APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

STATUTORY PROVISIONS

APPENDIX TABLE OF CONTENTS (Cont.)

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (SEPTEMBER 10, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK MILLER; SCOTT COPELAND;LAURA PALMER; TOM KLEVEN; ANDY PRIOR; AMERICA'S PARTY OF TEXAS, also known as APTX; CONSTITUTION PARTY OF TEXAS, also known as CPTX; GREEN PARTY OF TEXAS, also known as GPTX; LIBERTARIAN PARTY OF TEXAS, also known as LPTX,

Plaintiffs-Appellees/ Cross-Appellants,

v.

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 the State of Texas,

Defendants-Appellants/ Cross-Appellees.

No. 23-50537

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-700

Before: WIENER, ELROD, and WILSON,
Circuit Judges.

JENNIFER WALKER ELROD, *Circuit Judge*:

Independent candidates and minor political parties in Texas filed a lawsuit alleging that numerous provisions of the Texas Election Code, when considered in combination with one another, violate their First and Fourteenth Amendment rights. Because they have not proven that the challenged provisions violate their constitutional rights, we AFFIRM in part and REVERSE in part.

I

The Texas Election Code requires candidates to fulfill certain requirements to be listed on Texas ballots. Plaintiffs–Appellees allege that the challenged provisions violate the First and Fourteenth Amendments because, when applied in combination with one another, they impose severe and unequal burdens on "non-wealthy Independents and Minor Parties." Specifically, they argue that the following provisions of the Code "have prevented [them] from being able to fully participate in Texas's electoral process": Texas Election Code §§ 141.063–.065, 141.066(a), 141.066(c), 142.002, 142.006–.009, 142.010(b), 162.001, 162.003, 162.012, 162.014, 181.0311, 181.005(a), 181.005(c), 181.006(a), 181.006(b), 181.006(f)–(j), 191.007(b), 181.031–.033, 181.0041, 192.032(a)–(d), 192.032(f), and 202.007.

At the most fundamental level, the Code provides three ways for a candidate to obtain a place on the statewide general-election ballot: (1) winning a primary election; (2) receiving a nomination from a political party that nominates by convention and qualifies for ballot access; or (3) submitting a nominating petition signed by the required number of voters. *See* Tex. Elec.

Code §§ 142.001–10, 172.001–173.087, 181.001–.068, 192.032.

Under section 172.001 of the Texas Election Code, political parties that received at least twenty percent of the vote in the last gubernatorial election, which are classified as "Major Parties," nominate their candidates for state and county government and Congress by primary election. *See* Tex. Elec. Code § 172.001. To run in a primary election, a candidate must either (1) submit an application to the state or county party chair in December of the year before the election and pay a filing fee or (2) submit a nomination petition. *Id.* §§ 172.116, .117(a), .120(a), .120(h), .122. The filing fees range from $75 to $5,000. *Id.* § 172.024. If a candidate elects to submit a nomination petition, he or she must collect between 500 and 5,000 signatures depending on the office sought. *Id.* § 172.025. The Republican and Democratic parties are the only parties to have qualified as Major Parties under the Code since 1900.

The second way to obtain ballot access is for "Minor Parties," which are new political parties or parties that did not receive at least two percent of the total vote cast for governor at least once in the five previous general elections, to nominate candidates by convention. *See id.* §§ 172.002, 181.002, 181.003. Like Major Party candidates, candidates who seek a Minor Party's nomination must complete a notarized application in December of the year before the election. *Id.* §§ 141.031, 172.023(a), 181.031–33. To list a nominee on the general-election ballot, a Minor Party must file a convention-participant list within seventy-five days of the convention that shows participation equal to at least one percent of the total vote for governor in the

preceding general election. *Id.* § 181.005(a). No Minor Party has qualified for the ballot in this manner in the last fifty years.

Thus, Minor Party candidates typically obtain ballot access through the third method provided for by the Code, which is filing nomination petitions. To qualify for the ballot using this method, a Minor Party must file a nomination petition containing enough valid signatures to make up for the shortfall in their convention-participation list within seventy-five days of the convention date. *See id.* § 181.006(a), (b). Notably, the Texas Election Code restricts petitions in numerous ways. First, a voter is not allowed to sign a nomination petition until after primary elections are held. *Id.* § 181.006(j). In addition, only voters who have not voted in a primary election and have not signed another Minor Party's nomination petition or participated in another party's convention are allowed to sign. *See id.* §§ 162.001, 162.003, 162.012, 162.014, 181.006(g), 181.006(j).

Further, to file a petition, a petition circulator must sign an affidavit confirming that they did each of the following: witnessed each signature, confirmed the date of signing, verified each signer's registration status, and confirmed each registration number entered on the petition. *Id.* §§ 141.064, 141.065. There is no electronic method for obtaining or submitting signatures. Moreover, when a Minor Party succeeds at obtaining ballot access through this method, it can only retain ballot access if one of its candidates for statewide office has received at least two percent of the vote in at least one of the five previous general elections. *Id.* § 181.005(c). Otherwise, the Minor Party

must go through the petition process again during the next election cycle. *Id.*[1]

Independents can only qualify for the ballot by satisfying the nomination-petition requirements. And the requirements for doing so mirror the requirements imposed on Minor Party candidates who fail to obtain ballot access by convention. Indeed, Independents must file a declaration of intent in December of the year before the election, just like Minor Party candidates. *Id.* § 142.002. Likewise, Independents must file an application and a nomination petition that contains valid signatures equal in number to one percent of the total vote for governor in the preceding election. *Id.* §§ 142.004, 142.007. Independents seeking state office must also submit their nomination petitions by the thirtieth day after the runoff-primary election day, but they may not circulate them until after the primary election or runoff-primary election. *Id.* §§ 142.004–.006, 142.009, 202.007.[2] Likewise, Independents must have petition circulators complete affidavits confirming the validity of signatures and only voters who have not voted in a primary election or signed another nomination petition may sign. *Id.* §§ 141.062–.066.

---

[1] In 2019, Texas amended the statutory scheme to impose a new requirement on Minor Parties that is symmetrical with a requirement imposed on Major Parties. The added provision states that to appear on the general-election ballot, candidates must either pay a filing fee or submit a nomination petition that complies with section 141.062 and is signed by a specific number of eligible voters. Tex. Elec. Code § 181.0311 (previously codified as § 141.041).

[2] In 2020, these restrictions made it so that Independents seeking state office had either thirty days or 114 days to collect signatures, depending on whether a runoff primary took place. ROA.2309.

II

Plaintiffs–Appellees filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that the challenged provisions of the Texas Election Code are unconstitutional as applied to them when applied in combination with one another. They then filed a motion for a preliminary injunction, which the district court denied. In the same order, the district court also denied Defendants' motion to dismiss.

The parties filed cross-motions for summary judgment. The district court granted in part and denied in part each party's motion. Specifically, the district court held that all of Plaintiffs–Appellees' challenges failed except for one. The district court agreed with Plaintiffs–Appellees that the provisions of Texas Election Code Chapter 141 that mandate that any candidate who is required to submit a petition in support of their candidacy obtain and submit the requisite number of voter signatures in hardcopy are unconstitutional. It reasoned that the ballot-access petition requirements place an unequal burden on Plaintiffs–Appellees because "they cannot use electronic methods for petitioning whereas Texas allows Major Parties to use electronic methods as part of their procedures for accessing the ballot."

Accordingly, the district court enjoined Defendants–Appellants from enforcing any provision of Chapters 141, 142, 162, 181, or 202 of the Texas Election Code insofar as any such provision imposes an unequal burden on Plaintiffs by imposing a paper-petitioning process. Defendants–Appellants appealed. Without objection from Plaintiffs–Appellees, the district

court entered an order staying its injunction. Plaintiffs–Appellees then filed notice of their cross-appeal.

III

We review a district court's decision to grant a preliminary injunction for abuse of discretion. *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016). Under this standard, the district court's findings of fact are reviewed for clear error, and conclusions of law are reviewed *de novo*. *Id.*; *see also O'Donnell v. Harris Cnty.*, 892 F.3d 147, 155 (5th Cir. 2018).

When evaluating the constitutionality of ballot-access laws, we apply the *Anderson-Burdick* framework. Under this standard, we determine whether a law that regulates ballot access is constitutional by weighing 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." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "The rigorousness of the inquiry into the propriety of the state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights." *Tex. lndep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). "[R]easonable, nondiscriminatory restrictions" are subject to less exacting review, whereas laws that impose "severe" burdens are subject to strict scrutiny. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788, and *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Nevertheless, in every case, the Supreme Court has emphasized that "[h]owever slight [the] burden may appear . . . it must be justified by

relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288–89).

The district court carefully summarized the burdens that Plaintiffs–Appellees allege as each stemming from one of the following: (1) the number of signatures required to petition under the Texas Election Code; (2) the cost of obtaining signatures; (3) the time constraints on petitioning; (4) the restrictive petitioning procedures; and (5) section 141.041, which was enacted in 2019 and is now codified at section 181.0311. In this court, Plaintiffs–Appellees now also argue that the district court did not address their claim that the requirements imposed on Independents in presidential elections are unconstitutional. Because Plaintiffs–Appellees have failed to prove that the challenged provisions impose severe burdens on them, when considered individually or in combination with one another, and because the regulations are justified by legitimate state interests, we uphold the constitutionality of all challenged provisions as applied to Plaintiffs– Appellees.

A

As the district court proficiently explained, "[t]o qualify for the general election ballot in Texas, a statewide Minor Party or Independent candidate must submit valid signatures totaling 1% of all votes cast in the most recent gubernatorial election and 1% of all votes cast for president in Texas in the most recent presidential election." Plaintiffs–Appellees allege that this requirement imposes a severe burden that should be subjected to strict scrutiny. We disagree.

We have already held that a one-percent requirement does not impose a severe burden on potential candidates. *See Nader v. Connor*, 388 F.3d 137–38 (5th Cir. 2004). Specifically, in *Nader*, the district court held, and this court affirmed, that requiring a presidential candidate to gather signatures equal to one percent of votes cast in the prior presidential election was not "unduly restrictive or unreasonable" because Texas has a legitimate interest in "'assur[ing] itself that the candidate is a serious contender truly independent, and with a satisfactory level of community support.'" *Nader v. Connor*, 332 F. Supp. 2d 982, 987 (W.D. Tex. 2004) (alteration in original) (quoting *Storer v. Brown*, 415 U.S. 724, 746 (1974)); *see also Nader*, 388 F.3d at 137–38. Although *Nader*'s holding is not alone outcome determinative in this case, because courts must give "due consideration . . . to the practical effect of election laws of a given state," *Nader*, 332 F. Supp. 2d at 988, the reasoning articulated in *Nader* applies. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) (stating that decisions in this area of constitutional law involve consideration of specific facts, circumstances, and the impact that a restriction has on voters).

As the district court correctly observed in its order, the Libertarian Party and Green Party of Texas have surmounted the requirement to secure ballot access consistently for several years. Thus, they have not shown that the burden is unduly restrictive as applied to them. In addition, the remaining plaintiffs have not shown that the numerical signature requirement unconstitutionally burdens their parties or voters. The Constitution Party of Texas and America's Party of Texas have about 130 members and ten members, respectively. Thus, neither Minor Party can credibly

claim to have "a significant, measurable quantum of community support," which a state is within its constitutional bounds to require for ballot access. *Am. Party of Tex. v. White*, 415 U.S. 767, 782–83 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)). Likewise, the individual plaintiffs have failed to prove that the numerical requirement "freezes the status quo." *Kirk*, 84 F.3d at 185 (quoting *White*, 415 U.S. at 787). Instead, the evidence suggests that the requirement does no more than "implicitly recognize[] the potential fluidity of American political life." *Id.* at 185 (quoting *White*, 415 U.S. at 787). And the mere fact that a state's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Indeed, Texas's numerical signature requirement is justified by the state's legitimate state interest in "assur[ing] itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support," before listing that candidate on the ballot. *See Storer*, 415 U.S. at 746; Tex. Elec. Code §§ 142.007 (1), 192.032(d). Accordingly, we uphold the requirement as constitutional as applied to Plaintiffs–Appellees.

B

Plaintiffs–Appellees also argue that the challenged provisions are unduly burdensome because, practically speaking, they make it so that Minor Party and Independents must hire professional petition circulators to collect an adequate number of signatures to obtain ballot access through the petitioning process. In support of this argument, Plaintiffs–Appellees cite the Supreme Court's decision in *Bullock*, which struck down a statutorily mandated filing fee. 405 U.S. at 149. While Plain-

tiffs–Appellees recognize that there is no statutory requirement to pay petition circulators in this case, they argue that the practical effect of the challenged provisions, which is that their candidates must hire petition circulators to complete a successful petition drive, constitutes "a distinction without a difference." But Plaintiffs–Appellees have failed to establish that the costs amount to a *consequential* burden in this case. As the district court explained in its order, "[t]he evidence in this case does not show that the State is impermissibly conditioning Plaintiffs' participation in the electoral process on their financial status." Once again, the evidence reflects that the Libertarian and Green Parties of Texas have ballot access, and the remaining plaintiffs fail to establish that they have been impacted by the alleged burden, even if we were to hold that the burden is severe.

C

Plaintiffs–Appellees further argue that the provisions of the Texas Election Code that place time constraints on when Independents or Minor Parties can collect signatures for petitions are unconstitutionally burdensome. It is true that the Texas Election Code places more stringent time constraints on candidates seeking to access the ballot through the petitioning process than any other state. Nevertheless, Plaintiffs–Appellees' claim that this is severely burdensome as applied to them fails for the same reason that their claims concerning the number of signatures required and the costs of obtaining signatures fail. As the district court adeptly held, Plaintiffs–Appellees have failed "to present adequate evidence that the time constraints burden them. Instead, [they] simply argue that the time period

remains fixed while the number of required signatures increases with each election cycle." Such evidence is not sufficient to establish a severe burden on Plaintiffs–Appellees.

D

Next, Plaintiffs–Appellees challenge the requirements imposed on petition signers and circulators. Specifically, Plaintiffs–Appellees allege that the "primary screenout" provisions, which restrict potential voters from signing petitions before the primaries and then prohibit voters who have voted in the primaries from signing petitions, impose an unconstitutional burden. However, Plaintiffs–Appellees have once again failed to tie the restrictions to evidence of the severe burdens placed specifically on them. *See Kirk*, 84 F.3d at 186 & n.5. Not only so, the screenout restrictions are "nothing more than a prohibition against any elector's casting more than one vote in the process of nominating candidates for a particular office." *White*, 415 U.S. at 785. Texas "may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process" such that "each qualified elector may . . . exercise the political franchise . . . either by vote or by signing a nominating petition." *Id.* at 785–86 (quoting *Jackson v. Ogilvie*, 325 F. Supp. 864, 867 (N.D. Ill.), *aff'd*, 403 U.S. 925 (1971)). But once that determination has been made, the electorate "cannot have it both ways," even despite Plaintiffs–Appellees' best arguments. *Id.* at 785 (quoting *Jackson*, 325 F. Supp. at 867).

E

Plaintiffs–Appellees also argue that section 181.0311, which states that candidates seeking nomination at a convention must pay a filing fee or submit a petition in lieu thereof, runs afoul of the Equal Protection Clause because it is facially discriminatory against "non-wealthy candidates and their supporters" and does not implicate any legitimate state interest. *See* Tex. Elec. Code § 181.0311. Specifically, Plaintiffs–Appellees argue that the provision is unconstitutional because "[i]t requires that Minor Party candidates pay filing fees identical to those paid by Major Party candidates, but while the Major Parties retain the fees their candidates pay, the State retains the fees that Minor Party candidates pay."

But Plaintiffs–Appellees' argument is not supported by precedent. In Texas, all party candidates that seek ballot access through a primary or nominating convention, regardless of party affiliation, must demonstrate that they are serious candidates with some public support by submitting either a filing fee or a nominating petition. *See id.* § 181.0311. Section 181.0311 serves that state interest, and its implementation is consistent with the well-established rule that a state is not obliged to assure "every voter . . . that a candidate to his liking will be on the ballot." *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

Plaintiffs–Appellees' argument that the Supreme Court's holding in *Bullock* demands otherwise is inapposite. In *Bullock*, the Court held that "providing no reasonable alternative means of access to the ballot" other than paying a filing fee violates the Equal Protection Clause. 405 U.S. at 149. It did so because it reasoned that, in a state with such a ballot-access

scheme, candidates seeking election could be "precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Id.* at 143. But the system that Texas has created under section 181.0311 does not have such an inherently preclusive effect. By giving candidates an option between collecting signatures or paying a filing fee, Texas law does not measure whether a candidacy is serious or spurious "solely in dollars." *Lubin*, 415 U.S. at 716.

F

Finally, Plaintiffs–Appellees argue that "the Supreme Court and this Court have made clear that states may not impose more severe ballot access requirements on candidates for president than they do on candidates for other statewide offices" and that Texas's Election Code does just that. Specifically, Plaintiffs–Appellees allege that the challenged provisions impose more severe restrictions on presidential Independents than on statewide Independents in two ways. First, while statewide Independents must obtain petition signatures equal to one percent of the last vote for governor, presidential Independents must obtain signatures equal to one percent of the last vote for president. *See* Tex. Elec. Code § 192.032(d). Second, presidential Independents may not circulate their petitions until after the presidential primary but must submit them by the second Monday in May, which results in presidential Independents having less time to circulate petitions than statewide Independents.

But Plaintiffs–Appellees misapply *Kirk* and *Anderson*. In *Kirk*, we held that Texas's deadlines for filing

declarations of intent did not unduly burden minor parties but that requiring nomination petitions to contain each signer's voter-registration number did. 84 F.3d at 187. In doing so, we noted in dicta that when considering challenges to state-imposed restrictions on national elections, courts must consider that states have a "less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Id.* at 183 (quoting *Anderson*, 460 U.S. at 795). Contrary to Plaintiffs–Appellees' claim, this statement from *Kirk* does not stand for the proposition that it would be unconstitutional for a state law to have the effect of practically requiring more from potential presidential candidates than from candidates running for statewide election. Rather, *Kirk* merely says that when evaluating the constitutionality of ballot-access laws, courts should factor in that a state has less important interests in regulating nationwide elections than statewide elections. Indeed, our law does not suggest that it is unconstitutional for a state law to have the effect of practically requiring more from potential presidential candidates than candidates running for statewide election. Thus, we affirm the district court's holding that section 181.0311 is not unconstitutionally burdensome as applied to Plaintiffs–Appellees.

G

We turn finally to Plaintiffs–Appellees' argument that the lack of electronic petitioning methods available to Minor Party and Independents render Texas's requirement that petitions be completed on paper unconstitutional. Specifically, Plaintiffs–Appellees argue that the requirement that petitions be completed on paper

violates Plaintiffs–Appellees' right to equal protection because Major Parties are allowed to use electronic methods to obtain ballot access. We disagree.

While Major Parties are allowed to use electronic methods during the Primary Election process, all candidates who participate in the petitioning process are required to obtain their petition signatures through wet-ink/hard-copy signatures. And as confirmed at oral argument, all candidates, regardless of party affiliation, have the opportunity to file applications for ballot access and the accompanying petitions electronically under Chapter 141. Tex. Elec. Code §§ 141.040(c); 141.062–141.065.[3] In other words, the paper-petitioning requirements are the same for all candidates who elect to obtain ballot access through the petitioning method.

Under the mistaken impression that only Major Parties could file applications and petitions electronically, the district court found for the Plaintiffs–Appellees on this equal protection claim. But because this is not the case, we reverse the district court's holding that the electronic petitioning requirement is unconstitutional.

IV

Because the challenged provisions of the Texas Election Code do not violate the Constitution as applied

---

[3] To the extent that Plaintiffs–Appellees argue that the paper-petitioning requirement has a more burdensome effect on them than on Major Party candidates, we reject that claim for the same reasons that we have rejected Plaintiffs–Appellees' other claims. Plaintiffs–Appellees have failed to tie the paper-petitioning requirement to evidence of the severe burdens placed specifically on them.

to Plaintiffs–Appellees, we AFFIRM in part and REVERSE in part and RENDER.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (SEPTEMBER 10, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK MILLER; SCOTT COPELAND;LAURA PALMER; TOM KLEVEN; ANDY PRIOR; AMERICA'S PARTY OF TEXAS, also known as APTX; CONSTITUTION PARTY OF TEXAS, also known as CPTX; GREEN PARTY OF TEXAS, also known as GPTX; LIBERTARIAN PARTY OF TEXAS, also known as LPTX,

Plaintiffs-Appellees/ Cross-Appellants,

v.

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 the State of Texas,

Defendants-Appellants/ Cross-Appellees.

No. 23-50537

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-700

Before: WIENER, ELROD, and WILSON,
Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and REVERSED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that Each party bear its own costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(b). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.

ORDER GRANTING INJUNCTIVE RELIEF, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION (JUNE 26, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK MILLER, ET AL.,

Plaintiffs,

v.

JANE NELSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF TEXAS, AND JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS THE DEPUTY SECRETARY OF THE STATE OF TEXAS,

Defendants.

No. 1:19-CV-700-RP

Before: Robert PITMAN, U.S. District Judge.

ORDER

Before the Court are Plaintiffs 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's (collectively, "Plaintiffs") Proposed Order and Supporting Brief, (Dkts. 104, 104-1), and Defendants Jane

Nelson, in her official capacity as the Secretary of State of the State of Texas, and Jose A. Esparza, in his official capacity as the Deputy Secretary of the State of Texas's (the "Secretary of State" or "Defendants") Proposed Order and Supporting Brief, (Dkt. 103).

I. Background

When the Court resolved the parties' cross-motions for summary judgment, (Dkts. 57, 58), the Court granted in part and denied in part Plaintiffs' motion for summary judgment and granted in part and denied in part Defendants' motion for summary judgment. (Dkt. 102). Specifically, the Court held that (1) Defendants failed to show there is a connection between the burdens imposed on Plaintiffs by the paper nomination petition process set out in the challenged provisions and Defendants' stated interest to help avoid voter confusion, ballot overcrowding, and frivolous candidacies and (2) the challenged provisions, to the extent they require a paper petitioning process, impose unequal burdens on Plaintiffs in violation of the Equal Protection Clause. (*Id.* at 27). The Court instructed the parties to confer and attempt to reach an agreement on the relief to be entered. (*Id.* at 27–28). The parties conferred but failed to reach an agreement. (Dkt. 103, at 1; Dkt. 104, at 7).

II. Discussion

Having been unable to reach agreement, the parties submitted competing proposed orders, and briefs in support, for the Court's consideration. Plaintiffs propose:

1. Defendants are ENJOINED from enforcing against Plaintiffs any provision of the Texas Election Code Chapters 141, 142, 162, 181

and 202 insofar as any such provision imposes any Unconstitutional Burden or contemplates, relies upon, or requires paper nomination petitions or a paper nomination petitioning, verification, or submission process.

2. The Texas Election Code shall otherwise remain in full force and effect and Defendants shall enforce each of its provisions to the extent authorized therein.

3. The Court retains jurisdiction over this matter to enforce this order and to enter further relief as necessary and appropriate.

(Dkt. 104-1). While the first paragraph of the proposal generally captures the Court's holdings, it includes one phrase that is too broad: "insofar as any such provision imposes *any* Unconstitutional Burden." (*Id.*) (emphasis added). The Court rejects that portion of Plaintiffs' proposed language as reaching beyond the Court's opinion. The Court finds paragraphs two and three unnecessary.

Defendants propose: "The Court ENJOINS defendants from rejecting ballot-access petitions under Texas Election Code Chapters 141, 142, 181, 192, and 202 on the basis that such petitions were signed using an electronic stylus, or on the basis that such petitions were submitted by electronic means, such as electronic mail." (Dkt. 103-1). The Court finds Defendants' proposal too narrow. It does not reflect the holdings of this Court that the challenged provisions are constitutionally problematic to the extent they require paper petitions and impose unequal burden on Plaintiffs by imposing a paper petitioning process. Preventing the Secretary of State from rejecting signatures by

"electronic stylus" or petitions that are submitted by email would provide only a partial remedy.

Despite those differences, Defendants admit that Plaintiffs' proposed order "is similar to [Defendants' proposed order] insofar as it enjoins [Defendants] from enforcing any provision of the Election Code requiring 'paper nomination petition or a paper nomination petitioning, verification, or submission process.'" (*Id.* at 3). What Defendants object to in their brief is additional language proposed by Plaintiffs when the parties met and conferred that "forc[es]" the Secretary of State to "adopt new policies and procedures regarding the implementation of electronically signed and transmitted candidate petitions." (*Id.*). That first proposal set out a long and detailed process for the parties and the Court to commence regarding the Secretary of State's implementation of an alternative system to the paper petitioning process. (*See* Dkt. 103-2). Plaintiffs later abandoned that approach. As Plaintiffs clarified in their brief, the proposed order Plaintiffs submitted to the Court is "consistent with Plaintiffs' most recent offer to Defendants in that it does not grant affirmative relief." (Dkt. 104, at 7). Plaintiffs' current proposal—and the proposal before the Court—avoids the issues highlighted by Defendants in their brief.

The Court is satisfied that Plaintiffs' proposed language, with revisions that narrow its scope, better aligns with the Court's intent. Accordingly, to effectuate the Court's holdings in its Order at Dkt. 102, the Court will adopt Plaintiffs' proposed language, with modifications, in a separate order rendering final judgment and entering the permanent injunction.

SIGNED on June 26, 2023.

/s/ Robert Pitman
United States District Judge

PERMANENT INJUNCTION AND DECLARATORY JUDGMENT, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION (JUNE 26, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK MILLER, ET AL.,

Plaintiffs,

v.

RUTH R. HUGHS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF TEXAS, AND JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS THE DEPUTY SECRETARY OF THE STATE OF TEXAS,

Defendants.

No. 1:19-CV-700-RP

Before: Robert PITMAN, U.S. District Judge.

PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

On July 11, 2019, Plaintiffs 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's

(collectively, "Plaintiffs") filed this lawsuit, (Dkt. 1), against Defendants Jane Nelson, in her official capacity as the Secretary of State of the State of Texas, and Jose A. Esparza, in his official capacity as the Deputy Secretary of the State of Texas's (the "Secretary of State" or "Defendants"), requesting relief, including:

1. Enter a declaratory judgment holding that Texas's statutory scheme regulating ballot access for parties that do not nominate by primary election is unconstitutional as applied to Plaintiffs, and that the following statutory provisions are unconstitutional as applied in conjunction with one another: §§ 141.063; 141.041; 141.064; 141.065; 141.066(a),(c); 162.001, 162.003, 162.012, 162.014; 181.0041; 181.005(a),(b); 181.006(a),(b),(f)-(j); 181.007(b); 181.031; 181.032; 181.033;

2. Enter a declaratory judgment holding that Texas's statutory scheme regulating ballot access for Independent candidates is unconstitutional as applied to Plaintiffs, and that the following statutory provisions are unconstitutional as applied in conjunction with one another: §§ 141.063; 141.064; 141.065; 142.002; 142.006; 142.007; 142.008; 142.009; 142.010(b); 192.032(a)-(d),(f),(g); 202.007;

3. Enter an order enjoining the Secretary of State from enforcing the challenged provisions as applied to Plaintiffs.

(Am. Compl., Dkt. 14, at 30). To resolve the dispute, the parties filed cross motions for summary judgment, (Dkts. 57, 58), and the Court issued its Order granting in part and denying in part Plaintiffs' motion for sum-

mary judgment and granting in part and denying in part Defendants' motion for summary judgment. (Dkt. 102). The parties filed additional briefing regarding the relief to be entered, (Dkts. 103, 104), and the Court entered an order relating to that briefing on this date. The Court now enters the following relief.

IT IS ORDERED that the Court DECLARES that the challenged provisions of Chapters 141, 142, 162, 181, and 202 of the Texas Election Code that regulate the paper nomination petition process, as described in the Court's Order at Dkt. 102, are unconstitutional as applied to Plaintiffs because (1) Defendants failed to show there is a connection between the burdens imposed by the paper nomination petition process and Defendants' stated interest to help avoid voter confusion, ballot overcrowding, and frivolous candidacies and (2) the paper nomination petition process, as opposed to an electronic process, imposes an unequal burden on Plaintiffs.

IT IS FURTHER ORDERED that Defendants are ENJOINED from enforcing against Plaintiffs any provision of Chapters 141, 142, 162, 181, and 202 of the Texas Election Code that contemplates, relies upon, or requires paper nomination petitions or a paper nomination petitioning, verification, or submission process.

As nothing remains to resolve, the Court renders Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS FURTHER ORDERED that this case is CLOSED.

SIGNED on June 26, 2023.

/s/ Robert Pitman
United States District Judge

AMENDED ORDER, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION (OCTOBER 4, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK MILLER, ET AL.,

Plaintiffs,

v.

RUTH R. HUGHS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF TEXAS, AND JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS THE DEPUTY SECRETARY OF THE STATE OF TEXAS,

Defendants.

No. 1:19-CV-700-RP

Before: Robert PITMAN, U.S. District Judge.

AMENDED ORDER

Before the Court are Plaintiffs Mark Miller, Scott Copeland, Laura Palmer, Tom Kleven, Andy Prior ("the Individual Plaintiffs"), America's Party of Texas, Constitution Party of Texas, Green Party of Texas, and Libertarian Party of Texas's (collectively, the

"Plaintiffs") Motion for Summary Judgment, (Dkt. 57), and Defendants Ruth R. Hughs, in her official capacity as the Secretary of State of the State of Texas, and Jose A. Esparza, in his official capacity as the Deputy Secretary of the State of Texas's (the "Defendants" or the "State") Motion for Summary Judgment, (Dkt. 58), and related responsive briefing. Having considered the parties' briefs, the record, and the relevant law, the Court will grant in part and deny in part Plaintiffs' motion for summary judgment and grant in part and deny in part Defendants' motion for summary judgment.[1]

I. Background

This case is about ballot access in Texas. Plaintiffs seek declaratory and injunctive relief alleging, in general terms, that the Texas Election Code imposes unconstitutional burdens on minor political parties and independent candidates while guaranteeing ballot access to "the two oldest and largest political parties." (Am. Compl., Dkt. 14, at 1). Plaintiffs filed their complaint against Defendants on July 11, 2019, (Compl., Dkt. 1), followed by an amended complaint on July 25, 2019, (Am. Compl., Dkt. 14). Plaintiffs filed their lawsuit shortly after the end of the 86th legislative session and shortly before new changes to the Texas Election Code were scheduled to go into effect in advance of the 2020 general election. (*See* Mot. Prelim. Inj., Dkt. 23, at 2).

Plaintiffs are individuals and political parties. The Individual Plaintiffs are voters and potential

[1] For clarity, this amended order corrects a typo in the first paragraph of the original order.

candidates, including: Mark Miller ("Miller"), who is a registered voter and "wants to run for office in future elections in Texas as an independent or nominee of a party that is required to nominate candidates by convention"; Scott Copeland, who is a registered voter and chair of the Constitution Party of Texas ("CPTX"); Laura Palmer, who is a registered voter and former co-chair of the Green Party of Texas ("GPTX"); Tom Kleven, who is a registered voter and seeks to vote for Third Parties; and Andy Prior, who is a registered voter, served as chair of America's Party of Texas ("APTX"), and "attempted to run for Land Commissioner in 2018 as a nominee of APTX, but APTX lacked the resources necessary to conduct a successful petition drive, and it did not qualify for ballot access." (*Id.* at 2–4). CPTX, GPTX, and APTX are also plaintiffs in the suit, as well as the Libertarian Party of Texas ("LPTX"). (*Id.* at 4–5).

On October 10, 2019, Plaintiffs filed a motion for preliminary injunction, (Dkt. 23), which the Court heard on October 31, 2019, (Minute Entry, Dkt. 28), and denied on November 25, 2019, (Order, Dkt. 30). In that same Order, the Court also denied Defendants' motion to dismiss, (Dkt. 16). (*Id.*). Defendants filed an answer, (Dkt. 31), to the amended complaint, and the Court set a scheduling order, (Dkt. 34), which was later amended several times, (Dkts. 38, 41, 43, 48, 50). The parties filed the cross motions for summary judgment currently before this Court. Defendants also moved to strike portions of Plaintiffs' summary judgment evidence, (Dkt. 78), a dispute which was eventually resolved by the parties, (Dkt. 88).

A. Statutory Framework

Before addressing the facts developed in this case, the Court sets out the statutory framework under the Texas Election Code that governs ballot access in Texas. The State began regulating ballot access in 1903, including placing requirements on independent candidates. (Pls. Statement of Facts, Dkt. 59, at 4). In 1968, the State extended those requirements to third parties. (*Id.*). Since then, the State has expanded the requirements into the current statutory scheme regulating ballot access in Texas that Plaintiffs claim violates their constitutional rights by imposing severe and unequal burdens on their First and Fourteenth Amendments.

Under the Texas Election Code, there are three ways for a candidate to obtain a place on the statewide general election ballot: (1) win a primary election, (2) receive a nomination from a political party that nominates by convention and qualifies for ballot access, or (3) submit a nominating petition signed by the required number of voters. (Defs. Mot. Summ. J., Dkt. 57, at 8).

1. Major Parties

Political parties that received at least 20% of the vote in the last gubernatorial election ("Major Parties") nominate their candidates for state and county government and Congress by primary election. *See* Tex. Elec. Code § 172.001. Since 1900, only the Democratic Party and Republican Party have qualified as Major Parties under Section 172.001. (Pls. Statement of Facts, Dkt. 59, at 7). Candidates seeking to run in a primary election must submit an application to the state or county chair, depending on the office, in December of

the year before the election and pay a filing fee or submit a nomination petition. Tex. Elec. Code §§ 172.116, .117(a), .120(a), .120(h), .122. Filing fees range from $75 to $5000. *Id.* § 172.024. If a candidate instead chooses to submit a nomination petition, the candidate must collect from 500 to 5,000 signatures. *Id.* § 172.025.

2. Minor Parties

Political parties that are new or did not receive at least 2% of the total vote cast for governor at least once in the five previous general elections must nominate their candidates by convention ("Minor Parties"). *See* Tex. Elec. Code §§ 172.002, 181.002, 181.003. Minor Parties that intend to nominate by convention must register with the Secretary of State by January 2 of the election year. *Id.* § 181.0041. Candidates who intend to seek a Minor Party's nomination must file a notarized application in December of the year before the election. *Id.* §§ 141.031, 172.023(a), 181.031–33. The nominating conventions are held after the primary election in either March or April depending on the office sought. *Id.* §§ 41.007(a), 181.061(a),(b),(c). To place a nominee on the general election ballot, a Minor Party must file precinct convention participant lists—within 75 days of the precinct convention date—with the Secretary of State that contain participants equal in number to at least 1% of the total vote for governor in the preceding general election. *See id.* § 181.005(a). A participant is eligible if she is a registered voter or resident of the precinct who is eligible to vote who has not voted in a primary election or attended the convention of another party in the same election year. *See id.* §§ 162.001, 162.003, 162.012, 162.014, 181.065, 112.002–04. No

Minor Party has qualified for the ballot pursuant to Section 181.005(a) in at least 50 years. (Pls. Statement of Facts, Dkt. 59, at 9).

If a Minor Party's participant list lacks the required number of participants, then the Minor Party must file nomination petitions—within the same 75-day period—that contain a sufficient number of valid signatures to make up for the shortfall. *See* Tex. Elec. Code §§ 181.006(a),(b). A voter may not sign a nomination petition until after the primary election, a provision often referred to as a primary screenout. *See id.* §§ 162.001, 162.003, 162.012, 162.014, 181.006(g),(j). Additionally, there are restrictions on who may sign the petition. Voters may not sign the petition if they voted in the primary election, and voters may not sign a Minor Party's nomination petition if they participated in another party's convention or signed another party's petition. *See id.* §§ 162.001, 162.003, 162.012, 162.014, 181.006(g),(j). If a voter chooses to sign a petition, the voter must include their address, date of birth or voter registration number, printed name, date, and typically the county they are registered to vote in. *Id.* § 141.063(a)(2).

Additionally, the person collecting the signature, often called a petition circulator, must read aloud the following oath to each potential signer:

> I know that the purpose of this petition is to entitle the _____ Party to have its nominees placed on the ballot in the general election for state and county officers. I have not voted in a primary election or participated in a convention of another party during this voting year, and I understand that I become ineligible to do so by signing this petition. I

> understand that signing more than one petition to entitle a party to have its nominees placed on the general election ballot in the same election is prohibited.

Id. §§ 181.006(f), 141.064. Before filing the petition, the petition circulator must take several steps. The circulator must witness each signature, confirm that the date of signing is correct, verify each signer's registration status, and confirm that each registration number entered on the petition is correct. *Id.* § 141.064. Circulators must also execute an affidavit stating they complied with the requirements and believe each signature is genuine and the corresponding information correct. *Id.* § 141.065.

Once the petitions are submitted, the Secretary of the State has about two months to certify a Minor Party's nominees, specifically up until 68 days before the general election. *See id.* §§ 142.010(b), 181.007(b), 192.033(b). The certification is for one election cycle only, and the Minor Party does not retain ballot access unless one of its candidates for statewide office receives at least 2% of the vote in at least one of the five previous general elections.[2] *Id.* § 181.005(c). Without 2% of the vote, Minor Parties must go through the petition process again in the next election cycle to qualify for the ballot.

In 2019, Texas amended the statutory scheme to impose a new requirement on Minor Parties, under Section 141.041 of the Texas Election Code, one that

---

[2] Prior to amendment in 2019, Texas required one Minor Party candidate for statewide office to receive at least 5% of the vote in the previous election. *See* Tex. Elec. Code § 181.005(b); Pls. Statement of Facts, Dkt. 59, at 10).

is symmetrical with a requirement imposed on Major Parties. Section 141.041 states that to appear on the general election ballot, candidates must either pay a filing fee or submit a nomination petition that complies with Section 141.062 and is signed by a specific number of eligible voters. *Id.* § 141.041(a). These requirements are the same imposed on Major Party candidates. *Id.* § 141.041(b),(c); 172.024-25.

3. Independents

Candidates who are not affiliated with a political party ("Independents") may access the ballot through a procedure that is similar to that following by Minor Parties, except that Independents may not nominate by convention and must submit nomination petitions signed by eligible voters. Independents must file a declaration of intent in December of the year before the election. Tex. Elec. Code § 142.002. They must file an application and a nomination petition that contains valid signatures equal in number to 1% of the total vote for governor in the preceding election. *Id.* §§ 142.004, 142.007. In 2020, that meant Independents needed to obtain 83,717 valid signatures. (Am. Compl., Dkt. 14, at 14). Independents seeking state office must submit their nomination petitions by the 30th day after the runoff primary election day, but they may not circulate them until after the primary election or runoff primary election. *Id.* §§ 142.004–06, 142.009, 202.007. In 2020, Independents seeking state office had either 30 days or 114 days to collect signatures, depending on whether a runoff primary took place. (Am. Compl., Dkt. 14, at 14). Like Minor Party candidates, Independents cannot obtain signatures until after the primary election, or runoff when applicable. Tex. Elec. Code § 142.009. An Independent

candidate's nomination petitions and the signatures on the petitions are subject to the same requirements as Minor Parties' petitions and signatures. *Id.* §§ 141.062-66.

Additionally, the petition circulator must read aloud the following oath to each potential signer:

> I know the purpose of this petition. I have not voted in a primary election or runoff primary election of any political party that has nominated, at either election, a candidate for the office of _____ for which _____ is a candidate.

Id. §§ 141.064, 142.008.

Independent candidates for president also must file an application and nomination petition, and their signature requirement is equal to at least 1% of the total vote for president in Texas in the preceding presidential election. *See id.* §§ 192.032(a),(b),(d). In 2020, that translated to 89,692 valid signatures. (Am. Compl., Dkt. 14, at 15). Independent candidates for president must file their application no later than the second Monday in May of the presidential year. *Id.* §§ 192.032(c),(g); 41.007(c). Independent candidates running for president cannot circulate their petition until after the presidential primary in March, *id.* §§ 192.032(g), 41.007(c), which translated to 69 days to collect signatures in 2020, (Pls. Statement of Facts, Dkt. 59, at 11).

B. The Challenged Provisions' Impacts on Plaintiffs

1. The Facts Before the Court

In their cross-motions for summary judgment, the parties do not contest the facts before the Court on summary judgment, and it is largely Plaintiffs who present a record to the Court.[3] Along with their motion for summary judgment, Plaintiffs filed a Statement of Undisputed Material Facts, (Dkt. 59), on which the Court relies to evaluate the effect of the Texas Election Code on Plaintiffs' ballot access. Attached to Plaintiffs' Statement of Undisputed Material Facts are many declarations, (Dkts. 60-72), one expert report, (Dkt. 73), and a transcript of a deposition, (Dkt. 74).[4] Finally, the State filed a motion to strike portions of Plaintiffs' summary judgment evidence. (Dkt. 78). After the parties had briefed the motion, they filed a Joint Notice of Resolved Issues Raised in Defendants' Objections to Plaintiffs' Summary Judgment Evidence and Motion to Strike, (Dkt. 88). In that notice, the parties stated that they conferred about the State's objections and, after conferring, the State agreed to withdraw their objections and Plaintiffs agreed to redact portions of the evidence, specifically related to Oliver Hall's declaration and documents attached to that declaration. (*Id.*). Pursuant to the parties' agree-

---

[3] Defendants do provide deposition transcripts for APTX, CPTX, LPTX, GPTX, and Keith Ingram, corporate representative of Defendants. (*See* Appendix, Dkt. 57-1).

[4] For ease of reference, the Court often refers directly to the Statement of Undisputed Material Facts, rather than each individual underlying document.

ment and this Court's order on January 28, 2022, for Oliver Hall's declaration and exhibit, the Court only considers his substituted declaration and the exhibit attached to it. (Dkts. 90, 90-1, 90-2).

2. History of Texas Ballots Containing Minor Party and Independent Candidates

From 1903, when Texas began regulating access to the ballot, to 1967, when Texas began requiring Minor Parties to collect signatures, Texas's general election ballots were not overcrowded. (Pls. Statement of Facts, Dkt. 59, at 5). The peak was in 1908 when five Minor Parties—Populist, Prohibition, Socialist, Socialist Labor, and Independence League parties—appeared on the general election ballot in the presidential race. (*Id.*). A maximum of four Minor Party candidates for governor appeared in five of thirty-three gubernatorial elections during that same time period. (*Id.*). Similarly, in senate elections held during that period, Minor Parties had two candidates on the ballot five times. (*Id.*). For some elections, no Minor Party fielded a candidate for governor or senator. (*Id.*).

Since 1967, Minor Parties and Independent candidates have qualified for the ballot. Among Minor Parties, LPTX, New Alliance Party, Reform Party, and GPTX all have fielded a candidate on the general election ballot. (*Id.* at 6). Among Independent candidates, several have qualified to appear on the ballot as presidential candidates, including John Anderson (1980), Lyndon LaRouche, Jr. (1984), and Ross Perot (1992). (*Id.*). For the governor's race, two Independent candidates qualified in 2006: Carole Strayhorn and Kinky Friedman. (*Id.*). Since then, no statewide

Independent candidate has qualified for the general election ballot. (*Id.* at 7). To illustrate the difficulties faced by Independent candidates, Plaintiffs present the 2018 ballot as an example when 8 out of 70 *i*ndependent candidates—for statewide and district office—qualified to appear on the ballot meaning that 88.6% failed to qualify. (*Id.*).

3. Current Impact of Texas's Ballot Access Statutory Scheme

This year, in 2022, Texas's 1% signature requirement amounts to 83,434 valid signatures for Minor Parties and Independents. (Pls. Statement of Facts, Dkt. 59, at 12). In 2024, it will be 113,151 signatures for Independent presidential candidates. (*Id.*). Texas's signature number requirement is higher than every other state except California. (*Id.*). To ensure they can meet the verification thresholds, Minor Parties and Independents collect signatures "far in excess of the number of valid signatures actually required." (*Id.*). Texas is one of 10 states that imposes a time limitation for collecting signatures, and Texas's time limitation is the most restrictive, with the window in Arkansas being longer at 90 days, Wisconsin five or six months, Kansas and Michigan six months, and the rest one year or longer. (*Id.*).

Gathering signatures is costly and time consuming. (*Id.* at 13). After printing the petition forms at their own expense, Minor Parties and independents can rely on volunteers to collect signatures or hire trained petition circulators. Volunteers are less effective, tending to be slower and unable to work more than a few hours at a time. (*Id.*). Since about 1980, almost all volunteer-led petition drives have failed. (*Id.*). In the

last 20 years, no statewide Minor Party or Independent candidate has had a successful petition drive without paid petition circulators. (*Id.*).

Plaintiffs assert that statewide Minor Party and Independent candidates must hire paid petition circulators. (*Id.*). Circulators can collect about 10 signatures per hour on average, with a validity rate of approximately 70% which translates to 400 signatures—280 of which will be deemed valid on average—per 40-hour work week. (*Id.*). Petition circulators typically charge per signature. (*Id.*). In 2018, the cost was $587,500, assuming there was no primary runoff. (*Id.*). A paid petition drive in 2022 will cost a statewide Minor Party or Independent candidate between $882,000 and $1.375 million. (*Id.* at 13–14).

Another challenge is that Texas is the only state that prohibits Minor Parties and Independents from collecting signatures before the primary election and on the day of the primary election, as well as prohibits voters from signing petitions if they voted in a primary election. (*Id.* at 14). The day of the primary election is considered "by far the most productive day" in other states. (*Id.*). Not being able to collect on primary day makes petitioning more difficult in Texas. (*Id.*). Petition circulators consider Texas to be the most difficult state in which to conduct a successful petition drive given the number requirement and the timing restraints. (*Id.*).

Even with petition circulators, petition drives face obstacles. Plaintiffs point out that finding suitable voters is challenging given that there must be foot traffic and voters willing to stop in public and provide their signatures and personal information, plus local officials and property owners are sometimes unaware

of petition circulators' right to collect signatures and adversaries or others sometimes sabotage petitions with ineligible or fraudulent names. (*Id.*). Once an eligible, or seemingly eligible, voter stops and is willing to share personal information, the voter also must listen to the circulator recite the oath, which adds delay and "often intimidates or otherwise dissuades voters from signing." (*Id.* at 15). After collecting signatures, a petition circulator reviews the signatures and must execute a notarized affidavit attesting that they have verified each person's voter registration status and believe the signatures are genuine and the other information collected is correct. (*Id.*).

Executing a petition drive on paper presents additional challenges. Using a paper form, "circulators have no practicable methos of confirming, in real time, that potential signers are eligible," for example that they live in the correct jurisdiction and have not voted in the primary election or signed a nomination petition for another candidate or party. (*Id.* at 14–15). Sometimes the signer's handwriting is illegible, resulting in more signatures that cannot be verified and creating the need to collect additional signatures to compensate for those that cannot be verified. (*Id.* at 15). After the drive, Minor Parties and Independents must collect the petitions from the circulators and review them for compliance, which means organizing many boxes filled with petitions (each petition sheet has room for ten signatures). (*Id.*). The final step is to deliver the boxes of petitions "by truck or van" to Defendants' office in Austin. (*Id.*). Other states have implemented electronic methods by which voters can sign nomination petitions and simultaneously confirm eligibility. (*Id.* at 15).

4. Plaintiffs' and Independents' Experiences Complying or Attempting to Comply with the Challenged Ballot Access Provisions

According to Plaintiffs, the challenges outlined above burden Minor Parties, Independents, and their supporters, including the Individual Plaintiffs, and "have prevented [them] from being able to fully participate in Texas's electoral process." (Pls. Mot. Summ. J., Dkt. 58, at 20). The Court begins with the experience of APTX, a small Minor Party. APTX does not have a website, take membership dues, or have a way to track membership. (APTX Depo., Dkt. 57-1, at 6). APTX has had one statewide convention which 10 people attended and about five donors total since it began in 2009. (*Id.* at 6, 9). APTX has less than $1,000 in its bank account because it does "not have any expense[s] that would require a budget." (*Id.* at 12). APTX has never qualified for the ballot in Texas "because it lacks the financial resources necessary to conduct a successful petition drive." (Pls. Statement of Facts, Dkt. 59, at 18). In 2018, APTX leaders looked into hiring petition circulators but ultimately decided against it after the "lowest price quote" translated to a total cost of at least $500,000. (*Id.*). APTX "lacks sufficient funds to pay even a fraction of that amount." (*Id.*). APTX instead organized an all-volunteer petition drive and collected only a few thousand signatures, falling far short of the 47,182 required signatures. (*Id.*). During recent elections, APTX members told party leaders that they have decided to join or vote for a different party because APTX is not on the ballot and that they will not run for office as an APTX nominee because they would not appear on the ballot. (*Id.*).

Similarly, CPTX lacks the money and resources needed to complete a successful petition drive. (*Id.* at 19). CPX has about 130 members and has two expenses: its website and email service. (CPTX Depo., Dkt. 57-1, at 21, 23). CPTX has not attempted a petition drive, volunteer or paid. (*Id.* at 25). CPTX advises its nominees to run as independents in down-ballot races which have lower signature requirements. (Pls. Statement of Facts, Dkt. 59, at 19). According to Plaintiffs, "CPTX's exclusion from the ballot has hampered its ability to fundraise, recruit new members, and participate in public debates and other political events." (*Id.*).

In the last 20 years or so, GPTX has had varying success accessing the ballot and currently has ballot access. After failing to qualify for the ballot in 2004, 2006, and 2008, GPTX qualified in 2010 "by accepting an in-kind contribution of approximately 90,000 nomination petition signatures, which were delivered by a professional petition circulating firm." (*Id.* at 16). In response, the Texas Democratic Party sued GPTX, subjecting GPTX to litigation even though GPTX had not retained the petition circulators or paid them. (*Id.*). From 2010 until 2018, GPTX retained ballot access "by running candidates that received a sufficient number of votes to meet the 5% threshold." (*Id.*). For 2018, GPTX needed to submit 47,183 valid signatures in 75 days. (*Id.*). GPTX laced the resources to pay for a petition drive or organize a volunteer petition drive. (*Id.*). Instead, GPTX told its members to seek ballot access as independent candidates for state or local races, which have lower signature requirements. (*Id.*). For 2020, GPTX candidates were "unable to comply on short notice with the new require-

ments imposed by § 141.041" of the Texas Election Code. (*Id.* at 17). Ultimately, seven GPTX candidates appeared on the 2020 general election ballot after the Supreme Court of Texas "held that § 141.041 had been improperly enforced." (*Id.*). GPTX has lost members and supporters "who become discouraged and disillusioned by the ongoing need to conduct petition drives that exhaust the party's resources but still fall short of legal requirements." (*Id.*). Those members leave to join a party that has ballot access or vote for Democratic candidates, and "even GPTX's most ardent and loyal members are often unwilling to run for office as GPTX's nominees, because they will not appear on the ballot." (*Id.*).

LPTX has maintained ballot access since 1998, except in 2002. (LPTX Depo., Dkt. 57-1, at 37). Although LPTX lacks the financial resources necessary to hire petition circulators, LPTX "focuses its time and resources on running candidates for as many statewide offices as possible." (Pls. Statement of Facts, Dkt. 59, at 17). Focusing on only those races harms its "ability to engage in political speech for the purpose of spreading its message and influencing public debate." (*Id.* at 18). At the same time, however, LPTX admitted that LPTX "needs to make sure its candidates do well during any given election cycle . . . regardless of the ballot provisions in the Texas Election Code." (LPTX Depo., Dkt. 57-1, at 37). If LPTX fails to retain ballot access, it will not be able to qualify again because it would be too costly to conduct a successful petition drive. (Pls. Statement of Facts, Dkt. 59, at 18). Also, in 2020, Wes Benedict attempted to seek the nomination as the LPTX senate candidate. (*Id.*). He was unable to pay the $5,000 filing fee or submit a petition with 5,000 valid

signatures by the deadline and withdrew his nomination application. (*Id.*).

Independent candidates, including Plaintiff Mark Miller, face obstacles trying to appear on the general election ballot. After appearing on the ballot as LPTX's nominee for Railroad Commissioner, Miller considered creating a new political party but "chose not to pursue this alternative because the necessity of registering a new party by January 2 of the election year and the high cost of conducting a statewide petition drive made such an effort impracticable if not actually impossible unless the prospective party could raise hundreds of thousands of dollars in funding." (*Id.* at 19). Danny Harrison, who wanted to run for governor as an Independent, had no means to collect 47,183 valid signatures and chose not to run. (*Id.*). No statewide Independent candidate has qualified for the general election ballot since 2006. (*Id.*).

Finally, the challenged provisions can impact voters. Plaintiffs' political views are not adequately represented by the Major Parties or the Minor Parties that do appear on the ballot. (*Id.* at 20–21). Voters, including Plaintiffs, have a desire to vote for candidates who represent a wider range of views, and the "exclusion of such candidates from the ballot denies these voters the opportunity to vote for candidates nominated by the [Minor] Party that best represents their views and diminishes their ability to choose." (*Id.* at 21).

II. Legal Standard

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477

U.S. 317, 323–25 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

If the moving party does not bear the ultimate burden of proof, after it has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). When the movant bears the burden of proof, she must establish all the essential elements of her claim that warrant judgment in her favor. *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002). In such cases, the burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017).

Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent sum-

mary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin All. v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000). Cross-motions for summary judgment "must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538–39 (5th Cir. 2004).

III. Discussion

A. Anderson-Burdick Framework

While states may regulate elections, that authority is not absolute given the fundamental significance of voting in our constitutional system. In the Fifth Circuit, the test for evaluating the constitutionality of laws regulating ballot access is the *Anderson-Burdick* test.[5] Under that test, a court first considers the "char-

---

[5] Both sides agree that the *Anderson-Burdick* framework applies in this case. (Pls. Mot. Summ. J., Dkt. 58, at 22–23; Defs. Mot.

acter and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). That is weighed against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* "The rigorousness of the inquiry into the propriety of the state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights." *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Provisions that "impose 'severe restrictions' . . . must be 'narrowly drawn' and support 'compelling' state interests, whereas 'reasonable, nondiscriminatory restrictions' require only 'important regulatory interests' to pass constitutional muster." *Meyer v. Texas*, No. H-10-3860, 2011 WL 1806524, at *3 (quoting *Burdick*, 504 U.S. at 434). After weighing those factors, the court can decide whether the challenged provisions are unconstitutional. *Anderson*, 460 U.S. at 789.

While the parties generally agree on how the *Anderson-Burdick* test applies in ballot access cases, they disagree whether the Supreme Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974), controls. Since *American Party of Texas* was decided before *Anderson* and *Burdick*, Plaintiffs argue the later, more stringent test set out in *Anderson* and *Burdick* controls, not *American Party of Texas*. The State disagrees, noting that the Supreme Court has not cast doubt on *American Party of Texas* and has continued to cite the case favorably. This Court

---

Summ. J., Dkt. 57, at 15–17).

expresses no opinion on whether *American Party of Texas* controls as it does not alter the outcome here.

B. Whether Plaintiffs Launch a Facial Attack on the Challenged Provisions

In its opposition to Plaintiffs' motion for summary judgment, the State contends Plaintiffs "attempt to cast their lawsuit as both a facial and 'as applied' challenge to the ballot access requirements Texas law places on 'non-primary parties.'" (Defs. Resp., Dkt. 79, at 1). To support that contention, the State quotes a sentence from Plaintiffs' motion for summary judgment: "The Challenged Provisions impose many additional burdens that fall on Independents and [Minor Parties] alone, and place them at a significant disadvantage to [Major Parties]." (*Id.* at 2). The State argues that Plaintiffs "'essentially assert the facial unconstitutionality'" of the requirement by challenging the provisions "for both themselves and other [Minor Parties]." (*Id.*) (quoting *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). The State attempts to drag Plaintiffs' claims into the zone of a facial attack to hold Plaintiffs' claims to a higher standard, (*id.*), but Plaintiffs' pleadings make an as-applied challenge. For example, in their amended complaint, Plaintiffs assert that the challenged provisions "as applied in conjunction with one another . . . violate rights guaranteed to Plaintiffs." (Am. Compl., Dkt. 14, at 30). For declaratory relief, Plaintiffs ask this Court to declare the challenged provisions are "unconstitutional as applied to Plaintiffs" and to enjoin the State "from enforcing the Challenged Provisions as applied to Plaintiffs." (*Id.* at 30). Plaintiffs do not seek relief for any non-party, and the Court does not construe Plaintiffs' claims as a facial challenge.

C. The Character of the Burdens Placed on Plaintiffs' Rights

Plaintiffs "developed a comprehensive evidentiary record" in an attempt to demonstrate that the challenged provisions make it "prohibitively difficult and expensive" for Minor Parties and Independents to access the ballot in Texas. (Pls. Mot. Summ. J., Dkt 58, at 26). Plaintiffs argue those burdens—viewed in isolation or cumulatively—impose severe and unequal burdens on Plaintiffs' First and Fourteenth Amendment rights. The Court will step through each burden or set of burdens.

1. Number of Required Signatures

Plaintiffs argue that the number of signatures they are required to collect to appear on the ballot imposes a severe burden. To qualify for the general election ballot in Texas, a statewide Minor Party or Independent candidate must submit valid signatures totaling 1% of all votes cast in the most recent gubernatorial election and 1% of all votes cast for president in Texas in the most recent presidential election. Tex. Elec. Code §§ 142.007(1), 192.032(d). In 2020, that amounted to 83,434 valid signatures, and in 2024, it will be 113,151 valid signatures. (Pls. Statement of Facts, Dkt. 59, at 12). Plaintiffs have shown that in practice they must collect many more signatures because 30-50% of the signatures collected are later deemed invalid. (*Id.*). The number is higher than what any other state requires, other than California. (*Id.*). Courts have compared signature requirements between states and that comparison has played a role in determining whether a state's numerical requirements are severely burdensome.

See Williams v. Rhodes, 393 U.S. 23, 47 & n.10 (1968) (Harlan, J. concurring) (comparing Ohio's requirement to "the overwhelming majority of other States" and finding it "clearly disproportionate to the magnitude of the risk that [Ohio] may properly act to prevent"); *Lee v. Keith*, 463 F.3d 763, 768–69 (7th Cir. 2006) (finding Illinois's requirement "severe" in part because it "exceeds those of all other states"); *Graveline v. Benson*, 992 F.3d 524, 540 (6th Cir. 2021) (finding Michigan's requirement "severe" in part because "in terms of absolute numbers only five states have higher requirements").

While Texas's ballot access provisions may impose more of a burden than other states with its numerical requirement, Plaintiffs' evidence fails to show that the requirement is severely burdensome. First, LPTX and GPTX currently have ballot access in Texas, negating Plaintiffs' claim that the 1% requirement is overly stringent. LPTX and GPTX have surmounted that obstacle and have done so for a period of years. LPTX only has needed to collect signatures once in the last 20 years to appear on the ballot, and their petition drive was successful. (LPTX Depo., Dkt. 57-1, at 37). In the last 12 years, GPTX needed signatures in 2010, and 92,000 signatures were collected by paid circulators as an in-kind donation to GPTX. (GPTX Depo., Dkt. 57-1, at 51; Pls. Statement of Facts, Dkt. 59, at 16). GPTX did not make an attempt to be on the ballot in 2018 because it "lacked the financial and other resources necessary to conduct a successful petition drive." (Pls. Statement of Facts, Dkt. 59, at 16). Otherwise, GPTX has appeared on the ballot, including in 2020, and will appear on the 2022 ballot. Despite the fact that GPTX has and will appear on the ballot,

Plaintiffs argue that the challenged provisions still "pose an existential threat" because should they fail to retain ballot access, they "have no realistic chance of qualifying again." (Pls. Reply, Dkt. 83, at 10) (citing Pls. Statement of Facts, Dkt. 59, at 16–17). While the Court acknowledges the uncertainty faced by Plaintiffs, the fact remains that LPTX and GPTX currently have access to the ballot and that access has been fairly consistent for years. In this instance, the Court will not find that the burden imposed qualifies as severe when the thrust of the burden is theoretical and speculative. Finally, Plaintiffs point out that GPTX would not have appeared on the 2020 ballot but for Texas enacting a new law in 2019 "seemingly in an attempt to influence this litigation" that re-qualified GPTX based on its 2016 electoral results. (Pls. Reply, Dkt. 83, at 11). Texas may have enacted the law in an attempt to influence this litigation. Whatever the motivation behind the law, the new law reduced the burden on GPTX and made it easier for GPTX to appear on the ballot. Thus, the change in law does not support Plaintiffs' claim.

Second, APTX and CPTX, which lack ballot access, have not shown that the numerical requirement burdens their parties. Neither APTX nor CPTX is a flourishing party. APTX does not have a website, take membership dues, or have a way to track membership. (APTX Depo., Dkt. 571, at 6). APTX has had one statewide convention which 10 people attended and about five donors total since it began in 2009. (*Id.* at 6, 9). APTX has less than $1,000 in its bank account because it "does not have any expenses that would require a budget." (*Id.* at 12). When APTX attempted an all-volunteer petition drive, APTX collected just

a few thousand signatures, well short of the 47,182 required signatures. (Pls. Statement of Facts, Dkt. 59, at 18). Similarly, CPTX lacks the money and resources needed to complete a successful petition drive. (*Id.* at 19). CPX has about 130 members and has two expenses: its website and email service. (CPTX Depo., Dkt. 57-1, at 21, 23). Importantly, CPTX has not attempted a petition drive, volunteer or paid. (*Id.* at 25). APTX and CPTX do not have robust support nor have they made genuine efforts to gain that support, and they have failed to show that it is the statutory burden of collecting signatures that prevents them from appearing on the ballot. Similarly, the burden on voters who wish to vote for APTX or CPTX candidates and cannot do so is by virtue of that party failing to make real efforts to meet the requirements. In this case, any burden on voters tracks the burden on Minor Parties. Because LPTX and GPTX have ballot access and APTX and CPTX have not shown more than a hypothetical burden, the Court finds that the 1% requirement is not severely burdensome based on the facts presented to this Court today.

2. Cost of Obtaining Signatures

The thrust of Plaintiffs' argument is that they must hire professional petition circulators to obtain an adequate number of signatures to meet the statutory requirement. Plaintiffs have shown that volunteer petition drives are rarely successful, (Pls. Statement of Facts, Dkt. 59, at 13), and that in the last two decades no Minor Party or Independent has successfully completed a petition drive without "spending substantial sums to hire paid petition circulators," (*id.*). Plaintiffs rely on *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Bullock v. Carter*, 405 U.S. 134

(1972), to support their notion that the financial burdens associated with collecting signatures impose a severe burden on their rights. Those cases are not directly applicable because they involved statutorily-mandated fees, specifically a poll tax and excessive filing fees. *Harper*, 383 U.S. at 666; *Bullock*, 405 U.S. at 134. Plaintiffs' argument is more nuanced, however. Plaintiffs contend that although there is no statutory requirement to pay petition circulators, the practical effect of the challenged provisions is that Plaintiffs must hire petition circulators to run a successful petition drive. In response, the State counters that it is not "impossible" to gain ballot access using a volunteer-led petition drive. (Def. Resp., Dkt. 79, at 7).

The law lays somewhere in between Plaintiffs' and the State's characterizations. Plaintiffs in a ballot access case are not required to show that a statute makes it impossible to gain ballot access. On the other hand, plaintiffs do need to demonstrate a serious, consequential burden. For example, in *Libertarian Party of Kentucky v. Grimes*, the Sixth Circuit explained that Kentucky's ballot access laws "may impose some financial costs" because they "may require greater campaign efforts," the statutory scheme did not exclude or virtually exclude Minor Parties from the ballot. 835 F.3d 570, 575 (6th Cir. 2016) ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."). That court also noted that the challenged provision was only one of two mechanisms to access the ballot, much like the statutory scheme in Texas which allows for Minor Parties to access the ballot through a petition drive or filing fee. While this Court understands Plaintiffs' analogy to mandatory fees like in *Harper* and *Bullock* and finds it initially compelling,

the Court finds that Plaintiffs cannot get there at this time. The evidence in this case does not show that the State is impermissibly conditioning Plaintiffs' participation in the electoral process on their financial status. LPTX and GPTX currently have ballot access, and APTX and CPTX lack the kind of support needed to genuinely launch a petition drive. Plaintiffs also proffer that to qualify for the 2022 ballot, the Serve America Movement Party obtained proposals from three petitioning firms that ranged from $882,000 to $1.375 million, but the Serve America Movement Party is not a party to this lawsuit. Plaintiffs make a good case that it is expensive, perhaps prohibitively expensive, to comply with the petition requirement, but none of the Plaintiffs is suffering from that burden, even if it is a severe burden.

3. Time Constraints

Plaintiffs argue that the "extreme" time constraints placed on Plaintiffs to obtain signatures severely burdens their rights. (Pls. Mot. Summ. J., Dkt. 58, at 31). Under the current statutory scheme, Minor Parties have 75 days and statewide Independents have 107 days. *See* Tex. Elec. Code §§ 181.005(a), 142.004-06, 142.009. If there's a primary runoff, Independents would have only 30 days. *See id.* § 142.009(1). In 2024, presidential Independents will have 68 days. *See* §§ 192.032(c),(g); 41.007(c). Texas's time constraints in combination with the number of signatures required is more restrictive than other states. The time constraints may be the most restrictive in the country given the numerical requirement, but Plaintiffs fail to present adequate evidence that the time constraints burden them. Instead, Plaintiffs simply argue that the time period remains fixed while the number of re-

quired signatures increases with each election cycle. (Pls. Mot. Summ. J., Dkt. 58, at 31–32). The Court cannot find that the time constraints impose severe burdens on Plaintiffs.

4. Petitioning Procedures

Plaintiffs take issue with the various requirements imposed on petition signers and circulators and the process itself: collecting signatures by hand, attempting to collect signatures in public, requesting detailed personal information in public, reciting the required oath to potential signers, the primary screenout which means signatures cannot be collected until after the primary election, and the petition circulator affidavit that verifies the signatures are genuine and personal information correct. (Pls. Mot. Summ. J., Dkt. 58, at 32–35). As it relates to the primary screenout, Plaintiffs have shown that Texas is the only state that prohibits Minor Parties and Independents from collecting signatures before the primary election and prohibits voters from signing petitions if they voted in a primary election. (Pls. Statement of Facts, Dkt. 59, at 14). The primary screenout makes petitioning more difficult in Texas. (*Id.*). Plaintiffs present sufficient evidence that stopping people in public places and asking them to provide persona information adds challenges because petition circulators are often asked to relocate and some voters are unwilling to stop in public and provide personal information. (*Id.* at 14). Likewise, Plaintiffs' evidence establishes that the oath, paper forms, and affidavit dissuade voters from signing, make the process more time consuming, and create the need for more signatures. (*Id.* at 15). Whereas other states have implemented online petitions for voters to sign, Texas has not done so. (*Id.*). The

Court again does not disagree that the inability to use online petitions may burden Plaintiffs and indeed finds that the lack of electronic methods does burden Plaintiffs. Yet again, though, Plaintiffs fail to tie the restrictions to evidence of the severe burdens placed specifically on them, or, if they did, it was a plaintiff that already had ballot access. For example, a member of LPTX submitted a detailed declaration documenting how the petition process is "extraordinarily laborious and expensive" and how the primary screenout "lowers your overall signature validity rate." (Benedict Decl., Dkt. 69, at 6–7). To the extent LPTX members could demonstrate that these provisions impose burdens, LPTX is not burdened enough to be excluded from the ballot in Texas.

5. Newly-Enacted Section 141.041

Finally, Plaintiffs urge the Court to find that Section 141.041 of the Texas Election Code imposes substantial additional burdens on Plaintiffs. In 2019, this Court declined to preliminarily enjoin enforcement of that provision's requirement that a candidate pay a filing fee or meet the petition requirements of Sections 141.041(e) and 141.062. (Order, Dkt. 30). Although the provision allows a candidate to pay a fee or submit a petition, Plaintiffs argue it has excluded "non-wealthy candidates and their supporters." (Pls. Mot. Summ. J., Dkt. 58, at 35). Specifically, in support of their claim, Plaintiffs state that LPTX candidates were excluded in 2020 and cite Wes Benedict's ("Benedict") declaration, (Dkt. 69). (Pls. Mot. Summ. J., Dkt. 58, at 36).

In his declaration, Benedict says he attempted to seek the LPTX nomination for U.S. Senate, which,

pursuant to Section 141.041, meant he needed to pay the $5,000 filing fee or submit a petition with 5,000 valid signatures by December 9, 2019. (Benedict Decl., Dkt. 69, at 8). He attempted to raise funds but only raised about $500. (*Id.*). According to Benedict, potential supporters were unwilling to donate "when they did not even know whether I would be the party's nominee." (*Id.*). Then Benedict explains that another LPTX candidate paid the filing fee "so it would be a waste of LPTX's supporters' money to help pay my filing fee." (*Id.*). In his next sentence, Benedict concludes: "As a result, I withdrew my application for LPTX's nomination as a candidate for U.S. Senate." (*Id.*). His declaration does not support Plaintiffs' claim that Section 141.041 severely burdens their right to access the ballot. Rather, Benedict's declaration shows he chose not to pursue the party's nomination in part because another LPTX candidate already qualified for the ballot. Without more, Plaintiffs have not presented evidence that Section 141.041 imposes severe burdens on them.

D. State Interests

Next, the Court evaluates the State's interest in imposing the challenged restrictions. The State says it has an interest in ensuring candidates demonstrate a significant modicum of support before gaining access to the ballot. (Defs. Resp., Dkt. 79, at 10). The State's interest "helps to avoid voter confusion, ballot overcrowding, and frivolous candidacies." (*Id.*). In the face of Plaintiffs' failure to show that the challenged provisions—even taken together—impose severe burdens, the Court finds that the State's stated interest is sufficient to meet rational basis review, save for one set of rules governing ballot access.

The provisions governing nominating petitions in Texas that require the petition to be printed on paper and signed in person and by hand impose a burden on Plaintiffs that is not reasonably related to the State's interest in ensuring candidates demonstrate a significant modicum of support to qualify for the ballot. *See, e.g.*, Tex. Elec. Code § 141.063(b) (requiring that the signer's signature be in their "own handwriting"). The State's goals of avoiding voter confusion, ballot overcrowding, and frivolous candidacies are not served by requiring Minor Parties and Independents to use an inefficient and laborious process that includes printing paper petitions at their own expense, sending petition drive volunteers or paid workers out to public spaces to request that people stop and go through a paper form at a time and in a place that may be inconvenient or uncomfortable, making it impractical to confirm, in real time, whether a potential signer is eligible, reducing the number of valid signatures because sometimes the signer's handwriting is illegible or becomes illegible as the paper is handled, collecting the printed and signed petitions at their own expense from the circulators, organizing the paper petitions, reviewing the paper petitions by hand, and then driving the boxes of petition forms to Austin. (*See* Pls. Statement of Facts, Dkt. 59, at 14– 15). Indeed, other states have implemented electronic methods by which voters can sign nomination petitions and simultaneously confirm eligibility. (*Id.* at 15). Plaintiffs have shown that electronic methods would reduce or eliminate much of the burden imposed on Minor Parties and Independents. For example, CPTX state chair Scott Copeland stated: "If Texas authorized electronic petitioning procedures, such as a secure web-based portal or petition circulation by email, CPTX would focus our outreach

efforts on social media platforms such as Facebook and Twitter, which cost nothing and enable us to reach a large number of supporters and other voters who may be receptive to our platform and message." (Copeland Decl., Dkt. 66, at 2). The Court therefore holds that the challenged provisions, to the extent they require paper petitions, violate Plaintiffs' fundamental rights because there is no connection between those burdensome provisions and the Defendants' stated interest.

E. Unequal Burdens

Plaintiffs next challenge Texas's ballot access laws as violating the Equal Protection Clause because they operate as a "de facto financial barrier to Independents' and [Minor Parties'] participation in Texas's electoral process, while the alternative path available to [Major Parties] guarantees their nominees automatic access to the general election ballot at taxpayer expense." (Pls. Mot. Summ. J., Dkt. 58, at 36). First, alternate ballot access rules for Major Parties and Minor Parties are not per se unconstitutional. *Jenness v. Fortson*, 403 U.S. 431, 441–42 (1970) ("[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot."). States may impose different requirements on Minor Parties. Second, in Texas, appearing on the ballot is not conditioned on being able to pay a fee. A candidate may pay the filing fee or submit a petition, which furthers the State's proffered interest in limiting ballot access to serious candidates who

have demonstrated public support. Third, the same issue plagues this claim that doomed almost all of Plaintiffs' claim that the challenged provisions burden their fundamental rights—Plaintiffs have not shown that the challenged provisions "operate as a mechanism to exclude certain classes of candidates from the electoral process." *Anderson*, 460 U.S. at 793. Fourth, the Fifth Circuit and other district courts in Texas have recognized that many parts of Texas's ballot access scheme pass constitutional muster even though they affect Major Parties, Minor Parties, and Independents differently. *See, e.g.*, *Nader v. Connor*, 332 F. Supp. 2d 982, 988–89 (W.D. Tex.), *aff'd*, 388 F.3d 137 (5th Cir. 2004); *Kirk*, 84 F.3d at 184–86; *Meyer*, 2011 WL 1806524, at *3–5. For these reasons, Plaintiffs' Equal Protection Clause claim fails in most respects.

While most of the statutory scheme does not run afoul of the Equal Protection Clause, one aspect of the challenged provisions does impose unequal burdens on Plaintiffs. Plaintiffs have shown that Texas places an unequal burden on Plaintiffs because they cannot use electronic methods for petitioning whereas Texas allows Major Parties to use electronic methods as part of their procedures for accessing the ballot. Pursuant to Section 172.029 of the Texas Election Code, state and county chairs for the Major Parties "shall electronically submit" information about each candidate who files an application for a place on the ballot. Tex. Elec. Code § 172.029(a). Defendants must "continuously maintain an online database" of the information submitted. *Id.* § 172.029(b). Defendants are also directed to adopt rules surrounding the electronic submissions. *See id.* § 172.029(b),(e). Texas also allows Major Parties to certify primary election results electronically. *See*

§§ 172.116, 172.117(a), 172.122. Plaintiffs have no ability to electronically conduct petitioning, verify signatures, or submit petitions. Instead, Plaintiffs use the same hard copy paper procedures enacted almost 120 years ago in 1903. Defendants also have not taken any steps to reduce the burdens those procedures impose on Minor Parties and Independents. (Ingram Depo., Dkt. 74, at 216–17). In fact, Defendants have not "considered any measures that would reduce the burden and expense of the petitioning process" including adopting electronic procedures. (*Id.* at 214, 216–17). When asked whether electronic procedures, such as enabling signatures to be validated as a petition was signed, would reduce the administrative burden on Defendants too, Defendants admitted that it "[c]onceivably" would. (*Id.* at 215). Validating them by paper takes Defendants up to one to two weeks. (*Id.*). If the "circulator's affidavit was electronically filled in and verified and the signature was automatically filled in and verified," Defendants admitted they "completely agree[d]" that "it could cut the process short" and reduce their burden. (*Id.* at 216). Because Major Parties can retrieve and transmit information online, requiring Minor Parties and Independents to conduct the petitioning process on paper imposes an unequal burden on Plaintiffs.

IV. Conclusion

For these reasons, IT IS ORDERED that Defendants' Motion for Summary Judgment, (Dkt. 57), is GRANTED IN PART and DENIED IN PART and Plaintiffs' Motion for Summary Judgment, (Dkt. 58), is GRANTED IN PART and DENIED IN PART.

Defendants' motion for summary is granted and Plaintiffs' motion for summary judgment denied except for the Court's holdings that (1) the challenged provisions, to the extent they require paper petitions, violate Plaintiffs' fundamental rights and (2) the challenged provisions, to the extent they require a paper petitioning process, impose unequal burdens on Plaintiffs in violation of the Equal Protection Clause.

IT IS FURTHER ORDERED that the parties shall meaningfully confer and submit a joint and agreed proposed order on or before October 14, 2022 that sets out the appropriate relief based on this Order. IT IS FINALLY ORDERED that if the parties meaningfully confer and are unable to reach an agreement, the parties shall file simultaneous briefs of no more than ten pages on or before October 21, 2022 that set out how they believe the relief should be fashioned based on this Order. If the parties file briefs, the parties also shall attach a proposed order.

SIGNED on October 4, 2022.

/s/ Robert Pitman
United States District Judge

ORDER STAYING CASE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION (SEPTEMBER 30, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK MILLER, ET AL.,

Plaintiffs,

v.

RUTH R. HUGHS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF TEXAS, AND JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS THE DEPUTY SECRETARY OF THE STATE OF TEXAS,

Defendants.

No. 1:19-CV-700-RP

Before: Robert PITMAN, U.S. District Judge.

ORDER

The Court entered an order resolving Plaintiffs' claims on September 29, 2022. All that remains in this case is to enter final judgment, which will be done as soon as practicable after the Court has heard from the parties regarding the appropriate relief. In the meantime, the Court ORDERS this action is STAYED

pending the agreed proposed order or briefing from the parties.

SIGNED on September 30, 2022.

/s/ Robert Pitman
United States District Judge

STATUTORY PROVISIONS INVOLVED

ELEC § 141.063. Validity of Signature

(a) A signature on a petition is valid if:

(1) except as otherwise provided by this code, the signer, at the time of signing, is a registered voter of the territory from which the office sought is elected or has been issued a registration certificate for a registration that will become effective in that territory on or before the date of the applicable election;

(2) the petition includes the following information with respect to each signer:

(A) the signer's residence address;

(B) the signer's date of birth or the signer's voter registration number and, if the territory from which signatures must be obtained is situated in more than one county, the county of registration;

(C) the date of signing; and

(D) the signer's printed name;

(3) the part of the petition in which the signature appears contains the affidavit required by Section 141.065;

(4) each statement that is required by this code to appear on each page of the petition appears, at the time of signing, on the page on which the signature is entered; and

(5) any other applicable requirements prescribed by this code for a signature's validity are complied with.

(b) The signature is the only information that is required to appear on the petition in the signer's own handwriting.

(c) The use of ditto marks or abbreviations does not invalidate a signature if the required information is reasonably ascertainable.

(d) The omission of the state from the signer's residence address does not invalidate a signature unless the political subdivision from which the signature is obtained is situated in more than one state. The omission of the zip code from the address does not invalidate a signature.

(e) The signer's residence address and registration address are not required to be the same if the signer would otherwise be able to vote for that office under Section 11.004 or 112.002.

ELEC § 142.007. Number of Petition Signatures Required (Statewide Independents)

The minimum number of signatures that must appear on a candidate's petition is:

(1) for a statewide office, one percent of the total vote received by all candidates for governor in the most recent gubernatorial general election; or

(2) for a district, county, or precinct office, the lesser of:

(A) 500; or

(B) five percent of the total vote received in the district, county, or precinct, as applicable, by all candidates for governor in the most recent gubernatorial general election, unless that number is under 25, in which case the required number of signatures is the lesser of:

(i) 25; or

(ii) 10 percent of that total vote.

ELEC § 181.005. Qualifying for Placement On Ballot By Party Required to Nominate By Convention

(a) To be entitled to have the names of its nominees placed on the general election ballot, a political party required to make nominations by convention must file with the secretary of state, not later than the 75th day after the date of the precinct conventions held under this chapter, lists of precinct convention participants indicating that the number of participants equals at least one percent of the total number of votes received by all candidates for governor in the most recent gubernatorial general election. The lists must include each participant's residence address and voter registration number.

ELEC § 181.006. Petition Supplementing Precinct Convention Lists

(a) If the number of precinct convention participants indicated on the lists filed under Section 181.005 is fewer than the number required for the political party to qualify to have the names of its

nominees placed on the ballot, the party may qualify by filing a petition as provided by this section.

(b) A petition must:

(1) satisfy the requirements prescribed by Section 141.062 for a candidate's petition;

(2) contain signatures in a number that, when added to the number of convention participants indicated on the lists, equals at least one percent of the total number of votes received by all candidates for governor in the most recent gubernatorial general election; and

(3) be filed with the secretary of state by the state chair before the deadline for filing the lists of precinct convention participants.

(c) Except as provided by this section, the petition is subject to the applicable provisions of Subchapter C, Chapter 141. 1

(d) A signer's voter registration is not required to be in any particular territory.

(e) A copy of a request for the withdrawal of a signature must be delivered to the state chair at the time the withdrawal request is filed.

(f) The following statement must appear at the top of each page of the petition: "I know that the purpose of this petition is to entitle the _____ Party to have its nominees placed on the ballot in the general election for state and county officers. I have not voted in a primary election or participated in a convention of another party during this voting year, and I understand that I become

ineligible to do so by signing this petition. I understand that signing more than one petition to entitle a party to have its nominees placed on the general election ballot in the same election is prohibited."

(g) A person who has voted in a primary election or participated in a convention of another party during the voting year in which the petition is circulated is ineligible to sign the petition, and the signature of such a person is invalid.

(h) A signature is invalid if the person signed the petition subsequent to signing a petition to qualify another political party to have the names of its nominees placed on the ballot for the same election, whether the other party is circulating the petition under this chapter or under Chapter 182.

(i) On signing the petition, the person becomes ineligible to affiliate with another party during the voting year in which the petition is signed.

(j) The petition may not be circulated until after the date of the party's precinct conventions held under this chapter. A signature obtained on or before that date is invalid.

(k) The secretary of state shall post a notice of the receipt of a petition on the secretary of state's Internet website and may post the notice on a bulletin board used for posting notice of meetings of state governmental bodies. Any person may challenge the validity of the petition by filing a written statement of the challenge with the secretary of state not later than the fifth day after the date notice is posted. The secretary of

state may verify the petition signatures regardless of whether the petition is timely challenged.

ELEC § 192.032. (Presidential) Independent Candidate's Entitlement to Place On Ballot

(a) To be entitled to a place on the general election ballot, an independent candidate for president of the United States must make an application for a place on the ballot.

(b) An application must:

(1) comply with Section 141.031, except that:

(A) the application is not required to include a candidate's occupation, length of residence, or statement that the candidate is aware of the nepotism law; and

(B) the application must contain the applicable information required by Section 141.031(a)(4) with respect to both the presidential candidate and the running mate;

(2) state the names and residence addresses of presidential elector candidates in a number equal to the number of presidential electors that federal law allocates to the state; and

(3) be accompanied by:

(A) a petition that satisfies the requirements prescribed by Section 141.062; and

(B) written statements signed by the vice-presidential candidate and each of the presidential elector candidates indicating

that each of them consents to be a candidate.

(c) The application must be filed with the secretary of state not later than the second Monday in May of the presidential election year.

(d) The minimum number of signatures that must appear on the petition is one percent of the total vote received in the state by all candidates for president in the most recent presidential general election.

(e) A petition signer's voter registration is not required to be in any particular territory.

(f) The following statement must appear at the top of each page of the petition: "I did not vote this year in a presidential primary election."

(g) A signature on the petition is invalid if the signer:

(1) signs the petition on or before the date of the presidential primary election in the presidential election year; or

(2) voted in a presidential primary election during the presidential election year.

(h) A candidate in a presidential primary election is ineligible to be an independent candidate for president or vice-president of the United States in the succeeding general election.

SUMMARY OF CHALLENGED STATUTORY PROVISIONS (APPELLANT OPENING BRIEF, APPX. A)

Statutory Provision

§ 141.041 (now codified as § 181.0311)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Candidates seeking nomination at convention must pay filing fee or submit petition in lieu thereof; filing fees and petition requirements equal to those imposed on candidates seeking access to primary election ballot.

Statutory Provision

§ 141.063

Applies To

Independents and
Non-Primary Parties [Minor Parties]

Requirement

Petition signature valid only if signer is registered and includes registration number or birth date; the date of signing; printed name; petition also must include required affidavit and oath.

Statutory Provision

§ 141.064

Applies To

Independents and
Non-Primary Parties [Minor Parties]

Requirement

Petitioner must point to and recite required oath to each petition signer; witness each signature; verify signing date; and verify signer's registration status and that registration number is correct.

Statutory Provision

§ 141.065

Applies To

Independents and
Non-Primary Parties [Minor Parties]

Requirement

Petitioner's affidavit must be notarized and state that petitioner pointed out and read oath to each signer; witnessed each signature; verified each signer's registration status and believes each signature to be genuine.

Statutory Provision

§ 141.066(a),(c)

Applies To

Independents and Voters

Requirement

A person may not sign the petition of more than one candidate for the same office in the same election, and if a person does, each subsequent signature after the first is invalid.

Statutory Provision

§ 142.002

Applies To

Independents

Requirement

Declaration of Intent due in December of the year before the election.

Statutory Provision

§ 142.006

Applies To

Independents

Requirement

Petitions due within 30 days of runoff primary.

Statutory Provision

§ 142.007

Applies To

Independents

Requirement

Establishes petition signature requirements: for statewide Independents, one percent of total vote for Governor in previous election.

Statutory Provision

§ 142.008

Applies To

Independents

Requirement

Oath must appear on each petition page.

Statutory Provision

§ 142.009

Applies To

Independents

Requirement

Signatures on petitions invalid if obtained before the primary election, or the runoff primary, if there is one, or if the signer voted in a primary election or runoff primary for the office the Independent seeks.

Statutory Provision

§ 142.010(b)

Applies To

Independents

Requirement

Secretary not required to certify petitions until 68 days before general election.

Statutory Provision

§ 162.001

Applies To

Voters

Requirement

Must be affiliated with party to participate in convention.

Statutory Provision

§ 162.003

Applies To

Voters

Requirement

Voters become affiliated with party by voting in primary.

Statutory Provision

§ 162.012

Applies To

Voters

Requirement

Affiliated voters ineligible to affiliate with another party in same voting year.

Statutory Provision

§ 162.014

Applies To

Voters

Requirement

Establishes criminal penalties for unlawful participation in convention or primary

---

Statutory Provision

§ 181.0311 (formerly codified as § 141.041)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Candidates seeking nomination at convention must pay filing fee or submit petition in lieu thereof; filing fees and petition requirements equal to those imposed on candidates seeking access to primary election ballot.

Statutory Provision

§ 181.005(a)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Party must submit lists within 75 days of their precinct conventions showing that the number of participants equaled at least one percent of the entire vote for governor in the last general election.

Statutory Provision

§ 181.005(c)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Party does not qualify to retain ballot access unless one of its candidates for statewide office received at least two percent of the vote at least once in the preceding five elections. (**Plaintiffs do not challenge this requirement, enacted in 2019, which appears to supersede the prior requirement established by § 181.005(b)**).

Statutory Provision

§§ 181.006(a),(b)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

If party fails to comply with § 181.005(a), it must submit petitions containing enough valid signatures to make up for the deficiency (with notarized affidavits from each petition circulator, *see* §§ 141.063, 141.065).

Statutory Provision

§ 181.006(f)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Oath must appear on each petition page.

Statutory Provision

§ 181.006(g)-(j)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Petitions must be signed by registered voters, after the date of the primary election, who did not vote in a primary election or previously sign a petition to place another party's nominees on the ballot for the same election.

Statutory Provision

§ 181.007(b)

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Secretary not required to certify petitions until 68 days before general election.

Statutory Provision

§§ 181.031, 181.032, 181.033

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Potential nominees must submit candidate applications in December of the year before an election.

Statutory Provision

§ 181.0041

Applies To

Non-Primary Parties [Minor Parties]

Requirement

Party must register with the Secretary no later than January 2 of the election year.

Statutory Provision

§§ 192.032(a),(b),(c),(d)

Applies To

Presidential Independents

Requirement

Petitions must be submitted by the second Monday in May and contain valid signatures equal in number to 1 percent of the total vote for president in Texas in the last presidential general election.

Statutory Provision

§ 192.032(f)

Applies To

Presidential Independents

Requirement

Oath must appear on each petition page.

Statutory Provision

§ 192.032(g)

Applies To

Presidential Independents

Requirement

Petitions must be circulated after the presidential primary election; and any signature collected before that date, or from a signer who voted in a presidential primary that year is invalid.

Statutory Provision

§ 202.007

Applies To

Independents

Requirement

If a vacancy occurs after runoff primary election day, an Independent's petitions for that office are due 30 days after vacancy occurs or the 70th day before the general election, whichever is earlier.