UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 23-2756

INDIANA GREEN PARTY, LIBERTARIAN PARTY OF INDIANA, JOHN SHEARER, GEORGE WOLFE, DAVID WETTERER, A.B. BRAND, EVAN MCMAHON, MARK RUTHERFORD, ANDREW HORNING, KEN TUCKER and ADAM MUEHLHAUSEN,

Plaintiff-Appellants,

- v. -

DIEGO MORALES,

Defendant-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
AT No. 1:22-CV-00518-JRS-KMB

BRIEF OF APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2756

Short Caption: Indiana Green Party, et al. v. Morales

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Indiana Green Party, Libertarian Party of Indiana, John Shearer, George Wolfe, David Wetterer, A.B. Brand, Evan McMahon, Mark Rutherford, Andrew Horning, Ken Tucker and Adam Muehlhausen

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Center for Competitive Democracy

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/Oliver B. Hall Date: November 16, 2023

Attorney's Printed Name: Oliver B. Hall

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/William P. Tedards, Jr. Date: November 20, 2023

Attorney's Printed Name: William P. Tedards, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/Mark Brown Date: November 20, 2023

Attorney's Printed Name: Mark Brown

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, because this case arises under First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court Order and Judgment appealed from were entered on August 14, 2023, and the notice of appeal was timely filed on September 8, 2023.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves a constitutional challenge to the ballot access requirements that Indiana imposes on Independent candidates and Minor Parties. Plaintiff-Appellants assert that such requirements are unconstitutional as applied separately and in combination with one another because they impose severe and unequal burdens and they are not narrowly tailored to further any compelling state interest. In support of their Motion for Summary Judgment, Plaintiff-Appellants asserted 35 undisputed material facts and submitted a comprehensive evidentiary record that amply supports their claims. Defendant-Appellee, by contrast, asserted no material facts, submitted almost no evidence, and expressly conceded the truth of Plaintiff-Appellants' material facts. The District Court nonetheless concluded that under the "lenient standard" the Supreme Court has established for constitutional review of state election laws, precedent required it to uphold Indiana's requirements irrespective of the undisputed facts and uncontroverted record evidence. The questions presented for review are:

I. Whether the District Court erred by denying Plaintiff-Appellants' motion for summary judgment where the undisputed facts demonstrate that the Challenged Provisions are severely burdensome as applied and that they are not narrowly tailored to serve any compelling state interest?

II. Whether the District Court erred by failing conduct the fact-intensive analysis of Plaintiff-Appellants' claims required under the *Anderson-Burdick* framework?

III. Whether the District Court erred by granting summary judgment to Defendant-Appellee in the absence of a factual or evidentiary basis for such judgment?

STATEMENT OF THE CASE

This appeal arises from an action commenced on March 17, 2022 by the Indiana Green Party ("INGP"), the Libertarian Party of Illinois ("LPIN") and several voters and candidates who either support INGP or LPIN or are Independent, including John Shearer, George Wolfe, David Wetterer, A.B. Brand, Evan McMahon, Mark Rutherford, Andrew Horning, Ken Tucker and Adam Muehlhausen (collectively, "Plaintiff-Appellants"), against Defendant-Appellee Diego Morales ("the Secretary"), who is named in his official capacity as Secretary of State of the State of Indiana. Plaintiff-Appellees filed suit pursuant to 42 U.S.C. § 1983 and allege that several provisions of the Indiana Election Code are unconstitutional as applied separately and in combination with one another. (ECF No. 1 ("Compl.") at 2.) Specifically, Plaintiff-Appellants challenge I.C. 3-8-6-3 (the "Signature Requirement"); I.C. 3-8-6-6, 3-8-6-10(a) (the "Petitioning Procedure"); I.C. 3-8-6-10(b) (the "Filing Deadline"); and I.C. 3-8-4-1 (the "Vote Test") (collectively, the "Challenged Provisions"). (Compl. ¶¶ 94-99.)

Factual and Procedural Background

Nearly 40 years ago, Indiana enacted legislation that quadrupled its requirements for Independents and Minor Parties to qualify for and retain ballot access, thus adopting the Signature Requirement and Vote Test challenged here. Shortly after the Signature Requirement took effect, several voters, candidates, and a minor political party filed a lawsuit to challenge its constitutionality. *See Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985) (Posner, J.). This Court upheld the Signature Requirement under the deferential standard then applicable, *see id.* at 1173-75, but Judge Posner observed that "Indiana would be in trouble" if heightened scrutiny applied because the state had not asserted any interest to justify its decision to quadruple the requirement. *See id.* at 1173. Judge Posner suggested, based on the failure of any candidate to comply with the new

requirement in 1984, that it "will eliminate all minor parties" such that Indiana's ballot will be "completely closed" to them." *Id.* (citation omitted). "[O]nly time will tell," Judge Posner observed.

Time has now told. No Independent or Minor Party candidate has completed a successful statewide petition drive in Indiana in 23 years and counting. As predicted, Indiana's ballot is, for practical purposes, "completely closed" to these candidates and the voters who support them. *Hall*, 766 F.2d at 1173.

In this case Plaintiff-Appellants present the constitutional challenge that Judge Posner apparently anticipated in *Hall*. Since that case was decided, the Supreme Court has made clear that a more exacting standard of review applies, pursuant to which courts must conduct a fact-intensive analysis of the burdens imposed by a challenged restriction and weigh them against the strength and legitimacy of the state interests asserted as justification for the burdens before ruling on the constitutionality of the restriction. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). This "*Anderson-Burdick*" framework expressly forbids courts from employing the "litmus test" analyses on which *Hall* relied. *See Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020); *but see Hall*, 766 F.2d at 1175 (reasoning that "the lawfulness of [the Signature Requirement] follows *a fortiori* from the decisions upholding higher requirements.").

Here, Plaintiff-Appellants have presented a comprehensive evidentiary record demonstrating the panoply of increasingly severe and unequal burdens the Challenged Provisions have imposed on Indiana's Independent and Minor Party voters, candidates and political parties since they took effect four decades ago – not least of which is the staggering cost of complying with them, which now approaches $500,000 or more. Not only does the record establish that no state interest justifies these burdens, but also, unlike *Hall*, 766 F.2d at 1176, it includes affirmative,

uncontroverted evidence that Indiana's quadrupled Signature Requirement and Vote Test were never intended to further any such interest. Further, the record here establishes that the Challenged Provisions are more restrictive than necessary – by several orders of magnitude – to protect any compelling or legitimate state interest, and certain provisions do not protect any legitimate state interest at all. Consequently, the Challenged Provisions cannot withstand *Anderson-Burdick* scrutiny. They are unconstitutional as applied.

Overview of Indiana Election Code

Under Indiana law, Independent or Minor Party candidates qualify for the ballot only if: (1) they submit nomination petitions signed by eligible voters equal in number to 2 percent of the total vote for Secretary of State in the prior election, *see* I.C. 3-8-6-3 (the "Signature Requirement"); and (2) the voters sign the paper petitions in person, by hand, on a petition form separated by the voters' county of residence, and the petitions are timely submitted to the appropriate county board of election, of which there are 92, *see* I.C. 3-8-6-6, 3-8-6-10(a) (the "Petitioning Procedure"), on or before June 30 of the election year in which the candidates run. *See* I.C. 3-8-6-10(b) (the "Filing Deadline"). A new party that successfully qualifies may retain that qualification only if it runs a candidate for Secretary of State who qualifies for the ballot and then receives at least 2 percent of the total votes cast in that race. *See* I.C. 3-8-4-1 (the "Vote Test"). Because Indiana has not adopted a ballot retention test that applies in presidential election cycles, it is impossible for a new party formed in such years to remain ballot-qualified. *See id.* Further, Indiana does not provide *any* procedure by which Independent candidates can retain ballot access, even if they comply with the Vote Test. Therefore, an incumbent Independent who wins election to office still must petition for ballot access in the next election.

Independents and Minor Parties must bear the entire expense of complying with the foregoing provisions. That includes the cost of printing the thousands of petition pages necessary to conduct a statewide petition drive and every other expense associated therewith.

By contrast, Major Parties in Indiana – the Republicans and Democrats – select their nominees by means of taxpayer-funded primary elections. *See* I.C. 3-10-1-2; IC 3-11-6-1; IC 3-11-6-9; IC 3-11-6.5-2. Local elections officials prepare the Major Parties' primary election returns and transmit them electronically to state elections officials via a computerized system established by the state. IC 3-10-1-33; *see* IC 3-7-26.3 (establishing computerized statewide voter registration list). State officials then canvass the votes and tabulate the results. IC 3-10-1-34. The candidate of a political party receiving the highest vote total for each office is the party's nominee for that office, IC 3-8-7-1, and such nominees are placed on the general election ballot automatically. IC 3-8-7-25(1). Neither the major party candidates nor the parties themselves incur any expense in connection with the candidates' placement on the general election ballot.

Proceedings Before the District Court

Plaintiff-Appellants' Complaint asserts two claims. In Count I, Plaintiff-Appellants assert that the Challenged Provisions, as applied separately and in combination with one another, violate their First Amendment rights. (Compl. ¶¶ 94-97.) Count II asserts that the Challenged Provisions, as applied separately and in combination with one another, violate Plaintiff-Appellants' right to Equal Protection of the law. (*Id.* ¶¶ 98-99.) Plaintiff-Appellants request that the District Court declare the Challenged Provisions unconstitutional as applied separately and in combination with one another, and that the District Court enjoin enforcement of the Challenged Provisions as applied to Plaintiff-Appellants. (*Id.* ¶ 100.)

The Secretary moved to dismiss Plaintiff-Appellants' claims pursuant to Rule 12(b)(6). (App. at 13.) Relying on *Hall*, the Secretary argued that "controlling law so completely forestalls recovery that, even taking Plaintiffs' allegations as true, no relief can be granted." (App. at 14.) The District Court rejected this "audacious" argument, explaining that *Hall* itself "left open the possibility that the two percent requirement, then new, would eventually prove unduly restrictive." (App. at 14, 15 (citation omitted).) The District Court further observed that "[b]oth the facts and the law have changed" in the 37 (now 38) years since *Hall* was decided. (App. at 16.) And the District Court observed that Plaintiff-Appellants assert an as-applied in combination claim, whereas *Hall* only addressed a challenge to the Signature Requirement itself. (App. at 16.) Therefore, the District Court concluded, "*Hall* does not govern this claim." (App. at 16.) The District Court thus denied the Secretary's motion, explaining that "[i]t is far too early for the Court to say that no relief is possible on the facts as alleged." (App. at 16.)

The parties proceeded to take discovery. The Secretary disclosed only one witness – Johnathan Bradley King, its designee pursuant to Rule 30(b)(6), and Plaintiff-Appellants deposed him in that capacity. (ECF No. 51-5.) The Secretary did not take any depositions. The parties thus proceeded to the filing of dispositive motions and, on May 8, 2023, Plaintiff-Appellants filed their Motion for Summary Judgment. (ECF No. 60.)

This Court has repeatedly observed that "summary judgment is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Johnson v. Cambridge Industries, Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (citation and internal quotation marks omitted). Plaintiff-Appellants complied with that directive by filing 17 declarations in support of their Motion, including: ECF No. 60-2 ("Brand Decl."); ECF No. 60-3 ("Buchanan Decl."); ECF No. 60-4 ("Harper Decl."); ECF No. 60-5

("Hawkins Decl."); ECF No. 60-6 ("Kafoury Decl."); ECF No. 60-7 ("McMahon Decl."); ECF No. 60-8 ("McReynolds Decl."); ECF No. 60-9 ("Muehlhausen Decl."); ECF No. 60-10 ("Redpath Decl."); ECF No. 60-11 ("Rutherford Decl."); ECF No. 60-12 ("Stein Decl."); ECF No. 60-13 ("Tucker Decl."); ECF No. 60-14 ("Verney Decl."); ECF No. 60-15 ("Wetterer Decl."); ECF No. 60-16 ("Winger Decl."); ECF No. 60-17 ("Wolfe Decl."); and ECF No. 60-18 ("Tedards Decl."). Based on this uncontroverted record evidence, Plaintiff-Appellants asserted 35 Material Facts Not in Dispute as additional support for their Motion. (ECF No. 60 at 4-11 ("SMF").)

Plaintiff-Appellants' material facts – the truth of which the Secretary expressly admits (ECF No. 65 at 4 ("Defendants accept the statement of the facts as laid out by Plaintiffs.")) – conclusively establish the following:[1]

The Challenged Provisions Impose Severe Burdens

- No Independent or Minor Party candidate has completed a successful statewide Nomination Petition drive in Indiana since 2000;
- Only eight successful statewide Nomination Petition drives have been completed in Indiana by Independent or Minor Party candidates since 1984;
- The only statewide candidates who have appeared on Indiana's general election ballot since 2000 have been candidates of the Democratic Party, the Republican Party, or the Libertarian Party;
- Volunteer petition drives cannot succeed when states require as many signatures as Indiana's current Signature Requirement;
- The last candidate to succeed in a statewide nomination petition drive in Indiana was Pat Buchanan, running as an Independent candidate for President in 2000;
- The cost of Mr. Buchanan's 2000 nomination petition drive was more than $350,000. Mr. Buchanan's campaign could not have afforded the cost of the Indiana petition drive were it not assured of millions of dollars in federal matching funds;

[1] The evidence establishing these facts is cited in Plaintiff-Appellants' Statement of Material Facts. (ECF No. 61 at 4-11.)

- The Green Party Presidential candidate, Ralph Nader, attempted a statewide nomination petition drive in Indiana in 2000 but failed;

- The campaign of the Green Party Presidential nominee in 2016, Jill Stein, determined that it could not mount a petition drive in Indiana because the cost of complying with the Indiana nomination petition requirements was prohibitive;

- The campaign of the Green Party Presidential nominee in 2020, Howie Hawkins, determined that it could not mount a petition drive in Indiana because the cost of complying with the Indiana nomination petition requirements was prohibitive;

- Two petitioning firms provided proposals to the Green Party for a statewide nomination petition drive for the 2022 election cycle. The cost estimates were $465,345 and $565,750;

- Although the Libertarian Party has retained its ballot-qualified status since 1994, the imperative that the Party must meet the 2-percent vote test in every race for Secretary of State to do so distorts its political priorities, its fund raising and budgetary priorities and its electoral strategy. It hinders its ability to grow and develop as a party and restricts its ability to promote its platform and build support among the electorate;

- If the Libertarian Party loses its status as a ballot-qualified party, the Party will be unable to execute a successful nomination petition drive to re-qualify because the cost of doing so is prohibitive;

- An Independent or Minor Party candidate who qualifies for the ballot by Nomination Petition in a Presidential election year does not enable the Minor Party to retain that qualification for the next election cycle;

- Indiana provides no procedure whereby an Independent candidate can ever retain ballot qualification in Indiana;

The Challenged Provisions Impose Unequal Burdens

- Indiana taxpayer funds are used to pay for the administration of and supplies and equipment used in Major Party primaries, with funds raised through local property taxes and funds appropriated by the General Assembly;

- In the 2020 election cycle, public funds totaling $14,676,849.66 were expended by Indiana to support the Democratic and Republican primaries;

- Major Party candidates appear on the ballot automatically once they are nominated in taxpayer-funded primaries, and neither the candidates nor the Major Parties need expend any funds or resources to ensure their ballot placement;

- Indiana does not provide public funding to pay for any costs associated with an Independent or Minor Party candidate's efforts to comply with Indiana's Nomination Petition procedures;

The State Interests Asserted by the Secretary Do Not Justify the Burdens Imposed by the Challenged Provisions

- When measured as a percentage of the total vote for President in 2020, Indiana's 2024 signature requirement for independent and minor party Presidential candidates is higher than all other states, except California and Wyoming;

- In the history of American elections, no state which has imposed a requirement of more than 5000 signatures on Independent or Minor Party candidates for President has ever had more than eight candidates on the general election ballot, with the exception of New York, which had nine in 1980 and nine in 1996;

- In the history of American elections, no state which has imposed a requirement of more than 5000 signatures on independent or minor party candidates for Governor or Senator has ever had more than eight candidates on the general election ballot, except for New York, which had ten candidates for Governor in 1998;

- States frequently accommodate more than eight candidates on their Presidential primary ballots. In 2016, the Republican Party's Presidential primary ballot included more than ten candidates in twenty-one states;

- In 2020, the Democratic Party's Presidential primary ballot included more than ten candidates in nine states;

- Over the twelve Presidential election cycles that Indiana's 0.5 percent signature requirement was in effect (1936 through 1980), the signature requirements fluctuated between 6,642 and 8,863, and the number of candidates that appeared on Indiana's general election ballot fluctuated between four and six, with one exception in 1980 when there were seven;

- Over the last five Presidential election cycles (2004-2020), the number of candidates that have appeared on Indiana's general election ballot has been frozen at three;

- In 1980, legislation was introduced to quadruple Indiana's ballot access requirements for Independent and Minor Party candidates. At the time, to qualify for the ballot Indiana required such candidates to submit nomination petitions signed by eligible voters equal in number to 0.5 percent of the vote cast for Secretary of State in their districts in the preceding election for that office. Minor party candidates for Secretary of State could qualify their party to retain ballot access if they received votes equal in number to 0.5 percent of the vote cast for that office. The legislation would increase both requirements to 2 percent of the votes cast for Secretary of State;

- The legislation was introduced as House Bill 1159 by State Representative Richard Bell, a Democrat;
- The bill was enacted virtually without debate, to settle scores, based on occurrences in a local mayoral election;
- No Representative mentioned a regulatory interest that the legislation was intended to protect or identified any reason why it should apply to statewide, congressional and legislative races;
- The Secretary of State "had no role in the passage of [this] statute, and has no direct knowledge of the intention behind [its] passage.";
- Indiana's June 30 filing deadline is earlier than the deadline in all but six other states;
- Indiana's June 30 filing deadline is much earlier than Indiana's filing deadline was for most of the State's history;
- In 2018, sixteen states and D.C. had August or September filing deadlines for statewide independent candidates, with no problems reported;
- Indiana is one of only four states in which Presidential candidate Ralph Nader, who placed third in the 2000, 2004, and 2008 Presidential elections, never qualified for the ballot;
- The other three states in which Ralph Nader never qualified for the ballot, Georgia, North Carolina, and Oklahoma, have all eased their Presidential ballot access requirements since he last ran.

Plaintiff-Appellants thus presented the District Court with the facts and evidence necessary to support their claims, as set forth more fully below. *See infra* Part I.

The Secretary, by contrast, failed to provide the District Court with any factual or evidentiary basis to enter judgment in his favor. The Secretary expressly conceded the truth of all material facts asserted by Plaintiffs, (ECF No. 65 at 8), but conspicuously failed to address those facts or explain why they are insufficient to support Plaintiff-Appellants' claims. The Secretary completely disregarded Plaintiff-Appellants' evidence with the exception of a single declaration that he mischaracterized as "opinion" rather than the factual testimony of a competent first-hand witness. (ECF No. 65 at 16.) Further, the Secretary did not assert a single material fact in support

of his own Motion, (ECF No. 65 at 8), and submitted almost no admissible evidence. (ECF No. 64 at 3.) In short, the Secretary asked the District Court to deny Plaintiff-Appellants' Motion and grant his on the basis of a nearly fact-free, evidence-free submission. The Secretary thus relied almost exclusively on assertions made without citation to specific facts and without evidentiary support. But this Court has repeatedly emphasized that "conclusory statements, not grounded in specific facts, are not sufficient to avoid summary judgment." *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 726 (7th Cir. 2004) (citation omitted). "Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of truth of the matter asserted." *Id.* (citation and footnote omitted). Plaintiff-Appellants satisfied this demand; the Secretary did not.

The District Court's Opinion and Judgment

In an abrupt reversal from the position it correctly took at the motion to dismiss stage, (App. at 16), the District Court concluded at summary judgment that "precedent compels this Court to conclude" that the Challenged Provisions are constitutional. (App. at 10.) It did so with only a passing reference to the factual and evidentiary record. (App. at 9.) In fact, the District Court expressly declined to conduct the "fact-intensive" analysis and "careful balancing" it previously acknowledged was required under Supreme Court and Seventh Circuit precedent, (*compare* App. at 10-11 *with* App. at 14-16), and instead relied on *Hall* and other cases to support its conclusion that the Signature Requirement is necessarily constitutional here, no matter what the facts establish. (App. at 10-11.) The District Court did not even address Plaintiff-Appellants' claim that the Challenged Provisions are unconstitutional as applied in combination. It entered its Order and Judgment granting summary judgment for the Secretary on August 14, 2023. (ECF Nos. 70, 71.) Plaintiff-Appellants appeal from that Order and Judgment.

SUMMARY OF THE ARGUMENT

This case comes to the Court on the basis of a record that is truly uncontested. The Secretary expressly concedes the truth of the material facts that Plaintiff-Appellants assert, and the Secretary has chosen to disregard rather than contest the evidence that Plaintiff-Appellants submitted. The Secretary also asserts no material facts and submitted almost no admissible evidence. The facts and evidence in the record are therefore genuinely undisputed, and they conclusively establish that the Challenged Provisions impose severe and unequal burdens as applied separately and in combination with one another. Plaintiff-Appellants have also proven that the Challenged Provisions are far more severe than necessary to further any legitimate or compelling state interest, and that certain provisions further no legitimate interest at all.

The District Court nonetheless granted summary judgment for the Secretary, but only because it did not address the comprehensive factual and evidentiary record that Plaintiff-Appellants developed, nor the complete lack of any factual basis that could support judgment as a matter of law for the Secretary. Indeed, the District Court expressly declined to perform the analysis required under the *Anderson-Burdick* framework, in direct violation of Supreme Court and Seventh Circuit precedent. This was error. The District Court should be reversed.

STANDARD OF REVIEW

This Court reviews a district court's entry of summary judgment *de novo* and draws all reasonable inferences in favor of the nonmoving parties. *See Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006) (citation omitted). Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 772 (7th Cir. 1997)

(quoting Fed. R. Civ. P. 56(c)). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the party opposing the motion and draw all justifiable inferences in favor of that party. *Rednour*, 108 F.3d at 772.

ARGUMENT

I. The Challenged Provisions Cannot Withstand *Anderson-Burdick* Scrutiny Because the Undisputed Facts Demonstrate That They Impose Severe and Unequal Burdens That Are Not Justified by Any Compelling or Legitimate State Interest.

The uncontroverted evidentiary record in this case conclusively establishes that the Challenged Provisions cannot withstand scrutiny under the *Anderson-Burdick* analytic framework. *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. The Challenged Provisions impose severe and unequal burdens on Plaintiff-Appellants' rights as voters, candidates and political parties, and they are not narrowly tailored to further any compelling or legitimate state interest. The Challenged Provisions are therefore unconstitutional as applied.

A. The Undisputed Facts Establish That the Challenged Provisions Impose Severe Burdens.

Under the first step in the *Anderson-Burdick* analysis, the Court must consider the "character and magnitude" of the burdens the Challenged Provisions impose. *Anderson*, 460 U.S. at 789. "Much of the action takes place" at this step, because the severity of the burden imposed determines whether strict scrutiny or a less demanding level of review applies. *Stone v. Bd. of Election Commissioners*, 750 F.3d 678, 681 (7th Cir. 2014) (citation omitted).

In *Lee*, this Court measured the severity of the burden imposed by Illinois's ballot access laws "by comparison to the ballot access requirements in the other 49 states [and] by the stifling affect they have had on Independent [and new partisan] candidacies since their inception…." *Lee*, 463 F.3d at 768. Like the provisions struck down in *Lee*, the Challenged Provisions here "fall[] on the 'severe' end of the sliding scale" under both metrics.

Indiana's Signature Requirement, as applied to candidates for statewide office in 2024, translates to 36,943 valid signatures. See I.C. 3-8-6-3. That figure is substantially lower than it has been in recent years. In 2022, for example, the Signature Requirement was 44,935 valid signatures. (Compl. ¶ 68.) But even the lower 2024 Signature Requirement places Indiana's ballot access requirements among the most restrictive in the nation: as applied to presidential candidates, only three states impose a higher requirement – California, Texas and New York – and they, unlike Indiana, are three of the four most populous states in the nation. *See* Winger Decl., Ex. C. Further, when measured as a percentage of the total vote in the 2020 presidential election, Indiana's 2024 Signature Requirement is higher than every other state's except California and Wyoming. *See* Winger Decl. ¶ 13. The Signature Requirement, when measured in comparison with those of other states, falls on the severe end of the scale. *See Lee*, 463 F.3d at 768.

The Signature Requirement is also severe due to its "stifling effect" on new partisan and Independent candidacies. It is undisputed that no such candidate has complied with the Signature Requirement in 23 years and counting. (SMF #1.) That is "powerful evidence" that the burden it imposes is severe. *Cf. Stone*, 750 F.3d at 683 (finding nine candidates' compliance with a signature requirement in a single election "powerful evidence" that the burden imposed was not severe). As the Court explained, "[w]hat is ultimately important is not the absolute or relative number of signatures required but whether a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot." *Id*. at 682 (citation and quotation marks omitted). When the Court struck down the provisions challenged in *Lee*, for example, it emphasized "the importance of the historical record to the constitutional equation," and thus relied heavily on the "complete exclusion" of Independent candidates from Illinois' ballot in the preceding 25 years to support its finding of a severe burden. *Lee*, 463 F.3d at 770. Here, the

uncontested facts establish the complete exclusion of new partisan and Independent candidates from Indiana's statewide ballot for the last 23 years – a nearly identical length of time. (SMF #1). As in *Lee*, therefore, the historical record in this case establishes that the Signature Requirement imposes a severe burden. *See Lee*, 463 F.3d at 769-70 (citing *Storer*, 415 U.S. at 742).

When plaintiffs challenge election laws as applied in combination, as Plaintiff-Appellants do here, courts "are required to evaluate challenged ballot access restrictions together, not individually, and assess their combined effect on voters' and candidates' political association rights." *Id.*, F.3d at 770 (citing *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)). Here, Indiana's early Filing Deadline compounds the already-severe burden imposed by the Signature Requirement. The June 30 Filing Deadline is earlier than that of all but six other states, and it is more than a month earlier than the median deadline for all 50 states. (SMF #32); *see* Winger Decl. ¶ 15. The Filing Deadline, although not the earliest in the nation, is nonetheless on the severe end of the scale when measured in comparison with other states. *See Lee*, 463 F.3d at 768.

The uncontroverted evidence in the record supports the common-sense conclusion that Indiana's early Filing Deadline makes its high Signature Requirement even more difficult to meet. The last statewide candidate to qualify for Indiana's ballot by petition, presidential Independent Patrick Buchanan in 2000, was under extreme time pressure to comply with the Filing Deadline, even though at that time it was July 15 – two weeks later than it is now. *See* Buchanan Decl. ¶¶ 5-11. As a result, Buchanan had to dedicate his entire campaign apparatus and resources to the effort until it was complete, which prevented him from dedicating time and resources to ballot access efforts in other states or even to his actual campaign for election. *See id.*; *see also id.* at ¶¶ 14, 16-18. Indiana's early Filing Deadline placed similar constraints on the last statewide candidate to qualify before Buchanan – the Reform Party's 1996 presidential nominee Ross Perot –

notwithstanding the virtually unlimited resources available to his campaign as a self-financed billionaire. *See* Verney Decl. ¶¶ 9-10, 19-20.

The heavy burdens imposed by the Signature Requirement and Filing Deadline are exacerbated by Indiana's laborious and inefficient 134-year-old Petitioning Procedure. *See* I.C. 3-8-6-6, 3-8-6-10(a). As in 1889, when Indiana first started regulating access to the ballot, new partisan and Independent candidates must obtain voters' signatures in person, by hand, on paper nomination petitions, which must be separated by voters' county of residence and submitted to 92 different county boards of election. *See id*. That procedure may have been adequate as a means of demonstrating the requisite modicum of support in 1889, when Indiana's statewide signature requirement amounted to only 500 signatures, but it is grossly inadequate to the task in Indiana's recent election cycles, when the Signature Requirement has translated to approximately 35,000-45,000 signatures.

When petition circulators obtain a voter's signature, they have no way to verify that the voter is eligible to sign the petition and that the signature is valid. As a result, a substantial percentage of the total signatures that petitioners obtain are invalidated due to technical defects such as incorrect or omitted information, information signed on the wrong line, mismatches between a voter's current and registered addresses, or simply because a voter's handwriting is illegible. *See* Kafoury Decl. ¶ 8; Muehlhausen Decl. ¶ 14; Tucker Decl. ¶ 8; Verney Decl. ¶ 7. To ensure compliance with the Signature Requirement, therefore, it is generally necessary to exceed it by at least 50 percent. *See* Kafoury Decl. ¶ 8; Buchanan Decl. ¶ 4; Redpath Decl. ¶ 8; Tucker Decl. ¶ 8; Verney Decl. ¶ 7. In effect, the inadequacy of the Petitioning Procedure increases the Signature Requirement – which is already severe standing alone – by half as much again.

Moreover, under the best of circumstances, collecting signatures by hand is inherently time-consuming, labor-intensive and expensive. *See* Muehlhausen Decl. ¶ 14; Kafoury Decl. ¶¶ 9-10; Redpath Decl. ¶¶ 8-13; Tucker Decl. ¶¶ 9-10. Voters are often unwilling to stop in public and provide their signatures and personal information to an unknown petition circulator, even if they support a candidate's right to participate in an election. *See* Muehlhausen Decl. ¶ 15. Other potential signers may be confrontational, threatening or abusive. *See* Kafoury Decl. ¶ 10. Additionally, political adversaries or unscrupulous petition circulators can sabotage paper nomination petitions by deliberately signing ineligible or fraudulent names. *See* Kafoury Decl. ¶ 17. Local officials and property owners also frequently force petition circulators to relocate, losing valuable time in the process, even when they are engaged in First Amendment protected conduct. *See* Tucker Decl. ¶ 10. All of this makes petitioning a physically challenging and mentally taxing activity that few people are able to do successfully. *See* Kafoury Decl. ¶¶ 9-10. Furthermore, those who have disabilities, such as Plaintiff-Appellant Brand, who is legally blind, or those who require the use of a wheelchair, are at an extreme disadvantage – if they are able to petition at all. *See* Brand Decl. ¶ 14; Wolfe Decl. ¶ 14.

Petitioning is especially time-consuming and difficult in Indiana due to its unusual requirement that petitions be separated by voters' county of residence and submitted to 92 different county boards of voter registration. *See* Buchanan Decl. ¶¶ 5-7; Verney Decl. ¶ 13; Kafoury Decl. ¶ 11. This dramatically increases the burden of petitioning in Indiana as compared to the great majority of states that impose no such requirement. *See* Buchanan Decl. ¶ 8; Kafoury Decl. ¶ 7; Redpath Decl. ¶¶ 8-13; Verney Decl. ¶ 13. To conduct a statewide petition drive in Indiana, new partisan and Independent candidates must circulate multiple copies of the same petition – a different form for each county in which voters reside – throughout the state, then retrieve, separate

by county and deliver thousands of pages of petitions to 92 different locations statewide. Such an effort strains the resources of the most well-funded campaigns, and it is a practical impossibility for non-wealthy grassroots campaigns that must rely on volunteers. (SMF ## 9-10) As set forth below, *see infra* at Part I.B, the cost of conducting a statewide petition drive in 2022 ranged from $465,000 to $565,000. (SMF #11.)

The Vote Test adds yet another burden to new parties seeking to become ballot-qualified in Indiana, because it is measured as a percentage of the vote for Secretary of State, and the office of Secretary of State is only elected every four years, in non-presidential election cycles. *See* IC 3-8-4-1. That makes it impossible, under Indiana law, to form a new political party and retain ballot access in presidential election years. Furthermore, the Vote Test does not apply to Independent candidates at all. That make it impossible, under Indiana law, for an Independent candidate to remain ballot-qualified no matter how many votes the candidate receives. (SMF #5.) An incumbent Independent who wins election to office is still required to petition for ballot access to run for reelection. *See id*.

The Vote Test also burdens unqualified new parties and ballot-qualified Minor Parties by compelling them to prioritize the election for Secretary of State above all others, because that is the only election by which they can obtain or retain ballot-qualified status under Indiana law. This distorts the parties' political, electoral and financial priorities. It obliges them to redirect their resources away from races for higher-profile offices that present the parties' best opportunity to grow and build support among the electorate, and toward a race for a largely administrative office that garners little attention among the electorate. (SMF #12); *see* McMahon Decl. ¶¶ 15-26; Rutherford Decl. ¶¶ 7-10; Wolfe Decl. ¶¶ 5, 12.

B. The Undisputed Facts Establish That the Challenged Provisions Impose Unequal Burdens.

Indiana's Major Parties and their candidates and voters do not suffer any of the foregoing burdens. The Challenged Provisions do not impact them at all. Instead, Major Parties select their nominees by means of taxpayer-funded primary elections. (SMF #15.) Taxpayer funds pay for every aspect of the Major Parties' primary elections, down to the last paper clip. *Id*. In the 2020 election cycle, Indiana spent $14,676,849.66 in taxpayer funds on the Major Parties' primary elections – an expenditure that was typical of recent election cycles. (SMF #16). Once the Major Parties select their nominees, the candidates appear on Indiana's general election ballot automatically. (SMF #17.) Neither the candidates nor the Major Parties incur any expense in connection with their candidates' qualification for Indiana's general election ballot. (SMF #18.)

New partisan and Independent candidates, by contrast, must bear the entire cost of complying with the Challenged Procedures – Indiana does not even provide them with the petitions they must circulate. New partisan and Independent candidates therefore must print or photocopy the thousands of petition pages they need to complete a statewide petition drive at their own expense. That expense, however, is trivial compared to the total cost of the petition drive itself.

The uncontested evidence demonstrates that volunteer petition drives for statewide candidates have rarely succeeded, if ever, in the nearly 40 years since Indiana quadrupled the Signature Requirement in 1984. (SMF #8,14); *see* Kafoury Decl. ¶¶ 7-11; Redpath Decl. ¶ 9; Verney Decl. ¶ 10; Wetterer Decl. ¶ 8. No statewide petition drive – volunteer or paid – has succeeded in the last 23 years and counting. (SMF #1.) The last successful statewide petition drive, for the Reform Party's Patrick Buchanan in 2000, cost more than $350,000 and was possible only because Buchanan qualified for millions of dollars in public matching funds and had a veritable army of paid petition circulators working on it. (SMF #7); *see* Buchanan Decl. ¶ 13. Similarly, the Reform Party's successful statewide petition drive in 1996 was possible only because its

presidential candidate Ross Perot was a billionaire who spent $11-$12 million on his petition drives nationwide, a substantial portion of which funded his petition drive in Indiana. *See* Verney Decl. ¶¶ 4, 15, 18.

More than two decades later, the cost of a statewide petition drive has only increased. The uncontested evidence demonstrates that the cost in 2022 ranged from $465,000 to $565,000. (SMF #11); *see* Wetterer Decl. ¶¶ 5-6. Such costs are staggering. They are also insurmountable for non-wealthy candidates and parties, including Plaintiff-Appellants. (SMF ##7-10, 13); *see* McMahon Decl. ¶¶ 31-34; Brand Decl. ¶¶ 8-9; see also Kafoury Decl. ¶ 19; Stein Decl. ¶ 9; Hawkins Decl. ¶ 11. The Challenged Provisions thus run afoul of *Anderson*, because they restrict Plaintiff-Appellants' participation in Indiana's electoral process based on their economic status. *See Anderson*, 460 U.S. at 793 & n.15. And because every other non-wealthy candidate and party is similarly restricted, the Challenged Provisions "operate to freeze the political status quo." *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

Finally, unlike new parties or qualified Minor Parties, Major Parties need not concern themselves with the Vote Test. Although Major Parties must comply with it to remain ballot-qualified, they are virtually guaranteed to receive 2 percent of the vote simply by running a candidate for any office, including Secretary of State. The distorting effects of the Vote Test thus fall on Minor Parties alone – as does Indiana's failure to adopt *any* test that applies in presidential election cycles. And because the Vote Test does not even apply to Independents, they are unequally burdened in that they have no means under Indiana law to retain ballot access in any election cycle.

C. The Undisputed Facts Establish That the Severe and Unequal Burdens Imposed by the Challenged Provisions Have Devastated Plaintiff-Appellants' Ability to Participate in Indiana's Electoral Process.

INGP is the Indiana state affiliate of the fourth-largest political party in the United States. In Indiana, it remains a nascent grassroots party that has never qualified for the ballot despite making a concerted effort to do so by means of a volunteer petition drive for its candidate for Secretary of State in 2018. *See* Muehlhausen Decl. ¶¶ 6-18. INGP lacks the funds to pay for a successful statewide petition drive and it has no reasonable expectation of raising the funds necessary to do so. *See* Brand. Decl. ¶¶ 8-9; Wetterer Decl. ¶¶ 9-11. Simply put, INGP, like any other non-wealthy new party – has no realistic expectation that it will ever become ballot-qualified under current law. *See id*. Faced with that stark reality, INGP struggles to retain its current members, much less to grow as a party. *See id*. ¶ 9; Tucker Decl. ¶ 3; Muehlhausen Decl. ¶ 4.

Plaintiff LPIN is the Indiana state affiliate of the third largest political party in the nation. It is currently ballot-qualified but it too lacks the funds necessary to conduct a successful statewide petition drive. (SMF #13.) As a result, it must prioritize the election for Secretary of State over all other elections. (SMF #12.) This gravely distorts LPIN's political, electoral and financial priorities and harms its ability to grow as a party and build support among the electorate. *Id*. When the office of Secretary of State is up for election, LPIN diverts all of its time, money and resources to supporting its candidate in that race. *Id*. Rather than recruiting its best candidates for higher-profile offices such as Governor and United States Senator, LPIN must run them for Secretary of State – an election that few voters know or care about. *See* McMahon Decl. ¶¶ 15-19; Rutherford Decl. ¶¶ 6-7. LPIN is nonetheless obliged to pursue these actions because its candidate for Secretary of State must receive at least 2 percent of the vote for LPIN to remain ballot-qualified. *See* McMahon Decl. ¶¶ 15-19. If LPIN loses that status, it has no realistic expectation of qualifying again under current law. (SMF #13.)

The harm caused by the Challenged Provisions ultimately falls upon Indiana voters, including Plaintiff-Appellants, who have been systematically deprived of the opportunity to vote for any new partisan or Independent candidate for statewide office for 23 years and counting. *See* Brand Decl. ¶ 12; Muehlhausen Decl. ¶ 3; Tucker Decl. ¶ 4; Wetterer Decl. ¶ 14; Wolfe Decl. ¶ 3. With rare exceptions in down-ballot races, INGP's members have never had the opportunity to cast a vote for the candidates they support. *See* Brand Decl. ¶ 12; Muehlhausen Decl. ¶ 3; Tucker Decl. ¶ 4; Wetterer Decl. ¶ 14; Wolfe Decl. ¶ 3. The Independent voter Plaintiff-Appellants, including Plaintiff-Appellants Tucker and Muehlhausen, suffer the same injury. *See* Muehlhausen Decl. ¶ 3; Tucker Decl. ¶ 4.

D. The Undisputed Facts Establish That the Challenged Provisions Are Not Narrowly Tailored to Serve Compelling State Interests.

When election laws impose "severe" burdens, as the Challenged Provisions do, they must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (citation and quotation marks omitted). The Challenged Provisions fail that test on multiple grounds. The Secretary has not genuinely asserted that they further any legitimate state interests, and the record contains affirmative, uncontested evidence that they were never intended to do so. (SMF ##19-22.) The Challenged Provisions also are not narrowly tailored. Accordingly, based on the uncontroverted record here, the Challenged Provisions cannot withstand scrutiny under the *Anderson-Burdick* analysis.

1. The Challenged Provisions Are Not Narrowly Tailored.

In the history of American elections, since states began regulating access to the ballot, no state that has imposed a requirement of more than 5,000 signatures for statewide office has ever had more than eight candidates on the ballot for President, United States Senate or Governor, with just three exceptions in New York. (SMF ##24-25); *see* Winger Decl. ¶¶ 6-7. And even in such a

rare instance, Indiana's regulatory interests would not be implicated. *See Williams*, 393 U.S. at 47 (Harlan, J. concurring) (opining that "the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion."). Indeed, many states frequently accommodate more than eight candidates on their presidential primary ballots without problem. (SMF ##26-27); *see* Winger Decl. ¶¶ 8-9. Moreover, the uncontested evidence establishes that Indiana can limit the ballot to fewer than eight candidates with a much lower signature requirement. (SMF #28); *see Hall*, 766 F.2d at 1173 (observing that Indiana's previous 0.5-percent signature requirement had been sufficient to limit ballot access to a "tolerable" number of candidates for at least 40 years). Indeed, Indiana has adequately limited access to its primary ballot by imposing a requirement of just 4,500 signatures. *See* Winger Decl. at ¶ 11.

The Supreme Court has acknowledged that "any fixed percentage requirement is necessarily arbitrary," in that a somewhat lower requirement might suffice as well as the state's chosen requirement. *American Party of Texas v. White*, 415 U.S. 767, 783 (1974). At the same time, however, "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," and consequently, "we have required that States adopt the least drastic means to achieve their ends." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("This requirement is particularly important where restrictions on access to the ballot are involved."). Here, Indiana's Signature Requirement is greater, by orders of magnitude, than necessary to protect its legitimate regulatory interests. It is not narrowly tailored.

Similarly, for most of Indiana's history, the state maintained orderly elections using deadlines that were much later than the current June 30 filing deadline. (SMF #31); *see* Winger Decl. ¶ 14. While a state's choice of deadline may be "arbitrary" in the same sense as its choice of

signature requirement, *see American Party of Texas*, 415 U.S. at 783, the record evidence demonstrates that the June 30 deadline is not necessary to prevent harm to Indiana's electoral processes. And like the Signature Requirement, Indiana's Filing Deadline is also not narrowly tailored. (SMF ##32-33.)

The uncontested evidence also demonstrates that, despite the endemic deficiencies of the Petitioning Procedure, Indiana has not materially updated or improved it in the 134 years since it was first adopted in 1889. Indeed, the Secretary admits that alternative procedures, which would more effectively enable candidates to demonstrate the requisite modicum of support under Indiana law, have never been considered. (King Tr. (ECF No. 51-5 at 68:5 – 70:7); *see* McReynolds Decl. ¶¶ 9-21. The Petitioning Procedure, too, is not narrowly tailored.

Finally, Indiana has never had an overcrowded ballot. (SMF ##28-29.) It did not have an overcrowded ballot prior to 1986, when the current 2-percent Vote Test took effect, nor did it have an overcrowded ballot prior thereto, when the Vote Test was only 0.5 percent. (SMF #28); *see Hall*, 766 F.2d at 1173. Like the Signature Requirement, therefore, the Vote Test is greater, by orders of magnitude, than necessary to protect Indiana's legitimate regulatory interests. Additionally, the Vote Test absolutely prohibits Independent candidates and new parties that form in presidential election years from retaining ballot-qualified status. (SMF #4.)

When Michigan persistently failed to enact procedures by which Independents could qualify for its ballot, the Sixth Circuit declared "in absolute terms, that the Michigan election laws, so far as they foreclose Independent candidates access to the ballot, are unconstitutional." *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984). The Court concluded that Michigan's discriminatory laws served no legitimate state purpose. *See id*. at 606 (citation omitted). The same is true of Indiana's failure to provide Minor Parties with a procedure to retain

ballot access in presidential election cycles and its failure to provide Independents with such a procedure in any election cycle. *See id.* The Vote Test is not narrowly tailored.

2. The Uncontested Evidence Demonstrates That the Current Signature Requirement and Vote Test Were Not Intended to Serve Legitimate State Interests.

The requirement that the Court "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and then "determine the legitimacy and strength of each of those interests" is especially important in this case. *Anderson*, 460 U.S. at 789. In *Hall*, the election official defendants failed to assert any state interest to justify Indiana's newly-quadrupled Signature Requirement – a failure that would have spelled "trouble" but for the deferential standard of review applied in that case. *Hall*, 766 F.2d at 1173. Although the Court upheld the Signature Requirement, it acknowledged that evidence of "invidious intent" could change the analysis. *See id*. at 1176.

The record in this case contains such evidence. Plaintiffs' witness Mitchell V. Harper was an elected member of the Indiana State House when the legislation quadrupling the Signature Requirement and Vote Test was introduced. *See* Harper Decl. ¶¶ 6, 9. Former Rep. Harper was directly involved in the process from the time the legislation was introduced in committee to the debate – or lack thereof – before the full House to final enactment. (SMF ##19-22); *see* Harper Decl. ¶¶ 9-22. According to former Rep. Harper's first-hand, eyewitness account, he "never heard any Representative mention a regulatory interest that the legislation was intended to protect or identify any reason why it should apply to statewide, congressional and legislative races." *Id*. ¶ 29. Instead, former Rep. Harper attests, the legislation "was never intended as anything more than political score settling" precipitated by the presence of an Independent candidate on the ballot in the 1980 mayoral election in Michigan City, Indiana. *Id*. ¶¶ 29, 12-17.

3. Less Burdensome Alternatives Are Available to Protect Indiana's Regulatory Interests.

The historical record establishes that Indiana could adopt a much lower signature requirement and later filing deadline and still protect its legitimate regulatory interests – just as it did for its entire history prior to 1980. Indiana could also reduce the burdens imposed by the Challenged Provisions by updating and improving its 134-year-old Petitioning Procedure. Electronic petitioning platforms are available, which greatly alleviate the administrative burden and costs imposed by Indiana's archaic paper-based procedures. *See* McReynolds Decl. ¶¶ 13-17. Both the District of Columbia and the State of Arizona have adopted such platforms.[2] *See id.* at 25; *see also* Arizona Secretary of State, E-Qual, https://apps.azsos.gov/equal/ (last visited November 14, 2023) (Arizona's web-based petitioning platform). In addition to reducing the burden and cost of using paper nomination petitions, such platforms automatically validate voters' signatures, which would greatly reduce the cost of complying with the Signature Requirement by eliminating the need for candidates to exceed it by 50 percent or more. *See* McReynolds Decl. ¶ 20. Such platforms are also ADA-compliant because they enable blind people to sign without assistance. *See id*. ¶ 21. Finally, the Secretary admits that no state interest is served by requiring that candidates submit nomination petitions directly to county boards of voter registration – they could also submit them directly to the office of the Secretary of State. *See* King Tr. (ECF No. 51-

[2] When the Covid-19 pandemic arose, many states adopted electronic petitioning procedures on short notice, either voluntarily or by court order. *See*, *e.g.*, *Libertarian Party of Il. v. Pritzker*, 455 F. Supp. 3d 738 (N.D. Ill. 2020) (requiring Illinois to adopt accept electronically signed petitions in 2020 election), *aff'd*, *Libertarian Party of Illinois v. Cadigan*, 824 Fed. Appx. 415 (7th Cir. 2020); *Green Party of Md. v. Hogan*, No. 1:20-cv-1253 (D. Md. June 19, 2020); *Goldstein v. Sec. of the Commonwealth*, 142 NE 3d 560 (Mass. 2020). None of these states reported any problems arising as a result of these new procedures. Indiana could do the same here.

5) at 34:15 – 35:13. This, too, would substantially alleviate the burden of complying with the Petitioning Procedure.

II. The District Court Should Be Reversed Because It Made No Attempt to Perform the Fact-Intensive Analysis Required Under the *Anderson-Burdick* Framework.

When the District Court denied the Secretary's motion to dismiss, it observed that Plaintiff-Appellants could carry their burden by presenting facts and evidence demonstrating that the Challenged Provisions are "unduly restrictive" as currently applied. (App. at 15.) It therefore rejected the Secretary's assertion that this Court's 38-year-old decision in *Hall* forecloses Plaintiff-Appellants' claims. (App. at 15-16.) Under Supreme Court and Seventh Circuit precedent, the District Court reasoned, "constitutional claims against ballot access schemes require a 'fact-intensive analysis,'" (App. at 14 (quoting *Gill*, 962 F.3d at 365), and "[b]oth the facts and the law have changed" since *Hall* was decided. (App. at 16.) The District Court thus concluded – correctly – that "*Hall* does not govern" Plaintiff-Appellants' claims. (*Id.*)

At summary judgment, the District Court directly contradicted its own prior Order. It concluded, "just like the court in *Hall*," that "precedent compels this Court to conclude that the burden imposed is not unconstitutional." (*Id.* at 10.) The District Court reached this conclusion with only a passing reference to the undisputed material facts and uncontroverted evidence that Plaintiff-Appellants submitted in support of their claims, which it reduced to a single paragraph that disregards the large majority of the uncontested record. (*Id.* at 9.) More important, the District Court reached its conclusion while expressly declining to conduct the "careful balancing" mandated by the *Anderson-Burdick* analysis. (*Id.* at 10.) This was clear error that requires reversal.

A. The District Court Was Required to Conduct a Fact-Intensive Analysis of the Burdens Imposed by the Challenged Provisions and to Weigh Them Against the State Interests Asserted by the Secretary.

Nearly 45 years ago, the Supreme Court made clear that ballot access cases cannot be decided by applying a "litmus-paper test" that neatly separates unconstitutional statutory schemes from those that pass muster. *Storer v. Brown*, 415 U.S. 724, 730 (1974). Decisions in such cases, the Court explained, are "a matter of degree," and require careful consideration of "the facts and circumstances behind the law." *Id.* (citations omitted). The "inevitable question for judgment" is whether "a reasonably diligent … candidate [can] be expected to satisfy" the statutory requirements, and the answer to that question requires an examination of "past experience." *Id.* at 742 ("it will be one thing if Independent candidates have qualified with some regularity and quite a different matter if they have not"). Consequently, there is no simple rule that can act as a "substitute for the hard judgments that must be made" based on the record in each case. *Id.* at 730.

Time and again, the Supreme Court has reaffirmed that proper adjudication of ballot access cases requires a fact-intensive and fact-specific analysis of each case. As the Court observed, "No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 1616 (2008); *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1989); *Tashjian v. Republican Party of CT.*, 479 U.S. 208, 214 (1986); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986); *Anderson*, 460 U.S. at 789-90; *Clements v. Fashing*, 457 U.S. 957, 963 (1982). This principle is, in short, foundational to the Supreme Court's ballot access jurisprudence.

The Court therefore established the *Anderson-Burdick* framework that now governs constitutional review of ballot access cases. *See Anderson*, 460 U.S. at 789. This framework establishes a "flexible standard," according to which "the rigorousness of our inquiry into the

propriety of a state election law depends upon the extent to which a challenged restriction burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Under this standard, "reasonable, nondiscriminatory restrictions" are subject to less exacting review, whereas laws that imposes "severe" burdens are subject to strict scrutiny. *See id.* (citations omitted). But in every case, "However slight [the] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 128 S.Ct. at 1616 (citation and quotation marks omitted).

Lower courts, including this Court, have duly applied the *Anderson-Burdick* analysis, with its careful focus on the "character and magnitude" of the plaintiff's alleged injury, as balanced against the "precise interests" the state asserts to justify the challenged regulations, the "legitimacy and strength of each of those interests," and the extent to which they "make it necessary" to burden plaintiff's constitutional rights. *Anderson*, 460 U.S. at 789. Courts reviewing ballot access laws therefore must be cognizant not to treat prior cases as determinative of the specific questions of fact and issues of law raised in the particular case before them. Indeed, this Court has expressly recognized that it is "difficult to rely heavily on precedent" in deciding ballot access cases, due to the "great variance among states' schemes." *Nader*, 385 F.3d at 735. Similarly, the Eleventh Circuit has recognized that because the factual record of each case necessarily differs, its own prior decision upholding the constitutionality of a challenged statute does not "foreclose the [plaintiff's] right to present the evidence necessary to undertake" the *Anderson-Burdick* analysis in a new case. *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1984). In sum, in the words of the Ninth Circuit, "the Supreme Court and our sister circuits have emphasized the need for context-specific analysis in ballot access cases." *Arizona Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016) (citations omitted) (rejecting reliance on "strained analogies to past cases.").

B. The District Court Erred by Failing to Conduct the Required Fact-Intensive Analysis of Plaintiff-Appellants' Claims.

This case is materially indistinguishable from *Gill*. *See Gill*, 962 F.3d at 365-66. In *Gill*, the District Court rejected an Independent candidate's challenge to Illinois's ballot access requirements on the ground that the candidate "advanced the same challenges to the same restrictions at issue" in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). *Id.* at 365. The District Court therefore concluded – without addressing the specific facts and record evidence – that it was "bound by *Tripp*." *Id.* This Court reversed. *See id.* at 366. "By relying on *Tripp,* the district court neglected to perform the fact-intensive analysis required for the *Anderson-Burdick* balancing test," this Court concluded. *Id.*

The District Court committed the same error here. It made only passing mention of the specific facts and evidence in this case and made no attempt to identify the burdens the Challenged Provisions impose or determine whether they are severe and unequal. (App. at 9-10.) Nor did the District Court analyze the legitimacy and strength of the interests the Secretary asserted as justification for the burdens imposed. (*Id.* at 10-11.) And finally, the District Court made no attempt to determine whether the Challenged Provisions are sufficiently tailored to protect the asserted interests. (*Id.*)

Instead, the District Court summarily concluded that "precedent compels" it to hold that "the burden imposed [by the Challenged Provisions] is not unconstitutional." (App. at 10.) To justify this conclusion, the District Court cited a Supreme Court decision that upheld Illinois's 25,000-signature requirement and this Court's decision in *Hall*, which "evaluated the same 2% requirement challenged here and came to the same conclusion." (App. at 10 (citing *Norman v. Reed*, 502 U.S. 279, 295 (1992); *Hall*, 766 F.2d at 1175.) The District Court also noted that the Supreme Court had "upheld higher nominating petition requirements" than Indiana's. (App. at 11

(citations omitted).) Like the District Court in *Gill*, however, the District Court here failed to address the facts of the cases it cited, the facts in this case, or whether they "align" sufficiently to justify its reliance on this precedent. *See Gill*, 962 F.3d at 365. The District Court's fact-free comparison of signature requirements, devoid of analysis of the burdens they impose as applied, is a textbook example of the "litmus-test" reasoning that the *Anderson-Burdick* framework prohibits. *See id.* (citation omitted).

Naturally, the facts in this case do not align with those in the cases the District Court cited, most of which are especially unreliable as precedent because they involve another state's statutory scheme entirely. *See Nader*, 385 F.3d at 735. Nor do the facts here align with *Hall*, which did not and could not have addressed the undisputed facts demonstrating that the Challenged Provisions have become severely burdensome and prohibitively expensive in the decades since that case was decided. *See supra* Part I.A-B. And as the District Court itself recognized when it denied the Secretary's motion to dismiss, *Hall* is not dispositive for another reason: Plaintiff-Appellants "bring a challenge based on a combination of statutory requirements, not solely the two percent requirement, and in the Court's balancing analysis it must consider how those requirements act together to burden Plaintiffs' rights." (App. at 16 (citations omitted).)

At the summary judgment stage, however, the District Court expressly declined to conduct the "careful balancing" required under *Anderson-Burdick*. (App. at 10.) It did so "despite the more recent cases from the Seventh Circuit" reaffirming its obligation to do so. (*Id.*) The District Court compounded its error by failing to address Plaintiff-Appellants' as-applied in combination claim entirely. Indeed, except for a single sentence it devoted to upholding the Filing Deadline on the ground that the Supreme Court had upheld an earlier one (App. at 11 (citation omitted)) – another improper litmus test, *see Gill*, 962 F.3d at 365 – the District Court did not acknowledge Plaintiff-

Appellants' claims against any other Challenged Provision, much less did it analyze the Challenged Provisions' "combined effect" as it was required to do. *See Lee*, 463 F.3d at 770 (citing *Nader*, 385 F.3d at 735). The burdens imposed by the Petitioning Procedure and Vote Test are wholly absent from the District Court's discussion. (App. at 9-11.)

All of this was in clear violation of this Court's unequivocal guidance in *Gill*. The District Court simply did not perform the "fact-intensive" analysis or any of the other mandatory steps prescribed by the *Anderson-Burdick* framework. *See Gill*, 962 F.3d at 364-65. As a result, the District Court found nothing "to distinguish this case from precedent," (App. at 11 (citing *Hall*, 766 F.2d at 1173), in direct contradiction of its own prior conclusion that "[b]oth the law and the facts have changed" since *Hall* was decided. (App. at 16.) The District Court's error is crystallized in its mistaken reference to the "lenient standard" that applies to claims challenging the constitutionality of state election laws. (*Id.* at 11.) The Supreme Court has expressly concluded that when such laws impose "severe" burdens, strict scrutiny applies. *See Burdick*, 504 U.S. at 434 (citation omitted). The District Court's assumption that all election laws are subject to a lenient standard of review was clearly erroneous and requires reversal.

III. The District Court Should Be Reversed Because the Secretary Failed to Provide the Factual Basis Required to Support Entry of Summary Judgment in His Favor.

The Secretary manifestly failed to carry his burden at summary judgment. The Secretary failed to assert a single material fact in support of his Motion. (ECF No. 65 at 8.) The Secretary also submitted almost no admissible evidence. (ECF No. 64 at 4.) Further, the Secretary expressly conceded the truth of Plaintiff-Appellants' material facts, which establish that Plaintiff-Appellants – not the Secretary – are entitled to judgment as a matter of law. (*Compare* ECF No. 65 at 8 with ECF No. 61 at 4-10.) Despite conceding the truth of Plaintiff-Appellants' material facts, the Secretary conspicuously failed to address them and disregarded all of Plaintiff-Appellants'

evidence except a single declaration. (ECF No. 65 at 15-16.) The Secretary thus presented the District Court with nothing more than fact- and evidence-free assertions that cannot support entry of summary judgment in his favor. *See Lucas*, 367 F.3d at 727 ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of truth of the matter asserted.").

A. The Secretary Failed to Carry His Burden Because His Motion Is Unsupported by Material Facts or Admissible Evidence.

It is black letter law that "[a] party seeking summary judgment must file and serve a supporting brief … containing the facts: (1) that are potentially determinative of the motion; and (2) as to which the movant contends there is no genuine issue." S.D. Ind. L.R. 56-1(a). Here, the Secretary expressly declined to comply with that rule. (ECF No. 65 at 8.) The Secretary failed to assert a single material fact in support of his Motion, much less to explain why any such fact is potentially determinative of this action. (*See id*.)

Further, when a party opposes summary judgment, the party ordinarily "must set forth *specific* facts showing there is a genuine issue for trial," and if the party fails to do so, "summary judgment, if appropriate, *shall* be entered against the adverse party." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (quoting Fed. R. Civ. P. 56(e)) (emphasis added by Court). That is because a court deciding summary judgment has "one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Id.* (citation omitted). The parties therefore have a "concomitant burden to identify the evidence that will facilitate this assessment." *Id*. Accordingly, when a non-moving party fails to "submit a factual statement in the form called for by the pertinent rule and thereby conceded the movant's version of the facts," this Court has "repeatedly … sustain[ed] the entry of summary judgment" against that party. *Id*. at 922 (collecting cases).

This Court has also recognized, however, that district courts have discretion to overlook a party's "transgression of the local rules." *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013) (citations and brackets omitted). For example, in cases such as this, where Plaintiff-Appellants "bear[] the ultimate burden of persuasion," the Court has excused a defendant's failure to submit a statement of material facts as required by Local Rule 56-1. *See id*. at 1168-69. But even in such a case the Secretary, as the moving party, has the initial burden "to inform the district court why a trial is not necessary," *id*. at 1168, and he must do so in one of two ways. The Secretary must either submit "affirmative evidence that negates an essential element of [Plaintiff-Appellants'] claim[s]," or he must demonstrate that Plaintiff-Appellants' "evidence [was] insufficient to establish an essential element of [their] claim[s]." *Id*. at 1169 (citation omitted). The Secretary failed to carry his burden under either prong of this test.

1. The Secretary Failed to Submit Affirmative Evidence That Negates an Essential Element of Plaintiff-Appellants' Claims.

If the Secretary believed that his Motion negates an essential element of Plaintiff-Appellants' claims, it is unclear how. The Secretary did not even cite *Modrowski* or any other case that applies the same test, much less did he attempt to demonstrate that his Motion satisfies it. Nonetheless, to do so the Secretary was required to submit evidence sufficient to negate Plaintiff-Appellants' claims that the Challenged Provisions impose "severe burdens" on Plaintiffs that "are not justified by any legitimate or compelling state interest" and that they "cause injury to" Plaintiffs' right to Equal Protection. (ECF No. 1 at 25-26, ¶¶ 96, 99.) The scant evidence the Secretary submitted is woefully inadequate to that task.

In the entire "Argument" section of his Motion, the Secretary cites to just one piece of evidence: the affidavit of Jerrold A. Bonnet. (ECF No. 65 at 12-32; ECF No. 64-1 at 1-6.) As an initial matter, this affidavit is inadmissible and should be excluded because the Secretary did not

disclose Mr. Bonnet as a witness.[3] But even if Mr. Bonnet's affidavit were admissible, it plainly fails to provide evidence that negates any element of Plaintiff-Appellants' claims. The first two pages of that affidavit do nothing more than identify Mr. Bonnet and recite provisions of the Indiana Election Code. (ECF No. 64-1 at 1-2.) Further, despite Mr. Bonnet's statement that he has "personal knowledge" of the matters to which he attests, (ECF. No. 64-1 at 1, ¶ 1), the remaining three pages of his affidavit contain multiple statements that are inadmissible as matters of opinion or conclusions of law – not statements of fact. For example, Mr. Bonnet avers:

> "The Challenged Provisions do not create unequal burdens and nothing in the Secretary's discovery responses supports an allegation of unequal burdens." (ECF No. 64-1 at 3, ¶ 10);
>
> "If a candidate or a party does not have the support of the electorate, that candidate or party will have difficulty achieving the Signature Requirement." (*id* at 3, ¶ 16);
>
> "As the Indiana General Assembly has decided the 2% Signature Requirement is needed to protect the State's interest, a lower signature requirement would not suffice." (*id.* at 4, ¶ 18);
>
> States have an inherent interest in requiring an early filing deadline…." (*id.* at 4, ¶ 19);
>
> "The Challenged Provisions … when taken as a whole, do not limit the political participation of voters, candidates, or political parties in Indiana's electoral process." (*id.* at 4, ¶ 21).

These statements may reflect Mr. Bonnet's opinions or conclusions in his capacity as the Secretary's General Counsel, (*id.* at 1, ¶ 2), but they are inadmissible to prove the truth of the matters asserted. *See* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

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[3] The Secretary did not disclose Mr. Bonnet by name as required by Fed. R. Civ. P. 26(a), thus depriving Plaintiff-Appellants' of their right to depose him pursuant to Fed. R. Civ. P. 30. The only disclosure the Secretary made pursuant to Rule 26(a) is that "Representatives from the Secretary of State's office would have discoverable information…." Mr. Bonnet's affidavit is therefore inadmissible under Fed. R. Civ. P. 37(c).

Mr. Bonnet does attest to one alleged fact – that when Indiana quadrupled its signature requirement in 1980, the "change was implemented, in part, to reduce the confusion caused by the 1980 election with eight presidential candidates on the ballot," (ECF No. 64-1 at 3, ¶ 14) – but even if Mr. Bonnet's affidavit were admissible that statement should not be credited for several reasons. First, Mr. Bonnet avers that he has served as the Secretary's General Counsel "since 2005." (*Id.* at 1, ¶ 2.) Therefore, nothing in his affidavit supports the conclusion that he has "personal knowledge" of the reasons Indiana quadrupled the Signature Requirement in 1980. (*Id.* at 1, ¶ 1.) Second, the legislation quadrupling the Signature Requirement was enacted on March 3, 1980 – eight full months before the 1980 presidential election, *see Hall*, 766 F.2d at 1172 – making it impossible that the legislation was adopted in response to any purported "confusion" in that election (not to mention the complete lack of evidence of any such confusion). Finally, during the discovery process, the Secretary repeatedly disavowed any knowledge of the reasons Indiana quadrupled its signature requirement. (*E.g.*, ECF No. 64-2 at 2 ("Defendant is the Secretary of State, not the Indiana General Assembly, had no role in the passage of any statute, and *has no direct knowledge of the intention behind their passage*.") (emphasis added); Dep. Tr. of Johnathan Bradley King (February 13, 2023) (ECF No. 51-5) at 59-6 – 59-7 ("I cannot provide specific information in this regard, but I can provide speculation."). The Secretary is bound by this testimony propounded during the discovery process. He may not disavow any knowledge of the reasons Indiana quadrupled its signature requirement, both in response to an interrogatory and in a Rule 30(b)(6) deposition, then submit evidence from an undisclosed witness that purports to establish the very facts of which he previously claimed ignorance. *See generally*, S. Gensler, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY (2014) ("many courts have held that an organizational party will not be able to add to or alter its position on matters covered in a

Rule 30(b)(6) deposition unless the party can show that the 'new' information was not known or reasonably available at the time of the deposition.") (footnote omitted).

Even if every statement in Mr. Bonnet's affidavit were admissible – and they are not – it would do nothing to negate any element of Plaintiff-Appellants' claims. The affidavit is virtually silent, for example, with respect to the central issue in this case – Plaintiff-Appellants' claim that the Challenged Provisions impose severe and unequal burdens. *See Stone*, 750 F.3d at 681. The only statements in Mr. Bonnet's affidavit that arguably address this claim are the following:

> "The Challenged Provisions … when taken as a whole, do not limit the political participation of voters, candidates, or political parties in Indiana's electoral process." (ECF No. 64-1 at 4, ¶ 21).
>
> "Over the course of the last 130 years, politicians have used the Petitioning Procedure to qualify for ballot access in both state and local elections across Indiana." (*Id.* at 5, ¶ 26).

The first statement is nothing more than a conclusory assertion that the Challenged Provisions are not burdensome. But this Court has repeatedly held that "conclusory statements, not grounded in specific facts, are not sufficient to avoid summary judgment." *Lucas*, 367 F.3d at 726. Mr. Bonnet's conclusion that the Challenged Provisions are not burdensome, which is unsupported by any specific facts, does not negate Plaintiff-Appellants' claim that the burdens are severe and unequal, which is amply supported by competent and detailed evidence. *See id*.

Mr. Bonnet's statement that candidates and parties have complied with the Petitioning Procedure in the past 130 years also fails to negate Plaintiff-Appellants' claim that the Challenged Provisions impose severe and unequal burdens as presently applied. That claim is grounded in the undisputed facts that no statewide petition drive has succeeded in the last 23 years, that volunteer petition drives do not succeed because the resources required are so excessive, and that a successful statewide petition drive costs in excess of $500,000 at present market rates, among others. (SMF

##1,6,7,11,14.) Mr. Bonnet's affidavit does not even acknowledge these facts, much less negate them – nor could it, because the Secretary expressly concedes their truth. (ECF No. 65 at 8.)

Mr. Bonnet's affidavit likewise fails to negate Plaintiff-Appellants' claim that no compelling or legitimate state interest justifies the severe and unequal burdens the Challenged Provisions impose. Mr. Bonnet's affidavit contains no facts that demonstrate the laundry list of state interests the Secretary asserted in the proceedings below is even implicated, (ECF No. 65 at 3-4, 10-11), much less that the Challenged Provisions are sufficiently tailored to serve them. It simply lists those interests and avers that the Secretary "provided" them to Plaintiff-Appellants. (*Id.* at 4-5.)

Federal Courts have repeatedly concluded that states may not defend ballot access requirements by "relying … on generalized and hypothetical interests identified in other cases." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006); *see also Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 403 (8th Cir. 2020); *Reform Party of Allegheny Cty. v. Allegheny Cty. Dept. of Elections*, 174 F.3d 305, 315 (3rd Cir. 1999); *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11th Cir. 1992). The Secretary's Motion typifies this improper approach. The Secretary has simply asserted every conceivable state interest, collectively, as justification for every burden imposed by the Challenged Provisions without making any attempt to demonstrate, by citation to facts or evidence in the record, how any of those asserted interests (assuming they are legitimate) justifies any particular burden on Plaintiff-Appellants' rights. (ECF No. 65 at 14-16); *but see Gill*, 962 F.3d at 364 (citation omitted) (the State must identify the "precise interests" that justify the burdens imposed by its requirements); *see also Crawford*, 553 U.S. at 191 ("However slight [the] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (citation and quotation marks omitted)).

Mr. Bonnet's affidavit fails to remedy this deficiency. With respect to the Signature Requirement, for example, Mr. Bonnet avers that the Indiana General Assembly "has decided [it] is needed to protect the State's interest," then summarily concludes that "a lower signature requirement would not suffice." (ECF No. 64-1 at 4, ¶ 18.) This assertion fails to carry the Secretary's burden on multiple grounds. It does not identify any precise state interest whatsoever, much less show how the Signature Requirement furthers that interest. *See Gill*, 962 F.3d at 364. It presumes that the Signature Requirement is necessary because the Indiana General Assembly has decided it is, even though legislatures can and do enact unconstitutional signature requirements. *See, e.g.*, *Graveline*, 992 F.3d 524, 529, 539 n.3 (6th Cir. 2021) (holding Michigan's 30,000-signature requirement – equivalent to 1 percent of the total vote for governor – unconstitutional). And it does not rebut Plaintiff-Appellants' evidence demonstrating that the Signature Requirement is far more restrictive than necessary to further any legitimate state interest. It is, in short, a "conclusory statement[], not grounded in specific facts, [that is] not sufficient to avoid summary judgment." *Lucas*, 367 F.3d at 726.

Mr. Bonnet's statements relating to the Filing Deadline are similarly deficient. Mr. Bonnet avers, for example, that Indiana needs "adequate time to organize its electoral proceedings," (ECF No. 64-1 at 4, ¶ 19), and that Indiana's county and state-level entities "need time" to perform their regulatory duties. (*Id.* at 5, ¶ 25.) But these statements would be equally true of any filing deadline. In no way do they negate Plaintiff-Appellants' claim that the Filing Deadline is unnecessarily early, nor do they rebut the evidence supporting that claim.

Finally, Mr. Bonnet offers no evidence whatsoever that could negate Plaintiff-Appellants' Equal Protection claims. He merely asserts that "[t]he Challenged Provisions do not create unequal burdens and nothing in the Secretary's discovery responses supports an allegation of unequal

burdens." (ECF No. 64-1 at 3, ¶ 10.) The Secretary's burden, however, is not to demonstrate that his evidence – to the extent it exists – fails to support an Equal Protection violation, but to demonstrate that it negates an essential element of Plaintiff-Appellants' Equal Protection claims. *See Modrowski*, 712 F.3d at 1169. The Secretary cannot carry that burden by summarily denying that the Challenged Provisions impose unequal burdens. *See Lucas*, 367 F.3d at 726.

In sum, Mr. Bonnet's affidavit – even if admissible – fails to negate any element of Plaintiff-Appellants' claims, and it is the only affirmative evidence the Secretary offered in support of his Motion. Therefore, the Secretary failed to make the showing necessary to prevail under the first prong of the *Modrowski* test.

2. The Secretary Failed to Demonstrate That Plaintiffs' Evidence Is Insufficient to Establish an Essential Element of Their Claims.

The Secretary cannot prevail under the second prong of the *Modrowski* test, either, because he made no attempt to demonstrate that Plaintiff-Appellants' evidence is insufficient to establish an essential element of their claims. Plaintiff-Appellants submitted 17 declarations in support of their Motion. (ECF No. 60-1 at 1-2.) The Secretary chose to disregard this evidence entirely, with a single exception. Simply put, the Secretary cannot demonstrate that Plaintiff-Appellants' evidence is insufficient to support their claims without addressing that evidence.

The only piece of Plaintiff-Appellants' evidence that the Secretary attempts to address is the declaration submitted by Mr. Harper, the former Indiana State House member who was present when the legislation that quadrupled the Signature Requirement and the Vote Test was enacted. *See supra* Part I.D.2; (ECF No. 65 at 15-16; ECF No. 60-4 at 1-2, ¶¶ 3,4,6,9). Mr. Harper's declaration supports Plaintiff-Appellants' claims because it tends to prove that the legislation was unnecessary to protect any legitimate state interest and that it was never intended to do so. (ECF No. 60-4 at 5, ¶ 29.) It is therefore probative of the "legitimacy and strength" of the interests the

Secretary asserts as justification for the Challenged Provisions, as well as "the extent to which those interests make it necessary to burden [Plaintiffs'] rights." *Gill*, 962 F.3d at 364 (citation omitted). In particular, Mr. Harper's declaration refutes the Secretary's demonstrably false assertion that Indiana quadrupled the Signature Requirement and Vote Test due to a concern over unsubstantiated "voter confusion" during the 1980 presidential election. (ECF No. 65 at 16.) The Secretary's attack on Mr. Harper's evidence boils down to his assertion that "one legislator's opinion that no compelling state interest was being protected is irrelevant." (ECF No. 65 at 16.) This mischaracterizes Mr. Harper's evidence. Mr. Harper offers factual testimony relating to the process by which the Signature Requirement and Vote Test were enacted, based on his direct participation in that process and as a firsthand witness thereto. Plaintiff-Appellants properly rely on Mr. Harper's evidence to prove the truth of the facts he asserts, and the Secretary's attempt to rebut that evidence by mischaracterizing it as opinion fails.

Furthermore, while Mr. Harper's declaration supports Plaintiff-Appellants' claims, it is by no means the only evidence on which they rely. It is not even the only evidence that demonstrates the Challenged Provisions are more restrictive than necessary to protect any legitimate state interest. Therefore, even if the Secretary were able to rebut Mr. Harper's evidence – and he cannot – the Secretary still could not carry his burden under *Modrowski* because he does not even acknowledge the other 16 declarations on which Plaintiff-Appellants rely, much less attempt to demonstrate that this evidence is insufficient to prove an essential element of Plaintiff-Appellants' claims. *See Modrowski*, 712 F.3d at 1169. The Secretary cannot prevail under either prong of the *Modrowski* test.

* * *

The Secretary's clear failure to satisfy either prong of the *Modrowski* standard cannot be overlooked or excused as a mere technical defect in his position. At the "put up or shut up moment" in this lawsuit, the Secretary was obliged to present the District Court with a factual basis on which it could grant judgment as a matter of law in his favor, *Johnson*, 325 F.3d at 901 (citation omitted), and the Secretary made no attempt to do so. He asserted no facts and almost no admissible evidence in support of his Motion. (ECF No. 65 at 4; ECF No. 64 at 3, ¶ 10.) He expressly conceded all material facts asserted by Plaintiff-Appellants but declined to address them. (ECF No. 65 at 4; ECF No. 64 at 3, ¶ 10.) And he disregarded almost all the evidence Plaintiff-Appellants submitted in support of their motion for summary judgment. Consequently, the record is devoid of any factual basis that could support judgment as a matter of law for the Secretary. The District Court's decision to enter judgment in the Secretary's favor was therefore error. This Court should reverse.

CONCLUSION

For the foregoing reasons, the Order and Judgment of the District Court granting summary judgment to the Secretary should be reversed, and this case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellants complies with the type-volume limit of Fed. R. App. P. 32(a(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 13,584 words.

I certify that the foregoing Brief of Appellant complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief is prepared in Times New Roman 12 Point Font.

/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2023, I caused the foregoing Brief of Appellants to be served electronically, via the Court's CM/ECF system, which will effect service on all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 23-2756

INDIANA GREEN PARTY, LIBERTARIAN PARTY OF INDIANA, JOHN SHEARER, GEORGE WOLFE, DAVID WETTERER, A.B. BRAND, EVAN MCMAHON, MARK RUTHERFORD, ANDREW HORNING, KEN TUCKER and ADAM MUEHLHAUSEN,

Plaintiff-Appellants,

- v. -

DIEGO MORALES,

Defendant-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
AT No. 1:22-CV-00518-JRS-KMB

APPENDIX TO BRIEF OF APPELLANTS

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STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

I hereby certify that all required materials within the scope of Circuit Rule 30(a) and Circuit Rule 30(b) are included in this Appendix.

/s/Oliver B. Hall
Oliver B. Hall

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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INDIANA GREEN PARTY, LIBERTARIAN PARTY OF INDIANA, JOHN SHEARER, GEORGE WOLFE, DAVID WETTERER, A.B. BRAND, EVAN MCMAHON, MARK RUTHERFORD, ANDREW HORNING, KEN TUCKER, ADAM MUEHLHAUSEN, Plaintiffs, v. DIEGO MORALES, in his official capacity as Indiana Secretary of State, Defendant.	)	No. 1:22-cv-00518-JRS-KMB

Final Judgment

Pursuant to the Order also issued this day, judgment is entered in favor of Defendant on all claims. Plaintiffs shall take nothing by their Complaint. This is a **final judgment** under Federal Rule of Civil Procedure 58.

Date: 08/14/2023

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk

BY: Samantha Burmester
Deputy Clerk, U.S. District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA GREEN PARTY, LIBERTARIAN PARTY OF INDIANA, JOHN SHEARER, GEORGE WOLFE, DAVID WETTERER, A.B. BRAND, EVAN MCMAHON, MARK RUTHERFORD, ANDREW HORNING, KEN TUCKER, ADAM MUEHLHAUSEN, Plaintiffs, v. DIEGO MORALES, in his official capacity as Indiana Secretary of State, Defendant.	)	No. 1:22-cv-00518-JRS-KMB

Order on Motion for Summary Judgment

I. Introduction

This is a ballot access case. In Indiana, minor political parties and independent candidates for public office must meet various statutory requirements before being listed on the ballot in state elections. Plaintiffs—the Indiana Green Party, the Libertarian Party of Indiana, various of their officers, and some independent candidates for public office—together bring suit alleging that those requirements as applied violate their First and Fourteenth Amendment rights.

Now before the Court is Plaintiffs' Motion for Summary Judgment. (ECF No. 60).

II. Legal Standard

The legal standard on summary judgment is well established:

> Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Skiba* [*v. Illinois Cent. R.R. Co.*, 884 F.3d 708, 717 (7th Cir. 2018)] (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 [] (1986)). A theory "too divorced from the factual record" does not create a genuine issue of material fact. *Id.* at 721. "Although we construe all facts and make all reasonable inferences in the nonmoving party's favor, the moving party may succeed by showing an absence of evidence to support the non-moving party's claims." *Tyburski v. City of Chicago*, 964 F.3d 590, 597 (7th Cir. 2020).

Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711, 718 (7th Cir. 2021). The Court applies that standard here.

III. Discussion

A. Ballot-Access Law

Ballot access cases are serious.

> Restrictions on access to the ballot burden two distinct and fundamental 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."

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Ordinarily, burdens on fundamental rights are strictly scrutinized, *see, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding poll tax unconstitutional), and, indeed, the Supreme Court once applied strict scrutiny to evaluate burdens on ballot access, *see Storer v. Brown*, 415 U.S. 724, 729 (1974) (citing as examples *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Kramer v. Union Free*

School District, 395 U.S. 621 (1969)), *Munro v. Socialist Workers Party*, 479 U.S. 189, 201 (1986) (Marshall, J., dissenting) (observing that strict scrutiny was the "clear" standard in prior ballot access cases). The Court has gradually moved away from strict scrutiny of ballot access restrictions. *See Hall v. Simcox*, 766 F.2d 1171, 1173 (7th Cir. 1985) (analyzing the trend and noting "uncertainty about the standard"). In *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), for example, the Court upheld a Georgia law requiring prospective independent candidates to have a nominating petition signed by 5% of the electorate in order to be listed on the ballot. The Court did not explain its standard of review; instead it observed that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* at 442. Later cases picked up that observation, *Storer*, 415 U.S. at 732, and expanded it, adding, for instance, that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government. . . . [T]he State's interest in the stability of its political system . . . [is] compelling," *id.* at 736.[1] *See also Anderson v. Celebrezze*, 460 U.S. 780, 788

[1] The Supreme Court has often justified ballot access restrictions by appeal to the purported stability of the two-party system. *See, e.g.*, *Storer*, 415 U.S. at 736 ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) ("[T]he States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party-splintering and excessive factionalism."). But those references may be misplaced.

In The Federalist 10, which is almost invariably cited in judicial discussions of factionalism, *see, e.g.*, *Storer*, 415 U.S. at 736, *Norman*, 502 U.S. at 299–300 (Scalia, J., dissenting),

n.9 (1983) (citing *Jenness* for the proposition that the state has "the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot"). The current test reflects that historical trend

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Timmons, 520 U.S. at 368, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2201 (2023) (Thomas, J., dissenting), Madison warns against the danger of having any one faction in the majority. The Federalist No. 10 (James Madison). He argues that a large, federated republic will be less subject to a tyrannous majority because it will encompass more competing interests, and no one faction will take control. Laws will be better and more impartially considered when passage requires many different interests to concur. In other words, Madison's concern with "factionalism" in The Federalist No. 10 is *exactly the opposite* of the concern about "party-splintering" advanced in *Storer* and cases citing to it. Nor is The Federalist No. 10 unique in its views. The same theme recurs later, in The Federalist No. 51 (James Madison) ("There are but two methods of providing against [the evil of an unjust majority] . . . by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable"), and in George Washington's Farewell Address, where he warned: "[t]he alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is [] a frightful despotism." The Founders, viewing factions as inevitable, wanted at least for there to be many of them, so that organizing a majority would be difficult.

This Court suspects, then, that the Founders would not have countenanced *any* of the various devices by which the modern state assumes responsibility for party organization (with publiclyfunded primary elections), enforces party discipline (with sore-loser laws), or deters independent and third-party candidacies (with the ballot access rules of the sort at issue here). Those devices, of course, have been variously upheld. *See, e.g.*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 212 (1986) (implicit support for publiclyfunded primaries); *Storer*, 415 U.S. at 736 (sore-loser laws); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (write-in ban); *Timmons*, 520 U.S. 351, 354 (1997) (ban on "fusion" candidates).

It bears remembering that for the first hundred years of the nation's history, all ballots were write-in ballots, the voter had unrestricted choice of candidates, and the state exercised no control over party organization. *Burdick*, 504 U.S. at 446 (Kennedy, J., dissenting). The "Australian ballot," introduced as a reform in the late nineteenth century, brought both secret ballots and state control over the names listed on the ballot. (One could, of course, have had one change without the other, but that is not how it happened.) Critics at the time argued that state control over the list of candidates on the ballot impinged on the voters' freedom of choice. Eldon Cobb Evans, Dissertation, *A History of the Australian Ballot System in the United States* at 24–25 (1917); Robert La Follette, *The Adoption of the Australian Ballot in Indiana*, 24 No. 2 Ind. Mag. History 105, 119 (1928). The response? It was (then) so easy to get on the ballot that the restrictions were trivial. It is now perhaps hard to imagine a voting system without two parties wielding state power to entrench their advantages, but a long-historical view reveals there are alternatives.

toward excusing state burdens on ballot access[2]; now, under the so-called *Anderson-Burdick* test, the standard is not strict scrutiny but true balancing. The test directs this Court

> first [to] consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. 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. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Gill v. Scholz, 962 F.3d 360, 364 (7th Cir. 2020) (quoting *Anderson*, 460 U.S. at 789 (1983)). While in principle "the balancing test requires careful analysis of the facts," so it "should 'not be automatic,'" *id.* at 364–65 (quoting *Anderson*, 460 U.S. at 789), the test does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (citing *Munro*, 479 U.S. at 195–196), *see also Tripp v. Scholz*, 872 F.3d 857, 866 (7th Cir. 2017) (the state needs no "particularized showing" of voter confusion, ballot "overcrowding," or the like to rely on those asserted interests). And, in practice, courts have not conducted an independent balancing when faced with

[2] The move away from strict scrutiny has its dissenters. *See, e.g.*, *Timmons*, 520 U.S. at 378 (Stevens, J, dissenting) ("In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. . . . The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality."); *Munro*, 479 U.S. at 201 (Marshall, J., dissenting) ("The necessity for [strict scrutiny] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties.").

laws that are within the bounds set by earlier cases. *Norman v. Reed*, 502 U.S. 279, 295 (1992) (upholding, post-*Anderson*, a 2% nominating petition requirement as "considerably more lenient" than the 5% upheld in *Jenness*); *Hall*, 766 F.2d at 1174–75 ("We must follow what the Supreme Court does, and not just what it says . . . and while as an original matter a 2 percent requirement . . . might be thought an undue restriction on minor parties' access to the ballot, . . . the lawfulness of such a restriction follows *a fortiori* from the decisions upholding higher requirements."); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 776 (7th Cir. 1997) (citing *Norman* and *Jenness* to uphold "nearly identical" 5% petition requirement).

B. Case at Bar

The facts here are undisputed. In Indiana, ballot access is indexed to the latest Secretary of State election. Parties whose candidate receives 10% or more of the vote in that election must nominate candidates by primary elections, which are publicly funded. Ind. Code §§ 3-10-1-2, 3-11-6-1. Parties whose candidate receives between 2% and 10% of the vote nominate their candidates by party convention. Ind. Code § 3-10-2-15. All those parties above 2% retain ballot access automatically. Ind. Code § 3-8-4-1. Everybody else—parties whose candidate receives less than 2% of the vote, new parties, and all independents, regardless of how they performed in the previous election—must qualify for ballot access by petition. That requires getting hand-signed petitions amounting to 2% of the vote total from the previous Secretary of State election (about 40,000 in recent years), Ind. Code § 3-8-6-3, and submitting those petitions, divided up by county of voter registration, to each of 92 county

election boards, Ind. Code § 3-8-6-6, by June 30 of the election year, Ind. Code § 3-8-6-10(b).

While the parties dispute the burden imposed by those ballot access laws, they agree on the historical results. No independent or third-party candidate has successfully petitioned for ballot access since Pat Buchanan in 2000. (Pl.'s "Material Facts Not in Dispute" 5, ECF No. 61.) (Ralph Nader attempted a nomination petition the same year and failed. (*Id.*)) The Libertarian Party has retained ballot access by winning 2% or better of the vote in the Secretary of State elections. The party claims it must devote undue attention to those non-presidential-year races because it is convinced that it could not regain ballot access by nomination petition were it to fall off the ballot. (McMahon Decl. 3–8, ECF No. 60-7.) Current estimates reflect that a nomination petition would cost something like $500,000 and require gathering some 60,000 signatures (allowing a 50% overage for those signatures later found invalid) to have a fair chance of succeeding. (Hawkins Decl. 1–2, ECF No. 60-5.) Other minor parties, including the Green Party, and various independent candidates, assessing those costs, have chosen not to attempt nomination petitions. (Material Facts 5–6, ECF No. 61.)

The State lists the "compelling state interests" its ballot access laws ostensibly serve. (Def.'s Resp. 7–8, ECF No. 65.) Those interests are, not surprisingly, the canonical interests—in avoiding voter confusion, ballot overcrowding, and the like, *see, e.g.*, *Jenness*, 403 U.S. at 442, *Storer*, 415 U.S. at 729, *Burdick*, 504 U.S. at 433—

that the state need merely assert to have count for it in the balance, *see Munro*, 479 U.S. at 194*, Tripp*, 872 F.3d at 866.

Plaintiffs argue that the 2% requirement, as exacerbated by the 92-county procedure, imposes a burden that outweighs the state interests asserted. The Court, were this an issue of first impression, might agree. *Cf. Hall*, 766 F.2d at 1174–75 ("[A]s an original matter a 2 percent requirement . . . might be thought an undue restriction on minor parties' access to the ballot if the test is 'the least drastic means.'"). The State—the body politic as it exists independently of the party-affiliated individuals who fill its offices—has no legitimate interest in shielding established parties from either outside competition or internal dissent. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms").[3] But just like the court in *Hall*, and despite the more recent cases from the Seventh Circuit urging a careful balancing in each case, precedent compels this Court to conclude that the burden imposed is not unconstitutional. *Norman*, 502 U.S. at 295 (approving 2% requirement, post-*Anderson*, without conducting balancing, as within the acceptable bounds established by *Jenness*); *Rednour*, 108 F.3d at 776. The Seventh Circuit in *Hall* evaluated the same 2% requirement challenged here and came to the same conclusion. 766 F.2d at 1175 ("[T]he lawfulness of [the 2%] restriction follows *a*

[3] *Contra, e.g.*, *Storer*, 415 U.S. at 735, which upheld restrictions on independent candidacies because "[t]he general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds." The only principled difference between an "intraparty feud" and a "major struggle" is whether the debating candidates claim the same party name; there have been—and are—policy debates within the two major parties that would, if those parties split, easily be considered "major struggle[s]" worthy of a general election.

fortiori from the decisions upholding higher requirements); *see also Tripp v. Scholz*, 872 F.3d 857, 865 (7th Cir. 2017) ("On multiple occasions, the Supreme Court has upheld signature requirements equaling 5% of the eligible voting base."). The Supreme Court has upheld higher nominating petition requirements, *Jenness*, 403 U.S. at 438 (upholding 5% requirement), *Storer*, 415 U.S. at 738 (same, and suggesting in dicta that "gathering 325,000 signatures in 24 days" is not impossible), *Norman*, 502 U.S. at 292 (approving requirement of "only" 25,000 signatures), and has dismissed minor additional procedural burdens, like notarization of petition signatures, as trivial, *Am. Party of Texas v. White*, 415 U.S. 767, 787 (1974), *see also Hall*, 766 F.2s at 1175 (bar on write-in option is "trivial" additional restriction). Indiana's filing deadline is likewise within established bounds: *Jenness* upheld a mid-June deadline, earlier than the June 30 deadline here. 403 U.S. at 433–34.

IV. Conclusion

In conclusion, this Court does not see anything here to distinguish this case from precedent, which is "beyond [its] power to reexamine." *Hall*, 766 F.2d at 1173. For now, under the Supreme Court's lenient standard for state burdens on minor-party ballot access, a 2% petition requirement, even accompanied by tedious procedural burdens, is constitutionally permissible. Plaintiff's Motion for Summary Judgment, (ECF No. 60), is **denied**, and the State's Cross-Motion for Summary Judgment, (ECF No. 64), is **granted**.

Final judgment shall issue separately.

SO ORDERED.

Date: 08/14/2023

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA GREEN PARTY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:22-cv-00518-JRS-DML
	)	
HOLLI SULLIVAN, in her official capacity as Indiana Secretary of State,	)	
	)	
Defendant.	)	

Order on Motion to Dismiss

I. Introduction

This is a ballot access case. In Indiana, minor political parties and independent candidates for public office must meet various statutory requirements before being listed on the ballot in state elections. Plaintiffs—the Indiana Green Party, the Libertarian Party of Indiana, various of their officers, and some independent candidates for public office—together bring suit alleging that those requirements as applied violate their First and Fourteenth Amendment rights.

Now before the Court is the State's Motion to Dismiss, (ECF No. 17), which argues (based on a single thirty-seven-year-old case) that Indiana's ballot access scheme is constitutional as a matter of law.

II. Legal Standard

Usually, "[a] Rule 12(b)(6) motion tests 'the legal sufficiency of a complaint,' as measured against the standards of Rule 8(a)." *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020) (quoting *Runnion v. Girl Scouts of Greater Chi. and Nw. Ind.*, 786

F.3d 510, 526 (7th Cir. 2015)). Rule 8(a) requires that the complaint contain a short and plain statement showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). "To meet this standard, a plaintiff is not required to include 'detailed factual allegations,'" but the factual allegations must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Here, the State does not challenge the sufficiency of the complaint's factual allegations. Instead the State argues that controlling law so completely forestalls recovery that, even taking Plaintiffs' allegations as true, no relief can be granted. It is a permissible argument on a Rule 12(b)(6) motion, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."), though an audacious one in context: constitutional claims against ballot access schemes require a "fact-intensive analysis" under the applicable balancing test. *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020).

III. Discussion

Challenges to state electoral regulations are evaluated under the *Anderson-Burdick* balancing test (so-called after a pair of seminal Supreme Court decisions). *Id.* That test directs the Court

> first [to] consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. 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. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Gill, 962 F.3d at 364 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Because "the balancing test requires careful analysis of the facts," it "should 'not be automatic.'" *Id.* at 364–65 (quoting *Anderson*, 460 U.S. at 789). There is no "'litmus test' [to] neatly separate valid from invalid restrictions." *Id.* at 365 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008)). Indeed in *Gill* the Seventh Circuit overturned a district court that relied on factual analogies to an earlier-decided case and failed independently to consider the facts of the case then before it. *Id.* ("By relying on [the earlier case], the district court neglected to perform the fact-intensive analysis required for the *Anderson-Burdick* balancing test. That error is particularly evident because the facts . . . do not align.")

Here, the State relies exclusively on *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985) to argue that Plaintiffs' challenge may not proceed. One of the ballot access requirements Plaintiffs challenge is a "two percent requirement": by law,

> "Minor Parties" and "Independents" place their nominees on the general election ballot by submitting nomination petitions signed by qualified registered voters equal in number to 2 percent of the total vote cast for Secretary of State in the last election in the district that the candidate seeks to represent. *See* I.C. 3-8-6-1; I.C. 3-8-6-3.

(Pls.' Compl. 9 ¶ 25, ECF No. 1.) In *Hall*, the Seventh Circuit held that "Indiana's 2 percent requirement does not violate the Constitution." 766 F.2d at 1175. The State argues that Plaintiffs' claim fail as a result. In *Hall*, though, the court was asked to consider challenges only to the two percent requirement and to the lack of a write-in option. *Id.* And even then the court left open the possibility that the two percent requirement, then new, would eventually prove unduly restrictive. *Id.* at 1173.

It has been thirty-seven years since *Hall* was decided. Both the law and the facts have changed. Here, Plaintiffs bring a challenge based on a combination of statutory requirements, not solely the two percent requirement, (Pls.' Compl. ¶¶ 50–52, 68, 75, 80, ECF No. 1; Pls.' Resp. 7, ECF No. 27), and in the Court's balancing analysis it must consider how those requirements act together to burden Plaintiffs' rights, *Lee v. Keith*, 463 F.3d 763, 770 (7th Cir. 2006). Thus *Hall* does not govern the claim. It is far too early for the Court to say that no relief is possible on the facts as alleged. Rule 12(b)(6) dismissal is not appropriate.

Finally, the State invites the Court to rely on *Hall* at least to dismiss Plaintiffs' challenge to the two percent requirement. (Def.'s R. 4, ECF No. 33.) But that challenge is part and parcel of the challenge to the scheme as a whole—which claim remains valid—and "Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims." *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015). The Court will not grant partial dismissal here.

IV. Conclusion

Evaluation of Plaintiffs' constitutional challenge will require a fact-intensive balancing analysis. It is not forestalled as a matter of law; Rule 12(b)(6) disposition is not appropriate.

The State's Motion to Dismiss, (ECF No. 17), is **denied.**

SO ORDERED.

Date: 10/28/2022

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution by CM/ECF to registered counsel of record.