

No. 23-50537

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**In The United States Court of Appeals  
for The Fifth Circuit**

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MARK MILLER; SCOTT COPELAND; LAURA PALMER; TOM KLEVEN; ANDY PRIOR;  
AMERICA’S PARTY OF TEXAS, ALSO KNOWN AS APTX; CONSTITUTION PARTY OF  
TEXAS, ALSO KNOWN AS CPTX; GREEN PARTY OF TEXAS, ALSO KNOWN AS GPTX;  
LIBERTARIAN PARTY OF TEXAS, ALSO KNOWN AS LPTX,

*Plaintiffs-Appellees/Cross-Appellants,*

v.

JOHN OR JANE DOE, IN HIS OR HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE  
OF THE STATE OF TEXAS; JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS THE  
DEPUTY SECRETARY OF THE STATE OF TEXAS,

*Defendants-Appellants/Cross-  
Appellees.*

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On Appeal from the United States District Court for the  
Western District of Texas, Austin Division  
Case No. 1:19-cv-00700

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**BRIEF OF DEFENDANTS-APPELLANTS**

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**KEN PAXTON**  
Attorney General of Texas

**BRENT WEBSTER**  
First Assistant Attorney General

**GRANT DORFMAN**  
Deputy Attorney General for Civil  
Litigation

**JAMES LLOYD**  
Deputy Attorney General for  
Civil Litigation

**KIMBERLY GDULA**  
Acting Division Chief, General  
Litigation Division

*/s/ Kelsey L. Warren* \_\_\_\_\_

**KELSEY L. WARREN**  
Assistant Attorney General  
Texas State Bar No. 24095736  
Office of the Attorney General  
General Litigation Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
(512) 463-0447/Fax (512) 320-0667  
kelsey.warren@oag.texas.gov

*Counsel for Defendants-  
Appellants/Cross Appellees*

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**Jane Nelson, in her official capacity as the Secretary of State for the State of Texas, and Jose A. Esparza, in his official capacity as the Deputy Secretary of State for the State of Texas**

*Defendants-Appellants/Cross Appellees*

Kelsey L. Warren  
Assistant Attorney General  
Texas State Bar No. 24095736

Ryan G. Kercher  
Assistant Attorney General  
Texas State Bar No.

Office of the Attorney General  
General Litigation Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
(512) 463-0447/Fax (512) 320-0667  
[kelsey.warren@oag.texas.gov](mailto:kelsey.warren@oag.texas.gov)

**Mark Miller, Scott Copeland, Laura Palmer, Tom Kleven, Andy Prior, America's Party of Texas, Constitution Party of Texas, Green Party of Texas, and Libertarian Party of Texas**

*Plaintiffs-Appellees/Cross-Appellants*

Oliver Hall  
Center for Competitive Democracy  
P.O. Box 21090  
Washington, DC 20009  
202-248-9294  
[oliverhall@competitivedemocracy.org](mailto:oliverhall@competitivedemocracy.org)

David Philip Whittlesey  
Christopher Ryan  
Shearman & Sterling LLP  
111 Congress Ave.  
Suite 1700  
Austin, TX 78701  
(512) 647-1907/Fax: (512) 647-1899  
[david.whittlesey@shearman.com](mailto:david.whittlesey@shearman.com)  
[cryan@shearman.com](mailto:cryan@shearman.com)

*/s/ Kelsey L. Warren*  
**AAG KELSEY L. WARREN**  
*Counsel for Defendants-Appellants*

## **STATEMENT REGARDING ORAL ARGUMENT**

Defendants-Appellants (“Defendants”) submit that the legal arguments, issues on appeal, and statement of the record are adequately presented in the Briefs of the parties and oral argument is unnecessary to aid the Court’s decisional process. If, however, the Court requests oral argument, Defendants will be prepared to present their arguments to the Court.

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## STATEMENT OF JURISDICTION

The district court entered a permanent injunction that enjoins Defendants from enforcing Texas Election Code provisions governing the paper nomination petition process against Plaintiffs-Appellees (“Plaintiffs”) because ““the challenged provisions of Chapters 141, 142, 162, 181, and 202 of the Texas Election Code that regulate the paper nomination petition process [. . .] are unconstitutional as applied to Plaintiffs.” ROA.2377-2378. Chapter 141 of the Texas Election Code is the primary chapter at issue on appeal. Chapters 142, 162, 181, and 202 are at issue only insofar as they cite to the ballot-access petition requirements prescribed by Chapter 141. On the same day, the district court entered a final order disposing of all claims and all parties to this lawsuit. ROA.2379-2380. As such, this Court has jurisdiction over Defendants-Appellants’ appeal pursuant to 28 U.S.C. §1291.



## STATEMENT OF THE ISSUES

1. Any party or candidate that opts to utilize the nominating petition process in Texas must do so by paper hardcopies. Is Texas's requirement that nominating petitions be signed on paper constitutional because it is sufficiently related to the State's important interests of avoiding voter confusion, ballot overcrowding, and frivolous candidacies?

2. All candidates for office, regardless of party affiliation, are required to follow Texas Election Code Chapter 141. Are these laws constitutional because they do not violate the Equal Protection Clause?

## STATEMENT OF THE CASE

### **I. Plaintiffs' Claims.**

Plaintiffs are a collection of voters, political parties, former and potential political candidates, and former and current political party officials who are neither Republican nor Democrat. ROA.102-131. They challenged Texas's statutory requirements<sup>1</sup> for obtaining a place on the general election ballot as applied to independent presidential candidates, independent candidates for statewide office, and minor political parties that do not nominate their candidates via a primary election. Plaintiffs brought claims asserting that Texas's ballot access laws, specifically Texas Election Code sections 141.061-070 which govern the petition

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<sup>1</sup> Tex. Elec. Code, art. 9, Ch. C, subch. 141, §§ 141.061-070.

nomination process and section 141.041, violate the First and Fourteenth Amendments as well as the Equal Protection Clause. Plaintiffs also challenged Texas Election Code section 141.041, which took effect in September 2019 and required a candidate to submit an application to party officials to seek nomination at a party nominating convention or submit a petition in lieu of the filing fee. Plaintiffs sought injunctive relief permanently enjoining Defendants from enforcing these laws. ROA.102-131.

Plaintiffs are individuals and political parties. ROA.2305. The Individual Plaintiffs are voters and potential candidates, including: Mark Miller (“Miller”), who is a registered voter and “wants to run for office in future elections in Texas as an independent or nominee of a party that is required to nominate candidates by convention”; Scott Copeland, who is a registered voter and chair of the Constitution Party of Texas (“CPTX”); Laura Palmer, who is a registered voter and former co-chair of the Green Party of Texas (“GPTX”); Tom Kleven, who is a registered voter and seeks to vote for Third Parties; and Andy Prior, who is a registered voter, served as chair of America’s Party of Texas (“APTX”), and “attempted to run for Land Commissioner in 2018 as a nominee of APTX, but APTX lacked the resources necessary to conduct a successful petition drive, and it did not qualify for ballot

access.” ROA.2305. CPTX, GPTX, and APTX are also plaintiffs in the suit, as well as the Libertarian Party of Texas (“LPTX”). ROA.2305.

## II. Ballot Access in Texas.

There are three ways for a candidate to obtain a place on Texas’s statewide general election ballot: (1) win a primary election; (2) receive a nomination from a political party that nominates by convention and qualifies for ballot access; or (3) submit a nominating petition signed by the required number of voters.

A political party whose candidate for governor received at least 20% of the vote in the most recent gubernatorial election must nominate its general election candidates by primary election. TEX. ELEC. CODE § 172.001.<sup>2</sup> A political party whose candidate for governor received at least 2% but less than 20% of the vote in the most recent gubernatorial election may choose to nominate its general election candidates by primary election *or* by nominating convention. *Id.* §§ 172.002(a),<sup>3</sup> 181.002.<sup>4</sup> A political party that did not have a candidate in the most recent gubernatorial election

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<sup>2</sup> If the “party’s nominee for governor in the most recent gubernatorial general election received 20 percent or more of the total number of votes[,]” then the party’s candidates “for offices of state and county government and the United States Congress must be nominated by primary election.”

<sup>3</sup> If the “party’s nominee for governor in the most recent gubernatorial general election received at least two percent but less than 20 percent” of the votes for governor, then the “party’s nominees in the general election for offices of state and county government and the United States Congress may be nominated by primary election.”

<sup>4</sup> “A political party may make nominations for the general election for state and county officers by convention, as provided by this chapter, if the party is authorized by [§] 172.002 to make nominations by primary election.”

receive 2% of the vote must nominate its general election candidates by nominating convention. *Id.* § 181.003.<sup>5</sup>

**A. Primary Election Candidates.**

To seek a party's nomination for statewide office in a primary election a candidate must submit an application to party officials and either pay a filing fee or submit a petition in lieu of filing fee. TEX. ELEC. CODE §§ 172.021 (application required), 172.024 (filing fees for primary candidates), 172.025 (signatures required on petition in lieu of filing fee).

**B. Nominating Convention Candidates.**

Similarly, to seek nomination at a party nominating convention, a candidate must submit an application to party officials and either pay a filing fee or submit a petition in lieu of filing fee. TEX. ELEC. CODE § 141.041.<sup>6</sup> The amount of the filing fee “is the amount prescribed by [§] 172.024 for a candidate for nomination for the same office in a general primary election.” *Id.* § 141.041(b). Similarly, “[t]he minimum number of signatures that must appear on [a] petition [in lieu of filing fee]

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<sup>5</sup> “A political party must make nominations for the general election for state and county officers by convention, as provided by this chapter, if the party is not required or authorized to nominate by primary election.”

<sup>6</sup> This provision took effect in September 2019. *See* Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, §1, sec. 141.041, 2019 Tex. Sess. Law Serv. 822. Effective September 1, 2021, the filing fee/petition requirement transferred to Section 181.0311. *See* S.B. 2093, 87th Leg., R.S., ch. 149, General and Special Laws of Texas.

is the number prescribed by [§] 172.025 to appear on a petition of a candidate for nomination for the same office in a general primary election.” *Id.* § 141.041(e).

A party nominating by convention has three options for qualifying to have its nominees automatically placed on the general election ballot. First, a party qualifies if—in at least one of the five most recent general elections—the party’s nominee for any statewide office received at least 2% of the vote for that office. TEX. ELEC. CODE § 181.005(c). Second, a party qualifies if its precinct convention participants total at least 1% of the total votes cast in Texas’s most recent gubernatorial general election. *Id.* § 181.005(a).<sup>7</sup> Third, a party that did not have enough precinct convention participants to qualify under § 181.005(a) may submit additional signatures which—when added to the number of precinct convention participants—meet the 1% requirement. *Id.* § 181.006.

### **C. Independent Candidates.**

An independent candidate may obtain a place on the general election ballot by filing a nominating petition with the required number of signatures. Candidates for statewide office must collect signatures totaling 1% of all votes cast in Texas’s

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<sup>7</sup> “To be entitled to have the names of its nominees placed on the general election ballot, a political party required to make nominations by convention must file with the secretary of state, not later than the 75th day after the date of the precinct conventions held under this chapter, lists of precinct convention participants indicating that the number of participants equals at least one percent of the total number of votes received by all candidates for governor in the most recent gubernatorial general election. The lists must include each participant’s residence address and voter registration number.”

most recent gubernatorial election. TEX. ELEC. CODE § 142.007(1). Candidates for president must collect signatures totaling 1% of all votes cast for president in Texas in the most recent presidential election. *Id.* § 192.032(d).

### **III. Procedural History.**

Plaintiffs filed an Opposed Motion for a Preliminary Injunction solely seeking to enjoin the Defendants from enforcing Texas Election Code section 141.041 during the 2020 election cycle. ROA.207-255. The preliminary injunction was denied (ROA.285-305), and the parties proceeded to conduct discovery related to the claims set forth in Plaintiff's Amended Complaint. ROA.102-132. Defendants and Plaintiffs then each filed a Motion for Summary Judgment. ROA.2045.

After full briefing, the district court decided overwhelmingly in favor of Defendants, Secretary of State Jane Nelson and Deputy Secretary of State Jose Esparza in an order granting in part and denying in part each side's motion for summary judgment. ROA.2304-2331. But the district court found that the provisions of Texas Election Code Chapter 141, mandating that any candidate who is required to submit a petition in support of their candidacy to obtain and submit to the applicable filing authority the requisite number of voter signatures in hardcopy was unconstitutional. ROA.2330-2331. These signatures must be executed by the voter in their own handwriting, witnessed by person circulating the petition, and affixed to the petition form provided by the Secretary of State or a form that otherwise

contains the information prescribed for petitions in Chapter 141, Subchapter C. ROA.604-610. The district court alluded that electronic signatures and petitions should be considered or may be appropriate in finding that the provisions of the Texas Election Code requiring Plaintiffs-Appellees to submit paper petitions—in lieu of, or in addition to, a filing fee—violated Plaintiffs’ rights to equal protection. ROA.2328-2330. The district court found that Texas’s ballot-access petition requirements place an unequal burden on Plaintiffs-Appellees because “they cannot use electronic methods for petitioning whereas Texas allows Major Parties to use electronic methods as part of their procedures for accessing the ballot.” ROA.2328-2330.

The district court subsequently issued an injunction prohibiting the State from enforcing any Texas Election Code provision that requires or contemplates a paper nomination petition or the paper nomination process set forth in Chapter 141—including the signature verification and submission processes. ROA.2379-2381.

Defendants appeal only the portion of the district court’s decision declaring its paper nomination process unconstitutional and enjoining the State from enforcing Election Code Chapter 141, provisions specifically designed to protect the integrity and orderliness of elections, with ballots that reflect serious contenders with a

satisfactory level of community support. The district court correctly found in favor of Defendants on all other issues, which are not raised or addressed in this brief.

### **SUMMARY OF THE ARGUMENT**

“[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.” *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Texas has “several legitimate interests to support” its ballot-access requirements, including preserving “the integrity of the electoral process” and regulating “the number of independent candidates on the ballot by ensuring that: (1) the electorate is enough aware of the candidate either to know his views or to learn and approve of them in a short period; and (2) that at least a minimum of registered voters are willing to take him and his views seriously.” *Nader*, 332 F. Supp. 2d 982, 992 (W.D. Tex. 2004). And the State has no constitutional obligation “to ‘handicap’ an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.” *See Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986).

The primary issue on appeal is the constitutionality of Texas Election Code provisions governing the nominating petition process. These provisions as-applied to Plaintiffs, third-party or independent candidates for office, do not impose a severe burden on Plaintiff’s fundamental right to vote, but are instead reasonable, nondiscriminatory restrictions that serve important, regulatory interests of the State.



In fact, two of the Plaintiffs have qualified for the general ballot under the challenged ballot-access scheme, and the remaining Plaintiffs have made no real efforts to meet the statutory requirements.

Plaintiffs' claims do not present novel issues. Indeed, every court applying the well-known *Anderson/Burdick* framework to Texas's ballot-access provisions challenged here—including §§ 141.062-064—has upheld them as constitutional. Plaintiffs argued the district court should depart from these prior rulings because the intervening growth in Texas's electorate has made compliance with ballot-access provisions more difficult. ROA.112-114. As discussed below, these arguments necessarily fail. The growth in Texas's electorate is not a reason for invalidating ballot-access provisions already upheld as constitutional. Courts have upheld Texas's petition and signature requirements as a reasonable way to gauge a showing of a significant modicum of support amongst the electorate before qualifying for ballot access. As the electorate grows, the metric for gauging electoral support becomes increasingly important and must accurately reflect the size of the electorate—which is exactly what Texas's ballot-access provisions do. The district court's ruling undermines the State's interest in avoiding confusion, deception and frustration of the democratic process. Not to mention the State's ever-important

interest in promoting the integrity of the electoral process and the principle of “one person, one vote” in any given election cycle.

Moreover, the district court’s opinion that the requirements of Chapter 141 violate Plaintiffs’ right to equal protection is based on a fundamental factual misunderstanding about how candidates submit nominating petitions. ROA.2333. The district court was under the mistaken impression that only major parties can submit ballot-access petitions electronically. ROA.2329. This is factually inaccurate and contrary to the record. ROA.604-610. Chapter 141 applies to *all* candidates for public office in the State of Texas, regardless of the office they seek or the party with which they affiliate. TEX. ELEC. CODE §§ 141.040(c); 141.062-141.065. The opportunity to file applications and accompanying petitions electronically is therefore available to all candidates, including Plaintiffs. ROA.604, 2333. As such, the district court’s issuance of an injunction was in error and should be dissolved by this Court.

### **STANDARD OF REVIEW**

This Court reviews a trial court’s grant or denial of a permanent injunction for abuse of discretion. *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (citing *Peaches Entm’t Corp. v. Entm’t Repertoire Assocs.*, 62 F.3d 690, 693 (5th Cir. 1995)). The review of a permanent injunction is segmented, such that this Court will review the district court’s findings of fact under the clearly erroneous standard, and

the conclusions of law under the de novo standard.” *Id.* Where, as here, “the district court’s decision turns on the application of statutes or procedural rules, our review of that interpretation is de novo.” *U.S. v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 472 (5th Cir. 2007); *see also Signtech USA, Ltd. v. Vutek, Inc.*, 174 F.3d 1352, 1356 (Fed. Cir. 1999) (“[W]hether the terms of the injunction fulfill the mandates of FED. R. CIV. P. 65(d) is a question of law that this court reviews de novo.”).

This Court reviews the propriety of both hearing and granting declaratory relief for an abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995) (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942)).

## ARGUMENT

### **I. Texas’s Ballot-Access Framework Does Not Violate the First and Fourteenth Amendments.**

#### **A. Anderson/Burdick framework.**

“Voting is of the most fundamental significance in our constitutional system.” *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). The right to “vote in any manner and the right to associate for political purposes through the ballot,” however, are “not absolute.” *Id.* States have substantial authority to regulate elections “to ensure fairness, honesty, and order.” *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). One way

Texas has exercised that authority is by enacting ballot-access laws, including the provision of the Texas Election Code Plaintiffs challenged at the district court.

The framework for examining these voting laws and regulations is well-settled. “In the Fifth Circuit, the proper test for [evaluating] the constitutionality of” ballot-access laws “is the *Anderson/Burdick* Test.” *Meyer v. Texas*, Civ. No. H-10-3860, 2011 WL 1806524, at \*3 (S. D. Tex. May 11, 2011) (citations omitted). Under *Anderson/Burdick*, “[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Kirk*, 84 F.3d at 182 (citing *Burdick*, 504 U.S. at 434; *Celebrezze*, 460 U.S. at 789). “The rigorousness of the inquiry into the propriety of the state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights.” *Id.* (citing *Burdick*, 504 U.S. at 434). Provisions that “impose severe restrictions . . . must be narrowly drawn and support compelling state interests, whereas reasonable, nondiscriminatory restrictions require only important regulatory interests to pass constitutional muster.” *Meyer*, 2011 WL 1806524, at \*3 (quoting *Burdick*, 504 U.S. at 434).

**B. This Court has upheld Texas’s ballot-access laws before.**

Every court applying the *Anderson/Burdick* framework to Texas’s ballot-access provisions has found that these provisions are reasonable, nondiscriminatory, and advance important regulatory interests—including some of the very provisions the district court enjoined. *See, e.g., Nader v. Connor*, 388 F.3d 137 (5th Cir. 2004) (affirming that *Anderson/Burdick* test—not strict scrutiny—applies to Texas law requiring independent presidential candidates to obtain more nominating signatures than minor political parties; affirming constitutionality of petition signature requirements and deadline to file for independent presidential candidates); *Kirk*, 84 F.3d at 184-86 (upholding deadlines for minor party nominating petitions and candidate declarations of intent); *Meyer*, 2011 WL 1806524, at \*3 (upholding constitutionality of requirements for independent candidates for US House of Representatives). *See also, e.g., Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (upholding requirement that minor parties and independent candidates demonstrate sufficient electoral support to obtain ballot access, including requirements that petition signatures be gathered after primary election). These cases have rejected the very arguments Plaintiffs raised at the district court regarding nominating petition signature requirements.

In *Nader v. Connor*, this Court affirmed the district court’s finding that Texas’s paper petition and signature requirements and filing deadline for independent presidential candidates are “legal and constitutional” as applied to Green Party candidate Ralph Nader and voters supporting him. 388 F.3d 137 (5<sup>th</sup>

Cir. 2004), *cert. denied* 544 U.S. 921 (2005) (affirming *Nader v. Connor*, 332 F. Supp. 2d 982 (W.D. Tex. 2004), “for the reasons as well stated in the district court’s memorandum opinion”).

The plaintiffs in *Nader* challenged the constitutionality of TEX. ELEC. CODE §§ 192.032(a), 192.032(b)(3)(A)<sup>8</sup>, 192.032(c), and 192.032(d), which cite to Chapter 141 and compel independent candidates for the office of President and Vice President of the United States to comply with the paper signature requirements applicable to candidates for a public elective office in the State of Texas. *Nader*, 332 F. Supp. at 989-90. Declining to apply strict scrutiny, the district court found, and this Court affirmed, that requiring presidential candidates to gather signatures—pursuant to the procedures set forth in Chapter 141 of the Texas Election Code—equal to one percent of votes cast in the prior presidential election, was *not* “unduly restrictive or unreasonable,” since the “presidency is the only office being sought by that candidate” and Texas has a legitimate interest in “assur[ing] itself that the candidate is a serious contender truly independent, and with a satisfactory level of

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<sup>8</sup>“(a) To be entitled to a place on the general election ballot, an independent candidate for president of the United States must make an application for a place on the ballot. (b) An application must: [. . .] (3) be accompanied by: (A) a petition that satisfies the requirements prescribed by Section 141.062.” TEX. ELEC. CODE § 192.032(b)(3)(A).

community support.” *Nader*, 332 F. Supp. 2d at 987 (quoting *Storer*, 415 U.S. at 746); *Nader*, 388 F.3d at 137-38.

As such, Plaintiffs’ challenges to the paper nominating petition process under the First and Fourteenth Amendment are without merit, and the district court’s order enjoining the State from administering its lawful voting regulations must be dissolved.

**C. Texas’s ballot-access requirements for independent and third-party candidates serve a legitimate State interest and are constitutional.**

The challenged provisions, applicable to petitions filed by *any* candidate in a state-wide election, including independent candidates, are reasonable, nondiscriminatory regulations that further legitimate State interests.

**1. Texas’s signature and paper petition requirements are reasonable and do not impose a severe burden on Plaintiffs.**

The district court’s opinion succinctly summarized why Texas’s ballot-access provisions impose a reasonable rather than severe burden on Plaintiffs. ROA.2320-2326. As it related to the paper nominating petition requirements, the district court found that “plaintiff’s fail to tie the restrictions to any severe burdens placed specifically on them” particularly because two of the Affiliate Party Plaintiffs already have ballot access. ROA.2325-26. Turning to Texas Election Code section 141.041, the district court recognized that candidates have the option of paying a filing fee or meeting the nominating petition requirements. ROA.2326. Plaintiffs had

not otherwise “presented evidence that Section 141.041 imposes severe burdens on them.” ROA.2327.

**2. Texas’s signature and paper petition requirements further the State’s important interests in voting integrity and ballot orderliness.**

The Supreme Court has long recognized the states’ legitimate interest—before placing an independent candidate on the ballot—in “assur[ing] itself that the candidate is a serious contender truly independent, and with a satisfactory level of community support.” *Storer v. Brown*, 415 U.S. 724, 746 (1974). The Supreme Court has also recognized the “important state interest in requiring some preliminary showing of a significant modicum of support” for those on the ballot and “in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jenness*, 403 U.S. at 442; *see also, e.g., Munro*, 479 U.S. at 194 (“States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.”) (internal quotation marks and citation omitted). Texas’s ballot regulations seek to protect the State’s “important regulatory interests” in streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion. *Burdick*, 504 U.S. at 434. Texas is not required “to make a particularized showing of the existence of voter confusion,



ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.” *Munro*, 479 U.S. at 194-95.

Similarly, in the context of Party candidates, the Court has made clear that “[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Id.* at 732 (quoting *Jenness*, 403 U.S. at 442). Indeed, “the function of the election process is ‘to winnow out and finally reject all but the chosen candidates,’ not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’” Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.” *Burdick*, 504 U.S. at 438 (quoting *Storer*, 415 U.S. at 730-35).

It is not per se unconstitutional to impose different ballot access requirements on different types of candidates. *Jenness*, 403 U.S. at 441-42. Moreover, in Texas, neither a party nor a candidate are required to pay a fee to appear on the ballot. This Court and other district courts in Texas have recognized that many parts of Texas’s ballot access scheme pass constitutional muster even though they affect Major

Parties, Minor Parties, and independents differently. *See, e.g., Nader*, 332 F. Supp. at 988-89; *Kirk*, 84 F.3d at 184-86; *Meyer*, 2011 WL 1806524, at \*3-5.

For example, this Court affirmed in *Nader* that “more restrictive signature and deadline requirements for an independent candidate [could] be justified if the ballot-access requirements, as a whole, are reasonable and similar in degree to those for a minor-political-party candidate.” *Nader*, 332 F. Supp. 2d at 988 (citing *Storer*, 415 U.S. at 745). Thus, this Court has already held that the same paper petition and signature requirements enjoined by the district court here are in fact constitutional. *Nader*, 388 F.3d at 137-38.

A paper nominating petition is the method by which Texas has chosen to limit ballot overcrowding and require candidates to show the requisite support for their candidacy. *Jenness*, 403 U.S. at 442. While many other states have instituted digital petitioning procedures, Texas is not required to follow their lead. Consequently, to avoid ballot overcrowding and frivolous candidacies, Texas has chosen to require either paper petitions or the payment of a filing fee in order for third parties to be

considered for nomination by convention to appear on the general election ballot (just as it does for major-party candidates).

Moreover, Texas's requirement for paper petitions helps avoid voter confusion. It works in harmony with Chapter 141, which in turn provides additional requirements for the petition:

A person circulating a petition must: (1) before permitting a person to sign, point out and read to the person each statement pertaining to the signer that appears on the petition; (2) witness each signature; (3) ascertain that each date of signing is correct; and (4) before the petition is filed, verify each signer's registration status and ascertain that each registration number entered on the petition is correct.

TEX. ELEC. CODE § 141.064. These requirements necessitate in-person signatures affixed to a paper nominating petition because the petition circulator must witness and verify all signatures on the petition. ROA.604-610. Further, the requirements help to avoid voter confusion by confirming that the signatories understand what they are signing and its significance: that they are affirming under oath that they are indeed who they purport to be, registered voters who live within the district in which they will vote, and that they have not signed any other petition. ROA.604-610.

Chapter 141 is thus appropriately tailored to “the State’s admittedly vital interests” in ensuring “that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support.” *White*, 415 U.S. at 782-83 (quoting *Jenness*, 403 U.S. at 439). Given the reduced threshold for

ballot access, it is reasonable that candidates of emerging and novel third parties qualify for ballot access by showing a modicum of support among the Texas electorate. And it is sensible to require modicum of support at the same time primary election candidates submit their nominating petitions (or a filing fee) so the Secretary of State can efficiently complete the certification process after the nominating conventions of the third parties have concluded. *See, e.g.*, TEX. ELEC. CODE §§ 181.068, 181.007.

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

Perhaps most importantly in the context of paper nominating petitions and wet signature requirements, the State has an interest in promoting the integrity of the electoral process and a “one person, one vote” principle through an entire election cycle. *Meyer*, 2011 WL 1806524, at \*4 (citations omitted). Each state “indisputably has a compelling interest in preserving the integrity of its election process.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2347 (2021) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)). And “it should go without saying that a state may take action to prevent election fraud without waiting for it to occur and

be detected within its own borders.” *Id.* at 2348. The paper nominating petition and physical wet-ink requirements are powerful tools to combat voter fraud. Common sense dictates that wet-ink signatures—collected in person, under oath, and alongside other verifying information—prevents voting fraud to a greater degree than electronic signatures on a petition circulated online. These measures deter voting fraud and promote voter confidence, including confidence in the integrity of the election. *Texas Democratic Party v. Scott*, 617 F. Supp. 3d 598, 611 (W.D. Tex. 2022), *aff’d sub nom. Cascino v. Nelson*, No. 22-50748, 2023 WL 5769414 (5th Cir. Sept. 6, 2023). These measures also endeavor to ensure “one person, one vote.” The paper nominating petition process prevents a voter from supporting more than one candidate during the infancy of the election cycle: an individual cannot participate in a primary and then support an independent candidate for the same elected position in the same election year.

Texas’s stated interest in requiring physical wet-ink signatures on paper nominating petitions is linked to its stated goals. ROA.604-610. As such, it is clear that the requirements imposed by Texas Election Code Chapter 141 are constitutional because they advance legitimate state interests. Therefore, the district court’s issuance of a permanent injunction preventing Texas from enforcing these laws was in error and must be dissolved.

## **II. Texas’s Ballot-Access Requirements Do Not Violate the Equal Protection Clause.**

In *Bullock v. Carter*, the Supreme Court concluded that a state violates the Equal Protection Clause in the context of ballot access only by “providing *no reasonable alternative means of access* to the ballot” other than paying a filing fee—a fact which was “critical to [the Court’s] determination of constitutional invalidity.” *Bullock v. Carter*, 405 U.S. 145, 134 (1972) (emphasis added). Such a system violates equal protection, the Court concluded, because office seekers could be “precluded from seeking the nomination of their chosen party, no matter how qualified they might be, *and no matter how broad or enthusiastic their popular support.*” *Id.* at 143. This stands in stark contrast to Texas’s system, which provides the petition alternative for candidates who are qualified and have a modicum of popular support but choose not to pay a filing fee.

### **A. Texas’s signature and paper petition requirement applies to all candidates, regardless of Party affiliation.**

Plaintiffs argue that Texas’s nominating petition procedure operates as a “de facto financial barrier” to ballot access because “[p]aid petition circulators typically charge a per-signature fee for their services,” which Plaintiffs-Appellees estimate will result in “a successful petition drive in 2020” costing “more than \$600,000.” ROA.634. But there is no requirement that nominating petitions be completed via paid petition circulators. And the Supreme Court has acknowledged that “[e]ven in

this day of high-budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by ‘walking tours’ is a route to success.” *Lubin v. Panish*, 415 U.S. 709, 717 (1974).

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

The district court correctly held that Texas Election Code Chapter 141 does not impermissibly condition Plaintiffs’ participation in the electoral process on their financial status.” ROA.2324. Again, two of the Affiliate Party Plaintiffs have ballot access, and the other two lack the kind of voter support to “genuinely launch a

petition drive.” ROA.2324. But the court erroneously held that Chapter 141 violates Plaintiffs’ right to equal protection because Plaintiffs “cannot use electronic methods for petitioning whereas Texas allows Major Parties to use electronic methods as part of their procedures for accessing the ballot.” ROA.2329. But the Court’s analysis is misguided. All candidates, whether for a major party or third party, as well as any independent candidate, may transmit a petition to the Secretary of State via electronic means. ROA.604. But each candidate, regardless of party affiliation (or no affiliation at all), is still required to gather signatures on paper. ROA.610. TEX. ELEC. CODE § 141.063. Additionally, all third-party candidates—like major-party candidates—may elect to pay a filing fee in lieu of obtaining the requisite number of petition signatures. TEX. ELEC. CODE § 141.041.

The district court held that Chapter 141 violates independent candidates’ right to equal protection because the district court erroneously believed that candidates for major parties are exempt from complying with the paper signature requirements under Texas Election Code Chapter 141 if the major party opts to submit a nominating petition instead of remit a filing fee. ROA.2328-2330. But this is not the case. Chapter 141 applies the very same paper signature requirements to individuals who wish to become nominees—whether the party whose nomination they seek nominates by primary or nominating convention. *See* TEX. ELEC. CODE §§ 172.024 (filing fees for primary candidate), 172.025 (number of signatures required on



petition in lieu of filing fee for primary candidate); 141.041(b), (e) (imposing same fee and signature requirement on candidate seeking nomination by convention). Since all candidates—Democrat, Republican, Independent, or Libertarian—must either remit the filing fee or submit a petition to satisfy Texas Election Code Chapter 141, the law operates in a nondiscriminatory manner and the district court erred in finding that it violated the Equal Protection Clause.

**B. All candidates may file documents electronically.**

Texas’s Election Code does not prevent Plaintiffs from submitting petitions electronically. *See* TEX. ELEC. CODE § 141.040(c) (“An authority shall designate an e-mail address in the notice required by this section for the purpose of filing an application for a place on the ballot under Section 143.004.”); *see also id.* § 1.007(c) (“A delivery, submission, or filing of a document or paper under this code may be made by personal delivery, mail, telephonic facsimile machine, e-mail, or any other method of transmission.”). To the contrary, the Texas Election Code allows Plaintiffs-Appellees—like major-party candidates—to file their nominating petitions via email, as long as the petitions are signed on paper in the presence of a circulator in accordance with TEX. ELEC. CODE § 141.064.

Even assuming third parties are more likely to utilize the ballot-access petition than major parties, the decision is not forced on these candidates by Texas law. Because the signature and paper petition requirements apply to all candidates filing

petitions, regardless of party affiliation, these requirements do not violate Plaintiffs-Appellees' right to equal protection. As a result, the district court's injunction was in error and must be dissolved.

### **CONCLUSION**

The district court's permanent injunction should be dissolved, and the declaratory judgment must be reversed, and Plaintiffs-Appellees' claims should be dismissed as a matter of law.

Respectfully submitted,

**KEN PAXTON**  
Attorney General

**BRENT WEBSTER**  
First Assistant Attorney General

**GRANT DORFMAN**  
Deputy First Assistant Attorney General

**JAMES LLOYD**  
Deputy Attorney General for Civil Litigation

**KIMBERLY GDULA**  
Acting Division Chief, General Litigation  
Division

*/s/ Kelsey L. Warren*

**KELSEY L. WARREN**

Assistant Attorney General

Texas State Bar No. 24095736

Office of the Attorney General

General Litigation Division

P. O. Box 12548, Capitol Station

Austin, Texas 78711-2548

(512) 463-0447/Fax (512) 320-0667

[kelsey.warren@oag.texas.gov](mailto:kelsey.warren@oag.texas.gov)

***Counsel for Defendants-Appellants/Cross  
Appellees***

### **CERTIFICATE OF SERVICE**

On November 1, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

*/s/ Kelsey L. Warren*

**AAG KELSEY L. WARREN**

***Counsel for Defendants-Appellants/Cross  
Appellees***

## CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,820 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count).

*/s/ Kelsey L. Warren*

**AAG KELSEY L. WARREN**

*Counsel for Defendants-Appellants/Cross  
Appellees*