IN THE
Supreme Court of the United States

LIBERTARIAN PARTY OF NEW YORK, GREEN PARTY OF NEW YORK, ET AL.,
Petitioners,

v.

NEW YORK BOARD OF ELECTIONS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2020, New York passed massive, historic increases to its thresholds for independent minor political parties to gain and retain access to the ballot. The practical effect of these increases was the elimination of contemporary independent minor parties such as Petitioners and the predictable result that virtually no independent minor party will be able to attain or retain ballot access. In upholding the increases, the courts below purported to apply the standard first developed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992): a court must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up). In the minor party context, the Court has stated 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." *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality op.). The courts below upheld the increased thresholds. The questions presented are:

1. Did the courts below properly apply the *Ander-*

son-Burdick standard as a "two-tracked approach" rather than as "a sliding-scale balancing analysis" when they found the increased thresholds do not impose a severe burden on Petitioners and then determined that the thresholds were "coherent," "rational," "reasonable," and "justified" under a "quite deferential" review? *Compare Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring), with *id.*, at 210 (Souter, J., dissenting).

2. In assessing the burden to Petitioners in light of New York's requirement to collect over 1,070 valid signatures-per-day to run a candidate and thereby earn ballot access, did the courts below err by merely analogizing to prior precedent from this Court discussing collecting a certain amount of signatures-per-day—as also done by the First, Third, Seventh, Ninth, and Eleventh Circuits—or must a court apply a contextual analysis as it would for other ballot access restrictions, as performed by the Sixth and Eighth Circuits?

3. Did the courts below err in finding that the thresholds did not impose a severe burden (which would warrant strict scrutiny) because two "fusion" parties survived the new thresholds—*i.e.*, parties whose existence depends on cross-nominating major party candidates for governor and now president—even though this Court has previously held that "fusion" is of little constitutional significance? *See Timmons*, 520 U.S. at 362–64.

PARTIES TO THE PROCEEDING

Petitioners are the Libertarian Party of New York, the Green Party of New York, Anthony D'Orazio, Larry Sharpe, Gloria Mattera, and Peter LaVenia.

Respondents are the New York Board of Elections, Peter S. Kosinski, as the Co-Chair of the New York Board of Elections, Douglas A. Kellner, as the Co-Chair of the New York Board of Elections, Andrew J. Spano, as a Commissioner of the New York Board of Elections, Todd D. Valentine, as Co-Executive Director of the New York Board of Elections, Robert A. Brehm, Co-Executive Director of the New York Board of Elections.

RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of the stock of the Libertarian Party of New York or the Green Party of New York.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Southern District of New York:

SAM Party v. Kosinski, 483 F. Supp. 3d 245 (S.D.N.Y. 2020) ("*SAM Party I*") (preliminary injunction decision in related actions brought by the SAM and Working Families Parties)

Libertarian Party of New York v. New York Bd. of Elections, 539 F. Supp. 3d 310 (S.D.N.Y. 2021) ("*LPNY I*") (preliminary injunction decision)

SAM Party of New York v. Kosinski, 576 F. Supp. 3d 151 (S.D.N.Y. 2021) ("*SAM Party III*") (summary judgment decision in this and related SAM and Working Families Parties proceedings)

United States Court of Appeals for the Second Circuit:

Libertarian Party of New York v. New York State Bd. of Elections, No. 22-44-CV, 2022 WL 17547364 (2d Cir. July 19, 2022) ("*LPNY II*") (consolidating preliminary injunction and summary judgment appeals).

Libertarian Party of New York v. New York State Bd. of Elections, No. 22-44-CV, 2022 WL 10763416 (2d Cir. Oct. 19, 2022) ("*LPNY III*") (affirming summary judgment decision)

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The opinion of the court of appeals directly below (App. 1) is not reported but is available at 2022 WL 10763416. The district court's opinion from which Petitioners more recently appealed (App. 4) is reported at 576 F. Supp. 3d 151. The district court's opinion from which Petitioners first appealed, and which appeal was consolidated with that of the second opinion (App. 44), is reported at 539 F. Supp. 3d 310.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2022. Petitioners filed a petition for rehearing *en banc* on November 2, 2022. It was denied and final judgment was entered by the court of appeals on December 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Amendment I to the U.S. Constitution reads in relevant part: "Congress shall make no law … abridging the freedom of speech, … or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV to the U.S. Constitution reads in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws."

2020 N.Y. Laws Ch. 58 (S. 7508-B), Part ZZZ reads in relevant part (capitalized text is added; bracketed text is deleted):

§ 4. Article 14 of the election law is amended by adding a new title II to read as follows:

TITLE II

PUBLIC FINANCING

…

§ 9. Subdivision 1 of section 6-142 of the election law, as amended by chapter 79 of the laws of 1992, is amended to read as follows:

1. An independent nominating petition for candidates to be voted for by all the voters of the state must be signed by at least [fifteen] FORTY-FIVE thousand voters, OR ONE PERCENT OF THE TOTAL NUMBER OF VOTES, EXCLUDING BLANK AND VOID BALLOTS, CAST FOR THE OFFICE OF GOVERNOR AT THE LAST GUBERNATORIAL ELECTION, WHICHEVER IS LESS, of whom at least [one] FIVE hundred, OR ONE PERCENT OF ENROLLED VOTERS, WHICHEVER IS LESS, shall reside in each of one-half of the congressional districts of the State.

§ 10. Subdivision 3 of section 1-104 of the election law is amended to read as follows:

3. The term "party" means any political organization which [at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor], EXCLUDING BLANK AND VOID BALLOTS, AT THE LAST PRECEDING ELECTION FOR GOVERNOR RECEIVED, AT LEAST TWO PERCENT OF THE TOTAL VOTES CAST FOR ITS CANDIDATE FOR GOVERNOR, OR ONE HUNDRED THIRTY THOUSAND VOTES, WHICHEVER IS GREATER, IN THE YEAR IN WHICH A GOVERNOR IS ELECTED AND AT LEAST TWO PERCENT OF THE TOTAL VOTES CAST FOR ITS CANDIDATE FOR PRESIDENT, OR ONE HUNDRED THIRTY THOUSAND VOTES, WHICHEVER IS GREATER, IN A YEAR WHEN A PRESIDENT IS ELECTED.

§ 11. Severability. The component clauses, sentences, subdivisions, paragraphs, sections, and parts of this law shall be interpreted as being non-severable from the other components herein. If any clause, sentence, subdivision, paragraph, section or part of this act be adjudged by any court of competent jurisdiction to be invalid, such judgment shall invalidate the remainder thereof, and shall not be confined in its operation to the clause, sentence, subdivision, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

INTRODUCTION

This ballot access case challenges the constitutionality of some of the most impactful restrictions in recent history—ones that will indefinitely deprive New York voters of representation by independent minor parties. It also raises important questions relating to the proper application of the *Anderson-Burdick* analysis, which have led to conflicting lower court decisions notwithstanding this Court's plurality decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

Unlike other states that provide multiple routes to the ballot for political parties, including most notably a dedicated party petition, New York offers only one: first, a party must conduct an independent petitioning drive to run a gubernatorial or presidential candidate and meet a certain threshold of valid signatures from New York voters (the "petition threshold"). N.Y. Elec. Law § 6-142. That candidate must then garner enough votes beyond a certain threshold (the "vote threshold") to grant the party official statutory recognition and access to the ballot in subsequent years. N.Y. Elec. Law § 1-104. The party continues to enjoy these benefits only if its gubernatorial and presidential candidates meet the vote threshold in each subsequent election. The petition threshold by which a prospective party can attain party status was 15,000 valid signatures from 1922 to 1971 and 1992 to 2020. App. 48. The vote threshold for a party to retain qualified status was set in 1936 at 50,000 votes in gubernatorial elections. *Id.*

In April 2020, Governor Andrew Cuomo included in the New York budget by far the largest increase in state history in requirements for political parties to qualify for the ballot. These increases were bundled—non-severably—with a new public campaign finance regime. After limited debate, the legislature passed these increases into law. Specifically, it tripled the threshold of voter signatures required for a statewide independent nominating petition to qualify a new party from 15,000 to 45,000 or 1% of the previous gubernatorial vote, whichever is less, and quintupled its geographic distribution requirement from at least 100 to 500 signatures from voters residing in each of one-half of New York's congressional districts. 2020 N.Y. Laws Ch. 58 (S. 7508-B), Part ZZZ ("Part ZZZ"), § 10. It also raised the threshold for a party to retain qualification from 50,000 votes in gubernatorial elections to 130,000 votes or 2% of the vote, whichever is greater, in *both* gubernatorial and presidential elections—meaning every two years instead of every four. *Id.*, § 9.[1]

After the 2020 election, the Libertarian and Green Party presidential candidates failed to reach the vote threshold, the Parties were decertified, along with two others. Thereafter, they filed suit to challenge the

[1] The 1% figure for the petition threshold will always exceed the 45,000 ceiling and can be largely ignored. On the other hand, the 2% figure for the vote threshold will usually be the determining figure, but lower-turnout gubernatorial elections such as that in 2014 can lead the 130,000 figure to operate instead and raise the effective percentage. For example, the 2014 election resulted in a 3.4% threshold. *See Governor/Lt. Governor Election Returns,* NYS Bd. of Elec. (Dec. 15, 2014), https://www.elections.ny.gov/NYSBOE/elections/2014/general/2014Governor.pdf.

thresholds, asserting First and Fourteenth Amendment claims. In the 2022 gubernatorial election, no candidate successfully petitioned onto the ballot and New York voters were presented with only two candidates—the Republican and Democratic nominees. Petitioners' candidates attempted to collect enough signatures, but Respondents determined that they failed to do so.

For forty years, this Court has decided constitutional challenges to state election laws by applying the *Anderson-Burdick* analysis developed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and elaborated in *Burdick v. Takushi*, 504 U.S. 428 (1992). Yet in several significant cases, the Court has suggested the analysis to be more deferential to states. This has led to confusion among and inside federal circuits, as this Court recognized 15 years ago in the splintered opinion in *Crawford*. Since *Crawford*, the confusion among lower courts has only deepened.

For example, in sustaining the thresholds at issue here, the district court and the court of appeals did not seriously assess the "character and magnitude" of the burden imposed on the Libertarian and Green Parties of New York ("LPNY" and "GPNY," respectively), their candidates, and their voters. *Anderson*, 460 U.S. at 789. Instead, despite the Court's admonition not to impose any "litmus-paper test" (*id.*), the courts primarily viewed the thresholds as percentages and compared them to percentages selectively chosen from other states and upheld in prior cases. *See* App. 22–26, 92–94. The courts dismissed or ignored various exacerbating aspects of New York's electoral regime, including

most importantly the 42-day window to collect 45,000 valid signatures. *See* App. 26–28. Further, having found no severe burden, the courts below did not "identify and evaluate the precise interests put forward by the State as justifications," "determine the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Rather, they accepted the State's proffered justifications at an abstract level of analysis—no matter how weak or pretextual in their specifics—and merely found the thresholds "coherent," "rational," "reasonable," and "justified under the 'quite deferential' review." App. 33–35, 97. The Second Circuit conducted this superficial review even though in previous election law cases it has not taken the State's justifications at face value, as it did here. *See*, *e.g.*, *Price v. New York Bd. of Elections*, 540 F.3d 101, 108–10 (2d Cir. 2008) (finding restriction on primary absentee balloting "non-trivial" and the State's proffered justification as non-substantive, "contrived", and outweighed by the burden it imposed). Similar inconsistencies exist among district courts and circuit courts when applying the *Anderson-Burdick* analysis in and outside the minor party ballot access context.

In ballot access cases, even were a court not to find a "severe burden," the state must provide a real and substantial justification for its *precise* interests in increasing thresholds *to the extent* that it did. *See Crawford*, 553 U.S. at 191 ("However slight that burden may appear … it must be justified by relevant and legitimate state interests sufficiently weighty to justify

the limitation." (citation and quotation marks omitted)). As this Court has acknowledged, state legislatures have every incentive to eliminate minor parties and "more careful judicial scrutiny" is necessary to identify pretextual legislation. *Anderson*, 460 U.S. at 793. In practice, however, this admonition is honored in the breach, if at all. This case is therefore an ideal vehicle for the Court to provide guidance on the proper application of the *Anderson-Burdick* analysis, and to ensure that it provides lower courts with a meaningful framework for the constitutional review of state election laws.

This case also raises issues of critical importance not only to independent minor parties in New York, but also to the proper adjudication of ballot access challenges in general.

First, the courts below dismissed Petitioners' concern that the new petition threshold requires the collection of over 1,071 valid signatures-per-day, on average, and relied exclusively on a comparison to prior precedent—notably this Court's pre-*Anderson* cases *Storer v. Brown*, 415 U.S. 724, 740 (1974) and *Am. Party of Texas v. White*, 415 U.S. 767, 786–87 (1974). *See* App. 26–28. The First, Third, Seventh, Ninth, and Eleventh Circuits have similarly dismissed comparable concerns regarding the time permitted to collect signatures, while the Sixth and Eighth Circuits, as well as several recent district courts, have properly addressed such concerns in their application of the *Anderson-Burdick* analysis.

Second, this Court has recognized that ballot access obstacles impose a severe burden warranting strict scrutiny if they exclude virtually all minor parties. *See Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality op.) ("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"); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (noting that restrictions on third parties' ballot access are unconstitutional if they operate to "freeze the political status quo"); *Williams v. Rhodes*, 393 U.S. 23, 24 (1968) (striking "series of election laws" that "made it virtually impossible" for any non-major party to gain ballot access). Here, the courts below found that the thresholds did not "virtually exclude minor parties from the ballot" because two "fusion" parties survived the imposition of the new thresholds in 2020: the Working Families Party ("WFP") and the Conservative Party. *SAM Party II*, 987 F.3d at 275–76; *SAM Party III*, 576 F. Supp. 3d at 165.

But fusion parties attain and retain ballot access solely by cross-endorsing major party candidates with those candidates' consent. They in no way act like independent minor parties who pursue unique ideological goals and constituencies as do the Libertarian and Green Parties—two of the most successful minor parties in United States history. This Court's "virtual exclusion" jurisprudence focuses on the ability of parties *to run their own* candidates. Moreover, "[a]ll political ideas cannot and should not be channeled into the programs of our two major parties." *Williams*, 393 U.S. at 39. The Constitution does not permit the state to force

minor parties to participate in the electoral process exclusively by cross-nominating major party candidates, and here, Petitioners cannot do so because they do not share the major parties' political platforms. In 1997, this Court held that the availability of "fusion" has only minimal constitutional relevance and is therefore not mandated. *See Timmons*, 520 U.S. at 362–63. Now the Court should hold that the corollary is also true: the availability of fusion cannot make constitutional what is otherwise unconstitutional.

FACTUAL BACKGROUND

In 2019, Governor Andrew Cuomo and the New York Legislature created a Campaign Finance Commission ("Commission") whose recommendations would become law unless acted upon by the Legislature. *See* Part XXX of the Laws of 2019, Chapter 59, Bill No. S01509C. In conjunction with a new publicly-funded campaign finance regime, the Commission recommended increases to the petition and vote thresholds discussed herein: (1) increasing the petition threshold for independent nominating petitions for statewide office to 45,000 signatures or 1% of votes, whichever is less, for the last gubernatorial election; and (2) increasing the vote threshold to 2% of the votes for governor or 130,000, whichever is higher, and applying it to presidential elections as well. *Report to the Governor and the Legislature*, Campaign Finance Reform Commission (Dec. 1, 2019), p.5, https://campaignfinancereform.ny.gov/system/files/documents/2019/12/campaignfinancereformfinalreport.pdf ("Commission Report"). On March 12, 2020, a state court found that the 2019 statute authorizing the

Commission was unconstitutional. *Hurley v. Pub. Campaign Fin. & Election Comm'n*, 69 Misc. 3d 254 (N.Y. Sup. Ct. 2020). In response, Governor Cuomo used the crisis COVID-19 budget to pass the defunct Commission recommendations through the legislature via amendments to a transportation infrastructure bill on April 1, 2020. Part ZZZ, *supra*; App. 53. With one day of debate in each house, the bill passed and was signed by the Governor on April 3, 2020. *Id.*

Even before the 2020 enactment of the increased petition and vote thresholds, New York imposed several onerous restrictions on petitioning by statewide candidates. Signatures must be gathered over a 42-day period and are due 23 weeks before the general election, which falls in May. N.Y. Elec. Law §§ 6-138(4), 6- 158(9). A signature is only counted if it is the first a voter has signed for the office concerned, including any designating petitions for party primary qualification. *Id.* § 6-138(1). Due to the formalities involved, most candidates rely on paid circulators, but New York bans payment based on circulators' productivity, *i.e.*, payment for each signature. *See Person v. New York Bd of Elections*, 467 F.3d 141, 143 (2d Cir. 2006); N.Y. Elec. Law § 17-122(4).

New York is also unique in having a strong tradition of fusion parties. *See Timmons*, 520 U.S. at 357 & n.7. Multiple parties may nominate the same candidate and list them prominently on their own ballot line (with the candidate's consent). App. 86. Fusion parties like the WFP and Conservative Party do so consistently, especially for elections in which they must meet the vote threshold to maintain party status and ballot

access. *See* App. G, Ex. B (showing last unique Conservative Party candidate was in 1990).

The increased thresholds applied for the first time in the 2020 presidential election. LPNY, the New York affiliate of the Libertarian Party, had consistently run candidates by petition for governor and president since 1974 (except 1986), but failed to meet the 50,000 vote threshold until 2018. App. 17, 53. GPNY, the New York affiliate of the Green Party, was formed in 1992 and met the vote threshold in 1998, 2010, 2014, and 2018. App. 17–18, 53–54. The Libertarian and Green Parties are the third and fourth largest political parties, respectively in the United States. *Id*.

In 2020, all minor parties but the fusion parties WFP and Conservative Party (who both cross-nominated major party candidates) failed to meet the vote threshold and lost party status. *Id*. In 2022, LPNY and GPNY attempted to petition gubernatorial candidates onto the ballot, but failed to meet the increased petition threshold. New York voters were thus presented with only two candidates—a Republican and Democrat—albeit appearing on four party lines.[2]

In 2020, Petitioners, the SAM Party, and WFP separately filed suit to challenge the election law changes in Part ZZZ, each taking different litigation positions. *See SAM Party I*, 483 F. Supp. 3d at 249–50, 54–55; App. 5–6. The SAM Party made a discrete challenge

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[2] *See* Rebecca C. Lewis, *New York's true two-person race for governor*, City & State (July 7, 2022), https://www.cityandstateny.com/politics/2022/07/new-yorks-true-two-person-race-governor/373954/.

based on the new requirement to retain qualification in presidential elections—claiming that it could not constitutionally be forced to run such candidates. *Id*. The WFP challenged the vote threshold and questioned the State's campaign finance justification. *Id*.; *see also SAM Party I*, 483 F. Supp. 3d at 264 & n.9. Petitioners, however, offered a full challenge to the vote and petition thresholds operating in conjunction within the overall election scheme. App. 7, 55; *see also SAM Party I*, 483 F. Supp. 3d at 250 n.1 (finding WFP not to have standing to challenge the petition threshold).

The SAM Party and WFP moved first for a preliminary injunction, which was denied by the district court. *SAM Party I*, 483 F. Supp. 3d 245. The SAM Party appealed. Petitioners moved for a preliminary injunction, which was denied. App. 79–80. Petitioners appealed. The Second Circuit affirmed the denial against the SAM Party while Petitioners' appeal was pending. App. 98 (*SAM Party II*). Almost exclusively on the basis of *SAM Party II*, Respondents then moved for summary judgment in all cases, which was granted. App. 38. Only Petitioners moved forward with an appeal of summary judgment, which was consolidated with the prior pending appeal. *LPNY II*, 2022 WL 17547364, at *1 (2d Cir. July 19, 2022). The Second Circuit summarily affirmed summary judgment upon *de novo* review and denied reconsideration *en banc*. App. 3, 43.

In opposing summary judgment, Petitioners relied on the following demonstrations and arguments. *See*

Brief for Plaintiffs-Appellants, No. 21-1464, ECF 119, pp. 24–31 (2d Cir. Mar. 21, 2022).

• The increased petition threshold is by far the most demanding among states in terms of valid signatures required to be collected per day in order to attain party status—over 1,071 valid signatures-per-day over a short 42-day period. The next most difficult demands almost four times less. *See* App. G, Ex. A; 10 Ill. Comp. Stat. Ann. 5/7-2, 5/10-3, 5/10-4; No. 1:20-cv-05820, ECF No. 46-6, pp. 35–39. Indeed, New York has the shortest period of any state except Minnesota and Rhode Island, which also provide a party petition. Declaration of Richard Winger, No. 1:20-cv-05820, ECF No. 84-2, pp. 10–11; App. G, Ex. A.

• The increased vote threshold is near the top in terms of percentage of the vote required relative to other states, when discounting those which allow alternative routes to party status (unlike New York). Declaration of Richard Winger, *SAM Party I*, No. 1:20-cv-00323, ECF No. 67, ¶¶ 16–19.

• The increased petition threshold is the third highest in the nation in absolute terms when the easier method in each state is compared for the 2024 presidential election. Declaration of Richard Winger, No. 1:20-cv-05820, ECF No. 84-2, p.6 & Appendix A.

• At least for president in 2024, New York has the nation's third earliest petition deadline, when the easier method in each state is compared. Declaration of Richard Winger, No. 1:20-cv-05820, ECF No. 84-2, p.10 & Appendix B.

• Governor Cuomo publicly stated that he intended to eliminate all but what he considered "legitimate" parties. Alan Chartock, *Gov. Cuomo On WAMC's Roundtable 11/5/20*, WAMC 26 (Nov. 5, 2020), https://www.wamc.org/post/gov-cuomo-wamcs-roundtable-11520; ECF No. 46-6, p.25.

• The thresholds were introduced by Governor Cuomo and passed over a matter of days as part of an emergency pandemic budget bill that the legislature was not capable of seriously debating or voting down, arguably in violation of the New York Constitution. A31–36; A45–46; A61–62. [3]

• The specific level and unique structure of the vote threshold (*i.e.*, that it takes the higher of an absolute number or a percentage) is untethered to ensuring a modicum of support or other state interest and is only plausibly calibrated to ensure that minor parties are eliminated in low turnout elections, particularly in gubernatorial elections such as that of 2014. A40–41. The Commission Report's stated rationale for reaching the specific level of the voter threshold ignored this issue and purported to adjust for voter turnout several times over. A41–42.

• The recent history of non-fusion party performance shows that the increased voter threshold was set at a level no such contemporary party could meet, especially for the 2020 election. A37–38.

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[3] These references are to the appendix in the Second Circuit. *See* No. 21-1464, ECF 40.

• The long-term history of non-fusion minor party performance shows that the voter threshold virtually eliminates all such parties. In the last century, only the American Labor Party in 1948-1952 running Vice President Henry Wallace and the Independence Party in 1996-2000 running billionaires Ross Perot and Tom Golisano would have met the increased voter qualification threshold in consecutive elections to qualify as a party for a full four-year term—and neither party had to overcome the increased petition threshold at the time. *See* App. G, Ex. B. Other one-cycle successes would have had much of their resources sapped by the increased petition threshold. *See id.*; No. 1:20-cv-05820, ECF No. 46-6, pp. 40–43.

• Plaintiffs-Appellants produced testimony establishing the great sums and effort that GPNY and LPNY have dedicated to petitioning efforts under the prior threshold and, based on this experience, they established without challenge that they do not have the volunteer or financial capacity to meet the increased threshold going forward. A94–96, A116–127; *see* App. 54–55.

• Past statewide petitioning efforts have rarely ever approached the 90,000 raw signatures a successful petitioning campaign would have to submit to resist a challenge. No. 1:20-cv-05820, ECF No. 84, p.25.

• The petition threshold's five-fold increase to its geographic distribution requirement, a requirement only found among five states, makes signature collection inefficient and diverts volunteer time and effort. A123; Declaration of Richard Winger, No. 1:20-cv-

05820, ECF No. 84-2, p.10. New York's petition regime has other widely recognized restrictive aspects. A122–24; Declaration of Richard Winger, No. 1:20-cv-05820, ECF No. 84-2, p.10; *see supra*, at 11. *E.g.*, *Jenness*, 403 U.S. at 438–39 & n.15 (describing New York's still present requirement that a petition signer can only sign one petition for each office a "suffocating restriction… upon the free circulation of nominating petitions").

• The prior thresholds were sufficient to protect New York's legitimate regulatory interests. A37–40. For example, the number of non-major party candidates for presidential and gubernatorial elections has been steady at two to three since 2012. *See* App. G, Ex. B.

• The increased thresholds dealt a one-two punch to eliminate all non-fusion minor parties from the ballot in 2020 by operation of the vote threshold, and keep them off with an impossible petition threshold. The predictable outcome is that New York's approximately 13 million voters will be given the option in most races to choose between only two major party candidates (although they may be cross-nominated by fusion parties)—as occurred in 2022. And it is highly unlikely that a minor party will ever again attain 50-state ballot access for its presidential candidate, an important marker nationwide for minor party legitimacy.[4]

[4] *See LP Presidential Nominee On The Ballot in All 50 States Plus DC*, Libertarian Party (Sept. 16, 2020), https://www.lp.org/lp-presidential-nominee-on-the-ballot-in-all-50-states-plus-dc/.

Petitioners also challenged the Respondents' proffered justifications—such as they were. The courts below, however, accepted them at face value. The "primary" state interest was to save costs for the new campaign finance program, although Respondents did not account for the many ways in which the program independently prevents funding candidates without substantial support. App. 30–32, 71–73. However, the drain on public funds is likely to be minimal in light of the law's other caps and qualifications that would prevent any public financing of minor party candidates. *See* App. 74 n.12. Furthermore, the State had the ready alternative of imposing a separate threshold for minor party candidates to access public funds, not the ballot. *See Green Party of Connecticut v. Garfield*, 616 F.3d 213, 231 (2d Cir. 2010).

Respondents also produced superficial support that the threshold increases "ensur[e] a sufficient modicum of public support, [and] reduc[e] voter confusion and ballot overcrowding." App. 33–34, 75–76. But they merely pointed to the number of candidates in past elections and produced several cherry-picked ballot examples to allegedly show how confusing they can be. App. 75. Notably, Respondents claimed that the increases were to account for the growth in registered voters since 1936 and 1922, when each threshold was allegedly set.[5] App. 15, 48, 52, 76. However, as Petitioners demonstrated, this was a manufactured, post-hoc, and incomplete rationale. The original Commission Report alleged that it was basing the 130,000 vote

[5] In fact, the previous petition threshold was set in 1992, reduced from 20,000. *See Election Reform Act of 1992*, 1992 Sess. Law News of N.Y. Ch. 79 (S. 7922, A. 11505).

threshold on increases in *voter turnout*, not voter registration, which makes more sense because voter registration is manipulated by many other factors like the State's recent adoption of automatic registration and does not reflect increased voter engagement.[6] Voter turnout, however, has not increased nearly enough to justify 130,000 votes or 2%. Nevertheless, the manufactured voter registration basis does not explain or account for the 2% aspect of the threshold nor the 1992 reduction in signatures. The courts below did not address these discrepancies.

In denying Petitioners' motion for preliminary injunction, the district court held that Petitioners failed to demonstrate a probability of success on the merits. App. 78. It concluded that the vote threshold does not impose a severe burden because the WFP and Conservative Party requalified under them in 2020 and because "courts have upheld ballot access provisions requiring demonstrations of a much higher 'modicum of support' than the quantum the amended New York Election Law requires." App. 61. It also concluded that "the independent nominating petition is a viable means for candidates to obtain ballot access and the recently-enacted Petition Requirement has not foreclosed that avenue of ballot access" because "other courts have upheld" higher absolute requirements in number of signatures. App. 63–64. The court dismissed the import of the 1,071 signatures-per-day requirement and Petitioners' testimony regarding their inability to meet the increased petition threshold by

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[6] *See New York Automatic Voter Registration Act*, 2020 Sess. Law News of N.Y. Ch. 350 (S. 8806, A.8280).

simply analogizing to *Storer* and *Am. Party*. App. 65–68. The court failed to take into account any other exacerbating aspects of New York's election regime except the increased geographic distribution requirement, which it wholly dismissed "[i]n view of the fact that the majority of New York's congressional districts are concentrated in the New York City metropolitan area." App. 70–71 n.11.

The court then found Respondents' proffered interests to be "valid," and that the thresholds "further[ed]" them and were "reasonable" and "nondiscriminatory." App. 71–76. The court found that the thresholds "help[ ] to ensure that candidates appearing on the ballots enjoy a 'modicum' of support, thereby assisting in maintaining an organized, uncluttered ballot; preventing voter confusion and frustration; avoiding fraudulent and frivolous candidacies; and assisting the maintenance of an efficient public finance system." App. 71. Regarding the petition threshold specifically, the court proclaimed that "[r]aising the number of signatures required is a reasonable, direct, and narrowly-tailored method for assuring that a candidate enjoys sufficient public support before allowing such candidate to appear on the ballot." App. 76. Notably, the court did not address Petitioners' critiques of Respondents' claims, nor did it find any justification for the ***extent*** to which the thresholds were increased. *Id*.

In *SAM Party II*, the Second Circuit rejected the SAM Party's entitlement to a preliminary injunction and reached certain conclusions consistent with *LPNY I*. It held that the vote and petition thresholds were not severe burden based on their absolute number,

finding that "New York's 2% threshold is in the middle of the pack among the three-dozen states that require parties to obtain a certain level of support in a statewide race" and that other courts have "approved of thresholds as high and higher." App. 92–93.[7] It then approved generally of the State's purported interests in "gauging whether a party continues to enjoy a sufficient 'modicum' of support deserving automatic ballot access" and "in conserving limited resources devoted to public financing of state elections." App. 95–96. The court insisted that no "'elaborate, empirical verification' of the State's justifications" was necessary, accepted the interests at face value, and found that Respondents adequately offered a "coherent account" of why the new law "will help to guard against disorder and waste." App. 97.

On summary judgment, the district court applied a substantially similar analysis. App. 20–35. It added that New York's vote threshold is "in the middle of the pack" among states and the Second Circuit's endorsement of "New York's interest in preserving the public fisc." App. 23–24, 31–32. The district court concluded that increasing the threshold was a "reasonable way" and a "reasonable step[ ]" to accomplish Respondents' goals and Respondents offered a "coherent account" how it furthered them. App. 33–35. Again, the court refused to evaluate the extent or appropriateness of the threshold increases. App. 32–34.

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[7] This observation is incorrect because it fails to account for the easiest route for parties to qualify in each state. *See* App. G, Ex. B.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Resolve a Pervasive Split Among Lower Courts Regarding the Proper Application of the *Anderson-Burdick* Analysis.

The *Anderson-Burdick* analysis emerges from this Court's recognition that the ability of minor political parties to participate in elections is key to voters' fundamental rights to freedom of association and equal protection. *Anderson*, 460 U.S. at 786 n.7.

In *Williams*, 393 U.S. 23, this Court struck down an Ohio election regime that required a petition of 15% of the gubernatorial vote for a new party to run a candidate for president while the major parties had automatic ballot access. The Court found that this arrangement "places burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Id.* at 30. The Court thus scrutinized and rejected Ohio's speculative argument that the threshold was intended to prevent voter confusion from an overly crowded ballot. *Id.* at 33.

Following *Williams*, however, the Court upheld several ballot access regimes and thresholds. *See Jenness*, 403 U.S. 431; *Storer*, 415 U.S. 724; *Am. Party*, 415 U.S. 767. In *Anderson*, the Court then established its "weighing" analysis:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected…. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

460 U.S. at 789. The Court warned that "[c]onstitutional challenges to specific provisions of a State's election laws… cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions" and "[t]he results of this evaluation will not be automatic." *Id*. Notably, the Court acknowledged that state legislatures have no incentive to consider minor parties' interests and "more careful judicial scrutiny" is appropriate. *Id.* at 793 n.16. But subsequent decisions have undermined that conclusion, leading to confusion and conflicting decisions among the lower courts.

In *Munro v. Socialist Workers Party*, the Court upheld a 1% vote threshold in Washington's blanket primary as a precondition to ballot access for minor party candidates. 479 U.S. 189, 189 (1986). The Court stated that "[w]e have never required a State 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." *Id.* at 194–95 (emphasis added). The Court excused States from proving "actual

voter confusion, ballot overcrowding, or the presence of frivolous candidacies" as long as "the response is *reasonable* and does not significantly impinge on constitutionally protected rights." *Id.* at 195–96 (emphasis added). In *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, however, the Court reaffirmed that "[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest." 489 U.S. 214, 222 (1989). And in *Norman v. Reed*, the Court required "the *demonstration* of a corresponding interest *sufficiently weighty* to justify the limitation." 502 U.S. 279, 288–89 (1992) (emphasis added).

In *Burdick*, the Court reaffirmed the *Anderson-Burdick* weighing analysis, but clarified that only "severe" restrictions are subject to strict scrutiny requiring narrow tailoring. 504 U.S. at 432–34. The 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.* at 434 (emphasis added). The Court has subsequently called this a "less exacting review," *Timmons*, 520 U.S. at 358, but importantly, the Court has never established a standard for determining whether a state election law is reasonable or not.

As a result, many courts, such as those below, have understood *Burdick* to establish a new standard that allows a court, upon finding no severe burden, to defer

to the State without examining evidence, "precise" interests, or the legitimacy or strength thereof. *See, e.g.*, *Barr v. Galvin*, 626 F.3d 99, 110 (1st Cir. 2010) ("there need be only a rational basis undergirding the regulation in order for it to pass constitutional muster"); *Buscemi v. Bell*, 964 F.3d 252, 263 (4th Cir. 2020) ("Election laws that impose only a 'modest' burden will be upheld if the state can 'articulate' its 'important regulatory interests.'"). Others, meanwhile, apply the full *Anderson-Burdick* analysis, including the requisite scrutiny of asserted state interests. *See, e.g.*, *Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480, 484–85 (3d Cir. 2017) ("The essential difficulty that a state faces in justifying a county-based signature-gathering requirement … is that, in the final step of *Anderson*—'consider[ing] the extent to which [the state's asserted] interests make it necessary to burden the plaintiff's rights'—alternatives to county-based requirements are readily available."). These splits manifest even within circuits. *Compare SAM Party II*, App. 97 ("Under the quite deferential review at this step," the state setting forth "a coherent account of why the challenged amendments will help to guard against disorder and waste… is enough to justify the burden the requirement imposes") (cleaned up)); *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015) ("If the burden is 'reasonable' and 'nondiscriminatory,' the statute will be subject to rational basis and survive if the state can identify 'important regulatory interests' to justify it."); *Navarro v. Neal*, 716 F.3d 425, 432 (7th Cir. 2013) ("the speculative concern that altering the challenged signature requirement would lead to a large number of frivolous candidates

qualifying for the ballot and, consequently, voter confusion is sufficient") (refusing to require any demonstration that the requirement actually serves the stated important interest); *Montana Green Party v. Jacobsen*, 17 F.4th 919, 926 (9th Cir. 2021) ("Because Plaintiffs have not shown a severe burden on ballot access, Montana may justify its election scheme by pointing to 'important regulatory interests.'"); *with Price*, 540 F.3d at 108–09 (2d Cir.) (rejecting rational basis review and stating 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.'"); *Graveline v. Benson*, 992 F.3d 524, 535 (6th Cir. 2021) ("Many regulations fall somewhere between these two extremes. When a regulation imposes an intermediate burden, 'courts engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'"); *Gill v. Scholz*, 962 F.3d 360, 364–65 (7th Cir. 2020) (*Anderson* and *Crawford* "reject cursory or perfunctory analyses; precedent requires courts to conduct fact-intensive analyses when evaluating state electoral regulations."); *Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) ("we cannot agree that even a speculative concern of voter confusion is sufficient *as a matter of law* to justify *any* regulation that burdens a plaintiff's rights, especially where that burden is more than de minimis" (cleaned up)) (requiring the state to produce evidence).

The Court took up this split in 2008 in *Crawford*, but it ended up creating another of its own. Justice

Scalia's concurrence claimed that *Burdick* established a "two-track approach" wherein non-severe burdens can be evaluated at a high level of generality that is deferential to the state. 553 U.S. at 204–06. In contrast, Justice Stevens' plurality opinion and Justice Souter's dissent (constituting a majority) reiterated that the *Anderson-Burdick* standard is a "sliding-scale" approach and not a "novel deferential important regulatory interests standard," as claimed by Justice Scalia. *Id.* at 190 n.8, 210. Justice Souter also took issue with the plurality's failure to "insist enough on the hard facts that our standard of review demands." *Id.* at 210. Indeed, the plurality largely avoided the question by focusing on a purported lack of evidence regarding the harm to specific voters. *Id.*, at 1622–23. Thus, *Crawford* continued a general deference to the State and failed to resolve lower courts' confusion regarding the proper application of the *Anderson-Burdick* analysis.

Many circuits have applied relatively superficial analyses. *See, e.g.*, *Jacobsen*, 17 F.4th 919 (9th Cir.) (minor political party had to submit signatures from registered voters equal to 5% of total votes cast for successful candidate for governor at last general election, or 150 electors, whichever was less, in at least 34 state legislative districts; found not to be severe and thus justified by "pointing to important regulatory interests"); *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277 (11th Cir. 2020) (finding minor political parties were not likely to succeed on merits of their claim that Florida statutes requiring them to either submit petition signed by one-percent of registered voters in

state or to affiliate with qualified national party in order to access ballot in presidential elections); *Tripp v. Scholz*, 872 F.3d 857, 866 (7th Cir. 2017) (upholding 5% signature requirement for new parties, allowing the state to address even speculative concerns); *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 22 (1st Cir. 2016) (upholding 3% signature requirement to be collected over seven months for party to attain ballot access, applying a "rational basis" version of *Anderson*).

On the other hand, several courts of appeals have recognized that at a minimum, the *Anderson-Burdick* analysis cannot consist of mere comparisons over percentages. *See Cowen v. Georgia Sec'y of State*, 960 F.3d 1339, 1342 (11th Cir. 2020) ("the determination that a 1 percent petition requirement by one state's election law in one context is constitutional, *vel non*, does not guarantee the same determination of a similar law in a different context"); *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 404 (8th Cir. 2020) (a claim challenging a signature requirement percentage below 5% could fail "if it stood alone," but not if "the current regime *as a whole* was unconstitutionally burdensome"); *Gill v. Scholz*, 962 F.3d 360, 365–66 (7th Cir. 2020) (criticizing court below for reflexively relying on prior circuit case that upheld the percentage requirement because it failed to evaluate the different impact based on different elections and districts); *Green Party of Ga. v. Georgia*, 551 F. App'x 982, 984 (11th Cir. 2014) ("The district court based its dismissal on our past decisions that upheld a 5% petition signature re-

quirement for other offices…. The district court's approach employs the type of 'litmus-paper test' the Supreme Court rejected in *Anderson*.");.

Indeed, the Sixth Circuit has developed a "muscular embrace" of *Anderson-Burdick* and has applied it in the minor party ballot access context. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 561–62 (6th Cir. 2021) (Readler, J., concurring); *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589–93 (6th Cir. 2006) (finding a severe burden by comparing Ohio political party qualification regime to the various states on several grounds, analyzing political party performance in Ohio, rejecting the state's attempt to address each restrictive aspect of the electoral regime separately, as well as the state's attempt to rely on "generalized and hypothetical interests"); *see also Graveline*, 992 F.3d at 539 (finding Michigan's ballot access regime for statewide independent and minor party candidates a severe burden and unconstitutional due to "the 30,000-signature requirement, [its] geographic-distribution requirement, and [an early] filing deadline"). Certain other cases have also applied stricter than normal analyses. *See, e.g.*, *Cortes*, 877 F.3d at 484–85 ("alternatives to county-based requirements are readily available").

Many commenters (and judges) have long observed the need for the Court to resolve the confusion and conflicting decisions among lower courts that apply the *Anderson-Burdick* analysis. *See, e.g.*, *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring) ("*Anderson-Burdick*'s hallmark is standardless standards."); *Daunt v. Benson*, 956 F.3d 396,

424 (6th Cir. 2020) (Readler, J., concurring) ("*Anderson-Burdick* is a dangerous tool. In sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them."); *Republican Party of Ark. v. Faulkner County, Ark.*, 49 F. 3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); *Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988) ("The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal clarity"); Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. Rev. 123, 143 (2021) ("We must … recommit to more robust legal protections for the right to vote. I join many others in suggesting the *Anderson/Burdick* standard as a place to start."); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 60 (2021) ("The Court has not explicitly overruled the *Anderson-Burdick* test, but its jurisprudence and the case law from the circuit courts of appeals in 2020 demonstrates that there is little federal judicial protection for the constitutional right to vote."); Lydia Saltzbart, *"A Dollar Ain't Much If You've Got It": Freeing Modern-Day Poll Taxes from* Anderson-Burdick, 29 J.L. & Pol'y 522, 552 (2021) ("lower courts have struggled to apply the test, leading many to disparage it as indeterminate"); Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 Ind. L.J. 139, 148 (2018) ("There is simply no way to reconcile the Court's extraordinary deference in *Crawford* … with its earlier skepticism about voting restrictions."); Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the*

Right to Vote, 96 N.Y.U. L. Rev. 1127, 1143 (2021) ("the right to vote is unmoored from a settled baseline"); Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 Election L.J. 263, 276 (2020) (describing the limitations of the framework as currently construed); Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. U. L. Rev. 763, 784 (2016) ("The major problem with the *Anderson-Burdick* standard … is that it's unclear exactly what the inquiry into the 'character' of the burden should entail."); Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 Yale L. & Pol'y Rev. 471, 485 (2016) ("*Crawford* illustrates how the current relaxed review of voting restrictions operates in practice."); Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 722–23 (2016) ("The 'balancing' test often functions as a simple binary formula…. But there are rare instances where courts reach a contrary conclusion."); Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 Wash. U.L. Rev. 553, 558 (2015) ("unlike prior practice, recent case law has given wide leeway to states to administer elections without meaningful judicial oversight"); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013) ("*Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another."); Bryan P. Jensen, Crawford v. Marion County Election Board: *The Missed Opportunity to Remedy the Ambiguity and Unpredictability of* Burdick, 86 Denv. U. L. Rev. 535, 547 (2009) (describing how *Anderson-Burdick* in-

structs courts to first consider burden and then analyze state interests, but Justice Stevens mistakenly reversed this order in *Crawford*); Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 100 (2009) ("the relevant balancing tests … leave[ ] plaintiffs facing an uphill battle, but without clear constitutional rules from the Supreme Court").

As the foregoing commentary demonstrates, this Court's intervention is urgently needed to clarify the proper application of the *Anderson-Burdick* analysis and to ensure uniformity among the lower courts' adjudication of cases arising in this critical area of constitutional and election law.

II. The Court Should Grant Certiorari to Resolve a Substantial Circuit Split Regarding the Number of Signatures Per Day States May Demand of Minor Parties and Thereby Clarify the Standard for Evaluating the Burden.

In their analysis of the burden imposed by the thresholds, the courts below dismissed as "unpersuasive" Petitioners' demonstration that New York's 1,071 signatures-per-day requirement for statewide petitions is an extreme outlier among all state ballot access requirements. App. 26–28, 67–69. They did so solely by analogy to the Court's pre-*Anderson* precedent and reasoning in *Storer* and *Am. Party. of Texas*. *Id*.

Several circuits have taken a similar categorical approach in dismissing signature collection timing

concerns, including the First, Second, Third, Seventh, Ninth, and Eleventh Circuits. *See Gardner*, 843 F.3d at 26 (1st Cir.) (finding a roughly 67 signatures-per-day requirement for statewide candidacy and party status constitutional by analogy to *Jenness* and *Storer*);[8] *Barr*, 626 F.3d at 110 (1st Cir.) (finding 167 signatures-per-day requirement for minor party presidential candidate constitutional by analogy to *Am. Party*); *LaRouche v. Kezer*, 990 F.2d 36, 40 (2d Cir. 1993) (upholding 466 signatures-per-day requirement for candidate petitions by analogy to *Storer* and *Am. Party*); *Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 178–79 (2d Cir. 2020) (upholding signature requirements from 74 to 7,500 over seven months by analogy to *Storer*, *Jenness*, and *Am. Party*); *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994) (upholding 358 signatures-per-day requirement for statewide candidacy and therefore party status by analogy to *Storer* and *Am. Party*); *Rogers v. Corbett*, 468 F.3d 188, 191, 195 (3d Cir. 2006) (upholding 450 signatures-per-day requirement for statewide candidacy and party status by analogy to *Storer*); *Valenti v. Mitchell*, 962 F.2d 288, 299–300 (3d Cir. 1992) (upholding 112 signatures-per-day requirement for congressional candidates by analogy to *Storer*); *Tripp*, 872 F.3d at 865 (7th Cir.) (upholding 27 signatures-per-day requirement for state representative candidates by analogy to *Am. Party*); *Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 684 (7th Cir. 2014) (upholding

[8] A number of cases with longer signature windows also rely on a comparison to the 180-day window in *Jenness*, which, in conjunction with other requirements, was upheld. 403 U.S. at 433–34.

139 signatures-per-day requirement for mayoral candidates by analogy to *Storer* and *Am. Party*); *Nader v. Keith*, 385 F.3d 729, 733–36 (7th Cir. 2004) (upholding 334 signatures-per-day requirement for independent presidential candidates by analogy to *Storer* and *Am. Party*); *Andress v. Reed*, 880 F.2d 239, 242 (9th Cir.1989) (upholding 223 signatures-per-day requirement for statewide office by analogy to *Storer*); *Stein v. Alabama Sec'y of State*, 774 F.3d 689, 699 & n.12 (11th Cir. 2014) (upholding 232 signatures-per-day requirement for party petition by analogy to *Storer*); *Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790, 794 (11th Cir. 1983) (finding that 188-day period for collection of 144,492 signatures "compares favorably" to those in *Jenness*, *Storer*, and *Am. Party*).

On the other hand, the Sixth and Eighth Circuits have instead applied a full *Anderson-Burdick* analysis. *See Graveline*, 992 F.3d at 543 (6th Cir.) (finding unconstitutional 167 signatures-per-day requirement for independent candidates in light of history, specific burdens, and a lack of alternative means to qualify); *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 403–04 (8th Cir. 2020) (affirming preliminary injunction against 300 signatures-per-day requirement for a new political party based on the unconstitutional burden of the election regime as a whole, rejecting a simple analogy to *Jenness* and other cases). A number of district courts have also done so, even in the majority of circuits that have conducted a wholly precedential analysis. *See, e.g.*, *Gottlieb v. Lamont*, 2022 WL 375525, at *11–12 (D. Conn. Feb. 8, 2022) (conducting detailed analysis of "0.86 to 36 signatures per day of petitioning for Assembly District candidates; 7 to 126

per day for State Senate candidates; and 35 to 90 per day for U.S. congressional candidates", taking into consideration Connecticut's overall election scheme and the burden on plaintiffs to collect signatures); *Gill v. Scholz*, 2016 WL 4487836, at *5 (C.D. Ill. Aug. 25, 2016) (granting preliminary injunction against 120 signatures-per-day requirement for independent House candidate, distinguishing other precedent with historical experience); *Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013) (finding 253 signatures-per-day requirement for minor party candidates in house of representatives special election unconstitutional in light of practical considerations); *Breck v. Stapleton*, 259 F. Supp. 3d 1126 (D. Mont. 2017) (finding 311 signatures-per-day requirement for candidates in house of representatives special election unconstitutional in light of timing, history, and practical capabilities); *Hall v. Merrill*, 212 F. Supp. 3d 1148 (M.D. Ala. 2016) (finding unconstitutional 107 or 57 signatures-per-day requirement for house of representatives special election in light of practical considerations, rejecting comparison to *Jenness* as a prohibited litmus-paper test), *vacated as moot*, 902 F.3d 1294 (11th Cir. 2018).

This Court should grant certiorari to resolve this split among the Circuits by clarifying that proper application of the *Anderson-Burdick* analysis requires that lower courts address the time limitations that states impose on signature collection. In doing so, the Court can clarify its warning that in assessing the burden, courts should not apply a "litmus-paper test." 460 U.S. at 789.

The Court's often-cited cases themselves do not support such a categorical rejection, especially here. In *Storer*, this Court upheld a 13,542 signatures-per-day petition requirement for independent candidates for president in California, opining that it would not be "impractical" for 1,000 canvassers to gather 14 signatures-per-day. 415 U.S. at 740. Yet that case is not analogous. The Court concerned itself with the requirements applicable to "one who desires to be a candidate for President." *Id.* at 740. By contrast, the Court recognized that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office." *Id.* at 745–46. It is therefore essential for state election regimes to allow new political parties to emerge and develop over multiple cycles. *See Williams*, 393 U.S. at 32 ("New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position."). Restrictions on political parties thus cannot be compared to those on independent presidential candidates.

On the other hand, the companion case *Am. Party of Texas v. White*, 415 U.S. 767, 776–78 (1974), directly concerned a 1% of the last gubernatorial vote party petition requirement for new political parties, requiring that such signatures be collected over 55 days. There, the Court was "unimpressed" that this was "too oner-

ous" for a "political organization." *Id.* at 786–87. However, *Am. Party* concerned a requirement of only 400 signatures-per-day. *Id.* New York's increased threshold is almost three times as much. An analogy to it proves nothing.

III. The Court Should Grant Certiorari to Clarify That Fusion Parties' Existence Cannot Justify a State's Exclusion of All Other Minor Parties.

The courts below found that the thresholds impose no severe burden in large part because two fusion parties survived and thus minor parties are not "virtually excluded." App. 22, 61, 92–93. The implication is that the Constitution is indifferent even if minor parties have to curry favor with and run major party candidates—whose loyalties necessarily belong to the major party. Yet this conclusion flies in the face of this Court's precedent and the fundamentals of minor party ballot access and its role in our democracy. In *Williams*, the Court stated:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. The absence of such voices would be a symptom of grave illness in our society.

393 U.S. at 39 (quoting *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250–51 (1957) (plurality op.)). And in *Anderson*, the Court elaborated:

> The right to vote is heavily burdened if that vote may be cast only *for major-party candidates* at a time when other parties or other candidates are clamoring for a place on the ballot. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

460 U.S. at 787–88 (cleaned up) (emphasis added). These principles make clear that minor parties are important specifically because they *do not* generally run major party candidates.

Moreover, many of this 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, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate *candidates who espouse their political views*. The formation of national political parties was almost concurrent with the formation of the Republic itself.") (emphasis added); *Clements*, 457 U.S. at 965 ("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, this Court conversely found the ability to run major-party candidates by way of fusion to *not* be constitutionally significant because it primarily involves a political party's interest in communicating its ideological position *to the candidate*, not to voters. *See Timmons*, 520 U.S. at 362–63. 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.

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As set forth above, this Court's review is necessary to resolve significant issues that have split and confused federal courts and to correct significant errors committed by the courts below in upholding New York's increased thresholds for minor party ballot access. The petition for certiorari should be granted.

Respectfully submitted,

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