21-1464;22-44

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

In their Opposition, Defendants-Appellees merely recapitulate and defend the reasoning of the District Court. In so doing, Defendants-Appellees help prove our point. Without further guidance from this Court, many in authority will abdicate their constitutional duty to consider whether and how their actions to limit access to the ballot will stifle democracy and voters' constitutional rights to associate and express themselves through true minor parties.

As the Supreme Court recognized in *Anderson v. Celebrezze*, there is no institution but the federal courts that is disinterested enough in partisan politics, but interested enough in foundational democracy and the Constitution that is capable of policing states' abuses of their control of the ballot to burden and eliminate minor parties, which are to the major party establishment a source of great inconvenience. 460 U.S. 780, 793 n.16 (1983) ("because 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"). Therefore, this review requires some actual teeth.

Defendants-Appellees defend the District Court by completely ignoring their own burdens of production or persuasion, minimizing the burdens on Plaintiffs-Appellants and other non-fusion minor parties by mischaracterizing the facts, and relying on their extremely minimal claims to a post-hoc rationalization involving increased registered voters and mere mentions of state interests, ignoring their weak application. Essentially, Defendants-Appellees ignore Plaintiffs-Appellants' detailed critique regarding how the *Anderson-Burdick* analysis (as well as the standard for summary judgment) is supposed to apply and what the District Court failed to address either in substance or at all. If Defendants-Appellees can merely cite to perceived threats and supply newly invented rationales to impose a worst-in-the-country minor party qualification regime by at least one clear and material measure (signatures-per-day for petitions) amid an extremely restrictive ballot regime (with no party specific qualification method and various restrictive rules on petitioning), then there truly is no judicial scrutiny at play—much less "more careful judicial scrutiny."

Defendants-Appellees and the District Court are looking to dilute the *Anderson-Burdick* analysis into rational basis review. They do this because they

know that if Plaintiffs-Appellants implicitly hold the burdens of production and persuasion then Plaintiffs-Appellants' lack of litigation resources will doom their chances.[1] But by the standards of summary judgment and *Anderson-Burdick*, once one recognizes that Defendants-Appellees must do more than simply insist that the state's actions are reasonable, it becomes clear that summary judgment cannot stand. Even more so, Defendants-Appellees' flawed and meager defense renders Plaintiffs-Appellants' case likely to be successful to merit a preliminary injunction.

[1] We will represent that most briefing in this case has been substantially written by a volunteer kind enough to donate his time and skills. Plaintiffs-Appellants have received no institutional or non-profit support in their challenge.

ARGUMENT

I. DEFENDANTS-APPELLEES FAIL TO DEFEND THE PROPRIETY OF THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION IN FINDING NO SEVERE BURDEN.

As Defendants-Appellees acknowledge, the *Anderson-Burdick* analysis applies to ballot restrictions such those posed by New York's increased petition and voter thresholds (or, as Defendants-Appellees call the latter, the Party Qualification Threshold), and the first step of the framework is to assess whether the new thresholds impose a severe burden on Plaintiffs-Appellants not "in isolation, but within the context of the state's overall scheme of election regulations." *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 145 (2d Cir. 2000). Importantly, this Court has emphasized "that in assessing the extent to which a given set of [ ] restrictions burdens First Amendment rights, our review is neither formalistic nor abstract. Instead, we must turn a keen eye on how the electoral scheme functions *in fact*; indeed, 'it is essential to examine in a realistic light the extent and nature of [the scheme's] impact on voters.'" *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 184 (2d Cir. 2006) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (emphasis in original), *rev'd*, 552 U.S. 196 (2008).

"[T]he Supreme Court has consistently taken an intensely practical and fact-oriented approach to deciding these election cases." *Bowe v. Bd. of Election Comm'rs of City of Chicago*, 614 F.2d 1147, 1152–53 (7th Cir. 1980) (declining to make a final determination on a 10% signature requirement "await[ing] a more complete consideration on the merits and facts of this case"). Courts are advised emphatically *not* to apply a "litmus-paper test that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789. Rather, even "a network of facially innocent provisions, instead of only categorical exclusions, may operate to infringe" constitutional rights. *Lopez Torres*, 462 F.3d at 184.

In defending the District Court, Defendants-Appellees first err by claiming that the thresholds "are not severe as a matter of law." Opp. 18. Burdens differ among parties and circumstances. Under the *Anderson-Burdick* analysis, no ballot restriction can be found constitutional without considering the facts and circumstances unique to that case. *See Anderson*, 460 U.S. at 789 ("The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'"); *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). For example, a burden found constitutional once may be found to be unconstitutional after history shows the restriction to be in actuality a virtual exclusion of minor parties from the ballot. *See Storer v. Brown*, 415 U.S. 724, 742 (1974) ("Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."); *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 401–02 (8th Cir. 2020) (finding that the party retention requirement previously held constitutional in part because there was a sufficiently accessible independent petition process was called into question once Arkansas heightened its petition requirements); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1360 (N.D. Ga. 2016) (rejecting as inapposite the argument that the statute was previously held constitutional), *aff'd*, 674 F. App'x 974 (11th Cir. 2017).

As such, it is very much relevant that when this Court considered the thresholds in *SAM II*, it was not presented with a direct challenge. Rather, the

plaintiff SAM Party challenged only the fact that the voter threshold would now apply to presidential election years and performances and SAM Party objected to the necessity of nominating presidential candidates. Defendants-Appellees, on the other hand, assert that this Court not only upheld the constitutionality writ large of the increased voter threshold, which the Court did discuss, but also the petition threshold, which the Court spontaneously mentioned as another avenue open to the SAM Party. However, the Court did not state that its analysis of the voter threshold applies at summary judgment—the posture of the case was clearly at the preliminary injunction phase. Moreover, the Court was never even informed of the functioning and history of the petition threshold. It was likely completely unaware that the scant 42 days offered to collect 45,000 valid signatures (and satisfy the fivefold-increased geographic distributional requirement of the threshold) places New York as the most restrictive state in the nation for minor parties in terms of signatures to collect per day and more than twice exceeds even the outer bound that the Supreme Court speculated on in *Am. Party of Texas v. White*, 415 U.S. 767, 786 (1974). This Court should follow its own precedent in *Cayuga Indian Nation of New York v. Seneca Cty., New York*, 978 F.3d 829, 834 (2d Cir. 2020), and avoid

taking on an implicit holding that was not fully briefed, especially in this key context for New York, and indeed national, democracy.

Defendants-Appellees fail to address, like the district court before it, the numerous ways in which the increased thresholds operate independently, together, and within the overall election regime to freeze in place the status quo and virtually exclude non-fusion minor parties from the ballot. We discussed these extensively in our other briefing and will not reiterate them here. Of course, the most apparent issue is that the increased 45,000 petition requirement—when considered with the unchanged 42-day window for collection—now requires over 1,071 signatures to be collected per day, which is approximately four times higher than the next state's requirement for party qualification. Opening Br. 26–27.

In their Opposition, Defendants-Appellees inappropriately split up and isolate the analysis regarding the voter and petition thresholds. Even so, their defenses break down on observation.

Regarding the voter threshold, Defendants-Appellees simply rely again on their limited claims that (1) the 2% threshold is "in the middle of the pack" of state voter thresholds on a limited percentage basis, (2) the Working Families and

Conservative Parties survived the 2020 election, and (3) precedent has upheld similar or higher voting thresholds as an abstract percentage matter. All of these claims are problematic as we have extensively briefed. In short, the "middle of the pack" observation is essentially an impermissible litmus-paper test that ignores significant differences among state regimes, most notably that New York is one of only eleven states that provides no independent route for a minor party to qualify for the ballot in advance of an election. In these states, minor parties may only qualify through the performance of statewide candidates, which should prompt extra and separate scrutiny. *See Graveline v. Benson*, 992 F.3d 524, 541 (6th Cir. 2021) ("No one disputes that in Michigan, the challenged statutory scheme is the only means by which independent candidates can access the ballot. The circumstances that supported a finding of an intermediate burden in *Grimes* do not exist in the instant case.").

Defendants-Appellees' reliance on precedent is both one-sided and improper. We have demonstrated that numerous courts have found similar or lower percentage thresholds unconstitutional based on the facts and circumstances unique to those cases, especially when focusing on the number of signatures required per

day. Opening Br. 27–28. All of Defendants-Appellees' and the District Court's cherry-picked cases are distinguishable. Opp. 19; SPA23. In *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 575–76 (6th Cir. 2016), the court upheld a 2% party retention threshold by expressly relying on the availability of independent candidate petitioning that the court found both theoretically and actually viable based on use. Here, the candidate petition process has also been raised to an extreme degree. In *Green Party of Ark. v. Martin*, 649 F.3d 675, 686-87 (8th Cir. 2011), the court considered precedent to uphold a 3% presidential-election voter threshold, but only "in light of . . . the many alternative paths Arkansas provides to the ballot, and the Green Party's own success in achieving ballot access," focusing on the open 10,000 signature party petition process through which the Green Party regularly qualified. New York has no party petition process. In *McLaughlin v. N.C. Bd. Of Elections*, 65 F.3d 1215, 1222–26 (4th Cir. 1995), the court upheld a 10% presidential-election voter threshold, but the plaintiff only made an esoteric challenge not based on the severity of the threshold, but as a challenge to the two-tiered electoral system imposing different requirements for petitioning and party qualification.[2] Finally, *Arutunoff v. Oklahoma State Election Bd.*, 687 F.2d 1375,

1379 (10th Cir. 1982), which upheld a similar requirement, was decided before *Anderson* and "omit[ed] any discussion of how long signatures could be collected or the deadline for filing." *Libertarian Party of Arkansas v. Thurston*, 394 F. Supp. 3d 882, 914 (E.D. Ark. 2019) (distinguishing cases similarly asserted by the State of Arkansas in which federal courts upheld high percentage ballot access laws).

Defendants-Appellees additionally err by focusing on the continued existence of minor parties that operate on fusion for party qualification—namely, the Working Families and Conservative Parties that former Governor Cuomo personally deemed "legitimate parties." But contrary to Defendants-Appellees claims, the courts have not narrowly required the total exclusion of formally defined "minor parties" to find virtual exclusion, blind to the realities involved. Rather, "[o]ur primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 184 (2d Cir. 2006) (quoting *Anderson*, 460 U.S. at 786), *rev'd on other grounds*, 552 U.S. 196 (2008); *see Maslow v. Bd. of Elections in City of New York*, 658 F.3d 291, 297 (2d Cir. 2011) (listing cases focusing on the "field of candidates" in general elections). The "virtual exclusion"

standard inherently acknowledges that "total exclusion" is not necessary—a ballot regime can be unconstitutional even if it produces some exceptions; otherwise states are provided an open route to avoid review by leaving intact severely compromised routes to the ballot for once-in-a-generation candidates or nominal minor parties. *See Am. Party of Texas v. White*, 415 U.S. 767, 783 (1974) ("what is demanded [by the state] may not be so excessive or impractical as to be in reality a mere device to always, ***or almost always***, exclude parties with significant support from the ballot" (emphasis added)); *Storer v. Brown*, 415 U.S. 724, 742 (1974) ("[T]he inevitable question for judgment: . . . could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only ***rarely*** that the unaffiliated candidate will succeed in getting on the ballot?" (emphasis added)).

As Plaintiffs-Appellants have tried to explain numerous times, and contrary to Defendants-Appellees' false claim that we "fail to cite any authority for the proposition that the distinction [based on fusion] has any constitutional significance," Opp. 20, all of the Supreme Court's ballot accesses cases reiterate

that the Constitution is concerned with voters' rights to associate in parties that run *their* preferred candidates and in voters' rights to vote for those candidates. *See* Opening Br. 40–43; *e.g.*, *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality) (summing up jurisprudence regarding ballot access for minor parties into the principle that "the State may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve ballot positions *for their candidates*" (emphasis added)). Indeed, the Supreme Court conversely found the ability to run major-party candidates by way of fusion to *not* be constitutionally significant. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997). The obvious corollary is that a system that leaves open fusion as the *only* route for minor parties to exist vindicates no significant constitutional rights and imposes a severe burden.

Fusion parties only indirectly and partially serve some of these interests, and in an extremely compromised way that leaves them beholden to an aligned major party. Specifically, fusion parties cannot now run either unique gubernatorial or presidential candidates, and in order to secure the cross-endorsement of major party candidates, they must compromise their goals in many ways in their other

endeavors—if they run unique down-ballot candidates or advocate too hard for their ideological preferences, they risk their own existence as a party. Yet this compromised and precarious life is the only remaining option left open to minor parties in New York State. Defendants-Appellees claim that this distinction is merely a matter of internal party strategy, but here too they press a false formalism to deny reality. Unless a previously fusion party decides to commit suicide, what this means *to voters* is that they will be presented with two candidates, albeit perhaps across four party lines. Everyone understands that these candidates are the major parties' candidates. Voting for them under a fusion line merely gives voters the ability to voice their ideological preference with their major-party vote. If a fusion party ever began to rival a major party, the major party would simply prevent its candidate from accepting the cross-endorsement.

The Court can take judicial notice that this is not mere speculation (or it may order discovery reopened if necessary). It is indeed what happened this year for independent petitioning. In 2020, all minor parties were eliminated except for the two New York traditional fusion parties for not reaching 2% of the vote (which was greater than 130,000 votes): the Working Families Party and the Conservative

Party. In 2022, despite a herculean effort by Plaintiff Larry Sharpe and LPNY to amass approximately enough signatures (even in the face of new congressional maps affecting the geographical distributional requirement and with the help of other prospective parties), Defendant-Appellant NYSBOE rejected the petition on *prima facie* review, counting (only!) 42,356 signatures. The Green Party filed fewer than 15,000 signatures. Thus, unless pending litigation overturns the Board's ruling, no independent petitions were successful for governor and the voters *will* have but two candidates across four party lines. Regardless, Defendants-Appellees are grossly incorrect in their assertion that our "argument that non-fusion parties fare worse under the new Party Qualification Threshold is not based on any competent evidence." Opp. 20–22. We do not rely solely on the 2020 presidential election and we do not deny that non-fusion minor parties have had successful instances in the past. Rather, we show that the voter threshold was set (indeed tailored) to be above the very predictable performance in 2020 to exclude the current crop of non-fusion minor parties. Opening Br. 24; A37-38. Moreover, we use the century of New York electoral history to show that non-fusion minor party successes are mostly isolated incidents and, with the new two-

year voter threshold, over 100 years, only two times would non-fusion minor parties retain party status for a full 4-year election cycle: the American Labor Party in 1948-52 and the Independence Party running two billionaires for 1996-2000. Opening Br. 25–26. One would need simply to apply common sense that the increased petition threshold, which Plaintiffs-Appellants have shown to be incredibly severe by other means, would operate among this history to keep non-fusion parties off the ballot in perpetuity and, if any non-fusion minor party managed somehow to achieve success, would not likely last beyond two years.

Regarding the petition threshold, Defendants-Appellees do even less. They first rely on this Court's mention of the independent petition process as an alternative for minor parties in *SAM Party II*. Opp. 22; 987 F.3d at 276. But in that preliminary injunction case, this Court was not at all presented with a challenge to the increased petition threshold nor a full set of facts and considerations regarding it. Notably, Defendants-Appellees make no effort to distinguish the precedent and rationale for why such a finding is not binding. Opening Br. 20–21.

Defendants-Appellees then rely, as did the District Court, on the Supreme Court's decisions in *Storer v. Brown*, 415 U.S. 724 (1974), and *American Party of*

Texas v. White, 415 U.S. 767 (1974), as well as general precedent upholding higher petition requirements as a percentage of the electorate. Opp. 22–25. We distinguished *Storer*'s speculation regarding the collection of 325,000 signatures over 24 days as both *dicta* and as specifically premised on the Court's expectations "for one who desires to be a candidate for President." 415 U.S. at 740. Defendants-Appellees claim that "[t]he question considered was whether the burden imposed by California law on independent candidates for president and vice president were constitutional." That is correct, but no, "[t]hat is [***not***] the same question at issue in this case." *Contra* Opp. 26. This case is about party qualification. New York has decided to condition party qualification on presidential and gubernatorial election performance. Minor parties therefore must field presidential candidates not because they desire to elect them as President, but because they desire them to perform well enough to earn party status and its ballot access. The expectation is entirely different—it is a beginning, not an end. *See Storer*, 415 U.S. at 745 ("[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.").

This distinction is why Defendants-Appellees wholly fail to appreciate that *White* did concern party ballot access and affirmatively stated that its expectation of 22,000 signatures within 55 days (yielding 400 signatures per day) "falls within the outer boundaries of support the State may require before according political parties ballot position." 415 U.S. at 783–84.[2] New York's increased petition threshold exceeds this figure by approximately 270%, falling clearly outside these "outer boundaries."[3]

In addition, *White* and Defendants-Appellees' cases elsewhere upholding petition thresholds do not account for all the ways in which New York's general election regime functions to exclude minor parties from the ballot and LPNY and GPNY in particular. Contrary to Defendants-Appellees' broad claim that "a signature requirement of 5% or less for ballot-access petitions is constitutional," many courts have found lower thresholds unconstitutional and *Anderson-Burdick*

[2] In addition, White acknowledged that Texas also offers minor parties a viable route to qualify by "counting noses" on precinct convention day, a unique process for which New York offers no analog—not even a party petition. *Id.*

[3] Compare this with LaRouche v. Kezer, 990 F.2d 36, 41 (2d Cir. 1993), where this Court reluctantly upheld Connecticut's 466 signature-per-day requirement there, finding it "only slightly more" than that in White and mitigated by Connecticut's small size in relation to Texas. New York's increased threshold, by contrast, cannot be rationally characterized as "slightly more" than 400 signatures per day.

forecloses such a litmus-paper test. And this Court has never represented otherwise. In *Prestia v. O'Connor*, the Court merely stated that under *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), "a requirement that ballot access petitions be signed by at least 5% of the relevant voter pool is ***generally*** valid." 178 F.3d 86, 88 (2d Cir. 1999) (emphasis added). This means that a facial attack based on the petition percentage alone will not succeed, see *LaRouche*, 990 F.2d at 40, but this is not what Plaintiffs-Appellants are arguing. It is the interplay of the petition threshold with the voter threshold and other aspects of New York's restrictive ballot regime that render the petition threshold unconstitutional, most notably the incredibly short 42-day period in which to collect the required signatures.[5]

Defendants-Appellees also attempt to deny the burden of petitioning on Plaintiffs-Appellants, claiming that LPNY and GPNY officers' affidavits establishing petition costs and volunteering efforts to be prohibitive as irrelevant. These officers testified based on their extensive knowledge and experience on the ground running serious and difficult petitioning efforts, but Defendants-Appellees casually dismiss their testimony by claiming that LPNY and GPNY simply do not want to "put in the hard work of organizing volunteers and generating support"

among voters. Opp. 25. By arguing that this testimony fails to "raise any triable issue of fact," Defendants-Appellees are telling this Court that they need not even rebut it. *Id*. This is not only insulting, but also unpersuasive. Defendants-Appellees further show bad faith by attempting to exploit the LPNY officer's personal opinion that the national Libertarian Party has a cynical attitude with regard to LPNY's ability to overcome the State's obstacles. In arguing this, Defendants-Appellees wholly abandon the principles of *Anderson-Burdick* and claim that "New York is not required to lower its ballot-access thresholds to compensate for the lack of support, resources, or investment that LPNY receives from its own national party." Opp. 26. Of course, a serious constitutional analysis cannot possibly demand that a political party reroute resources from other state affiliates. And in fact, *Anderson-Burdick* rejects Defendants-Appellees' framing that this challenge is requiring New York to "lower its ballot-access thresholds" to accommodate minor parties. Rather, it stands for the basic idea that the Constitution secures rights, and states cannot violate them. It is New York State that decided to monopolize and regulate the printing of ballots. If it would like to get out of that business, it is welcome to.

Defendants-Appellees rely on the Sixth Circuit's decision in *Grimes* that discounted the costs of petitioning in its determination of the constitutional burden imposed, but (1) Plaintiffs-Appellants' affidavits go beyond costs to feasibility, and (2) *Grimes* has been distinguished recently by the Sixth Circuit for reasons that materially align with this case. *See Graveline*, 992 F.3d at 541. Notably, the Sixth Circuit first qualified that *Grimes* hinged on plaintiffs' appeal to the "hypothetical maximum cost of petitioning" "to field a full slate of candidates," unlike the situations in *Graveline* and here where we are talking about specific offices. *Id*. Second, in *Grimes*, "third parties had qualified under the statutory scheme several times in the past," again unlike the situation in *Graveline* and here because Defendants-Appellees have cited to no minor party that has submitted 45,000 valid signatures and we know of none. *Id*. And third, *Grimes* found a reasonable alternative means to the ballot that was not challenged, unlike in *Graveline* and here. *Id*.

II. DEFENDANTS-APPELLEES FAIL TO DEFEND THE PROPRIETY OF THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION IN APPLYING THE MORE FLEXIBLE ANALYSIS OF THE *ANDERSON-BURDICK* FRAMEWORK.

Even under the more "flexible analysis" for restrictions that do not impose a severe burden, summary judgment cannot stand and Defendants-Appellees fail to persuasively argue otherwise.

Defendants-Appellees' defense is to essentially impose their own preferred standard for analysis and reject the admonition and holding in *Price* that rational basis review should ***not*** be utilized to review the constitutionality of ballot access restrictions. 540 F.3d at 108–09. According to Defendants-Appellees, Plaintiffs-Appellants were required to "prove the unreasonableness" of the threshold increases, "*i.e.*, that there is no logical connection between the amendments and the interests proffered." Opp. 33. In reality, however, the standard for cases not finding a severe burden is that "the court must actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, and the court must take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Price*, 540 F.3d at 108–09 (cleaned up). The Court was forced to make this clear in *Price* because more than a decade earlier, in

Schulz v. Williams, the Court incorrectly stated that if strict scrutiny does not apply then "we need only consider whether the requirement is a reasonable means of achieving the state's legitimate goals." 44 F.3d 48, 58-59 (2d Cir. 1994). The Court expressly called this "rational basis review." *Id.* at 59.[4]

Defendants-Appellees are apparently asking this Court *sub silentio* to ignore *Price* and take *Schulz* back up—without at all justifying the wisdom or propriety of the move. Not once in their brief do Defendants-Appellees mention the words "necessity," "necessary," "strength" to describe the analysis, even though this Court reiterated the *Price* standard directly in *SAM Party II*, 987 F.3d

[4] The Schulz court misinterpreted the import of Burdick v. Takushi, which expressly reaffirmed the detailed formulation of the Anderson "weighing" analysis. 504 U.S. 428, 434 (1992). In Burdick, the Supreme Court also stated that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. However, this was expressly a "general" observation and was relevant because in that case the Court was faced with assessing the unique import of Hawaii foreclosing write-in voting, but offering an open primary. Here, by contrast, we have an unfortunately common but clear constitutional issue—the unjustified raising of party retention and petitioning requirements, which inherently discriminates against new and minor parties. Cf id. (evaluating the sufficient availability of minor party and petition routes for candidates).

267, 274 (2d Cir. 2021).[5] Indeed, Defendants-Appellees purport to take *Schulz* further and put the onus on Plaintiffs-Appellants to prove unreasonableness and "no logical connection" between the State's interests and the threshold increases, but they offer nothing in support of that assertion. Opp. 33. Such a standard is, of course, absurd, since if it were to operate, it would require Plaintiffs-Appellants to prove a categorical determination unfit for any kind of weighing analysis.

Defendants-Appellees and the District Court apply this false rational basis standard and therefore, *inter alia*, (1) fail to conduct any meaningful evaluation of the burden on Plaintiffs-Appellants (merely calling it slight or incidental), (2) fail to conduct any weighing of the strength and relevance of the State's interests, and (3) fail to actually weigh the burden against the necessity of the thresholds' increases. To do that weighing, Defendants-Appellees would have had to produce more than "conclusory and unsupported arguments," but that is exactly what they have done here on summary judgment. *Credico v. New York State Bd. of Elections*,

[5] We do disagree with SAM Party II's description of the standard as "quite deferential." Id. In the fundamental context of ballot access restrictions on minor parties, the Supreme Court has stated that "more careful judicial scrutiny" is proper. Anderson, 460 U.S. at 793 n.16; see Molinari v. Bloomberg, 564 F.3d 587, 602-05 (2d Cir. 2009) (discussing the standard under "Anderson and its progeny [that] deal with election and voting rights laws that restrict speech or ballot access").

No. 10 CV 4555 RJD, 2013 WL 3990784, at *22 (E.D.N.Y. Aug. 5, 2013); *see Graveline*, 992 F.3d at 545 (rejecting a record consisting of two conclusory statements by the state's expert) ("Nothing in the record demonstrates that a signature requirement below 30,000 and above 5,000 has resulted in ballot overcrowding, voter confusion, or frivolous candidates in any state."). Even courts wrongfully applying rational basis review demand that the state "put[ ] forth precise interests and support[ ] those interests with statistical data." *Libertarian Party of Ohio v. Husted*, No. 16CV0100554, 2017 WL 9772337, at *13 (Ohio Com. Pl. June 07, 2017). Current precedent may allow Defendants-Appellees to justify the new thresholds without "elaborate, empirical verification" if they are not held to be a severe burden, but Defendants-Appellees must provide sufficient support and evidence that the district court can evaluate to "actually weigh" the strength and necessity of the state's proffered interests against the harm to Plaintiffs-Appellants. *SAM Party II*, 987 F.3d at 274; *see Norman v. Reed*, 502 U.S. 279, 288–89 (1992) ("To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the ***demonstration*** of a corresponding interest sufficiently weighty to justify the

limitation." (emphasis added)). They cannot offer essentially nothing and leave the district court to make an inherently unguided and subjective determination based on its own unknowable thinking. *See* Opp. 32–33 (calling the district court's conclusions that the new thresholds are "reasonable" steps and ways to achieve various broad goals to be "'weighing' of the State's regulatory interests" and, remarkably, a "showing [that] is sufficient"). It is significant that Defendants-Appellees in no way defend the adequacy of Mr. Brehm's declaration in support of summary judgment, despite Plaintiffs-Appellants' treatment of it in depth.

Rather, falsely claiming that they are "not required to do so," Defendants-Appellees offer three justifications for why the threshold increases were "appropriate:" (1) that the Working Families Party and the Conservative Parties met the 2% voter threshold in 2020 (even though three other parties did not), (2) that the thresholds "were set at a level corresponding to the increase" in voter registration since 1935 and 1922 (even though 1922 is a wholly arbitrary starting point), and (3) that the Commission Report shows that the voter threshold 2% percentage (but not the 130,000 aspect) that was reached was the result of a survey of national requirements and a compromise among commissioners. Opp. 35. But at

a fundamental level, none of these observations are real justifications for the increases. The first (and arguably third) is simply a claim that the increased voter threshold is not so bad (discounting the significance that the remaining minor parties are fusion parties). The second and third are rationales, not justifications—they assume other interests that Defendants-Appellees have never attempted to justify or support: an interest in keeping the voter threshold at pace with voter registration, and an interest in staying in the "middle of the pack" in terms of percentage of the electorate while ignoring nearly all variations between states in terms of electoral system overall and actual history of minor party performance. If these are the interests the State is pursuing then common sense immediately brings forth objections and recognizes the weakness of these justifications that we (and Richard Winger) have shown extensively elsewhere.

Our point with regard to dismissing Defendants-Appellees' new rationale for accounting for voter registration numbers and keeping the Court focused on the rationales in the Commission Report is because this case is unique. It is not a matter of simply taking the proffered rationales by the litigants ostensibly representing the State. Rather, Defendants-Appellees admitted in their Answer that

the Legislature merely passed recommendations that were previously held unconstitutional. Therefore we are all bound to a narrowly authorized Commission's stated rationale as the state's expressed goals. Defendants-Appellees primarily rely on a rationale that was not only omitted by the Commission Report, but directly contradicted by it. They claim now that the threshold increases account for the growth in voter registrations since 1936 and 1922 (and yet not since 1992 when the petition threshold was lowered from 20,000 to 15,000 signatures), but the Commission Report described at length its own (albeit woefully flawed) rationale that it reached the voter threshold increase to allegedly account for increases in voter turnout—not voter registration.[6] We believe considering this new voter registration rationale is improper not only because it is unjustified and unsupported, but because they are not putting forth *the State's* goals. The State has set forth its goals in the Commission Report and Defendants-Appellees should be bound to defend them such as they can. It is admittedly awkward to limit the state litigants in such circumstances, but the passage of these new thresholds was more

[6] The Commission Report provided a rationale for reaching 130,000 votes as the voter threshold (but not the 2% alternative threshold) by triple-counting the actually marginal increase in voter turnout since 1936. A41–42.

than awkward and created this situation—they were shoehorned into an emergency COVID budget in early April 2020 to fix an unconstitutional committee process inextricably tied with a campaign finance program by a governor who has publicly stated that he intended to eliminate all but two minor parties he subjectively considered "legitimate" (and not coincidentally function primarily through fusion voting). A31–36; A45–46; A61–62.

Finally, Defendants-Appellees attempt to bolster their purported state interests by falsely claiming that "Appellees demonstrated that increasing the thresholds to adjust for the nearly four-fold increase in the size of the electorate since the thresholds were set was a reasonable, direct, and narrowly-tailored method for advancing the State's interests." Opp. 29. Defendants-Appellees have done nothing of the kind. Sure, ensuring a modicum of popular support and preventing voter confusion are legitimate state interests to assert in ordinary circumstances, *see* Opp. 28-29, but "[t]he mere incantation of a talismanic phrase such as 'voter confusion' [or 'modicum of support'] cannot transform a specious interest into a compelling one." *Republican Party of State of Conn. v. Tashjian*, 770 F.2d 265, 284 (2d Cir. 1985). As discussed above, Defendants-Appellees provide

no support for the interests they specifically assert: keeping the thresholds in pace with voter registration numbers. Defendants-Appellees also complain in conclusory fashion that there have been five to ten gubernatorial candidates per election since 1994 and there have been allegedly confusing ballots. Notably, they do not attempt to specify how the ballot was confusing and fail to justify why five to ten is too much. *Contra Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) ("the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion"). Historical performance shows that the last decade has seen a lower trend that in no way justifies such an extreme response.

Defendants-Appellants must offer "precise" interests and justify "the extent to which those interests make it necessary to burden the plaintiff's rights." *Price*, 540 F.3d at 108–09. In their Opposition, although they appeal to ballot confusion and ensuring a modicum of support, Defendants-Appellants are careful to tiptoe around why these interests are served by the thresholds being set where they were. They do not attempt to ever justify the relative strengths of their interests and the ***extent*** of the voter and petition thresholds as would be proper, and

that is why Defendants-Appellants have to wrongfully manipulate the underlying analysis. That manipulation and the dismissal below should not be countenanced.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grant of summary judgment and direct it to enter a preliminary injunction in favor of the Plaintiffs-Appellants.

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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 6936 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: July 12, 2022

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