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

MARK MILLER, MICHELLE GANGES, 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, *Plaintiffs*,	§	
v.	§	No. 1:19-cv-00700-RP
JOHN OR JANE DOE, in his or her official capacity as the Secretary of State of Texas, and JOSE A. "JOE" ESPARZA, in his official capacity as the Deputy Secretary of State of the State of Texas, *Defendants.*	§	

DEFENDANTS' MOTION TO DISMISS

Defendants John or Jane Doe in his or her official capacity as Secretary of State of Texas and Jose A. "Joe" Esparza in his official capacity as Deputy Secretary of State of Texas (collectively, "Defendants"), respectfully request dismissal of all claims in this cause under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs' allegations are inadequate to establish standing and, in any event, their legal arguments are squarely foreclosed by Fifth Circuit and Supreme Court precedent.

NATURE OF THE PROCEEDING

Plaintiffs are a collection of voters, political parties, former and potential political candidates, and former and current political party officials who are neither Republican nor Democrat. They challenge Texas's statutory requirements for obtaining a place on the general election ballot as applied to them and seek injunctive relief permanently enjoining Defendants from enforcing these laws.

LEGAL AND FACTUAL BACKGROUND

I. Ballot Access in Texas

There are three ways for a candidate to obtain a place on Texas's statewide general election

ballot: win a primary election, receive a nomination from a political party that nominates by convention and qualifies for ballot access, or submit a nominating petition signed by the required number of voters.

A political party whose candidate for governor received at least 20% of the vote in the most recent gubernatorial election must nominate its general election candidates by primary election. TEX. ELEC. CODE § 172.001.[1] A political party whose candidate for governor received at least 2% but less than 20% of the vote in the most recent gubernatorial election may choose to nominate its general election candidates by primary election *or* by nominating convention. *Id.* §§ 172.002(a),[2] 181.002.[3] A political party that did not have a candidate in the most recent gubernatorial election receive 2% of the vote must nominate its general election candidates by nominating convention. *Id.* § 181.003.[4]

Primary Election Candidates. To seek a party's nomination for statewide office in a primary election a candidate must submit an application to party officials and either pay a filing fee or submit a petition in lieu of filing fee. TEX. ELEC. CODE §§ 172.021 (application required), 172.024 (filing fees for primary candidates), 172.025 (signatures required on petition in lieu of filing fee).

Nominating Convention Candidates. Similarly, to seek nomination at a party nominating convention, a candidate must submit an application to party officials and either pay a filing fee or submit a petition in lieu of filing fee. TEX. ELEC. CODE § 141.041.[5] The amount of the filing fee "is the amount prescribed by [§] 172.024 for a candidate for nomination for the same office in a general

[1] If the "party's nominee for governor in the most recent gubernatorial general election received 20 percent or more of the total number of votes[,]" then the party's candidates "for offices of state and county government and the United States Congress must be nominated by primary election."
[2] If the "party's nominee for governor in the most recent gubernatorial general election received at least two percent but less than 20 percent" of the votes for governor, then the "party's nominees in the general election for offices of state and county government and the United States Congress may be nominated by primary election."
[3] "A political party may make nominations for the general election for state and county officers by convention, as provided by this chapter, if the party is authorized by [§] 172.002 to make nominations by primary election."
[4] "A political party must make nominations for the general election for state and county officers by convention, as provided by this chapter, if the party is not required or authorized to nominate by primary election."
[5] This 2019 law will take effect September 1, 2019. *See* Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, §1, sec. 141.041, 2019 Tex. Sess. Law Serv. 822 (to be codified at TEX. ELEC. CODE § 141.041), attached as Ex. 1.

primary election." *Id.* § 141.041(b). Similarly, "[t]he minimum number of signatures that must appear on [a] petition [in lieu of filing fee] is the number prescribed by [§] 172.025 to appear on a petition of a candidate for nomination for the same office in a general primary election." *Id.* § 141.041(e).

A party nominating by convention has three options for qualifying to have its nominees automatically placed on the general election ballot. First, a party qualifies if—in at least one of the five most recent general elections—the party's nominee for any statewide office received at least 2% of the vote for that office. TEX. ELEC. CODE § 181.005(c).[6] Second, a party qualifies if its precinct convention participants total at least 1% of the total votes cast in Texas's most recent gubernatorial general election. *Id.* § 181.005(a).[7] Third, a party that did not have enough precinct convention participants to qualify under § 181.005(a) may submit additional signatures which—when added to the number of precinct convention participants—meet the 1% requirement. *Id.* § 181.006.

Independents. An independent candidate may obtain a place on the general election ballot by filing a nominating petition with the required number of signatures. Candidates for statewide office must collect signatures totaling 1% of all votes cast in Texas's most recent gubernatorial election. TEX. ELEC. CODE § 142.007(1). Candidates for president must collect signatures totaling 1% of all votes cast for president in Texas in the most recent presidential election. *Id.* § 192.032(d).

II. Plaintiffs' Factual Allegations[8]

Plaintiffs allege that they have suffered harm as voters, as state party affiliates, and as

[6] The current standard is 5%, but 2019 legislation lowers it to 2%, effective September 1, 2019. *See* Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, §2, sec. 181.005, 2019 Tex. Sess. Law Serv. 822 (to be codified at TEX. ELEC. CODE § 181.005(c)) ("A political party is entitled to have the names of its nominees placed on the general election ballot, without qualifying under Subsection (a) or (b), if the party had a nominee for a statewide office who received a number of votes equal to at least two percent of the total number of votes received by all candidates for that office at least once in the five previous general elections.").

[7] "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."

[8] Since the Court takes Plaintiffs' factual allegations as true at the 12(b) stage, Defendants do not contest them here, but reserve the right to do so should this case proceed.

candidates. They challenge the ballot requirements applicable to three political entities: independent presidential candidates, independent candidates for statewide office, and political parties that do not nominate their candidates via primary election.

Party Affiliate Plaintiffs. Plaintiffs include four state political party affiliates—America's Party of Texas ("APTX"), Constitution Party of Texas ("CPTX"), Green Party of Texas ("GPTX"), and Libertarian Party of Texas ("LPTX") (collectively, "Party Affiliate Plaintiffs"). Am. Compl. ¶¶11, 12, 13, 14. Each alleges that it "seeks to elect candidates at all levels of government in Texas," but that it "lacks the resources necessary to conduct a successful petition drive." *Id.* CPTX and APTX also state that they are "unable to qualify for the ballot" because of this lack of resources. *Id.* ¶¶11, 12. Each Party Affiliate plaintiff alleges that it "is injured by the burden and expense that Texas's statutory scheme imposes on" it, and that this "diminishes its capacity to participate effectively in Texas's electoral process and hinders [its] ability to grow and develop as a political party." *Id.* ¶¶ 11, 12, 13, 14.

Individual Plaintiffs. The other plaintiffs are six individuals seeking recovery as voters, party leaders, and/or candidates. (collectively, "Individual Plaintiffs"). Each individual plaintiff alleges harm as a registered Texas voter who intends to vote in future elections. Am. Compl. ¶¶5, 6, 7, 8, 9, 10. Each "seeks to campaign for, speak and associate with, and vote for candidates that must be nominated by convention or nomination petition," and claims to be "harmed by the lack of such candidates on Texas's general election ballot." *Id.* Three Individual Plaintiffs assert harm as leaders within a Party Affiliate Plaintiff—Copeland as Chair of CPTX, Palmer as former Co-Chair of GPTX, and Prior as former Chair of APTX. *Id.* ¶¶7, 8, 10. Each alleges being "harmed by the burden and expense that Texas's statutory scheme imposes on" their Party Affiliate and claims that this "diminishes [their Party Affiliate's] capacity to participate effectively in Texas's electoral process and hinders its ability to grow and develop as a political party." *Id.* ¶¶7, 8, 10.

Finally, three Individual Plaintiffs allege harm in connection with running in a statewide

election (collectively, "Candidate Plaintiffs"). Miller has run as a LPTX nominee 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, but" claims that "the requirements that Texas imposes upon such candidates chill him from attempting to do so." Am. Compl. ¶5. Copeland previously sought a CPTX nomination and intends to do so again but claims that "he is harmed by the practical impossibility of complying with Texas's ballot access procedures." *Id.* ¶7. And Prior "attempted to run" as an APTX nominee in 2018 and intends to do so in the future but claims that in 2018 "APTX lacked the resources necessary to conduct a successful petition drive, and it did not qualify for ballot access." *Id.* ¶10.

LEGAL STANDARDS

I. Dismissal Under Rule 12

A case is properly dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. To establish the court's subject-matter jurisdiction, a plaintiff must demonstrate standing, which requires him to show "an injury that is: (1) concrete, particularized, and actual or imminent (so-called injury 'in fact'); (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling." *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 517 (5th Cir. 2015). Thus, the issue under Rule 12(b)(1) is whether any plaintiff's allegations establish all of these elements with respect to the Defendants.

Federal Rule of Civil Procedure 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. William*, 490 U.S. 319, 326 (1989) (citations omitted). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Id.* at 326-27. Thus, the issue under Rule 12(b)(6) is whether the Amended Complaint alleges "enough facts to state a claim to relief that is plausible on its face," assuming that the allegations are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Notably, "[t]he tenet that a court must accept as true all of the allegations

contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555). Plaintiffs allege violations of their rights to vote, to speak and associate for political purposes, and to equal protection of the law under the First and Fourteenth Amendments. If their factual allegations do not state a violation of these rights, then this case should be dismissed under Rule 12(b)(6). *See, e.g.*, *Twombly*, 550 U.S. at 555.

II. *Anderson/Burdick* Framework

"Voting is of the most fundamental significance in our constitutional system." *Tex. Indep. Party v. Kirk,* 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi,* 504 U.S. 428, 433 (1992)). The right to "vote in any manner and the right to associate for political purposes through the ballot," however, are "not absolute." *Id.* States have substantial authority to regulate elections "to ensure fairness, honesty, and order." *Id.* (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). One way Texas has exercised that authority is by enacting ballot-access laws, including the ones Plaintiffs challenge here.

The framework for examining these laws is well-settled. "In the Fifth Circuit, the proper test for [evaluating] the constitutionality of" ballot-access laws "is the *Anderson/Burdick* Test." *Meyer v. Texas,* Civ. No. H-10-3860, 2011 WL 1806524, at *3 (S. D. Tex. May 11, 2011) (citations omitted). Under *Anderson/Burdick*, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Tex. Indep. Party v. Kirk*, 84 F.3d at 182 (citing *Burdick v. Takushi*, 504 U.S. at 434; *Anderson v. Celebrezze,* 460 U.S. at 789). "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." *Id.* (citing *Burdick,* 504 U.S. at 434). 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*, 2011 WL 1806524, at *3 (quoting *Burdick,* 504 U.S. at 434).

The Supreme Court has long recognized the "important state interest in requiring some preliminary showing of a significant modicum of support" for those on the ballot and "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also, e.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) ("States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.") (internal quotation marks and citation omitted). Texas's ballot regulations seek to protect the State's "important regulatory interests" in streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion. *Burdick*, 504 U.S. at 434. Texas is not required "to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. at 194-95.

Thus, every court applying the *Anderson/Burdick* framework to Texas's ballot-access provisions has found that these provisions are reasonable and nondiscriminatory, and advance important regulatory interests. *See, e.g.*, *Nader v. Connor,* 388 F.3d 137 (5th Cir. 2004) (affirming that *Anderson/Burdick* test—not strict scrutiny—applies to Texas law requiring independent presidential candidates to obtain more nominating signatures than minor political parties; affirming constitutionality of petition signature requirements and deadline to file for independent presidential candidates); *Tex. Indep. Party v. Kirk*, 84 F.3d at 184-86 (upholding deadlines for minor party nominating petitions and candidate declarations of intent); *Meyer,* 2011 WL 1806524, at *3 (upholding constitutionality of requirements for independent candidates for US House of Representatives). *See also, e.g.*, *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (upholding requirement that minor parties and independent candidates demonstrate sufficient electoral support to obtain ballot access, including

requirements that petition signatures be gathered after primary election). These cases have rejected the very arguments Plaintiffs raise here. Thus, the Court need not depart from (or even extend) these straightforward precedents to dismiss this case for failure to state a claim under Rule 12(b)(6).

ARGUMENT AND AUTHORITY

I. Plaintiffs' challenge to the requirements for independent candidates should be dismissed under Rule 12.

a. Plaintiffs lack standing to challenge requirements that apply only to independent candidates.

Only one plaintiff—Mark Miller—even alludes to participating in the political process as an independent candidate. *See* Am. Compl. ¶¶5-14. Thus, Miller is the only plaintiff who could even argue that he satisfies the "irreducible constitutional minimum of standing" under Article III—that is, a concrete and particularized injury, traceable to the Defendants and likely to be redressed by a favorable decision—with respect to laws applicable only to independent candidates. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (citation omitted). Indeed, since the Party Affiliate Plaintiffs select candidates by nominating convention, the requirements for independent candidates do not apply to (and cannot injure) them, divesting them of standing. The same is true for the Candidate Plaintiffs besides Miller, since each alleges a desire to seek the nomination of a Party Affiliate Plaintiff—*not* a desire to run as an independent. Am. Compl. ¶¶7 ("Copeland…intends to run for office as a CPTX nominee in 2020"); 10 ("Prior intends to run for office in future elections in Texas as the nominee of APTX"). These plaintiffs lack standing. *See, e.g.*, *Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F. Supp. 149, 153 (S.D. Tex. 1981) (holding that because no named plaintiff stated that he or she was an alien, no plaintiff had standing to assert that denial of voting rights for aliens was unconstitutional).

The Individual Plaintiffs similarly fail to establish standing. Though some mention a desire to vote for an independent candidate in the future, none identifies an independent candidate for whom

he wishes to vote, or an election in which he wishes to support such hypothetical candidate. Plaintiffs therefore fail to allege the "concrete and particularized" injury required to establish standing. Am. Compl. ¶¶5-10; *Lexmark Int'l v. Static Control Components*, 572 U.S. at 125. *See also, e.g., Kennedy v. Pablos*, No. 1:16-CV-1047-RP, 2017 WL 2223056, at *7 (W.D. Tex. May 18, 2017) (holding that plaintiff who "has not committed to any particular course of conduct with respect to his candidacy, alleging only that he 'might' seek the Democratic Party's nomination" lacked standing to challenge ballot-access laws because such an allegation "render[s] the probability of injury speculative") (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.")). Thus, these Individual Plaintiffs' allegations are insufficient to establish standing to challenge the requirements for independent candidates.

Miller, too, lacks standing to challenge these laws. He alleges that "he 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, but the requirements that Texas imposes upon such candidates chill him from attempting to do so." Am. Compl. ¶5. This fails to establish standing for at least two reasons. First, it is not sufficiently "concrete," as Miller "has not committed to any particular course of conduct with respect to his candidacy." *Kennedy v. Pablos*, 2017 WL 2223056, at *7. Second, "'[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418, (2013) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). And subjective chill is the only injury Miller asserts.

Indeed, Miller has succeeded in past attempts to appear on the ballot. *See* Am. Compl. ¶5 ("Miller ran for Railroad Commissioner as the [LPTX] nominee twice"). This demonstrates that his allegations of chill are not only speculative, they are also unreasonable. After all, Miller successfully obtained a place on the ballot under the very laws at issue, demonstrating that he as a LPTX candidate

has not been harmed. Regarding his vague allusion to running as an independent, the Supreme Court is "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413. Since multiple "independent decisionmakers" would have to exercise their judgment in particular ways to place Miller in the independent candidate situation he fears, his "allegations of a subjective chill" are inadequate to confer standing. *Id.*

Plaintiffs' challenge to the ballot requirements for independent candidates should be dismissed under Rule 12(b)(1) for lack of jurisdiction because they lack standing to pursue it.

b. Plaintiffs fail to allege a constitutional harm in connection with the ballot requirements for independent candidates.

Plaintiffs challenge three categories of laws applicable to independent candidates—those applicable to independent presidential candidates, those applicable to independent candidates for statewide office, and those governing the gathering of petition signatures. *See* Am. Compl. ¶93(B).[9] Even if any plaintiff had standing to pursue any of these challenges, they should be dismissed under Rule 12(b)(6) because Plaintiffs' allegations do not state a constitutional violation.

i. The requirements for independent presidential candidates are constitutional under binding precedent.

Plaintiffs challenge the ballot-access requirements for independent presidential candidates. *See* Am. Compl. ¶93(B) (citing TEX. ELEC. CODE § 192.032(a)-(d), (f), (g)). Independent presidential candidates must apply for a place on the ballot by the second Monday in May of the presidential election year. TEX. ELEC. CODE § 192.032 (a)-(c). The application must include a nominating petition with signatures totaling at least one percent of the total vote received in Texas by all candidates for president in the most recent presidential general election. *Id.* § 192.032 (d). These signatures must be

[9] The other law applicable exclusively to independent candidates that Plaintiffs challenge is TEX. ELEC. CODE § 202.007, which establishes a deadline for independent candidates to file an application to run to fill a vacancy in office. *See id.*; Am. Compl. ¶93 (B). As no plaintiff alleges a desire to run to fill a vacancy, the Court lacks jurisdiction over that claim. *See supra*, Part I(a); citations therein. And even if the Court had jurisdiction, this challenge still fails because—for the reasons explained in this section—candidate filing deadlines are minimally burdensome and further the State's interests.

obtained after the Texas presidential primaries conclude, and only voters who did not participate in a primary election that year may validly sign the nominating petition. *Id.* § 192.032 (f), (g). The Fifth Circuit has already upheld these provisions against the same arguments Plaintiffs urge here.

The Supreme Court has long recognized the state's legitimate interest—before placing an independent candidate on the ballot—in "assur[ing] itself that the candidate is a serious contender truly independent, and with a satisfactory level of community support." *Storer v. Brown*, 415 U.S. 724, 746 (1974).[10] Indeed, "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].' Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick*, 504 U.S. at 438 (quoting *Storer*, 415 U.S. at 735, 730). And, the State has an interest in promoting a "one person, one vote" principle through an entire election cycle. *Meyer*, 2011 WL 1806524, at *4 (citations omitted).

Thus, in *Nader v. Connor*, 388 F.3d 137 (5th Cir. 2004), the Fifth Circuit affirmed the district court's finding that Texas's petition signature requirements and filing deadline for independent presidential candidates are "legal and constitutional" as applied to independent candidate Nader and voters supporting him. *Id.* (affirming *Nader v. Connor*, 332 F. Supp. 2d 982 (W.D. Tex. 2004), "[e]ssentially for the reasons as well stated in the district court's memorandum opinion").[11] Declining to apply strict scrutiny, the district court found that requiring presidential candidates to gather signatures equal to one percent of votes cast in the prior presidential election was not "unduly restrictive or unreasonable," since the "presidency is the only office being sought by that candidate" and Texas has a legitimate interest in "'assur[ing] itself that the candidate is a serious contender truly

[10] Similarly, in the context of party candidates, the Court has made clear that "'[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.'" *Storer v. Brown*, 415 U.S. at 732 (quoting *Jenness v. Fortson*, 403 U.S. at 442).
[11] *Nader* challenged TEX. ELEC. CODE §§ 192.032(a), 192.032(b)(3)(A), 192.032(c), and 192.032(d).

independent, and with a satisfactory level of community support.'" *Nader*, 332 F. Supp. 2d at 987 (quoting *Storer*, 415 U.S. at 746).

Nader also held that "more restrictive signature and deadline requirements for an independent candidate [could] be justified if the ballot-access requirements, as a whole, are reasonable and similar in degree to those for a minor political-party candidate." *Id.* at 988 (citing *Storer*, 415 U.S. at 745). In Texas, political parties "whether they be major, medium or minor, are subject" to a convention process "not imposed upon independent candidates[.]" *Id.* at 990. That "winnowing process" is justified, as it helps "eliminate frivolous candidates and field only serious candidates." *Id.* But an independent candidate need not reveal his candidacy until after the presidential primaries (when he may start collecting signatures) and is not subject to convention requirements. Thus, an independent candidate "enjoys more flexibility in determining whether to run" and when to run "than does the candidate of a minor political party." *Id.* at 989. This flexibility, the district court found—and the Fifth Circuit affirmed—suggests "the variance between the ballot-access requirements for independent candidates and minor political-party candidates is not sufficiently severe to warrant strict scrutiny." *Id.* at 989.

The court similarly rejected Nader's argument that the May filing deadline was unconstitutionally early, noting that the advent of the "Super Tuesday" presidential primary "ratcheted forward" political life in Texas and the nation. *Id.* at 991. Given the "simple reality that the selection of presidential candidates occurs much earlier today than in the not too distant past," the court concluded that Texas's filing deadlines for independent candidates were reasonable. *Id.*

Having determined that the petition signature requirement and filing deadline did not impose a severe burden, the court considered whether § 192.032 served "important state interests" and found that it did. *Nader*, 332 F. Supp. 2d at 992. The court held that Texas has "several legitimate interests to support" its ballot-access requirements, including preserving "the integrity of the electoral process" and regulating "the number of independent candidates on the ballot by ensuring that (1) the electorate

is enough aware of the candidate either to know his views or to learn and approve of them in a short period, and (2) that at least a minimum of registered voters are willing to take him and his views seriously." *Id.*

Those interests apply here with equal vigor: Texas has an important interest in ensuring that independent candidates enjoy substantial support before they earn a place on the ballot. The Southern District of Texas faithfully applied this controlling precedent in *Faas v. Cascos*, rejecting First Amendment and Equal Protection challenges[12] to Texas's ballot requirements for independent presidential candidates as applied to a presidential hopeful and her supporters. 225 F. Supp. 3d 604, 612 (S.D. Tex. 2016) (summarizing ballot-access provisions for independent candidates; collecting cases) (citing *Nader v. Connor*, 332 F. Supp. 2d at 987). Just as the Fifth Circuit did in *Nader* and the Southern District of Texas did in *Faas*, this Court should apply this reasoning to dismiss Plaintiffs' challenge to the ballot-access provisions applicable to independent presidential candidates.

ii. The requirements for independent candidates for statewide office are also constitutional under controlling caselaw.

The requirements for independent candidates for statewide office are similar—and Plaintiffs' argument that those provisions violate the Constitution—is similarly unavailing. *See* Am. Compl. ¶93(B). Independent statewide candidates must collect signatures totaling one percent of the vote cast for Texas governor in the most recent gubernatorial election. TEX. ELEC. CODE § 142.007. Statewide independent candidates also must file a declaration of intent the December before the election, submit a ballot application within 30 days after the runoff primary election, and be certified to local election authorities at least 68 days before the general election. TEX. ELEC. CODE §§ 142.002 (declaration); 142.006 (application deadline); 142.010(b) (certification).

[12] The *Faas* plaintiffs invoked the Texas (rather than United States) Constitution, but *Faas* is still neatly applicable here because the court performed the exact same analysis. *See* 225 F. Supp. 3d at 610 ("Because Plaintiffs do not attempt to differentiate state from federal constitutional protections concerning ballot-access provisions, their claims will be addressed under the [*Anderson-Burdick*] federal analytical approach as it has been applied to state election laws.").

Plaintiffs' attempt to state a plausible claim against these provisions fails under existing precedent. In *Texas Independent Party v. Kirk*, independent candidates challenged these same requirements (except the certification deadline). 84 F.3d at 180-81 (citing TEX. ELEC. CODE §§ 142.002, 142.006, 142.007). The Fifth Circuit upheld them as constitutional under the First and Fourteenth Amendments. It first noted that the restrictions are not burdensome. *See* 84 F.3d at 185 (holding that "the January 2nd deadline for filing the declaration of intent is not a significant burden"), 186 (noting that "[t]he electoral scheme approved in *White* included a petition-gathering period that began after the primary election" and that "the amount of time allotted for obtaining the petition signatures also is constitutional" and concluding "[i]n light of *White*, we are naturally reluctant to categorize the petitioning deadlines as a significant burden.") (citations omitted).

Having found that these the requirements for independent candidates were "reasonable, nondiscriminatory restrictions on the rights of voters," the Court turned to the State's interests, noting that "[b]ecause the burdens are not severe, the State need not present narrowly-tailored regulations to advance a compelling state interest." *Tex. Indep. Party*, 84 F.3d at 186. It found that Texas's "important regulatory interests" in "equal treatment of candidates," "requiring a demonstration of sufficient public support to gain access to the ballot", and "fostering an informed electorate provide ample reason for the deadlines." *Id.* at 186-87. These laws survive scrutiny under *Anderson/Burdick*, and the Court should reaffirm that result here.

iii. Texas law governing the gathering of petition signatures is also constitutionally sound.

The same requirements apply to petition signatures supporting independent candidates for both statewide office and president.[13] Of these, Plaintiffs challenge Texas Election Code §§ 141.063 (requiring signer to be a registered voter and provide signature, name and address), 141.064 (requiring

[13] *See* TEX. ELEC. CODE § 141.061 (Chapter 141 petition requirements apply to all ballot applications).

circulator to witness each signature and point out each statement pertaining to the signer), and 141.065 (requiring affidavit of circulator). *See* Am. Compl. ¶93(B). There is no authority for the proposition that—in the process of enforcing the "one person, one vote" principle through an entire election cycle and maintaining the integrity of the electoral process—the State cannot require verification that signatures are genuine and signers are eligible to sign.

This is sufficiently obvious that it bears little mention in the caselaw, which treats the propriety of such verifications as implicit in rejecting the idea that signature requirements are unduly burdensome under *Anderson/Burdick*. *See, e.g., Tex. Indep. Party*, 84 F.3d at 186 (recognizing that "the State has a legitimate goal of requiring a demonstration of sufficient public support to gain access to the ballot," noting that "[m]ajor-party candidates demonstrate support at the time of the primary election," and concluding that "[a] petition deadline," like Texas's, which is "linked to the primary election date that allows sufficient time to gather signatures merely requires other candidates to demonstrate public support around the same time as their major-party opponents.").

All of Plaintiffs' arguments against Texas's requirements for independent candidates are foreclosed by existing precedent, and their challenge thereto should be dismissed under Rule 12(b)(6).

II. Plaintiffs have not stated a plausible constitutional challenge to the requirements for political parties that do not nominate by primary election.[14]

Plaintiffs challenge the Election Code's requirements for political parties that do not nominate via primary election. These include the same petition requirements applicable to all ballot applications, discussed *supra*, as well as the prohibition on signing more than one petition under § 141.066(a) and

[14] If this case is not dismissed, Plaintiffs likely lack standing to pursue this challenge. But given how clear it is that Plaintiffs' arguments against the convention process are foreclosed on the merits, Defendants do not argue standing as to this claim and reserve the right to do so should this litigation continue.

(c). Am. Compl. ¶93(A). Plaintiffs also challenge certain laws governing nominating conventions and those who may participate in the same. *Id.*[15]

a. The petition laws are constitutional.

Applying Chapter 141's petition laws to parties that do not nominate by primary election does not change the analysis above. *See supra* Part I(b)(iii). Nor does the prohibition on signing the petition of more than one candidate for the same office in the same election render the signature requirement constitutionally infirm. TEX. ELEC. CODE § 141.066(a),[16] (c).[17] Supreme Court precedent is clear that

> [A] State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.

Storer v. Brown, 415 U.S. at 741 (citing *Am. Party of Tex. v. White*, 451 U.S. at 785-86). Texas has an interest in the integrity of the nominating process and promoting a "one person, one vote" principle throughout an entire election cycle. Texas's petition requirements are constitutional.

b. The nominating convention provisions are also constitutional.

Plaintiffs contest the requirements that participants in nominating conventions affiliate with the party, and the provision rendering a voter ineligible to affiliate with two parties in the same voting year. Am. Compl. ¶93(A) (citing TEX. ELEC. CODE §§ 162.001, 162.012; *see also* TEX. ELEC. CODE § 162.014 (creating offense for unlawful participation in party affairs)).[18] Yet, for the reasons just

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[15] Citing TEX. ELEC. CODE §§ 181.0041 (registration of party required); 181.005(a),(b) (qualifying for placement on ballot by party required to nominate by convention); 181.006(a),(b),(f)-(j) (petition supplementing precinct convention lists); 181.007(b) (notice of qualifying parties); 181.031 (application required); 181.032 (authority with whom application filed); 181.033 (filing deadline), 162.001 (affiliation with party required), 162.003 (affiliation by voting in primary), 162.012 (ineligibility to affiliate with another party), 162.014 (unlawful participation in party affairs).

[16] "A person may not sign the petition of more than one candidate for the same office in the same election."

[17] "A signature on a candidate's petition is invalid if the signer signed the petition subsequent to signing a petition of another candidate for the same office in the same election."

[18] Plaintiffs also take issue with the fact that voters become affiliated with a political party by voting in a party's primary election, arguing that this gives major parties "a first, exclusive right to solicit voters' support, at a time when Non-Primary Parties are prohibited by law from formally affiliating with them via convention or by obtaining their signatures on a nomination petition." Am. Compl. ¶35; *see also id.* at ¶93(A) (citing TEX. ELEC. CODE § 162.003). But the Election Code

discussed and as the Supreme Court explained in *Storer v. Brown*, it is permissible (and furthers the State's vital interests) to limit each voter to nominating only one candidate for each office during a primary election cycle. *See also, e.g.*, *Meyer*, 2011 WL 1806524, at *4 (noting that Texas "has an important interest in requiring party affiliation through an entire election cycle because such a requirement prevents both party and independent voters from influencing the nominees of opposing parties . . . [and] preserves the 'one person, one vote' principle by prohibiting those who have given their primary vote to a party candidate from voting that another independent candidate be placed on the ballot.").

There can be no serious dispute that Texas may constitutionally require parties and candidates to comply with basic application requirements within the same calendar year in which they wish to appear on the ballot. *See, e.g., Am. Party of Tex.*, 415 U.S. at 780 (upholding prior version of Texas Election Code requiring all candidates to give notice of candidacy). Consequently, Plaintiffs' challenges to TEX. ELEC. CODE §§ 181.031, 181.032, 181.033 (requiring candidates to submit to party chair "an application for nomination by a convention…not later than the regular deadline for candidates to file applications for a place on the general primary ballot"), and 181.0041 (requiring party nominating by convention to register with Secretary by January 2 of election year) fail. And, though they complain that under TEX. ELEC. CODE § 181.007(b), "the Secretary is not required to certify [the Party Affiliate Plaintiffs'] nominees for placement on the ballot [until] 68 days before the general election," Plaintiffs fail to identify any harm this requirement allegedly works upon them. (Indeed, certification of candidate names to local election administrators has no impact on a candidate's ability to campaign). Thus, Plaintiffs fail to state a claim with respect to § 181.007(b).

Plaintiffs' argument against § 141.041 lacks any legal support—indeed, this new section merely applies the very same requirements to individuals who wish to become nominees—whether the party

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also has a straightforward procedure allowing voters to affiliate with a party nominating by convention *at that nominating convention*. TEX. ELEC. CODE § 162.007.

whose nomination they seek nominates by primary or nominating convention. *See* TEX. ELEC. CODE §§ 172.024 (filing fees for primary candidate), 172.025 (number of signatures required on petition in lieu of filing fee for primary candidate); 141.041(b), (e) (imposing same fee and signature requirement on candidate seeking nomination by convention).

All that remains is Plaintiffs' argument that the three pathways for minor parties to guarantee ballot access for their candidates are insufficient to pass constitutional muster. *See* TEX. ELEC. CODE §§ 181.005(a), 181.005(c), 181.006. Both the Supreme Court and the Fifth Circuit have rejected these arguments. Indeed, the Supreme Court has recognized that "the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." *Am. Party of Tex.*, 415 U.S. at 782-83 (quoting *Jenness*, 403 U.S. at 439). This is exactly what the State's three paths for guaranteed minor party ballot access ensure. Courts have upheld each of these three paths as sufficient to allow minor parties to appear on the ballot. In *American Party of Texas*, the Court upheld Texas's requirement that parties demonstrate support from "electors equal in number to 1% of the vote for governor at the last general election." 415 U.S. at 767. The Court held that this provided adequate access to the ballot and did not violate the Constitution, reasoning that, "[s]o long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner." *Id.* at 782-83. This is precisely what the nominating convention process under § 181.005(a) provides: guaranteed ballot access for any minor party that obtains support from one percent of the electorate.

This would survive constitutional scrutiny even if it were the only option available to minor parties in Texas—but it is not. A party that fails to get 1% participation in its convention gets a second bite at the apple under § 181.006, which provides additional time to drum up support. And, failing that, a minor party is *still* guaranteed a place for its candidates on the ballot if—in *any* of the previous

five general elections, *any* of its candidates received two percent of the vote for *any* statewide office. TEX. ELEC. CODE § 181.005(c).[19]

To the extent that Plaintiffs challenge the timing of their nominating conventions, this, too, fails under existing precedent. In addition to the independent candidate claims already discussed, in *Texas Independent Party v. Kirk*, a new political party and some of its officers and candidates challenged the "nomination by convention" process that largely remains in place today. 84 F.3d 178, 180-81 (noting timing of precinct, county, and district nominating conventions is linked to the primary election date and discussing timeline). The Court's analysis of the process bears repeating in full:

> We have little difficulty in concluding that the timeframe requirements for the nominating conventions are not a significant burden. The Supreme Court has already examined the framework of the Texas electoral scheme and held **that requiring minor political parties to nominate candidates through a convention process is constitutionally permissible.** Moreover, the convention process approved by the Supreme Court in *White* held the various nominating conventions sequentially, with precinct conventions on the same date as the statewide primaries for the major parties, the county conventions on the following Saturday, and the state convention on the second Saturday in June. This is precisely the same process Texas employs today. The only difference is that at the time of *White* Texas held its primary election in May. The switch to "Super Tuesday" in March caused a commensurate switch in the dates of the precinct, county, and district conventions. We find this change only a minor burden, given the Supreme Court's holding that **the Texas electoral system, with a convention nominating process linked to the date of the primary election,** "in no way freezes the status quo, but **implicitly recognizes the potential fluidity of American political life" and "affords minority political parties a real and essentially equal opportunity for ballot qualification."**

Id. at 185 (citing and quoting *White*, 415 U.S. at 780-81, 773-74, 787-88) (emphasis added).

Similarly today, Texas's convention nominating process is "linked to the date of the primary election"—which the Fifth Circuit held is constitutional in *Texas Independent Party*. *Id. See also* TEX. ELEC. CODE § 181.061(a) (statewide convention held on second or third Saturday in April of election year), (b) (district convention held on second Saturday after primary election), (c) (county convention

[19] Plaintiffs invoke TEX. ELEC. CODE § 181.005(b), which provides another path to guaranteed ballot access when a higher threshold is reached in an election. This is of no moment because 2019 legislation creates a lower standard under § 181.005(c). *See, e.g.,* Ex. 1.

held on first Saturday after primary election). And it has been clear in the 45 years since *White* that "requiring minor political parties to nominate candidates through a convention process is constitutionally permissible." *Tex. Indep.* Party, 84 F.3d at 185 (citing *White*, 415 U.S. at 780-81)). Thus, Plaintiffs fail to state a claim that the provisions for parties nominating by convention run afoul of the Constitution.

CONCLUSION & PRAYER

"[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jenness*, 403 U.S. at 442. And the State has no constitutional obligation "to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *See Munro*, 479 U.S. at 198. This case should be dismissed:

- Under Rule 12(b)(1), because no plaintiff has standing to challenge the ballot requirements applicable to independent candidates; and
- Under Rule 12(b)(6), because—as courts have repeatedly held—the ballot requirements for minor parties and independent candidates are reasonable, nondiscriminatory, and serve the State's important interests in "avoiding confusion, deception, and even frustration of the democratic process at the general election," *Storer*, 415 U.S. at 732 (quoting *Jenness*, 403 U.S. at 442).

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/ Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2798 | FAX: (512) 320-0667
anna.mackin@oag.texas.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that that on August 8, 2019, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General