impacted candidates, not voters, it was the "right to vote" that the Court found to be "heavily burdened" by the fees' exclusionary effect. *Id.* That was so even though the only plaintiff in the case was a *candidate* for local office. *Id.* at 710.

Harper, *Bullock* and *Lubin*—this Court's seminal cases establishing that wealth-based restrictions and classifications have no place in our nation's electoral processes—would be unthinkable if this Court had adopted the Fifth Circuit's specious distinction between so-called "*consequential*" and inconsequential burdens on constitutional rights. As explained *infra* at Part II, however, the Fifth Circuit committed this error be-

cause lower courts lack guidance as to how to measure the severity of a burden on constitutional rights. This Court's intervention is therefore urgently needed not only to bring the Fifth Circuit into conformity with this Court's precedent, but also to provide lower courts the necessary guidance with respect to this fundamental issue of national importance.

B. The Fifth Circuit's Opinion Deepens a Conflict Among Courts of Appeals as to Whether State Election Laws That Impose Substantial Costs Are Unconstitutional.

The Fifth Circuit's conclusion that the staggering cost of complying with Texas's statutory scheme does not constitute an unconstitutional burden directly conflicts with the decisions of three other federal courts of appeals—the Sixth Circuit, Seventh Circuit and Eleventh Circuit—each of which struck down laws that imposed substantially lower costs of complying than do the laws of Texas. It also conflicts with the decisions of four more federal courts of appeals—the Third Circuit, Fourth Circuit, Eighth Circuit and Eleventh Circuit—which have relied on *Harper*, *Bullock* and *Lubin* to strike down election laws that imposed other financial burdens without providing a non-monetary alternative. But while the Fifth Circuit's decision violates that line of precedent, it is no outlier. Notwithstanding their decisions that conflict with the decision below, both the Sixth Circuit and Seventh Circuit have also squarely held—consistent with that decision—that the substantial cost of completing a petition drive does *not* constitute an impermissible burden. That two circuits stand on both sides of this conflict underscores the lack of meaningful standards

under which lower courts presently labor when reviewing the constitutionality of state election laws.

1. In a challenge to Michigan's 30,000-signature requirement for independent candidates for statewide office, the Sixth Circuit found a severe burden and held the requirement unconstitutional even though it amounted to 0.72 percent of the actual voters in the previous general election—a less stringent requirement than Texas's. *See Graveline v. Benson*, 992 F.3d 524, 539-42, 548 (6th Cir. 2021); *see also id.* at 548 (Griffin, J., dissenting). Like Petitioners, the *Graveline* plaintiffs challenged Michigan's signature requirement as applied in combination with other provisions—most notably, the July 19 filing deadline—but even so, Michigan required fewer signatures, allowed a longer time to gather them, and imposed a later filing deadline than Texas. *See id.* at 528-529. Additionally, the record in *Graveline*, like the record below, disclosed that "most all-volunteer efforts fail and professionals are used to augment signature gathering efforts." *Id.* at 540 (quotation marks omitted). The plaintiff candidate's petition drive thus required "the expenditure of $38,000" in addition to "1,000 hours of volunteer time," *id.* at 530, while the total cost of a statewide petition drive came to $120,000. *See Graveline v. Benson*, 430 F.Supp.3d 297, 303 (E.D. Mich. 2019). Even though this was a fraction of the cost of a statewide petition drive in Texas, the Sixth Circuit, unlike the Fifth Circuit below, concluded it supported a finding of a severe burden. *See Graveline*, 992 F.3d at 543-546, 548.

The Eleventh Circuit has similarly held a ballot access scheme unconstitutional even though it was far less stringent and financially burdensome than Texas's. *See Green Party of Ga. v. Kemp*, 171 F.Supp.3d 1340

(N.D. Ga. 2016), *aff'd*, 674 Fed. Appx. 974 (11th Cir. 2017) (unpublished). In *Green Party of Ga.*, the plaintiffs challenged Georgia's one-percent signature requirement as applied to minor party presidential candidates. *See Green Party of Ga.*, 171 F.Supp.3d at 1344. That requirement translated to 50,334 signatures—much less than Texas's one-percent signature requirement—and Georgia allowed minor parties 15 months to collect those signatures—much longer than the 75 days Texas permits. *See id.* at 1347. Additionally, a statewide petition drive could cost as much as $350,000—much less than the cost in Texas. *See id.* at 1350. The District Court nonetheless relied on that cost, *inter alia*, to find Georgia's requirement imposed "a severe burden on associational and voting rights" and strike it down. *Id.* at 1363. The 11th Circuit "affirmed based on the district court's well-reasoned opinion." *Green Party of Ga.*, 674 Fed. Appx. 974 (per curiam) (unpublished).

The Seventh Circuit has also relied on the cost of complying with a ballot access scheme to support the conclusion that it "substantially burdened" the plaintiff candidates' rights. *See Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000). *Krislov* primarily concerned a challenge to restrictions on petition circulators under *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), but prior to reaching that issue, the Court expressly rejected the state's argument that Illinois's ballot access scheme was "only minimally burdensome" because it imposed relatively low signature requirements. *Id.* at 859 (5,000 signatures were required for statewide office). "[T]he number of signatures a candidate is required to obtain is just one of several important considerations" contributing to the burden, the Court observed. *Id.* at 860 (citations

omitted). "The uncontested record indicates that [the candidates'] ballot access took a lot of time, money and people, which cannot be characterized as minimally burdensome." *Id.*

Because each of the foregoing decisions involved ballot access requirements significantly less restrictive than Texas's and costs of complying that were substantially lower, the conflict between these decisions and the Fifth Circuit's decision below cannot be attributed to factual distinctions. Where the Fifth Circuit concluded that the cost of complying with Texas's statutory scheme did not establish a severe burden, its sister circuits reached the opposite conclusion—that the *lower* costs of complying with other states' *lesser* restrictions did.

Courts including the Third Circuit, Fourth Circuit, Eighth Circuit and Eleventh Circuit have also relied on *Harper*, *Bullock* and *Lubin* to strike down state election laws that imposed other financial burdens without providing a non-monetary alternative. *See Constitution Party of Pa. v. Cortes*, 116 F.Supp.3d 486, 502 (E.D. Pa. 2015) (striking down statutory scheme that required candidates to assume risk of incurring up to $130,000 in costs if they defended nomination petitions they were required by law to submit), *aff'd*, 824 F.3d 386 (3rd Cir. 2016); *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3rd Cir. 2003) (enjoining enforcement of Pennsylvania's filing fees against candidates unable to pay them); *Republican Party of Arkansas*, 49 F.3d 1289 (holding that Arkansas cannot require political parties to hold and pay for primary elections); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (declaring unduly burdensome nomination petition signature verification fees unconstitutional); *Dixon v. Maryland State Bd. of Elections*, 878 F.2d 776 (4th Cir. 1989)

(declaring mandatory filing fee of $150 for non-indigent write-in candidates unconstitutional); *McLaughlin v. North Carolina Board of Elections*, 850 F.Supp. 373 (M.D. N.C. 1994) (declaring five-cent per signature verification fee unconstitutional); *Clean-Up '84 v. Heinrich*, 590 F.Supp. 928 (M.D. Fl. 1984) (declaring ten-cent per signature verification fee unconstitutional). The Eighth Circuit aptly summarized the rule of law governing these cases in *Republican Party of Arkansas*, wherein it emphasized that Arkansas was neither "constitutionally required to fund primary elections" nor to "drop its mandatory party primary." *Republican Party of Ark.*, 49 F.3d at 1291. What the state could not do, however, was require political parties *both* to conduct *and* pay for primary elections. *See id.* That rule—like the decisions in *Graveline*, *Green Party of Ga.* and *Krislov*, *supra*—cannot be reconciled with the Fifth Circuit's conclusion that the necessary cost of complying with Texas's statutory scheme does not constitute a severe burden.

2. But the Fifth Circuit does not stand alone. The Seventh Circuit recently concluded, under materially indistinguishable circumstances from the decision below, that the approximately $500,000 cost of completing a statewide petition drive in Indiana is not a severe burden. *See Indiana Green Party*, 113 F.4th 739. As in the instant case, the factual record in *Indiana Green Party*—including the cost of a petition drive—is undisputed. *See Indiana Green Party v. Morales*, No. 1:22-cv-005158, 2023 WL 5207924, at *3 (S.D. Ind. Aug. 14, 2023). And like the Fifth Circuit below, the Seventh Circuit skirted the issue by referencing this cost only obliquely, without acknowledging its enormity or that it was sufficient to exclude the non-wealthy.

See Indiana Green Party, 113 F.4th at 747. The Seventh Circuit nonetheless expressly concluded that this cost "does not render Indiana's otherwise eminently reasonable requirements severely burdensome." *Id.* Although this conclusion directly contradicts its conclusion in *Krislov*, *supra*, the Seventh Circuit upheld Indiana's statutory scheme. *Id.*; *see id.* at 751.

The Sixth Circuit has likewise rejected the argument that the cost of a petition drive may constitute a severe burden, thus contradicting its decision reaching the opposite conclusion in *Graveline*, *supra*. *See Grimes*, 835 F.3d at 574. In *Grimes*, Kentucky did not permit an unqualified party to become ballot-qualified by means of a single nomination petition for its entire slate of candidates; instead, each candidate was required to submit a separate petition. *See id.* at 572-573. Two such parties challenged Kentucky's scheme on the ground that it required them to "incur high costs of gathering and filing petitions in order to field a slate of candidates," whereas qualified parties were entitled to "blanket ballot access without the need for petitioning . . . ." *Id.* at 573. The Sixth Circuit rejected the challenge. The "hallmark of a severe burden is exclusion or virtual exclusion from the ballot," it concluded, *id.* at 574 (citations omitted), and while Kentucky's scheme "may impose some financial costs on the [plaintiff parties] . . . those costs certainly do not constitute exclusion or virtual exclusion from the ballot." *Id.* at 575. The Court therefore upheld Kentucky's scheme, finding it imposed a burden "in between minimal and severe." *Id.* at 577 (citations omitted).

A functionally identical burden on First and Fourteenth Amendment rights cannot be constitutional

in some states but unconstitutional in others—particularly where, as here, that burden may be measured with precision in dollars and cents. But that is the scenario Independents and Minor Parties face under the present legal landscape. In other electoral contexts—those that impact major party candidates—this Court has consistently found such a "patchwork" scheme intolerable. *See Trump v. Anderson*, 601 U.S. 100, 116-17 (2024) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 822 (1995)). It is equally intolerable here. Certiorari is warranted to resolve this conflict among the lower courts.

II. The *Anderson-Burdick* Framework Fails to Provide Lower Courts With Meaningful Standards for Analyzing the Constitutionality of State Election Laws.

The importance of the *Anderson-Burdick* framework cannot be overstated. It is the standard by which lower courts analyze both First Amendment and Equal Protection challenges to state election laws. *See Rogers v. Corbett*, 468 F.3d 188, 194-195 (3rd Cir. 2006). As the preceding discussion demonstrates, however, it fails to establish meaningful standards that lower courts can apply to reach consistent and uniform results in this critical area of the law. As a result, lower courts are left to fashion their own *ad hoc* standards, as the Fifth Circuit did below, or to ground their analysis in nothing more than subjective opinion. That cannot be the operative test by which state election laws stand or fall.

A. This Court Has Not Established a Methodology or Substantive Standard For Measuring the Severity of a Burden on Constitutional Rights.

As Justice Stevens acknowledged in his opinion announcing the Court's judgment in *Crawford*, this Court has not "identif[ied] any litmus test for measuring the severity of a burden that a state [election] law imposes. . . ." *Crawford*, 553 U.S. at 190-91 (Stevens, J.). But that is an understatement. In fact, this Court has provided almost no guidance as to how lower courts should measure the severity of a burden, nor has it identified any substantive standard as to what constitutes a severe burden. The Court has only suggested that state laws are *not* severely burdensome if they "do not operate to freeze the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), or if they impose requirements that do "not appear to be . . . impossible." *Storer v. Brown*, 415 U.S. 724, 740 (1983). The only objective standard, it appears, is that states may not require a showing of support greater than 5 percent of the eligible pool of voters, which is the most restrictive requirement this Court has upheld. *See id.* at 739. Within that range, seemingly, anything goes—including, if the Fifth Circuit is not corrected, a statutory scheme that imposes a cost of hundreds of thousands of dollars or more. But that is inconsistent with this Court's pre-*Anderson* precedent. *See Harper*, 383 U.S. 663; *Bullock*, 405 U.S. 134; *Lubin*, 415 U.S. 709.

The Court has not been so reticent when it comes to the other side of the *Anderson-Burdick* scales—the state interests asserted to justify the burdens an election law imposes. More than 50 years ago, the Court recognized that there "is surely an important

state interest" in requiring candidates and political parties to demonstrate "a significant modicum of support" before placing them on the ballot—the interest in "avoiding confusion, deception and even frustration of the democratic process . . . ." *Jenness*, 403 U.S. at 442. Since then, lower courts have routinely found such interests sufficient to justify state election laws, frequently without inquiring whether the interests are even implicated. But lower courts need not bother with such details because this Court has "never required a State to make a particularized showing of the existence of voter confusion, ballot over-crowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1984). As a result, states are free to defend, and courts to uphold, state election laws without the slightest evidence they further any legitimate interest at all, much less that they are sufficiently tailored to that end.

This asymmetry leaves those seeking to vindicate constitutional rights under the *Anderson-Burdick* framework at a decided disadvantage. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 100 (2009) ("the relevant balancing tests . . . leave[] plaintiffs facing an uphill battle . . . without clear constitutional rules from the Supreme Court."). Unless a burden is deemed "severe," the state interests this Court has identified are generally sufficient to uphold a statute, even without evidence they are implicated. *See Stone*, 750 F.3d at 681 (citing *Burdick*, 504 U.S. at 434). Therefore, despite its lack of methodology or substantive standards, the first step of *Anderson-Burdick* is not just where "the action takes place"—it

is outcome-determinative in virtually every case. *Stone*, 750 F.3d at 681.

In the absence of substantive standards for identifying a severe burden, lower courts have developed their own. The Sixth Circuit, for example, has inferred from cases like *Jenness* and *Storer* that burdens are not severe unless they are practically impossible to overcome. *See Libertarian Party of Kentucky*, 835 F.3d at 574 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.") (citations omitted). In the decision below, the Fifth Circuit relied on its novel "*consequential* burden" standard to justify its disregard for the cost of complying with Texas's statutory scheme. Similarly, the Seventh Circuit justified its disregard for the financial burden imposed by Indiana's statutory scheme on the ground that the case was "not a close one." *Indiana Green Party*, 113 F.4th at 751. Because Indiana's signature requirement was "far lower than the 5 percent requirements" this Court has upheld, the Seventh Circuit found it "clear" that Indiana's statutory scheme is not severely burdensome. *Id.*; *but see Anderson*, 460 U.S. at 789 (rejecting litmus test analyses).

A balancing test that permits the Fifth Circuit to deem the burdens imposed by Texas's statutory scheme as less than severe, or the Seventh Circuit to conclude the same with respect to Indiana's statutory scheme, despite the hundreds of thousands of dollars it costs to comply with each one, is badly in need of recalibration. Only this Court can provide that critical correction and make *Anderson-Burdick* a functional framework to guide lower courts' review.

B. Courts and Commentators Are Increasingly Clamoring for This Court to Clarify the *Anderson-Burdick* Framework.

Petitioners are not alone in their belief that *Anderson-Burdick* is in dire need of revisitation. Far from it. In the four decades since *Anderson* was decided, the analytic framework it established has met with an unrelenting torrent of criticism. Initially, lower courts expressed confusion as to the standard of review it prescribes. *See*, *e.g.*, *Hatten*, 854 F.2d at 693; *Republican Party of Ark.*, 49 F.3d at 1296. One noted commentator was more blunt: "as a pronouncement of doctrine," Professor Tribe observed, this Court's ballot access jurisprudence "is positively Delphic." Tribe, *American Constitutional Law* § 1320 (2d Ed.1988).

This Court attempted to provide the requisite clarity in *Burdick*, by specifying that election laws that impose "severe" burdens are subject to strict scrutiny, whereas those that impose "only 'reasonable, nondiscriminatory restrictions'" are generally justified by "the State's important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Justice Scalia, joined by Justice Thomas and Justice Alito, concluded that *Burdick* succeeded in "forg[ing] *Anderson's* amorphous 'flexible standard' into something resembling an administrable rule." *Crawford*, 553 U.S. at 205 (citation omitted) (Scalia, J., concurring). But as the Seventh Circuit has observed, "this rule can only take us so far . . . for there is no 'litmus test for measuring the severity of a burden that a state law imposes.'" *Stone*, 750 F. 3d at 681 (quoting *Crawford*, 553 U.S. at 191).

Burdick thus failed to resolve lower courts' confusion or to stanch criticism of the *Anderson-Burdick* framework. *See*, *e.g.*, Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, EXCESS OF DEMOCRACY (Apr. 20, 2020), available at https://excessofdemocracy.com/blog/2020/4/the-fundamental-weakness-of-flabby-balancing-tests-in-federal-election-law-litigation (*Anderson-Burdick* is a "flabby . . . ad hoc totality-of-the-circumstances" test); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1859 (2013) ("*Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another."). And the lower courts' criticism has become even more pointed: *Anderson-Burdick* "seemingly is little more than a grand balancing test in which unweighted factors mysteriously are weighed"—a "rampant[ly] subjectiv[e]" exercise akin "to the hopeless task of assessing whether a particular line is longer than a particular rock is heavy"—and it allows a judge to "put[] . . . inherent policy preferences front-and-center when deciding critical matters of public and political interest." *Daunt*, 999 F.3d at 323, 325-27 (Readler, J., concurring) (citations omitted).

This Court revisited *Anderson-Burdick* most recently in *Crawford*, but that case did little to clarify matters, as a splintered Court produced four separate opinions but no majority. *See Crawford*, 553 U.S. 181. As a result, lower courts must continue to apply the "standardless" *Anderson-Burdick* analysis to state election laws, even as the volume of election law litigation has surged in recent election cycles with no sign

of abatement. *See* Miriam Seifter & Adam Sopko, *Election-Litigation Data: 2018, 2020, 2022 State and Federal Court Filings*, State Democracy Research Initiative (March 21, 2023), *available at* https://statedemocracy.law.wisc.edu/research/2023/election-litigation-database-2018-2020-2022-state-and-federal-court-filings/. The time has come for this Court to rectify the matter.

III. This Case Is an Ideal Vehicle For Resolving the Questions Presented.

This is a rare election law case that was not litigated in an emergency posture. As a result, it comes to this Court on the basis of a robust evidentiary record that conclusively establishes the increasing burden Texas's statutory scheme has imposed over the last five decades. Perhaps even rarer, that record is genuinely uncontroverted. As the District Court observed, the material facts are not in dispute and Respondents do not contest the "comprehensive evidentiary record" Petitioners developed in support of their claims. App.38a, 51a. Therefore, the only issue to be resolved is a question of law: whether the Constitution permits states to condition ballot access for Independents and Minor Parties on their ability to pay substantial costs. That question was directly presented to the courts below and the Fifth Circuit squarely addressed it. The Fifth Circuit held, incorrectly, that the exorbitant cost of complying with Texas's statutory scheme does not impose an unconstitutional burden on Petitioners' First and Fourteenth Amendment rights. This case is an ideal vehicle to breathe new life into the moribund *Anderson-Burdick* framework by correcting the Fifth Circuit's error and reaffirming what this Court has long held: states may not make money

a necessary condition of citizens' participation in their electoral processes.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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