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

MARK MILLER, *et. al.*, *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. ESPARZA, *in his official capacity as the Deputy Secretary of the State of Texas*, *Defendants.*	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants John or Jane Doe in his or her official capacity as Secretary of State of Texas[1] and Jose A. "Joe" Esparza in his official capacity as Deputy Secretary of State of Texas (collectively, "Defendants"), move for summary judgment pursuant to Federal Rule of Civil Procedure 56 on all claims by 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 (collectively, "Plaintiffs")[2]. In support thereof, Defendants would show the Court as follows:

INTRODUCTION

"[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). 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 v. Socialist Workers Party*, 479 U.S. 189, 198 (1986). 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.

But Plaintiffs' claims do not present novel issues. Indeed, every court applying the well-known *Anderson/Burdick* framework to Texas's ballot-access provisions challenged here has

[1] Ruth R. Hughs resigned her position as Texas Secretary of State effective May 31, 2021 and is no longer an appropriate defendant in this lawsuit.

[2] Plaintiff Michele Ganges was terminated as a party in this suit after the parties' joint stipulation of all claims asserted by her. *See* Dkt. No. 55.

upheld them as constitutional. Plaintiffs argue that the Court should depart from these prior rulings because they challenge additional provisions and because the intervening growth in Texas's electorate has made compliance with ballot-access provisions more difficult. As discussed below, these arguments necessarily fail. The additional provisions Plaintiffs challenge—to the extent those provisions were not already considered in prior decisions—advance the same important interests discussed in those opinions and impose requirements less onerous than those already upheld as constitutional. Likewise, the growth in Texas's electorate is not a reason for invalidating ballot-access provisions already upheld as constitutional. Texas's population has steadily grown since the percentage-based requirement for ballot-access about which they complain was first adopted over 100 years ago. Courts have upheld Texas's approach as a reasonable way to gauge a showing of a significant modicum of support amongst the electorate before qualifying for ballot access. As the electorate grows, the metric for gauging electoral support must keep track—which is exactly what Texas's ballot-access provisions do. Summary judgment should be granted in favor of defendants.

STATEMENT OF UNDISPUTED FACTS

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.[3] 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),[4] 181.002.[5] 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.[6]

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

[3] 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."

[4] 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."

[5] "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."

[6] "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."

submit a petition in lieu of filing fee. TEX. ELEC. CODE § 141.041.[7] 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 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). 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).[8] 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

[7] This provision took effect in September 2019. *See* Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, §1, sec. 141.041, 2019 Tex. Sess. Law Serv. 822. Effective September 1, 2021, the filing fee/petition requirement will transfer to Section 181.0311. *See* S.B. 2093, 87th Leg., R.S., ch. 149, General and Special Laws of Texas.

[8] "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."

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' Claims.

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

APTX was founded in 2009. APTX Depo. Tr. 8:24-9:2. It has held one state-wide convention (in 2018) in which roughly 10 individuals attended, including four officers. *Id.* at 13:3-15:2. The party does not have a website, take membership dues, or have any way of tracking membership. *Id.* at 15:3-8. It has had roughly five donors since its inception in 2009. *Id.* at 27:8-24.

The party does not have a budget because it "does not have any expenses that would require a budget" and has less than a thousand dollars currently in its bank account. *Id.* at 38:6-13.

CPTX has approximately 130 members statewide. CPTX Depo. Tr. 13:2-6. It has a budget of approximately $325 that it pays every three months for a website and email service. *Id.* at 19:20-23. It has no other expenses. *Id.* at 19:24-25. CPTX has neither made an effort at a volunteer-based petition drive for ballot access nor reached out to any outside firms to obtain an estimate of the cost for such a petition drive. *Id.* at 29:3-12. The party finds it "hard for [it] to get [its] message out." *Id.* at 21:8-10.

LPTX has ballot access in Texas. Since 1998, LPTX has reached the vote threshold required for automatic appearance in every election except 2002. LPTX Depo. Tr. 34:2-7. But the party was able to collect sufficient signatures in 2004 for candidates to appear on the ballot in that election year. *Id.* at 34:14-17. That was the only time in the last two decades that LPTX has had to collect signatures in order to appear on a Texas election ballot. *Id.* at 34:18-24. Regardless of the ballot-access provisions in the Texas Election Code, LPTX would want its candidates to perform well during any given election cycle. LPTX Depo. Tr. 35:4-17. After the Texas Election Code was amended in 2019 to introduce filing fees for parties that nominate by convention, LPTX did not change the way the party fundraises, nor did LPTX change any of its policies in response to the passage of the filing fee provision. *Id.* at 38:1-39:1. The party is aware of no specific examples of a candidate not running for office because of the filing fee. *Id.* at 39:2-7.

GPTX also has ballot access in Texas. In 2010, GPTX collected nearly 92,000 signatures in order to appear on the ballot. GPTX Depo. Tr. 38:8-11. After the 2010 election results, GPTX automatically qualified to appear on the ballot in 2012, 2014, and 2016. *Id.* at 38:16-23. In 2016, no

GPTX candidate met the required threshold of votes to qualify the party for automatic ballot access in 2018. *Id.* at 38:24-39-3. The 2019 amendments to the Texas Election Code allowed GPTX to secure automatic ballot access for the 2020 election cycle and its performance in the 2020 elections allowed it to secure automatic access through 2026. *Id.* at 42:3-10. The ability of GPTX to financially support its candidates is limited and it has not adopted any policy changes in response to the filing fees requirement introduced as part of the 2019 amendments to the Texas Election Code. *Id.* at 46:12-19, 48:24-49:9.

Individual Plaintiffs. The other plaintiffs are six individuals seeking relief 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. Summary Judgment Standard.

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wise v. E.I. DuPont De Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995).

If "the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). The movant "must demonstrate the absence of a genuine issue of material fact," but does not have "to negate the elements of the nonmovant's case." *Id.*; *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005).

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*, 403 U.S. at 442; *see also, e.g.*, *Munro*, 479 U.S. at 194 ("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. Plaintiffs' constitutional challenges fail and their claims must be dismissed.

ARGUMENT AND AUTHORITY

I. Texas's ballot access requirements for independent candidates are constitutional under the *Anderson/Burdick* framework.

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). The challenged laws survive review under the *Anderson/Burdick* framework.

A. The ballot access requirements for independent presidential candidates are constitutional.

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); 202.007). 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 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 deadline for an independent candidate to file an application to fill a vacancy in office that occurs after a runoff primary election day is either 30 days

after the vacancy occurs or 70 days before the general election occurs, whichever is earlier. *Id.* § 202.007.

The challenged provisions applicable to independent candidates further legitimate state interests. 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).[9] 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 the integrity of the electoral process and 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

[9] 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).

opinion").[10] 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 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.

[10] *Nader* challenged TEX. ELEC. CODE §§ 192.032(a), 192.032(b)(3)(A), 192.032(c), and 192.032(d).

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 found that § 192.032 served "important state interests." *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 force: Texas has an important interest in ensuring that independent candidates enjoy substantial support before they earn a place on the ballot. Just as the Fifth Circuit did in *Nader*, this Court should apply this reasoning and hold that the ballot-access provisions applicable to independent presidential candidates are constitutional.

The thrust of Plaintiffs' lawsuit is that *Nader* and other precedent are no longer good law because the population of Texas has increased. What remains unchanged, however, is that candidates must garner a sufficient share of the vote total to win election regardless of the size of the electorate. Thus, a percentage-based "preliminary showing of a significant modicum of support" makes good sense and remains constitutional regardless of the growing size of the

electorate. Indeed, the Ninth Circuit has rejected the argument that a one-percent signature requirement is unduly burdensome in a large state:

> Although the number of signatures the [California] Ballot Access Laws require may appear high, it accounts for only one percent of California's voter pool, the largest in the country. This low percentage threshold prevents candidates without established support from appearing on the ballot—satisfying California's interests—without seriously restricting the availability of political opportunity.

De La Fuente v. Padilla, 930 F.3d 1101, 1106 (9th Cir. 2019) (citation omitted).

The Ninth Circuit went on to note that laws requiring candidates to submit petitions demonstrating support from one percent of voters are "also consistent with other ballot access schemes deemed constitutional." *Id.* at 1106—07 (citing *Storer*, 415 U.S. at 740 ("Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden [and] ... would not appear to require an impractical undertaking for one who desires to be a candidate for President."); *Jenness*, 403 U.S. at 442 (upholding law requiring independent candidates to gather signatures equivalent to five percent of the number of registered voters in the previous presidential election); *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010) (concluding that the burden of collecting signatures equivalent to one percent of the state's voters in the previous presidential election was low)).

Plaintiffs' challenges to provisions not specifically ruled on in *Nader* do not warrant a different result. Plaintiffs challenge Texas Election Code §§ 141.063 (requiring signer to be a registered voter and provide signature, name and address), 141.064 (requiring 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).[11] These provisions promote the State's interest in enforcing the "one person, one vote" principle through an entire election cycle and maintaining the integrity of the electoral process by providing a process for verifying that petition signatures are genuine and that signers are eligible to sign. Limiting signers to verifiable registered voters is not burdensome and clearly advances the state's interest in the process, as do the requirements placed on both the signers and circulators to safeguard against petitioners supporting an independent candidate after already having voted in the presidential primary. 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).

Likewise, Plaintiffs' challenge to § 192.032(g) (prohibiting voters from signing an independent candidate's nomination petition before the presidential primary) fails to establish an unconstitutional burden. The *Nader* opinion specifically noted the effect of § 192.032(g) as part of its consideration of the totality of "the ballot-access requirements for independent candidates." *Nader*, 332 F. Supp. 2d at 954, 989. Regardless, this requirement serves the legitimate purpose articulated in *Storer* to help ensure that voters are limited to participating in just one of the alternative procedures available for supporting a candidate. And as discussed more below, the legislature reasonably concluded that there must be a deadline for an independent candidate's

[11] The same requirements apply to petition signatures supporting independent candidates for both statewide office and president. *See* TEX. ELEC. CODE § 141.061 (Chapter 141 petition requirements apply to any petition filed in connection with a ballot application).

petition well in advance of the August deadline for the Secretary of State to certify the ballot. *See*, *infra* pp. 26–27.

Indeed, Plaintiffs cannot distinguish their case from others upholding the signature and timing requirements. *See, e.g., Kirk*, 84 F.3d at 186 ("The Texas requirement that minor parties and independents demonstrate sufficient electoral support for ballot access was also approved by the Supreme Court in *White*. The electoral scheme approved in *White* included a petition-gathering period that began after the primary election. Furthermore, the amount of time allotted for obtaining the petition signatures also is constitutional.") (citing *White*, 415 U.S. at 782–83, 784–85, 786–88).

B. The requirements for independent candidates for statewide office are also constitutional.

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).

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. *Id.* 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 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." *Kirk*, 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. For the reasons discussed above, *supra* pp.17–19, the provisions Plaintiffs challenge that were not specifically addressed in *Kirk* do not establish an unconstitutional burden and do not warrant a different result than that reached in *Kirk*.

II. The ballot-access requirements for political parties that do not nominate by primary election are constitutional.

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 (c). Am. Compl. ¶93(A). Applying Chapter 141's petition laws to parties

that do not nominate by primary election (including CODE § 141.066(a),[12] (c)[13]) does not change the analysis above. *See supra* Part I. Plaintiffs also challenge Section 141.041 (requiring filing fee or petition for candidates that nominate by convention), as well as certain laws governing nominating conventions and those who may participate in the same. *Id.*[14]

A. Section 141.041 is constitutional.

Plaintiffs challenge § 141.041 as unconstitutionally burdensome, but this section merely applies the very same requirements to individuals who wish to become nominees—whether the party 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). Section 141.041 is appropriately tailored to "the State's admittedly vital interests" in ensuring "that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." *White*, 415 U.S. at 782-83 (quoting *Jenness*, 403 U.S. at 439). Given the reduced threshold for ballot access, additional parties will qualify. It's reasonable, then, that candidates of such parties qualify for ballot access by showing a modicum of support. And it is sensible to require this at the same

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

[13] "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."

[14] 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).

time it is required of primary election candidates so the Secretary can efficiently complete the certification process after the nominating conventions. *See, e.g.,* TEX. ELEC. CODE §§ 181.068, 181.007.

Moreover, the filing fee or signatures required increases in proportion to the support required to win the office for which the candidate wants to run. This is the very definition of tailoring. *See, e.g.*, *Jenness*, 403 U.S. at 442; *Storer v. Brown*, 415 U.S. 724, 740 (1974); *De La Fuente v. Padilla*, 930 F.3d 1101, 1106-07 (9th Cir. 2019); *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010).

B. The nominating convention provisions are 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)). 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). Yet, for the reasons discussed above and as the Supreme Court explained in *Storer*, 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.").

Plaintiffs do not seriously dispute—nor could they—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).

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).[15]

[15] 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 the 2019 amendment to the Texas Election Code created a lower standard under § 181.005(c).

Plaintiffs APTX and CPTX cannot credibly claim that they have "a significant, measurable quantum of community support" but are prevented from obtaining ballot access by Texas's laws. *Am. Party of Tex.*, 415 U.S. at 782-83 (quoting *Jenness*, 403 U.S. at 439). Neither party has made any real effort to secure ballot access and neither party can point to a showing of significant support based on their organization, membership, or funding. *See* APTX Depo. Tr. 13:3-15:2, 15:3-8, 27:8-24; CPTX Depo. Tr. 13:2-6, 19:20-25, 29:3-12. The other Party Affiliate plaintiffs, LPTX and GPTX, have both met Texas's petition requirements for ballot access in the past and both retain ballot access currently. LPTX Depo. Tr. 34:14-24; GPTX Depo. Tr. 38:8-11, 38:24-39-3, 42:3-10. This alone demonstrates that Texas's laws do not freeze the status quo. *Kirk*, 84 F.3d at 185.

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 *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 *Kirk*. *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 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." *Kirk*, 84 F.3d at 185 (citing *White*, 415 U.S. at 780-81)). Thus, Plaintiffs cannot show that the provisions for parties nominating by convention run afoul of the Constitution.

Finally, the timeframe in which petitions for ballot access must be submitted is reasonably limited to ensure that the Secretary of State's office has sufficient time to review the petitions before the ballot is certified in August. Ingram Depo. Tr. 171:22-185:16. As explained in the deposition testimony of Keith Ingram, Director of the Elections Division at the Texas Secretary of State, even a facial review of the petitions must be carefully performed and can take two weeks. *Id.* 178:4-7. Then, because of the likelihood of challenges to the petition by others the process must factor in time for a line-by-line review of applications that could exceed eight thousand pages in length. *Id.* 176:5-7, 199:14-201:7. As Mr. Ingram's testimony makes clear, a later deadline could put the process at risk:

> Q. So, my question is, how much time is necessary, prior to the August certification deadline, for your office to be able to validate non-primary parties' nomination petitions?
>
> A. So, what I explained to you is that pretty soon after the 75th day, we're running out of time. That's what I've said and that's what I'll stand by. It's not much longer than that because the circumstances are going to vary. Sometimes it's going to be more difficult, sometimes it'll be easier. But the fact is that if we want to make sure that we have enough time for every petition that could—could occur, then we need to make sure that it's in there by the 75th day as set by the legislature.

Id. at 186:8-18. The timeframe to gather signatures is not unconstitutionally burdensome in light of the state's legitimate interests.

III. Plaintiffs' Equal Protection claim fails.

Plaintiffs attempt to repackage their ballot-access challenges as an equal protection claim. They suggest that Texas's nominating petition procedure "'utilizes the criterion of ability to pay as a condition of being on the ballot,'" in violation of the Equal Protection Clause. Dkt. 17 at 13 (citing *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *Lubin v. Panish*, 415 U.S. 709, 718 (1974)). But Texas does *not* use the ability to pay a filing fee as a condition of being on the ballot. Rather, Texas furthers its important interest in limiting the ballot to serious candidates who demonstrate some public support by requiring *either* a filing fee *or* a nominating petition. *See* TEX. ELEC. CODE § 141.041. Supreme Court precedent—including the sole authorities Plaintiffs invoked at the motion to dismiss stage—explicitly permit this, including for litigants similarly situated to the Plaintiffs.

In *Bullock v. Carter*, the Court concluded that a state violates the Equal Protection Clause by "providing *no reasonable alternative* means of access to the ballot" other than paying a filing fee—a fact which was "critical to [the Court's] determination of constitutional invalidity." 405 U.S. at 149 (emphasis added). Such a system violates equal protection, the Court concluded, because office seekers 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. This stands in stark contrast to Texas's system, which provides the petition alternative for candidates who are qualified and have a modicum of popular support but lack financial resources.

Nevertheless, Plaintiffs argue that Texas's nominating petition procedure operates as a "de facto financial barrier" to ballot access because "[p]aid petition circulators typically charge a per-signature fee for their services," which Plaintiffs estimate will result in "a successful petition drive in 2020" costing "more than $600,000." Dkt. 14 ¶56. But there is no requirement that nominating petitions be completed via paid petition circulators. And the Supreme Court has acknowledged that "[e]ven in this day of high-budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by 'walking tours' is a route to success." *Lubin*, 415 U.S. at 717.

In *Lubin*—the other case Plaintiffs cited—the Supreme Court considered California's requirement that all candidates pay a filing fee. *Id.* The Court noted that "the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support" is beyond debate, and that "[a] large filing fee may serve the legitimate function of keeping ballots manageable." 415 U.S. at 716, 717. The problem with California's system, however, was that a filing fee, "standing alone, it is not a certain test of whether the candidacy is serious or spurious." *Id.* at 717. Thus, the Court concluded that "the process of qualifying candidates for a place on the ballot may not constitutionally be measured *solely* in dollars." *Id.* at 716 (emphasis original). Nevertheless, it acknowledged the obvious: that "[t]his does not mean every voter can be assured that a candidate to his liking will be on the ballot." *Id.* Texas law does not measure

whether a candidacy is serious or spurious "*solely* in dollars." *Cf. id*. Plaintiffs' equal protection claim fails.

CONCLUSION

For the foregoing reasons, Plaintiffs cannot demonstrate a genuine issue of material fact as to any of its claims. Defendants are entitled to summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on August 31, 2021, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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