21-1464

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

LIBERTARIAN PARTY OF NEW YORK,
ANTHONY D'ORAZIO,
LARRY SHARPE,
GREEN PARTY OF NEW YORK,
GLORIA MATTERA,
PETER LaVENIA,

Plaintiffs-Appellants,

v.

NEW YORK STATE BOARD OF ELECTIONS,
PETER S. KOSINSKI, as the Co-Chair of the New York State Board of Elections; DOUGLAS A. KELLNER, as the Co-Chair of the New York State Board of Elections; ANDREW J. SPANO, as a Commissioner of the New York State Board of Elections; TODD D. VALENTINE, as Co-Executive Director of the New York State Board of Elections; and ROBERT A. BREHM, as Co-Executive Director of the New York State Board of Elections,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Eight years ago, Defendant-Appellee New York State Board of Elections ("NYSBOE") stated in litigation that LPNY and the GPNY have "meaningful existences" as minor parties, in a constitutional sense, whose access to the ballot is far more important than that of a fusion party. Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, *Gonsalves v. New York State Bd. of Elections*, No. 13 Civ 5104, 2013 WL 12329309 (E.D.N.Y. Sept. 20, 2013). Indeed, NYSBOE lauded "the development of truly independent bodies, like the Green Party, which was able to develop into a recognized party with an automatic ballot line." *Id*. Of course, LPNY developed similarly in 2018.

In their Opposition Brief (Opp.), however, Defendants-Appellees take the exact opposite position. They argue that the new party qualification and petition thresholds need not be subject to any real tailoring analysis—either under strict scrutiny or *Anderson-Burdick*'s secondary analysis—because each absolute number of required votes or signatures is not high enough to be presumptively unconstitutional, two fusion parties survived the 2020 election, and LPNY and GPNY simply choose not to avail themselves of fusion. No longer are LPNY and GPNY meaningful presences on the ballot diligently working their way to formal party status, but rather political failures who are incapable of gathering support even in the information age. Opp. 26.

This about-face is not only hypocritical, but woefully superficial. Defendants-Appellees avoid responding in good faith to Plaintiffs-Appellants' arguments. By so doing, they show their disdain—at least in this case—for minor party participation, minor party voter rights, and the federal judiciary's indispensable role in policing state barriers to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780, 793 n.16 (1983) ("[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision making may warrant more careful judicial scrutiny.").

The District Court and now Defendants-Appellees overly rely on this Court's preliminary decision in *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267 (2d Cir. 2021) ("*SAM Party II*"), to reject any conclusion that the new party qualification and petition thresholds, separately and in conjunction, may impose a severe burden on Plaintiffs-Appellants' rights (or at least an unfair and unnecessary one). The SAM Party made a strategic decision to focus on the specific and novel requirement to field a presidential candidate to retain party status and automatic ballot access. *See id.* at 271 ("The SAM Party . . . argues that the new presidential-election requirement violates its members' First and Fourteenth Amendment rights."). Plaintiffs-Appellants have adequately and overwhelmingly shown that when provided a full view of New York's restrictive ballot access regime, the

extraordinarily difficult level set for each threshold, the contemporary state of non-fusion minor parties, and GPNY and LPNY's circumstances and experience, the new thresholds cannot stand—not only are they extreme, but they are completely unnecessary to serve the State's purported interests. It would be contrary to fairness, this Circuit's precedents, and the fundamental rights of Plaintiffs-Appellants and their voters, to rely on *SAM Party II* to deny a preliminary injunction in this case.

And even if the new thresholds were not subject to strict scrutiny, it is striking that Defendants-Appellants do not at all grapple with this Court's clear declaration based on equally clear Supreme Court precedent that a proper analysis "must determine both the legitimacy and ***strength*** of each of [the purported state] interests and the ***extent*** *to which those interests make it* ***necessary*** *to burden the plaintiff's rights*." *Yang v. Kosinski*, 960 F.3d 119, 129 (2d Cir. 2020) (cleaned up; emphasis added); *see SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 274 (2d Cir. 2021) ("*SAM Party II*"). Not only do Defendants-Appellees pretend that the question is only whether the State has "important regulatory interests" that "justify the burden" imposed (Opp. 15, 20, 35, 38–39), but they do not even bother to address Plaintiffs-Appellants' showings and arguments regarding the practical import and effect of the new thresholds.

ARGUMENT

I. DEFENDANTS-APPELLEES CANNOT REST ON *SAM PARTY II* AS THE LAW OF THE CASE.

In their Opposition, Defendants-Appellees improperly rely throughout on this Court's opinion in *SAM Party II* to foreclose any conclusion that the new party qualification and petition thresholds (separately and in conjunction) impose a severe burden or are unfair and unnecessary in their extent to further the State's interests. They even go so far as to claim that the opinion's forgivable but superficial analysis of the "combined effect" of New York's ballot-access laws is the law of the case and binding on this panel. *See* Opp. 31–32. This is wholly incorrect.

As laid out in our opening brief ("Br.") (at 47–50) and this Court in *Cayuga Indian Nation of New York v. Seneca Cty., New York*, 978 F.3d 829, 834 (2d Cir. 2020), *SAM Party II* should in no way be binding because it (1) was at the preliminary injunction stage, (2) did not address Plaintiffs-Appellants' arguments (indeed, SAM Party tactically narrowed its arguments), and (3) did not have the benefit of Plaintiffs-Appellants' direct arguments and factual showings concerning the burdens of both thresholds and their operation in context. Rather, the panel felt it necessary, for completeness, to spontaneously evaluate the combined effect of New York's overall ballot access regime—which means it did not even have a

single party's arguments to consider. To hold binding and conclusive such an analysis is contrary not only to the principles laid out in *Cayuga Indian*, but the *Anderson-Burdick* standard itself. *See Cowen v. Georgia Secretary of State*, 960 F.3d 1339, 1343 (11th Cir. 2020) (prior cases "do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*"); *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1984) (same).[1]

There cannot possibly be a requirement that all individuals or entities are required to promptly intervene in the first appellate hearing of a challenge under the *Anderson-Burdick* standard against an aspect of a state's election law—no matter how narrow—because the court must formally consider the state's overall ballot access regime. And in this case, it would be a mockery of democracy if these new thresholds were forever to stand and prevent minor parties from participating in New York's state, local, and national elections without even a fair and complete hearing of their most nefarious aspects.

In support of treating *SAM Party II* as binding and conclusive, Defendants-Appellees cite only to *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. United*

[1] Defendants-Appellees do not address either of these cases. Their claim that "[i]t is of no moment that 'the panel was only presented with the SAM Party's claims'" (Opp. 31) is directly contradicted by this Court's practice to "avoid relying on 'implicit holdings'" that do not explicitly address a party's argument. *Cayuga*, 978 F.3d at 834.

States Dep't of Justice, 697 F.3d 184, 208 (2d Cir. 2012). That case, however, dealt with a pure legal holding that "the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy." *Id.* at 207. The defendants relied on a footnote that arguably qualified the holding as tentative, but the court was not persuaded. *Id.* at 208. This uncontroversial case did not deal with a mixed issue of law and fact or any of the circumstances detailed above and in our opening brief.

Finally, Defendants-Appellees disingenuously argue that our claim to a "'much greater record' is meritless." Opp. 31. First, our record is entirely *in addition* to that presented in *SAM Party II*. There, the record focused at length on the State's purported (but illusory) interest in financially safeguarding the campaign finance regime. Here, we have primarily further developed the record concerning the burdens of the increased thresholds and the broader ballot access regime, beyond the presidential nomination requirement central to SAM Party's claims.[2] Second, great effort was made to collect and analyze all the relevant data, including the various states' petition signature requirements for party status, and present them in a concise and efficient way.

[2] We welcome the Court to consider the record in *SAM Party II*.

II. DEFENDANTS-APPELLEES CANNOT RELY ON THE EXISTENCE OF FUSION PARTIES TO JUSTIFY THE ELIMINATION OF ORDINARY MINOR PARTIES.

The district court held against our claims the continued formal existence of the Conservative and Working Families Parties—fusion parties that rely on cross-endorsing candidates not only to preserve party status and automatic ballot access, but as a matter of course for their operation. This system is unique to New York in its practical significance. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 n.7 (1997).

Defendants-Appellees attempt to bolster the district court by claiming that (1) "New York is entitled to enact laws that reflect the realities of its electoral system," (2) minor parties not using fusion is merely a "chosen political strategy [that] could lead to practical consequences through its loss of party status," *i.e.*, there is no legal basis for a distinction between fusion and non-fusion parties, and (3) historical election results do not support a distinction. Each of these arguments is wrong or misleading.

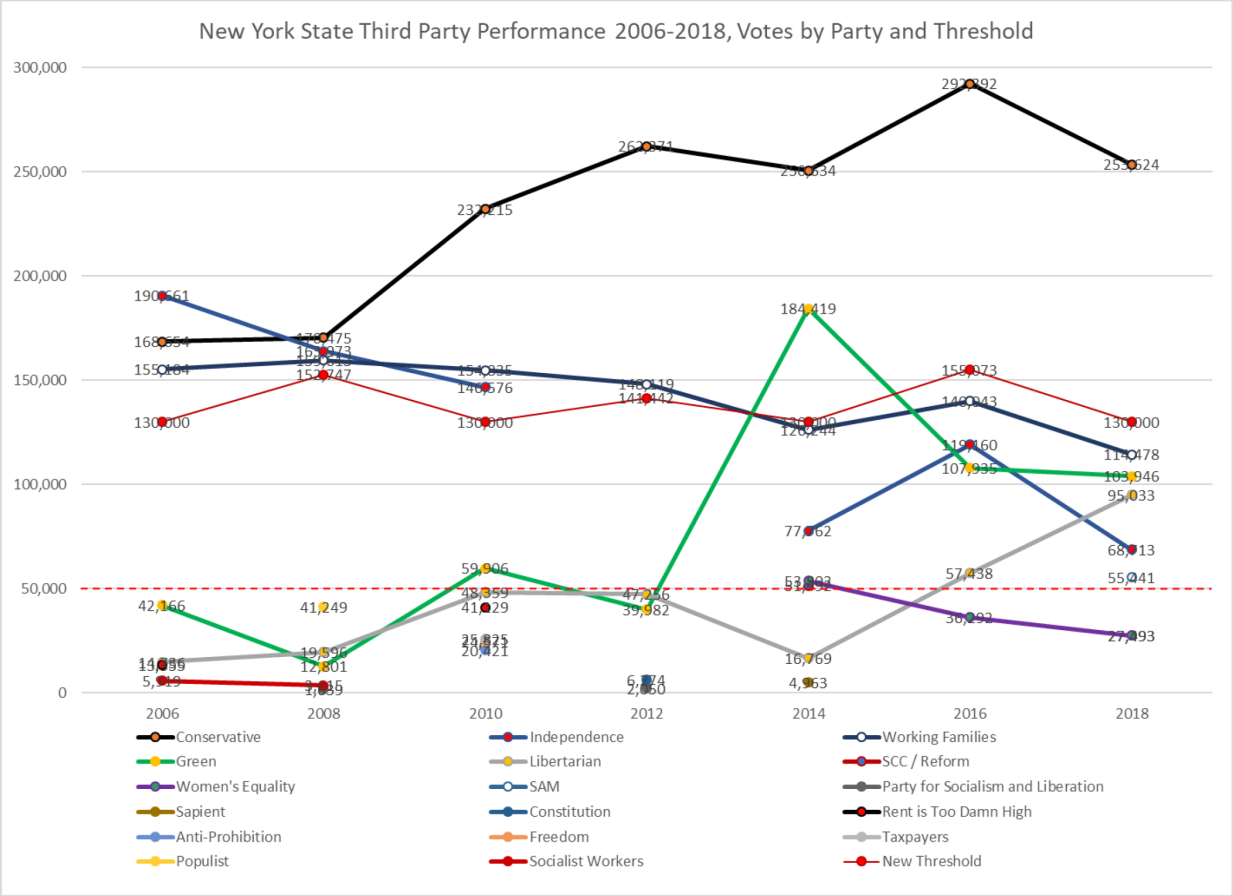
First, asking what New York is "entitled" to do is exactly the wrong question to ask. The *Anderson-Burdick* analysis focuses first and foremost on the burden on plaintiffs. Whether New York's actions may accommodate fusion (and to what extent) are only matters for determining proper tailoring in the latter stage of the analysis. This is a fundamental error that pervaded the district court's reasoning—

its first thought was to question Plaintiffs-Appellants' standing to question the State rather than evaluate the thresholds themselves. *See, e.g.*, *Libertarian Party of New York, v. New York Bd. of Elections*, No. 20-CV-5820 (JGK), 2021 WL 1931058, at *1 (S.D.N.Y. 2021) ("*LPNY*") ("[t]here is no authority for the proposition that a state is required to requalify a party that has garnered such low levels of support"). As for tailoring, Defendants-Appellees now claim that the Legislature set the new thresholds to somehow balance "competing interests" for and against fusion voting. But Defendants-Appellees have not properly laid out whether fusion voting could be a legitimate and important state interest capable of justifying obstacles to the ballot—nor how the increased thresholds are tailored to balance fusion voting while (at the very least) not unnecessarily impairing access to the ballot.

Second, the fact that LPNY and GPNY run their own candidates (and do not attempt to cross-endorse major parties' candidates) is not the type of "chosen political strategy" that carries any practical import. In our opening brief (at 54–57), we laid out in detail how the Supreme Court's jurisprudence on obstacles to the ballot is concerned with political parties offering voters unique *candidates*—not simply party labels. We also showed how the Court is indifferent to the existence of parties operating only on fusion. *Id.*; *see California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000); *Timmons*, 520 U.S. at 362–63 ("Ballots serve

primarily to elect candidates"); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). This case calls for a "legal distinction" between fusion and non-fusion parties *not* because Plaintiffs-Appellants are asking for one, but because the district court and Defendants-Appellees claim that the continued existence of the Conservative and Working Families Parties is constitutionally relevant. If minor parties can only exist in a neutered and vassalized form—forced to associate themselves before the voters with major party candidates for governor and president—is that not virtual exclusion from the ballot? *See, e.g.*, *Working Fams. Party v. Commonwealth*, 653 Pa. 41, 209 A.3d 270, 281 (2019) ("The Commonwealth views [fusion] as permitting the major parties 'to "squeeze out" the candidates of minor political parties and political bodies[,] leaving voters with even fewer candidates to choose from.'") (upholding state fusion ban). Indeed, to even have fusion be a practical option, minor parties would have to convince major party candidates to accept cross-endorsement, in which case even if they were successful, they would likely be somehow compromising their and their voters' political and ideological goals.

Third, historical election results *do* support a distinction between fusion and non-fusion parties. That is because, as we have shown, the increased party qualification threshold was set far above the conceivable performance of any non-fusion party in 2020, although it would predictably leave one or two fusion parties that could siphon off a fraction of votes for the major party candidate. *See* JA 38:



Defendants-Appellees and the district court merely point to the scattered historical examples of exceptional minor party candidates, but these are the proverbial exceptions that prove the rule. Notably, they do not attempt to compare these performances to those of contemporary fusion parties.[3] Ross Perot's 1996 and GPNY's 2000 and 2014 performances were flashes in the pan that (1) would

[3] In 1998, Tom Golisano's campaign on the Independence Party performed extremely well by minor party standards, but it only matched George Pataki's results on the Conservative Party line alone. *1998 New York gubernatorial election*, Wikipedia (last visited Nov. 8, 2021), https://en.wikipedia.org/wiki/1998_New_York_gubernatorial_election.

be impossible to replicate with the increased petition threshold, and (2) would not secure automatic ballot access equivalent to under the former thresholds because it would be lost within two years.[4] The only instances over the last century in which unique minor party candidates would have performed well enough in successive gubernatorial and presidential elections to attain the traditional four years of ballot access were the Independence Party in 1996-2000 and the American Labor Party in 1948-52.[5] *See New York gubernatorial elections*, Wikipedia, https://en.wikipedia.org/wiki/New_York_gubernatorial_elections; *Category: United States presidential elections in New York (state)*, Wikipedia, https://en.wikipedia.org/wiki/Category:United_States_presidential_elections_in_New_York_(state).

In our opening brief, we attempted to orient this Court on the role traditionally served by minor parties that motivated the Supreme Court in developing this entire line of jurisprudence. Simply put, minor parties vindicate the associational rights of candidates and voters "whose political preferences lie

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[4] Importantly, despite Ross Perot's incredible 1992 presidential performance, winning in New York over 1 million votes and over 15% of the vote, the New York Legislature felt that he needed the petition threshold lowered from 20,000 signatures to even make it onto the ballot and spare the state national embarrassment. Br. 67 n.13.

[5] And again, if the new petition threshold were in place at the time, it is an open question whether even these extraordinary efforts would have made it out of the starting gate.

outside the existing political parties." *Anderson*, 460 U.S. at 793–94. Whether or not LPNY and GPNY can theoretically resort to fusion is entirely academic because their candidates and voters believe in ideologies incompatible with and hostile to the major parties.[6] LPNY and GPNY are the affiliates of the leading minor parties in U.S. politics who consistently present ideological alternatives to the bipartisan establishment. If they are silenced in New York, they will not be replaced by ideological alternatives with more support—they will be replaced with nothing. New York voters will perpetually have the choice between two major party candidates across one or more lines.

When it was to its advantage, NYSBOE acknowledged that "[w]hen one thinks of minor parties, one contemplates the Libertarian Party, Right to Life Party, or some other group that has a meaningful existence like the Green Party, which became a recognized party under New York State Election Law." Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, *Gonsalves v. New York State Bd. of Elections*, No. 13 Civ 5104, 2013 WL 12329309 (E.D.N.Y. Sept. 20, 2013). In *Gonsalves*, NYSBOE successfully defended a state limitation on the number of ballot lines a candidate can appear on using independent nominating petitions. *See* N.Y. Elec. Law § 7-104(4)(c). In the

[6]As NYSBOE has recognized elsewhere, "it is rare for a registered member of a minor party to also be the major party's candidate." Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *Conservative Party ex rel. Long v. Walsh*, No. 10 Civ. 6923, 2010 WL 11678902 (S.D.N.Y. Nov. 9, 2010).

process, it called out the plaintiff fusion Tax Revolt Party as "a *de facto* arm of the Republican Party." *Id*. It also amazingly (and rightly) emphasized the constitutional importance of having true minor parties like LPNY and GPNY on the ballot—and not fusion parties:

> The statute purposely discourages the major parties from creating independent bodies to cross-nominate their candidates so that their candidates' names would appear on more rows of the ballot. As demonstrated by the Republican Party's ability to orchestrate the collection of over 20,000 signatures for their candidates' independent nominating petitions, major political parties have the manpower and resources to create scores of these purported independent bodies by circulating independent nominating petitions. If candidates of the major parties were permitted to have their names appear on the ballot *ad infinitum* and given a line on the ballot for each of the subsidiaries conjured up by a major party, it would wreak havoc on New York State's election scheme. Moreover, ***it would serve to choke the development of truly independent bodies, like the Green Party, which was able to develop into a recognized party with an automatic ballot line***.

Id. (emphasis added). This statement from NYSBOE is remarkable. It acknowledges, *inter alia*, that (1) there are "*truly* independent bodies like the Green Party" as opposed to fusion parties, (2) the "development" of these minor parties is a constitutionally valued goal, (3) that development is intimately tied to appearance on the ballot, (4) that development specifically contemplates the attainment of recognized party status, (5) that attainment is necessarily gradual and will require regular access as an independent body, (6) getting 20,000 signatures requires manpower and resources, and (7) the petition threshold needs to be set at a

level set for a developing, aspirational minor party—not at a level for immediate victory or where *only* a major party could expend enough manpower and resources. Note that NYSBOE recognized that the issue was major parties' abilities to take advantage of processes meant for minor party access, not the level of the processes themselves.[7]

III. DEFENDANTS-APPELLEES MISREPRESENT THE *ANDERSON-BURDICK* FRAMEWORK TO BE OVERLY SOLICITOUS OF THE STATE IN THE CONTEXT OF DIRECT OBSTACLES TO THE BALLOT.

In our opening brief, we painstakingly explained that the district court misquoted selective descriptions of the *Anderson-Burdick* framework to make it seem much more solicitous of the state than it is clearly supposed to be. Defendants-Appellants have decided to go even further. They claim that if a burden is not severe then the regulation must only be "reasonable" and "nondiscriminatory" to be "generally sufficient to justify" the burden. Opp. 19-20 (quoting *Burdick*, 504 U.S. at 434). Yet these selective descriptions do not and cannot contradict the actual enunciation of the framework, nor its direct genesis

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[7] In that case, "plaintiffs argued that the State could restrict the number of times a candidate could appear by increasing the number of signatures required to place an independent body's candidate on the ballot." 974 F. Supp. 2d 191, 201 (E.D.N.Y. 2013). In response, the court adopted NYSBOE's concern for non-fusion minor parties: "plaintiffs' suggested solution would actually make it more difficult for independent bodies to place candidates on the ballot, and, thus, would impose a greater restriction on constitutional rights than Section 7–104's current requirements." *Id.* at n.8.

from a line of cases that emphasized how essential it is for the federal courts to step in to prevent the major parties from abusing their control of the ballot and throwing up an infinite number of obstacles to minor party access.

As we explained, these quotes are not the Supreme Court enunciating the analysis to be performed. The actual analysis is that if a burden is not severe then a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.; see also, SAM Party II; Yang v. Kosinski,* 960 F3d 23 (2nd Cir. 2020). As one court has recognized, this means "conduct[ing] more than just a rational basis review," and "actually" weighing the injury against the state's justifications. *Credico v. New York State Bd. of Elections*, 751 F. Supp. 2d 417, 422 (E.D.N.Y. 2010) (pointing out that a court should give no "weight to 'flimsy' or 'extraordinarily weak' justifications proffered by the State") (quoting *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108–09 (2d Cir. 2008)); *see Bullock v. Carter*, 405 U.S. 134, 146 (1972) (striking down plausibly "rational" filing fee requirement because it was "ill-fitted" to state's interest and "other means to protect those valid interests [were] available").

Yes the Court has observed that a reasonable and non-discriminatory regulation is "generally" sufficient, but when *specifically* addressing ballot access, it has stated that "it is ***especially difficult*** for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. . . . The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson*, 460 U.S. at 793–94 (emphasis added).[8] The Sixth Circuit has explained that while "[i]t is true that a voter does not have an absolute right to vote for a candidate of her choice," citing *Timmons* and other cases, "when a candidate wishes to appear as one party's standard-bearer and voters want to exercise their constitutional right to cast a ballot for this candidate, ***the Court has viewed state-imposed restrictions on this fundamental process with great skepticism***." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006) (emphasis added).

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[8] Notably, when state policies require minor parties to satisfy unfair and unnecessary thresholds, they are discriminatory: "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Anderson*, 460 U.S. at 793–94.

Defendants-Appellees imply that once it is determined that ballot restrictions are not presumptively unconstitutional (*i.e.*, above 5%), the *ad seriatim* approach of the district court is enough, despite the Supreme Court and this Court's admonitions against a litmus test. According to them, so long as the court touches on the most notable aspects and dismisses them in succession and in isolation then that is enough. Respectfully, this is not enough. We suggest that this Court should adopt the following guidnce from *Libertarian Party v. Thurston*:

> The questions we face . . . do not call for a mere mechanical comparison of numbers and dates. Rather several additional non-numerical factors also guide our analysis. First, some restrictions are acceptable, both in terms of numerosity and deadlines, even if those restrictions favor the two-party system. Second, no one factor stands alone; rather, requirements must be viewed collectively to assess the overall burden. Third, parties' past success or failure in a particular state under extant or prior requirements is relevant to show the necessity or burdensomeness of the restrictions, and such history is also material to the question of whether the statutes are narrowly tailored to a compelling state interest. Fourth, the availability of alternative paths to party certification should be considered. Fifth, the lack or presence of geographic restrictions on the signature pool is relevant as is the ability of voters to sign multiple petitions and sign petitions without pledging votes. Sixth, the existence of similar or different restrictions on petitioning requirements for party access, independent access, ballot initiative access, or constitutional amendment access are relevant, in part, when assessing whether restrictions are narrowly drawn, but differences permissibly may exist between these schemes given the differences underlying

> the efforts in each area. And seventh, the existence of provisions that allow a party to register for individual races, or that allow individuals to run as independents rather than as party members, do not relieve the state of its burden to make restrictions on whole-ballot party access reasonable.

962 F.3d 390, 399-0 (8th Cir. 2020) (citations removed). Following this guidance, the district court should have considered, for example, the facts that (1) there is no independent party qualification mechanism, (2) the petition regime is very restrictive, (3) there is no reliably easier route for independent nominations, and (4) the abilities of existing non-fusion parties to meet the increased thresholds.

On the other side of the constitutional analysis are the purported interests that the State looked to satisfy by increasing the party qualification and petition thresholds. True, the state need not "make a particularized showing of" the interest justifying an election restriction, *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986), but it must nevertheless identify "precise interests" and the "**extent**" to which those interests make it "**necessary**" to burden the plaintiff's rights. *Anderson*, 460 U.S. at 789. Notably, this Court has previously recognized that when giving weight to purported state interests, courts may consider whether these interests are "flimsy" or "extraordinarily weak." *Credico*, 751 F. Supp. 2d at 422 (quoting *Price*, 540 F.3d at 108–09). Defendants-Appellees fail to address

how it could be proper for the district court to avoid any weighing or tailoring analysis.

In addressing the state's interests, Defendants-Appellees and the district court ignore that this case is unique among ballot access cases—we here consider not a regular piece of legislation that can be openly analyzed for all facially important interests the defendant looks to assert. Rather, Part ZZZ presents the newly increased thresholds as a non-severable part of a public campaign finance package with an extensive Report and specific provenance.[9] Defendants-Appellees and the district court should therefore be bound by the interests that the Legislature actually prioritized and weigh them accordingly.[10]

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[9] Defendants-Appellees admit that the Legislature passed Part ZZZ solely to correct the unconstitutional delegation identified in *Hurley v. Pub. Campaign Fin. & Election Comm'n*, 69 Misc. 3d 254 (Sup. Ct. Erie Co. Mar. 12, 2020). The full Report can be found at https://campaignfinancereform.ny.gov/system/files/documents/2019/12/campaignfinancereformfinalreport.pdf.

[10] The Report and its enunciation of its justifications and rationales were necessitated by the nature in which the Commission's enabling legislation constrained its activities to those "reasonably related to administration of a public financing program." *See* Report, pp. 6–7.

In reality, the Legislature relied mostly on the campaign finance interest and only secondarily on ballot clarity, ideological diversity,[11] and a general interest in parties having a modicum of support. Report, pp. 14-15.

With regard to the campaign finance program, Defendants-Appellees and the district court merely relied on *SAM Party II*'s rationale that even if spending on minor party candidates would always be insubstantial, the presidential-election requirement was a permissible avenue for the state to "prevent[ ] nonviable candidacies from receiving public funds." 987 F.3d at 277. This rationale is incomplete when weighed not against the requirement of parties qualifying every two years instead of four, but against massive burdens on new and developing political parties. The presidential qualification requirement is a simple measure that one can impose or not and thus may not need "elaborate empirical verification," *id.*, but *Anderson-Burdick* requires the consideration of the necessity and extent of the increased party qualification and petition thresholds. As amply demonstrated by the Brennan Center in *SAM Party II*, minor party candidates would have a very difficult time overcoming the campaign finance program's independent thresholds and would therefore have little to no financial impact. Furthermore, the State could have easily imposed a separate threshold for minor

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[11] Note that Defendants-Appellees never rely on the Report's interest in ideological diversity, since the thresholds are eliminating "truly independent bodies" like GPNY and LPNY.

party candidates like that upheld in *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 233–34 (2d Cir. 2010).[12]

With regard to the other goals, the district court and Defendants-Appellees make a thoroughly unsatisfying argument that too many ballot lines makes the ballot confusing. However, increasing the thresholds to this extent are not necessary to solve this issue. The State could easily redesign its notorious ballots and there is no attempt to even argue how these specific levels address this goal.

The only offered explanation for the "extent" of the increased thresholds is that "[t]he increased Party Qualification Threshold is a long-overdue correction to account for the increase in the number of registered voters in the 85 years since the threshold had been updated." Opp. 15. However, this claim is both unsatisfactory to justify the necessity of the "correction," and entirely manufactured—the Report explained (albeit in an incredibly contrived and internally inconsistent way) how the Commission reached the 2% or 130,000-vote threshold to account for voter turnout, registration, and expected further increases in voter turnout. *See* Report, pp.41–42. Defendants-Appellees must have realized that this explanation was fundamentally flawed because, among other things, it "compensated" multiple times over for the same actual or expected increases in voter turnout and it never

[12] We acknowledge that under *Buckley v. Valeo*, 424 U.S. 1 (1976), the State may have a looser hand in conditioning financing, but when fundamental ballot access is at stake, this deference is wholly inappropriate. *Garfield*, 616 F.3d at 233.

justified its dual nature and its default towards the higher threshold. The Report's explanation acknowledged, at least, that the 50,000-vote threshold enacted in 1935 represented 1.27% of voter turnout in 1934. *Id*. Thus, the simple move would be to set the party qualification threshold at 1.27% or 77,437 votes (1.27% of votes in the 2018 gubernatorial election). Such an increase, however, would be relatively modest. Substantively, Defendants-Appellees and the district court should have analyzed in detail why the 50,000 threshold was not adequate and how it was necessary to increase it all the way to 2% or 130,000 votes, whichever is greater.

A similar explanation would be necessary for the petition threshold. Defendants-Appellees merely claim that this accounts for increased registration numbers, but they wholly fail to address the fact that the threshold was reduced from 20,000 signatures to 15,000 in 1992. They do not show at all why a 15,000 or even 20,000 signature threshold is inadequate and why it is necessary to raise it all the way to 45,000.

If this is all that the Defendants-Appellees are willing to produce for the court to weigh to justify the extent of the increased thresholds, it is hard to see how Plaintiffs-Appellants could not show a likelihood of success.

IV. DEFENDANTS-APPELLEES DISTORT THE FACTS TO MINIMIZE HOW EXTREME AND DIFFICULT THE NEW THRESHOLDS ARE ALONE AND IN CONTEXT.

Rather than make their own showing, Defendants-Appellees continue to distort the facts surrounding the new thresholds and the overall context to minimize the impact of the new party qualification and petition thresholds.

First, Defendants-Appellants dismiss the 130,000 vote or 2% party qualification threshold as "relatively modest compared to other states" and cites to the exceptional third-party results discussed above. Opp. 22–23. But most of the states with higher thresholds offer a party petition or other mechanism that is usually much more manageable, can be satisfied in advance of an election, and which reasonably diligent minor parties can satisfy on a regular basis. New York is one of eleven states that offer no alternative path for a prospective political party other than running an "independent" candidate who must then satisfy a vote threshold. When Defendants-Appellees mention that states use 3% to 20% (Opp. 22), they do not attempt to isolate elections that determine party qualification. Plaintiffs-Appellants have cited various cases, which remain unaddressed, where thresholds have been held unconstitutional involving similar absolute numbers. *See* Br. 45-47.

Defendants-Appellees also desperately attempt to obscure the stark fact that New York's increased petition threshold is the most onerous—by far—in terms of signatures per day to determine party status. As laid out in Exhibit B to our initial memorandum in support of the preliminary injunction (attached here as Exhibit "A" for convenience), New York requires parties to gather 1,071.4 valid signatures per day, which is far more than the next most onerous state, Illinois, which requires 278 signatures per day. Notably, Illinois is next in line only because Arkansas's 297.2 signature per day, Georgia's 385.3 signature per day, and Pennsylvania's 600.3 signature per day requirements have all been recently held unconstitutional. *Thurston*, 962 F.3d at 405; *Cooper v. Raffensperger*, No. 1:20-CV-01312-ELR, 2020 WL 3892454, at *3 (N.D. Ga. July 9, 2020); *Constitution Party of Pa. v. Aichele*, No. 12-2726 (E.D. Pa. Feb. 1, 2018).

Rather, Defendants-Appellees dismiss the difficulty in gathering this many petition signatures in such a short amount of time. Yet their own expert in *SAM Party I* stated that "getting voters to sign qualifying petitions[ ] is highly labor-intensive, voter-by-voter work. As such, it is normally more difficult than reaching all but the highest vote support targets." JA 328-29.

Defendants-Appellees primarily rely on cases where the Supreme Court speculated about the ease of collecting signatures, yet their main two cases predate the *Anderson-Burdick* framework: *American Party of Texas v. White*, 415 U.S. 767

(1974), and *Storer v. Brown*, 415 U.S. 724 (1974).[13] Moreover, the cases' off-the-cuff rationalizations resemble rational basis review, which is clearly *not* the standard. *SAM Party II*, 987 F.3d at 274; *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108 (2d. Cir. 2008). Second, *American Party* upheld a lesser requirement of approximately 400 signatures per day, which is less than half of the one her.[14] Third, the Court expressly referenced the short "24-day period" in its remand for fact-finding in *Storer*. 415 U.S. at 742.

Importantly, as Defendants-Appellees concede, the Court in *Storer* remanded for fact-finding in the context of an independent presidential campaign, not a new or minor political party. 415 U.S. at 745 ("the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other"). Arguably, an independent presidential candidate could be required to show a higher modicum of support before accessing

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[13] Although Defendants-Appellees continue to cite to *Jenness v. Fortson*, 403 U.S. 431 (1971), Opp. 24, which *SAM Party* II primarily relied on, 987 F.3d at 276, it is comforting that they no longer rely on it as direct precedent. As we have pointed out, *Jenness* specifically distinguished New York's petition regime as one with "suffocating restrictions" that would change the outcome. 403 U.S. at 438–39 & n. 15; *see also id.* at 442.

[14] In *LaRouche v. Kezer*, 990 F.2d 36, 40 (2d Cir. 1993), this Court upheld Connecticut's independent petition threshold of 466 signatures per day because it was "only slightly more than was upheld in *American Party*." This case is the other side of that coin. It is not *slightly* more—it is much more—and should be held unconstitutional accordingly.

the ballot because he or she and his or her prospective voters have little interest in achieving a minority result for growth and gradual development. *See id.* at 740 ("the statute would not appear to require an impractical undertaking *for one who desires to be a candidate for President*") (emphasis added); *Thurston*, 962 F.3d at 402 ("The party petitioning restrictions at issue in the present case go farther [than restrictions on independent candidates] and tread upon the collective interests of party members in associating to advance political beliefs."). This distinction should foreclose assumptions that a petition drive should be expected to have 77, 100, or 1,000 full-time canvassers. *LPNY*, 2021 WL 1931058, at *10; Opp. 26. What may be arguably true for one-time presidential campaigns breaks down when there is a constitutional interest in providing space for the development and growth of new political parties.

Defendants-Appellees also dismiss LPNY and GPNY's ability to challenge the petition threshold because they "did not attempt to collect signatures and fail to obtain the necessary amount." Opp. 30. There is no requirement, however, that Plaintiffs-Appellants must first attempt to meet a threshold that they know to be unconstitutionally difficult based on their experience and judgment—a "showing of personal due diligence is not an element of a ballot access claim." *Perez-Guzman v. Gracia*, 346 F.3d 229, 243 (1st Cir. 2003) (such a rule "would tend to inoculate even the most blatantly unconstitutional electoral requirements from

legitimate attack"). The increased thresholds are not necessarily novel in their quality, but in their quantity. Plaintiffs-Appellants have extensive recent experience with petition gathering and have provided relevant testimony that makes valid extrapolations thereon.

V. PLAINTIFFS-APPELLANTS SATISFY IRREPARABLE HARM AND THE PUBLIC INTEREST REQUIREMENTS.

The district court held that Plaintiffs-Appellants failed to satisfy irreparable harm entirely based on the failure to show a likelihood on the merits. SA 57-59. Defendants-Appellants now try to argue that GPNY and LPNY's injury is too speculative. But this argument ignores the ongoing harm of losing party status and the cost or import of the unnecessary effort that will have to be made to attempt petitioning in early 2022.

It is also contrary to precedent. Irreparable harm is presumed in the First Amendment context. *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004) ("where a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary injunction has been satisfied"); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction"); *Dillon v. New*

York State Bd. of Elections, No. 05 CV 4766(JG), 2005 WL 2847465, at *3 (E.D.N.Y. Oct. 31, 2005).

For the same reasons, the public interest and the balance of the equities favor an injunction and the restoration of Plaintiffs-Appellants' earned access to the ballot. It is unfair of the district court to conclude that LPNY and GPNY ask for special treatment as opposed to the SAM and Independence Parties. SPA 60. We have no objection to crafting the preliminary injunction in more general terms. We simply cannot speak for these other parties. In *Upstate Jobs Party v. Kosinski*, 741 F. App'x 838, 840 (2d Cir. 2018), the plaintiff's only claim to impending harm was to its gubernatorial candidate which it had not named. In this case, it is abundantly clear and established on the record that LPNY and GPNY are continuously missing out on the benefits of party status and will need to lay out hundreds of thousands of dollars to petition for the 2022 election, which is necessary to their meaningful existence.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's denial of a preliminary injunction to Plaintiffs-Appellants and direct it to enter a preliminary injunction in favor of the Plaintiffs'-Appellants' candidates for office.

Dated November 26, 2021
Buffalo, New York

Respectfully submitted,
/s/ James Ostrowski

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Exhibit "A"--Appendix B attached to plaintiffs' brief in support of a preliminary injunction in the trial court. Document No. 46(6), 12/29/20, 1:20-cv-05820-JGK, SDNY.

Historical Performance of Unique Candidates in Presidential ("P) and Gubernatorial ("G) Elections in New York State[13]

Year	G/P	Party	Votes	Percentage
1918	G	Socialist	121,705	5.71%
1924	P	Progressive	474,913	14.55%
1924	P	Soc. Labor	9,928	0.30%
1924	P	Workers	8,244	0.25%
1928	P	Socialist	107,332	2.44%
1932	P	Socialist	177,397	3.78%
1932	P	Communist	27,956	0.60%
1932	P	Socialist Labor	10,339	0.22%
1936	P	Socialist	86,897	1.55%
1936	P	Communist	35,609	0.64%
1940	P	Socialist	18,950	0.30%
1948	P	American Labor	509,559	8.25%
1948	P	Socialist	40,879	0.66%
1952	P	American Labor	64,211	0.90%
1958	G	Independent-Socialist	31,658	0.55%
1962	G	Conservative	141,877	2.44%
1962	G	Socialist Worker	19,698	0.34%

[13] This list is compiled from Dave Leip's Atlas of U.S. Presidential Elections, available at https://uselectionatlas.org/. This list is missing gubernatorial elections from before the 1960s. Highlighted in green are years in which a party exceeded 2% of the vote. Highlighted in yellow are years in which a party met the previous voter threshold.

1962	G	Socialist Labor	9,762	0.17%
1966	G	Conservative	510,023	8.46%
1966	G	Liberal	507,234	8.41%
1968	P	Courage	358,864	5.29%
1968	P	Freedom & Peace	24,517	0.36%
1970	G	Conservative	421,529	7.07%
1980	P	Liberal	467,801	7.54%
1980	P	Free Libertarian	52,648	0.85%
1980	P	Right to Life	24,159	0.39%
1980	P	Citizens	23,186	0.37%
1988	P	Right to Life	20,497	0.32%
1990	G	Conservative	827,614	20.40%
1990	G	Right-to-Life	137,804	3.40%
1990	G	New Alliance	31,089	0.77%
1990	G	Libertarian	24,611	0.61%
1990	G	Socialist Workers	12,743	0.31%
1992	P	Independent	1,090,721	15.75%
1994	G	Independence Fusion	217,490	4.18%
1996	P	Independence	503,458	7.97%
1996	P	Green	75,956	1.20%
1996	P	Right to Life	23,580	0.37%
1998	G	Independence	364,056	7.69%

1998	G	Liberal	77,915	1.65%
1998	G	Right-to-Life	56,683	1.20%
1998	G	Green	52,533	1.11%
1998	G	Marijuana Ref.	24,788	0.52%
2000	P	Green	244,398	3.58%
2000	P	Right to Life	31,659	0.46%
2000	P	Independence	24,369	0.36%
2002	G	Independence	654,016	14.28%
2002	G	Right to Life	44,195	0.97%
2002	G	Green	41,797	0.91%
2002	G	Marijuana Reform	21,977	0.48%
2002	G	Liberal	15,761	0.34%
2002	G	Libertarian	5,013	0.11%
2004	P	Independence	99,873	1.35%
2006	G	Green	42,166	0.95%
2006	G	Libertarian	14,736	0.33%
2006	G	RTH	13,355	0.30%
2006	G	Socialist Workers	5,919	0.13%
2008	P	Populist	41,249	0.54%
2008	P	Libertarian	19,596	0.26%
2010	G	Green	59,906	1.29%
2010	G	Libertarian	48,359	1.04%
2010	G	Rent Too High	41,129	0.88%

2010	G	Freedom	24,571	0.53%
2010	G	Anti-Prohibition	20,421	0.44%
2012	P	Libertarian	47,256	0.67%
2012	P	Green	39,984	0.56%
2014	G	Green	184,419	4.83%
2014	G	Libertarian	16,967	0.44%
2016	P	Libertarian	57,438	0.74%
2016	P	Independence	119,160	1.55%
2016	P	Green	107,937	1.40%
2018	G	Green	103,946	1.70%
2018	G	Libertarian	95,033	1.56%
2018	G	SAM	55,441	0.91%
2020	P	Libertarian	60,369	0.70%
2020	P	Green	32,822	0.38%
2020	P	Independence	22,650	0.26%

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of [Second Circuit Local Rule 32.1(a)(4)/Federal Rule of Appellate Procedure 32(a)(7)] because this brief contains 6,027 excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a:

Times New Roman in 14 point type.

Dated November 26, 2021
Buffalo, New York

/s/ James Ostrowski
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