UNITED STATES COURT OF APPEALS
for the
FIFTH CIRCUIT

Case No. 23-50537

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,

Plaintiff-Appellees/Cross-Appellants,

- v. -

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

Defendant-Appellants/Cross-Appellees.

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

BRIEF OF PLAINTIFF-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.

Defendants-Appellants/Cross-Appellees

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

Plaintiff-Appellees/Cross-Appellants

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

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellees state that this case raises complex questions of constitutional law pertaining to the Texas Election Code and arises from a comprehensive evidentiary record that spans five decades. Plaintiff-Appellees therefore believe that oral argument will be helpful to assist the Court in resolving the issues and claims raised.

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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 entered a Permanent Injunction and Declaratory Judgment that disposes of all claims on June 26, 2023. ROA.2377-2378. Defendant-Appellants timely filed their Notice of Appeal from that Permanent Injunction and Declaratory Judgment on July 26, 2023. ROA.2395-2396. Plaintiff-Appellees timely filed their Notice of Cross-Appeal on August 5, 2023. ROA.2397.

STATEMENT OF ISSUES

This case involves a constitutional challenge to the ballot access requirements that Texas imposes on Independent candidates and Minor Parties. Plaintiff-Appellees assert that such requirements are unconstitutional as applied because they impose severe and unequal burdens and they are not narrowly tailored to further any compelling state interest. The District Court acknowledged that Plaintiff-Appellees presented a comprehensive evidentiary record in support of their Motion for Summary Judgment, which demonstrates the increasingly severe and unequal burdens the requirements have imposed over the past five decades, to the point that it now costs nearly $1 million or more to conduct a statewide petition drive. Defendant-Appellants, by contrast, submitted almost no evidence and conceded the truth of the material facts on which Plaintiff-Appellees rely. The District Court nonetheless upheld Texas's requirements except for those that govern the petitioning procedures. The questions presented for review are:

I. Whether the District Court correctly held the petitioning procedures unconstitutional and properly granted narrow relief that allows the Legislature unfettered discretion to enact an appropriate remedy?

II. Whether the District Court erred by granting summary judgment for Defendant-Appellants on all other claims, because the undisputed facts demonstrate that Texas's requirements impose severe and unequal

burdens that are not justified by any legitimate or compelling state interest?

III. Whether the District Court erred by upholding TEX. ELEC. CODE § 181.0311 because the undisputed facts demonstrate that it imposes severe and unequal burdens, is facially discriminatory, and serves no legitimate state interest?

STATEMENT OF THE CASE

This appeal arises from an action commenced on June 11, 2019 by Plaintiff-Appellees Mark Miller, Scott Copeland, Laura Palmer, Tom Kleven, Andy Prior, America's Party of Texas ("APTX"), Constitution Party of Texas ("CPTX"), Green Party of Texas ("GPTX"), and Libertarian Party of Texas ("LPTX") (collectively, "Plaintiff-Appellees") against the Secretary of State of the State of Texas and Deputy Secretary of State of the State of Texas (together, "the Secretary"), who are named in their official capacities only. Plaintiff-Appellees filed suit pursuant to 42 U.S.C. § 1983 and allege that the challenged provisions of the Texas Election Code ("the Challenged Provisions") are unconstitutional as applied in combination with one another.[1]

[1] *See* Appendix A, Table of Challenged Provisions.

INTRODUCTION

In this case Plaintiff-Appellees assert a constitutional challenge to "an entangling web of election laws" that effectively forecloses Texas's general election ballot to non-wealthy Independents and Minor Parties. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Douglas, J., concurring). The material facts are not in dispute. ROA.2310. They arise from the "comprehensive evidentiary record" that Plaintiff-Appellees presented to the District Court. ROA.2310, 2320. Those facts establish that in the State of Texas ("Texas"), independent candidates ("Independents") and minor political parties ("Minor Parties") cannot qualify for the ballot unless they have substantial funds to hire petition circulators to gather tens of thousands of signatures in a short period of time. They also establish that the cost of doing so now approaches $1 million or more. Those astronomical costs are caused by Texas's high signature requirements – the second highest in the nation – in combination with Texas's short petitioning periods, its obsolete and inefficient 118-year-old petitioning procedures, and other unique restrictions and requirements. Taken together, these provisions "operate to freeze the political status quo" in Texas: they interpose a near-absolute barrier to non-wealthy Independents and Minor Parties. *See Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

The Challenged Provisions Are the Most Burdensome and Expensive in the Nation. In 2022, a statewide Independent was required to collect 83,434 valid

signatures in just 107 days, while a Minor Party was required to collect the same number in just 75 days. *See* Tex. Elec. Code §§ 142.004-06, 142.007(1), 142.009 (establishing Independent requirements); §§ 181.005(a), 181.006(a),(b) (establishing Minor Party requirements).[2] In 2024, a presidential Independent must collect 113,151 valid signatures in just 68 days. *See* §§ 192.032(c),(g); 41.007(c). No other state requires so many signatures in such a short a time. ROA.671. As a result, statewide petition drives cannot succeed in Texas today unless paid petition circulators are hired – indeed, the record demonstrates that volunteer-led petition drives have not succeeded in decades, if ever. ROA.672.

As Texas's signature requirements have steadily risen over the years (because they are based on a percentage of votes cast in the most recent Gubernatorial or Presidential elections), while its petitioning periods remain fixed, the cost of conducting a statewide petition drive has skyrocketed. For the last two decades, any successful statewide petition drive has cost well over $100,000, and most cost hundreds of thousands of dollars. ROA.672-673. In 2010, a statewide petition drive cost more than $500,000. ROA.777, 832. By 2018, the cost had risen to $797,000, ROA.679, and in 2022, the cost ranged from $882,000 to $1.375 million. ROA.672-

[2] Hereinafter, all statutory citations are to the Texas Election Code unless otherwise specified.

673. These costs are not just staggering, they are insurmountable for the non-wealthy, including Plaintiff-Appellees. ROA.746-747, 762, 779, 793.

Texas has not updated or improved its petitioning procedures in the 118 years since it first adopted them in 1905. ROA.1850:23 – 1852:4, 2004:21 – 2005:11. The uncontested evidence demonstrates that collecting signatures by hand on paper petitions is inherently laborious, time-consuming, inefficient and expensive. ROA.672. Thus, while Texas's petitioning procedures may have been adequate in 1906, when Texas only required 2,802 signatures for statewide ballot access, they are grossly inadequate to the task today, when Texas's signature requirements have increased exponentially.

Texas also imposes additional requirements and restrictions that make petitioning more difficult there than any other state. Chief among them are its "primary screenout" provisions, which prohibit Independents and Minor Parties from collecting signatures until after the primary elections and prohibit voters who voted in a primary from signing their petitions. *See* §§ 181.006(j), 181.063, 142.009(1); §§ 181.006(g), 142.009(2). This makes petitioning in Texas more time-consuming and expensive than any other state, because it reduces the number of eligible signers, increases the number of invalid signatures that petitioners collect, and makes petitioning on primary election day – which is by far the most productive day of a petition drive – impossible. ROA.673. Texas also, unlike any other state,

requires that petition circulators recite a lengthy and legalistic oath to each potential petition signer, to confirm that they have not voted in a primary, which dissuades many people from signing the petition. ROA.674.

Texas Guarantees Major Parties Ballot Access at Taxpayer Expense. Major Parties face no such burdens, financial or otherwise. Major Parties are entitled to place their nominees on the general election ballot automatically once they are selected in taxpayer-funded primary elections. *See* §§ 172.116; 172.117(a); 172.120(a),(h); 172.122; 173.001 *et seq*. In each election cycle since 1972, Texas has spent millions of dollars in taxpayer funds to pay for the Major Parties' primaries, and in 2020 alone it paid approximately $18 million. ROA.1816:4 – 1817:3, 1924:1 – 1924:21. Texas has also adopted modern, electronic procedures to facilitate the Major Parties' administration of their primary elections. *See* §§ 172.029(b); 172.116, 172.117(a), 172.122. Yet Texas has made no attempt to explore alternatives that could ease the heavy burdens the Challenged Provisions impose on Independents and Minor Parties – and on the Secretary, who is charged with administering and enforcing them. ROA.2004:21 – 2005:11.

No State Interest Justifies the Severe and Unequal Burdens That Texas Imposes on Independents and Minor Parties, and the Harms It Inflicts on Voters. There is nothing unique about Texas that makes it necessary for the Challenged Provisions to impose such severe burdens. The undisputed facts demonstrate that

Texas's signature requirements are far higher and its petitioning periods much shorter than necessary to protect its legitimate regulatory interests. And certain provisions – the primary screenout among them – are not justified by any state interest whatsoever. The same is true of § 181.0311, which Texas enacted in 2019 (originally codified as § 141.041), and now requires candidates seeking the nomination of a Minor Party to comply with the same petitioning requirements or pay the same filing fees as candidates seeking access to a Major Party's primary election ballot – even though Minor Parties nominate by self-funded conventions and do not participate in the primary election process. Section 181.0311 is also discriminatory on its face, because it provides that state or local elections officials retain the filing fees paid by Minor Party candidates – thus enabling Texas to *profit*, financially, from their participation in the electoral process – whereas the filing fees paid by Major Party candidates are retained by the Major Parties and used to defray the costs of their primary elections.

The burdens imposed by the Challenged Provisions ultimately fall upon voters, including Plaintiff-Appellees, who are regularly denied the opportunity to vote for candidates who represent their views. ROA.679-680. At a time when other parties and candidates are "clamoring for a place on the ballot," *Williams*, 393 U.S. at 31, these voters frequently have no choice but to vote for a Major Party candidate or not at all. The Challenged Provisions violate Plaintiffs' First and Fourteenth

Amendment rights to cast their votes effectively, to speak and associate for political purposes, and to the equal protection of law.[3]

PROCEDURAL HISTORY

Plaintiff-Appellees commenced this action on July 11, 2019 and filed the Amended Complaint on July 25, 2019. ROA.26, 102. The Amended Complaint asserts two claims: Count I asserts that the Challenged Provisions violate Plaintiff-Appellees' First and Fourteenth Amendment rights as applied; and Count II asserts that the Challenged Provisions violate Plaintiff-Appellees' right to equal protection of the law. ROA.52-55. Plaintiff-Appellees request that the Challenged Provisions be declared unconstitutional as applied and that the Secretary be enjoined from enforcing them against Plaintiff-Appellees. ROA.55.

Following preliminary motions practice and discovery, the parties proceeded to file cross-motions for summary judgment. ROA.511, 611. On September 29, 2022, the District Court entered its Order granting in part and denying in part each party's motion (hereinafter, the District Court's "decision"). ROA.2275. Specifically, the District Court held that the Challenged Provisions are unconstitutional as applied to Plaintiff-Appellees insofar as they require or necessitate the use of paper nomination petitions, but granted summary judgment to

[3] A summary of the relevant provisions of the Texas Election Code is set forth in the Amended Complaint and incorporated herein by reference. ROA.32-44.

the Secretary on all other claims. ROA.2330. On June 26, 2023, the District Court entered its Order and Final Judgment enjoining the Secretary from enforcing the Challenged Provisions against Plaintiff-Appellees insofar as they "contemplate[], rel[y] upon, or require[] paper nomination petitions or a paper nomination petitioning, verification, or submission process." ROA.2378. Plaintiff-Appellees did not request and the District Court did not grant affirmative relief.

On July 26, 2023, the Secretary filed this appeal from the District Court's Order and Final Judgment. ROA.2395. On August 3, 2023, without Plaintiff-Appellees' objection, the District Court entered a Text Order staying its Order and Final Judgment. ROA.21. On August 5, 2023, Plaintiff-Appellees filed their Notice of Cross-Appeal from the District Court's Order and Final Judgment and the underlying Order granting in part and denying in part their motion for summary judgment. ROA.2397.

SUMMARY OF THE ARGUMENT

This case comes to the Court on the basis of a record that is truly uncontested. The Secretary does not dispute the truth of the material facts that Plaintiff-Appellants assert, ROA.2310, and the Secretary has chosen to disregard rather than the address the "comprehensive evidentiary record" that Plaintiff-Appellants submitted. ROA.2320. The Secretary also submitted almost no evidence. ROA.2310 & n.3. 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. 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 on all claims except one – Plaintiff-Appellees' claim that Texas's 118-year-old petitioning procedures are unconstitutional as presently applied. As to that claim the District Court should be affirmed. The undisputed facts overwhelmingly support its conclusion that the burdens imposed by the petitioning procedures are not justified by any legitimate state interest, and the Secretary offers no factual or evidentiary basis to disturb that conclusion on appeal. Indeed, the Secretary does not even *address* the facts and evidence in this case – the Secretary's brief is nearly bereft of citation to the record. As a result, the Secretary offers nothing more than a generic defense of Texas's interest in regulating ballot access, which is legally insufficient to defeat Plaintiff-Appellees' claims at summary judgment.

The District Court also granted appropriate relief. It merely enjoined enforcement of the Challenged Provisions insofar as they necessitate or require paper nomination petitions. The District Court granted no affirmative relief whatsoever – its narrow injunction neither requires the Secretary nor the Legislature to take any action, but properly leaves it to the unfettered discretion of the

Legislature to determine the nature and scope of the remedy. The District Court also stayed its injunction to permit the Legislature sufficient time to act. Thus the District Court did not abuse its discretion and there is no basis to disturb its injunction on appeal.

The District Court should be reversed on all other claims. Its conclusion that the Challenged Provisions impose only minimal burdens cannot be reconciled with the undisputed facts and uncontested evidence. Indeed, the District Court reached that conclusion only because it repeatedly disregarded Plaintiff-Appellees' evidence to the contrary, in direct violation of the federal rules governing relevance and admissibility. Had the District Court properly considered the evidence demonstrating the Challenged Provisions' combined effect and conducted the fact-intensive analysis required in ballot access cases, it could not have concluded that they withstand constitutional scrutiny. Plaintiff-Appellees carried their burden in this case; the Secretary did not. To the extent that the District Court ruled in the Secretary's favor, this case should be reversed and remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, "applying the same standard as the district court". *Austin v. Kroger Tex., LP*, 864 F.3d 326, 328 (5th Cir. 2017) (citation omitted). Summary judgment shall be entered

in favor of the moving party if the record, taken as a whole, "show[s] 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." Fed. R. Civ. P. 56(c). A "dispute about a material fact is 'genuine' … if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

This Court reviews the grant of an injunction under the "'abuse of discretion'" standard. *ODonnell v. Harris Cty.*, 892 F.3d 147, 155 (5th Cir. 2018) (citation omitted). "Findings of fact are reviewed only for clear error; legal conclusions are subject to *de novo* review." *Id.*

ARGUMENT

I. The District Court Decision Holding Texas's 118-Year-Old Petitioning Procedures Unconstitutional as Applied Should Be Affirmed.

The District Court correctly concluded that Texas's petitioning procedures are unconstitutional as applied to Independents and Minor Parties, and that portion of its decision should be affirmed. Indeed, no other conclusion would be consistent with the "comprehensive evidentiary record" that Plaintiff-Appellees developed in support of their claims. ROA.2320. As the District Court acknowledged, the Secretary submitted almost no evidence and "do[es] not contest" any of the material facts on which Plaintiff-Appellees rely. ROA.2310 & n.3; ROA.660-680. Those material facts are damning: they establish, for example, that the cost of complying

with the petitioning procedures in a statewide petition drive now approaches $1 million or more – a staggering sum that is directly attributable to the 118-year-old petitioning procedures' endemic inefficiencies. The District Court committed no error in holding these procedures unconstitutional as applied, and on this uncontroverted record there is no basis for reversal.

A. The *Anderson-Burdick* Framework Governs Review of Plaintiff-Appellees' Claims.

The Supreme Court has long held that ballot access cases require careful consideration of "the facts and circumstances behind the law" and cannot be decided by applying a "litmus-paper test." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (explaining that no simple rule can act as a "substitute for the hard judgments that must be made" in ballot access cases); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."). Ultimately, the key question that courts must address is whether "a reasonably diligent … candidate [can] be expected to satisfy" the statutory requirements. *Storer*, 415 U.S. at 742. To guide courts' analysis, the Supreme Court has established the '*Anderson-Burdick*' framework, pursuant to which a reviewing court:

> must first 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.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). This framework establishes a "flexible standard" in which "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this standard, "reasonable, nondiscriminatory restrictions" are subject to less exacting review, whereas laws that impose "severe" burdens are subject to strict scrutiny. *See id.* (citations omitted). But in every case, the Supreme Court has emphasized that "[h]owever slight [the] burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

B. The District Court Correctly Concluded That Texas's Petitioning Procedures Fail Scrutiny Under the Anderson-Burdick Analysis.

1. The Undisputed Facts Support the District Court's Findings and Establish That the Petitioning Procedures Impose Severe and Unequal Burdens.

The District Court properly began its analysis of the petitioning procedures by "identifying the nature of the right recognized in *Anderson* and *Burdick*," *Wilson v. Birnberg*, 667 F.3d 591, 598 (5th Cir. 2012), and "'consider[ing] the character and

magnitude of the asserted injury'" to Plaintiff-Appellees' rights. *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988) (quoting *Anderson*, 460 U.S. at 789). Specifically, the District Court found that the petitioning procedures burden Plaintiff-Appellees' First Amendment rights because they "dissuade voters from signing, make the process more time consuming, and create the need for more signatures." ROA.2325. The District Court also found that the petitioning procedures "add[] challenges because petition circulators are often asked to relocate and some voters are unwilling to stop in public and provide personal information." ROA.2325. Further, petitioning is "more difficult in Texas" than any other state due to the primary screenout, which "prohibits Minor Parties and Independents from collecting signatures before the primary election and prohibits voters from signing petitions if they voted in a primary election." ROA.2325. And the District Court found that "the lack of electronic [petitioning] methods does burden Plaintiffs." ROA.2325. The District Court properly supported these findings by citing competent evidence establishing undisputed facts. ROA.2310, 2325.

The District Court also found that Texas's petitioning procedures impose "unequal burdens" on Plaintiff-Appellees' rights. ROA.2329. Specifically, the District Court found that "Texas places an unequal burden on Plaintiffs 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.2329. In particular, pursuant to § 172.029, "state and county chairs for the Major Parties 'shall electronically submit' information about each candidate who files an application for a place on the ballot," and "Defendants must 'continuously maintain an online database' of the information submitted." ROA.2329 (citations omitted). Further, "Texas also allows Major Parties to certify primary election results electronically." ROA.2329 (citations omitted). By contrast, "Plaintiffs have no ability to electronically conduct petitioning, verify signatures, or submit petitions," but must instead "use the same hard copy paper procedures enacted almost 120 years ago in 1903." ROA.2329-2330. Additionally, "Defendants also have not taken any steps to reduce the burdens those procedures impose" on Plaintiff-Appellees, nor have they even "considered" the possibility of doing so. ROA.2330. These findings are also supported by citation to undisputed facts. ROA.2329-2330.

The Secretary cannot point to any error – much less a "clear error" – that would justify disturbing the District Court's findings under the highly deferential standard of review applicable here. *See Pilcher*, 853 F.2d at 337 (upholding district court findings under "clearly erroneous" standard). The Secretary does not even attempt to do so: the Secretary's brief is nearly bereft of citation to the undisputed facts and uncontested evidence in the record. [Brief of Defendants-Appellants "Sec. Br." at 12-27]; *but see Nader v. Connor*, 332 F. Supp. 2d 982, 988 (W. Tex. 2004)

(in the ballot access context "each case must be resolved on its own facts …."), *aff'd*, 388 F.3d 137 (5th Cir. 2004). Moreover, the uncontroverted record here is more than sufficient to support the District Court's findings: it practically compels the conclusion that the petitioning procedures impose severe and unequal burdens on Plaintiff-Appellees as presently applied.

As a threshold matter, the uncontested evidence establishes that collecting signatures by hand is inherently time-consuming, labor-intensive and expensive under the best of circumstances.[4] ROA.672, 736, 770-771, 789, 790, 810-813. It is a physically challenging and mentally taxing activity that few people can do successfully. ROA.672, 770, 810-811. It is even more so in Texas, which is the most difficult state in the nation due to its high signature requirements, short petitioning periods, primary screenout provisions and other burdensome requirements. ROA.671-673, 733-735, 768-769, 771-772, 788-789, 809-811. Indeed, no other state requires Independents and Minor Parties to collect so many signatures in such a short time as Texas, and no other state comes close. ROA.671.

Additionally, as the District Court correctly found, ROA.2325, no other state imposes a primary screenout, *see* §§ 181.006(j), 181.063, 142.009(1); §§ 181.006(g),

[4] A trained petition circulator might collect 10 signatures per hour, on average, with a validity rate of approximately 70 percent. ROA.747, 768, 789, 802-803, 810, 822, 823. This translates to a total of 400 raw signatures, or 280 valid signatures, in a full-time, 40-hour work week. To conduct a successful statewide petition drive, therefore, Independents and Minor Parties must employ dozens of full-time petition circulators, which comes at significant expense.

142.009(2), which makes petitioning uniquely difficult and significantly increases the burden and expense of conducting a petition drive in Texas. ROA.736, 771, 802, 811, 822. Only in Texas are Independents and Minor Parties prohibited from petitioning on primary election day, which is by far the most productive day in every other state. ROA.802, 807, 819-821. Furthermore, to enforce its primary screenout, Texas – again, unlike any other state – requires that petition circulators recite an oath to each potential signer that confirms they did not vote in a primary election. *See* §§ 141.064(1), 142.008, 181.006(f) and 192.032(f). The oath is lengthy and legalistic, and reciting it to every potential signer not only takes substantial time but also dissuades many people from signing. ROA.770-771, 802, 811-812, 821-822. Despite reciting the oath, petition circulators have no way to confirm whether potential signers voted in the primary, and many people sign even though they did, rendering their signatures invalid. ROA.771, 802, 811, 823.

Once signatures are collected, the requirement that petition circulators review them and execute a notarized affidavit attesting that they verified each signer's registration status and believe the signatures to be genuine and the related information correct adds yet another substantial burden. *See* §§ 141.064-65; ROA.771, 790, 812-813. This process is laborious and time-consuming, but more important, information written by hand using clipboards on busy sidewalks and other public spaces is frequently illegible, incomplete or improperly entered on the petition

form. ROA.674. Many signatures are therefore impossible to validate even though they were signed by qualified, eligible voters. ROA.674.

Due to these endemic inefficiencies, the petitioning procedures effectively compel Independents and Minor Parties to exceed Texas's signature requirements by approximately 50 percent or more to ensure that they comply. ROA.674, 734, 747, 749-750, 771, 802-803, 808, 811, 816-817, 823. Such inefficiencies may have been tolerable when the petitioning procedures first took effect in 1906, and Texas's 1 percent signature requirement amounted to only 2,802 signatures, ROA.663, but they render the petitioning procedures grossly inadequate today, when statewide Independents and Minor Parties must submit 83,434 valid signatures and presidential Independents must submit 113,151 valid signatures. ROA.671. To comply with those requirements using Texas's antiquated petitioning procedures, Independents and Minor Parties must exceed them by tens of thousands of signatures.

Moreover, despite the drastic increase in the number of signatures that Texas requires, the short period within which they must be collected remains fixed. ROA.668, 669. As a result, a statewide petition drive now necessitates a massive dedication of resources. ROA.672-673. Independents and Minor Parties must print thousands of pages of petitions, at their own expense, and enlist a veritable army of petitioners to circulate them throughout the state. ROA.672, 736, 790, 812. Then

the thousands of pages of petitions must be retrieved, reviewed for compliance, organized into multiple boxes and delivered by truck or van to the Secretary's office in Austin. ROA.736, 789, 790, 809, 810, 812-813, 823. Such an effort strains the resources of the most well-funded campaigns. ROA.672-673, 734-736, 787-788, 790.

Indeed, the uncontested evidence establishes that volunteer petition drives cannot succeed at the statewide level in Texas and have not succeeded in decades, if ever. ROA.672, 735-736, 750, 759, 772, 776, 787-790, 816-817, 828-832. Volunteer-led efforts fail, and the rare statewide petition drives that succeeded in the past did so only with substantial financial backing. ROA.672, 734-735, 755-757, 772, 777, 804, 809, 817. But the cost of these past petition drives pales in comparison to the cost of conducting a statewide petition drive today.

When GPTX first qualified for the ballot in 2000, its petition drive cost approximately $80,000. ROA.776. This substantial sum exceeded the fledgling party's limited resources and was paid not by GPTX but by the campaign of its presidential ticket, Ralph Nader and Winona LaDuke. ROA.776. In 2004, when LPTX last conducted a petition drive, the cost was $140,000 and the party went into debt to fund the effort. ROA.759, 810. Fourteen years later, in 2018, the cost of a petition drive for a statewide Independent had increased to $587,500 if there were no primary runoff, and $797,000 if there were a primary runoff (the latter figure

being higher due to the shortened, 30-day petitioning period). ROA.750. Four years later, the cost had climbed still higher: the Serve America Movement ("SAM Party") sought to qualify for Texas's ballot in 2022, and obtained proposals from three separate petitioning firms quoting prices ranging from $882,000 to $1.375 million. ROA.816-817. These sums are staggering, but they are the necessary and unavoidable cost of complying with Texas's petitioning procedures.

Rather than attempting to address this "comprehensive evidentiary record" establishing the severe and unequal burdens the petitioning procedures impose on Independents and Minor Parties, ROA.2320, the Secretary resorts to obfuscation. The Secretary repeatedly asserts or implies that "all" candidates – including those of the Major Parties – are subject to these burdens. [*E.g.*, Sec. Br. at 23.] That is categorically false. Neither Major Party has ever conducted a statewide petition drive nor will they ever need to do so. ROA.666. The heavy burden and exorbitant cost of undertaking that colossal effort falls on Independents and Minor Parties alone.

2. The Undisputed Facts Establish That the Interests Asserted by the Secretary Are Insufficient to Justify the Severe and Unequal Burdens Imposed.

Turning to the next step in the *Anderson-Burdick* analysis, the District Court correctly identified "the precise interests put forward by the State as justifications for the burden[s] imposed by" the petitioning procedures. *Texas Independent Party*

v. Kirk, 84 F.3d 178, 182 (5th Cir. 1996). According to the Secretary, that interest is to ensure that candidates demonstrate a "modicum of support before gaining access to the ballot." ROA.2327 (citation omitted). The District Court acknowledged that this interest advances the State's goals of avoiding "voter confusion, ballot overcrowding, and frivolous candidacies," ROA.2327, but concluded that the petitioning procedures are "not reasonably related" to serve these asserted interests. ROA.2327. The State's asserted goals, the District Court reasoned:

> are not served by requiring Minor Parties and Independents to use an inefficient and laborious process that includes printing paper petitions at their own expense, sending petition drive volunteers or paid workers out to public spaces to request that people stop and go through a paper form at a time and in a place that may be inconvenient or uncomfortable, making it impractical to confirm, in real time, whether a potential signer is eligible, reducing the number of valid signatures because sometimes the signer's handwriting is illegible or becomes illegible as the paper is handled, collecting the printed and signed petitions at their own expense from the circulators, organizing the paper petitions, reviewing the paper petitions by hand, and then driving the boxes of petition forms to Austin.

ROA.2327-2328 (citation omitted).

In reaching this conclusion, the District Court properly followed the Supreme Court's admonition that "[h]owever slight [the] burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (citation and quotation marks omitted). The District Court also properly concluded that Texas's petitioning procedures fail this

test. As set forth *supra* at Part I.B.1, it is undisputed that Texas's petitioning procedures are so inefficient that Independents and Minor Parties must exceed their signature requirements by as much as 50 percent or more – amounting to tens of thousands of signatures in a statewide petition drive – to account for the large number that are invalidated on technical grounds or due to illegibility. ROA.674, 734, 747, 749-750, 802-803, 808, 816-817, 823. It is also undisputed that the petitioning procedures are so laborious that volunteer efforts have not succeeded in decades, if ever, ROA.672, and that the cost of complying with them as currently applied approaches $1 million or more. ROA.673. These facts alone establish that the petitioning procedures are not sufficiently tailored to serve the Secretary's asserted interests.

In particular, the undisputed facts prove that the petitioning procedures make it well-nigh impossible for non-wealthy Independents and Minor Parties to demonstrate the "modicum of support" required under Texas law. *See Storer*, 415 U.S. at 742 (observing that "past experience" is useful to determine whether "a reasonably diligent … candidate [can] be expected to satisfy the signature requirements …."). No statewide Independent has done it since 2006 (and before that, since 1992) and no Minor Party has since 2004. ROA.676, 679. Further, no statewide petition drive will succeed in the future unless the Independent or Minor Party can afford to pay approximately $1 million or more to fund it. ROA.672-673.

Down-ballot candidates are also excluded. In 2018 alone, 70 Independents filed declarations of intent to run for statewide or district office, and only eight qualified for the general election ballot – meaning 88.6 percent failed. ROA.832. Between 2010 and 2016, 122 Independents filed declarations of intent to run for statewide and district offices, and only two qualified – meaning 98.4 percent failed. ROA.832-833.

Finally, as the District Court observed and the Secretary concedes, [Sec. Br. at 19], "other states have implemented electronic methods by which voters can sign nomination petitions and simultaneously confirm eligibility." ROA.2328 (citation omitted). Such methods "would reduce or eliminate much of the burden imposed on Minor Parties and Independents." ROA.2328 The Secretary also concedes that such methods would reduce the considerable burden the petitioning procedure imposes on the State. ROA.2330. The Supreme Court has "emphasized that 'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.'" *Illinois State 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."). The District Court correctly concluded that Texas's petitioning procedures fail to meet that requirement. Its decision holding the petitioning procedures unconstitutional as applied should be affirmed.

C. The Relief Granted by the District Court Is Appropriate, Narrowly Tailored and Gives Due Deference to the Legislature.

The power of federal courts to fashion broad equitable remedies is well-settled. *See United States v. Ramsey*, 331 F.2d 824, 827 (5th Cir. 1964) ("A federal district court is a court of equity, and as such has broad powers of discretion."); *see also Bell v. Hood*, 327 U.S. 678, 684-85 (1946); *see*, *e.g.*, *McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (affirming order placing independent candidate on ballot as remedy for unconstitutional ballot access scheme). At the same time, courts must "'narrowly tailor an injunction to remedy the specific action which gives rise to the order.'" *ODonnell v. Harris Cty.*, 892 F. 3d 147, 163 (5th Cir. 2018) (citation omitted). Here, the District Court tailored its injunction as narrowly as possible – it did not grant any affirmative relief but merely enjoined enforcement of the specific provisions that prescribe Texas's petitioning procedures. ROA.2378. The District Court therefore properly exercised "judicial deference to legislative judgment" *Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991) (approving district court's acceptance of legislation as remedy for voting rights violation). Indeed, the District Court stayed its order, without objection from Plaintiff-Appellees, ROA.21, thus allowing the Legislature unfettered discretion to enact an appropriate remedy. The District Court therefore committed no "abuse of discretion" and there is no basis to disturb its order under the highly deferential and

"narrow" review that applies on appeal. *See Securities and Exchange Comm. v. Forex Asset Mgmt.*, 242 F. 3d 325, 331 (5th Cir. 2001) (citation omitted).

II. The District Court Decision Denying Plaintiff-Appellees' Claim That the Challenged Provisions Are Unconstitutional as Applied in Combination Should Be Reversed.

In the proceedings below, Plaintiff-Appellees developed a "comprehensive evidentiary record" demonstrating the panoply of increasingly severe and unequal burdens the Challenged Provisions have imposed on Texas's Independent and Minor Party voters, candidates and political parties in the last five decades – not least of which is the staggering cost of complying with them, which now approaches $1 million or more. RAO.2320; RAO.660-680. The Secretary, by contrast, submitted almost no evidence and does not dispute any material facts on which Plaintiff-Appellees rely. RAO.2310. The record here is therefore truly uncontested, and it establishes that the Challenged Provisions erect a near-absolute barrier to the ballot against non-wealthy Independents and Minor Parties, including Plaintiff-Appellees. It further establishes that no compelling or legitimate state interest justifies the heavy burdens the Challenged Provisions impose.

The District Court nevertheless applied "rational basis review" to deny Plaintiff-Appellees' claims that the Challenged Provisions are unconstitutional as applied in combination. ROA.2326. This was error. As an initial matter, it is settled law that when plaintiffs challenge election laws as applied in combination, as

Plaintiff-Appellees do here, courts "must consider 'the combined effect of the applicable election regulations,' and not measure the effect of each statute in isolation." *Graveline v. Benson*, 992 F.3d 524, 536 (6th Cir. 2021) (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)); *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (same); *Lee v. Keith*, 463 F.3d 763, 768-69 (7th Cir. 2006) (same); *Pilcher*, 853 F.2d at 336 (same); *Nader*, 332 F. Supp. 2d at 987 (same). In clear violation of this precedent, the District Court improperly analyzed individual provisions separately, and concluded they do not impose "severe" burdens as applied in isolation. ROA.2320-2322, 2324, 2324-2325, 2326, 2326-2327. The District Court thus largely failed to address "the nature, extent, and likely impact of the election law requirements," and their "practical effect … viewed in their totality." *Nader*, 332 F. Supp. 2d at 987-88 (citations and quotation marks omitted).

The District Court compounded its error by repeatedly disregarding or discounting undisputed facts and uncontroverted evidence demonstrating the severe and unequal burdens the Challenged Provisions impose as applied in combination. These errors rendered the District Court's analysis fatally flawed. As the Seventh Circuit has explained, "much of the action takes place at the first stage" of the *Anderson-Burdick* analysis – the consideration of the character and magnitude of the burden imposed – because that is what determines whether strict scrutiny or a less

demanding standard of review applies. *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014). Had the District Court properly analyzed the Challenged Provisions' combined effect and credited the undisputed facts and uncontested evidence demonstrating that they impose severe and unequal burdens, it could not have applied rational basis scrutiny and upheld them.

A. The Challenged Provisions Implicate Plaintiff-Appellees' Fundamental First and Fourteenth Amendment Rights.

The Challenged Provisions "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams*, 393 U.S. at 30 ("Both of these rights, of course, rank among our most precious freedoms."). Laws that exclude candidates from the ballot "burden[] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for likeminded citizens." *Anderson*, 460 U.S. at 787-88. The Challenged Provisions also burden Plaintiff-Appellees' "right . . . to create and develop new political parties." *Norman v. Reed*, 502 U.S. 279, 288 (1992). These rights are "'of the most fundamental significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433 (citation omitted).

B. The Uncontested Evidence Establishes That the Challenged Provisions Severely Burden Plaintiff-Appellees' First Amendment Rights as Applied in Combination.

Both the Supreme Court and this Court have long recognized that "'a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.'" *Nader*, 332 F. Supp. 2d at 987 (quoting *Storer*, 415 U.S. at 737); *Pilcher*, 853 F.2d at 336 (same). Here, the uncontested evidence establishes that several of the Challenged Provisions are severely burdensome standing alone, and taken together, they erect an insurmountable barrier to non-wealthy Independent and Minor Party candidates. That is the *sine qua non* of a severe burden.

1. The Number of Signatures Required by Texas Is Excessive.

The heavy burden imposed by the Challenged Provisions arises first and foremost from the excessive number of signatures that Texas requires. To qualify for Texas's ballot in 2020, a statewide Independent or Minor Party candidate had to submit 83,434 valid signatures. ROA.671. To qualify in 2024, a presidential Independent must submit 113,151 valid signatures. ROA.671. In practice, however, Independents and Minor Party candidates must collect approximately 50 percent more signatures than the requirement to account for the large number that are invalidated. ROA.734, 768, 789, 802-803, 811, 823. These requirements are higher, by far, than the signature requirements imposed by every state other than California. *See* Winger, *2024 Presidential Petitioning Requirements*, Ballot Access News (July 2021 – Vol. 37, No. 2), http://ballot-access.org/2021/07/30/July-2021-ballot-access-

news-print-edition/ (accessed October 19, 2023). While not dispositive, this comparison is an important factor in determining whether Texas's signature requirements impose a "severe" burden. *See Williams*, 393 U.S. at 47 & n.10 (Harlan, J. concurring) (comparing Ohio's signature requirement to "the overwhelming majority of other States" and finding it "clearly disproportionate to the magnitude of the risk that [Ohio] may properly act to prevent …."); *Lee*, 463 F.3d at 768-69 (finding Illinois's signature requirement "severe" in part because it "exceeds those of all other states."); *Graveline*, 992 F.3d at 540 (finding Michigan's signature requirement "severe" in part because "in terms of absolute numbers only five states have higher requirements.").

To place Texas's excessive signature requirements in perspective, New York, the state with the next-highest signature requirement, requires only 45,000 signatures. *See* Winger, *2024 Presidential Petitioning Requirements*, *supra*. Further, Texas's signature requirements cannot be deemed "reasonable" simply because they are based on a percentage of votes cast in prior elections. As the Supreme Court has explained, such a "litmus-paper test" is improper in the ballot access context, and it cannot be substituted for the "hard judgments that must be made" based on the "facts and circumstances" of each case. *Storer*, 415 U.S. at 730 (citations omitted). For example, in *Graveline*, a 30,000-signature requirement was found severely burdensome even though it amounted to less than one percent of the

vote cast in the preceding election. *See Graveline*, 992 F.3d at 539-42 (30,000 signatures represented .72% of the votes cast for attorney general in the 2018 general election); *see also Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016) (finding Georgia's one-percent signature requirement severely burdensome), *aff'd*, 674 Fed. Appx. 974 (11th Cir. 2017).

Texas's signature requirements are not just excessive when compared with other states, they are also excessive when considered in connection with the Secretary's asserted justifications: avoiding crowded ballots and voter confusion by limiting ballot access to candidates who demonstrate a modicum of support. The empirical evidence unequivocally demonstrates that states can avoid overcrowded ballots by requiring as few as 5,000 valid signatures. ROA.1743, 1745; ROA.1759. Consequently, Texas's high signature requirements are not reasonably tailored to protect that interest. LPTX and GPTX – neither of which can comply with Texas's current signature requirements – routinely run candidates who receive hundreds of thousands or more than one million votes once they are on the ballot. ROA.755-757; ROA.759-761; ROA.777-779.

Ultimately, whether a ballot access restriction imposes a "severe" burden depends on whether the evidence shows that "reasonably diligent" candidates can comply with it. *See Storer*, 415 U.S. at 742. Here, the undisputed facts establish that Independents and Minor Parties cannot currently comply with Texas's signature

requirements, and that they have only done so with extreme rarity in the past. *See supra* at Part I.B.2; RAO.664-666, 762-763, 776-777; *see also Storer*, 415 U.S. at 742 ("it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.").

The District Court incorrectly relied on a single fact to support its conclusion that Texas's signature requirements (as applied in isolation) are not severely burdensome: LPTX's and GPTX's current status as ballot-qualified parties, the District Court reasoned, "negat[es]" the claim that these requirements are "overly stringent." ROA.2321. But LPTX has not completed a successful statewide petition drive since 2004, and its ability to do so nearly 20 years ago in no way negates the conclusion that the 1 percent requirement is severely burdensome now, when the undisputed facts establish that both the number of signatures required and the cost of obtaining them has drastically increased, ROA.663-664, 670, 672-673, and that LPTX cannot comply with the 1 percent requirement as presently applied. ROA.676-677, 763.

Similarly, that GPTX became ballot-qualified in 2010 because another entity conducted a petition drive on its behalf – without GPTX's involvement – does not support the conclusion that GPTX could comply with the 1 percent requirement then, nor that it can do so now. ROA.777, 2321. Nor does the Legislature's enactment of a law that retroactively qualified GPTX for the ballot in 2020 – allowing it to

circumvent the 1 percent requirement – support that conclusion. ROA.779, 2322. These facts do not show that LPTX and GPTX "have surmounted" the 1 percent requirement "for a period of years," as the District Court incorrectly concluded, ROA.2321, but that neither party has done so in decades. Furthermore, the undisputed facts establish that neither LPTX nor GPTX can comply with the 1 percent requirement as presently applied, ROA.762-763, 776-777, and there is no factual basis for the District Court's conclusion to the contrary.

2. The Extreme Time Constraints That Texas Imposes on Signature Collection Compound the Burden the Challenged Provisions Impose.

The ever-increasing number of signatures that Texas requires Independents and Minor Parties to obtain in the same fixed period compounds the severity of the burden imposed by the Challenged Provisions. The shorter the time permitted to collect signatures, the more money and resources are needed to do it. ROA.733-736, 746-747, 750-751, 768-773, 788-790, 801, 809-811, 824. And no other state places such extreme time constraints on Independents and Minor Parties who seek access to the ballot. ROA.671.

When Texas's one-percent signature requirement first took effect, in 1906, it translated to 2,802 signatures for statewide office. ROA.827; ROA.966-973. When the requirement was first applied to Minor Parties, in 1968, it translated to 14,259 signatures. ROA.827; ROA.974-979. In 1972, the requirement translated to 22,000

signatures. *See American Party of Tex. v. White*, 415 U.S. 767, 777 (1974). Today, 50 years later, the requirement has nearly quadrupled for statewide Independents and Minor Parties – they were required to submit 83,434 valid signatures in 2022 – and the requirement for presidential Independents has quintupled – they must submit 113,151 valid signatures in 2024. ROA.671. Yet the time allowed for obtaining these signatures remains fixed: Minor Parties have just 75 days, *see* § 181.005(a), and in 2022 statewide Independents had 107 days. *See* §§ 142.004-06, 142.009 (petitioning period starts after the March 1, 2022 primary election and ends 30 days after the May 24, 2022 primary runoff election). Independents unlucky enough to compete in a race with a primary runoff, meanwhile, have just 30 days to obtain their signatures. *See* § 142.009(1). In 2024, presidential Independents will have just 68 days to collect their 113,151 valid signatures. *See* §§ 192.032(c),(g); 41.007(c) (petitioning period begins March 6, 2024 and ends May 13, 2024).

The time constraints that Texas places on Independents and Minor Parties makes the combined burden imposed by the Challenged Provisions far more severe than any other state's requirements. Of the 39 states that have established procedures for a group to qualify as a political party by submitting a petition, 28 impose no time limitation whatsoever – the group can take as long as it needs to obtain the required number of signatures. ROA.671. Of the remaining 10 states that impose a time limit, none are anywhere nearly as restrictive as Texas. Georgia comes closest, and

it is far less restrictive, requiring a prospective party to obtain signatures equal to 1 percent of registered voters – currently 76,389 signatures – within a 15-month petition period. ROA.671, 835. The other nine states are even less restrictive, because their signature requirements are much lower than Georgia's and their petitioning periods are much longer than Texas's. ROA.671, 835.

The District Court acknowledged that the time constraints Texas imposes on Independents and Minor Parties "may be the most restrictive in the country …," but incorrectly concluded – without addressing any evidence whatsoever – that Plaintiff-Appellees "fail to present adequate evidence that the time constraints burden them." ROA.2325. The record evidence cited herein flatly contradicts this conclusion. It demonstrates that the time constraints drastically increase the burden and expense of complying with the Challenged Provisions to the point of making it a practical impossibility – and none of this evidence is controverted. RAO. 733-734, 750-751, 768-772, 788-790, 801, 809-811, 817, 824, 2310. The District Court's conclusion to the contrary is not merely unsupported, but contradicted by the undisputed facts.

3. Texas's Obsolete and Inefficient Petitioning Procedures Exacerbate the Burdens on Plaintiff-Appellees' Fundamental Rights.

As explained *supra* at Part I.B.1, the endemic inefficiencies of Texas's 118-year-old petitioning procedures exacerbate the burdens the Challenged Provisions impose, most significantly by making it prohibitively expensive for non-wealthy

Independents and Minor Parties to comply. Plaintiff-Appellees submitted an abundance of evidence to support this conclusion, RAO.672-673, and it is not in dispute. RAO.2310. The District Court acknowledged that Plaintiff-Appellees had demonstrated "that it is expensive, perhaps prohibitively expensive, to comply with the petition requirement," but improperly discounted this undisputed fact on the ground that one of Plaintiff-Appellees' witnesses "is not a party to this lawsuit" and "none of the [p]laintiffs is suffering from that burden, even if it is a severe burden." ROA.2324. In so doing the District Court violated black letter law. *See* Fed. R. Evid. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."); Fed. R. Evid. 402 ("Relevant evidence is admissible unless" the Constitution, a federal statute or applicable rule provides otherwise). A witness need not be a party to a lawsuit to provide relevant, admissible evidence, nor must Plaintiff-Appellees demonstrate that they are actively engaged in a petition drive to present evidence of the burdens that a petition drive imposes. *See id.* Further, evidence demonstrating the cost of complying with the Challenged Provisions is plainly relevant. *See*, *e.g.*, *Graveline v. Benson*, 430 F. Supp. 3d 297, 309, 311 (E.D. Mich. 2019) (finding burden "severe" where evidence showed that "all-volunteer efforts 'most often fail'" and independent candidates for statewide office therefore must "spend significant money for a professional signature-

gathering firm on top of the money associated with volunteer efforts."), *aff'd*, 992 F.3d 524, 540 (6th Cir. 2021); *Green Party of Ga.*, 171 F. Supp. 3d at 1350-51, 1363 (relying on cost of compliance to support conclusion that Georgia's 1 percent signature requirement imposed severe burden).

The District Court committed the same error when it declined to find that Texas's petitioning procedure imposes a severe burden on the ground that Plaintiff-Appellees fail to present "evidence of the severe burdens placed specifically on them, or, if they did, it was a plaintiff that already had ballot access." ROA.2326. Once again the District Court violated black letter law. *See* Fed. R. Evid. 401; Fed. R. Evid. 402. Evidence that the petitioning procedure is severely burdensome is relevant and admissible even if Plaintiff-Appellees are not presently engaged in a petition drive. Moreover, as the District Court elsewhere observed, Plaintiff-Appellees APTX and CPTX "lack[] the money and resources needed to complete a successful petition drive." ROA.2322. The same is true for LPTX, GPTX and every other Plaintiff-Appellee. ROA.746-747, 762, 780, 785-786, 793. That is direct evidence that the petitioning procedure specifically burdens Plaintiff-Appellees, and there is no basis in law for the District Court to discount such evidence.

C. The Uncontested Evidence Establishes That the Challenged Provisions Impose Unequal Burdens on Plaintiff-Appellees' Rights as Applied in Combination.

It is well settled that states may provide "alternative paths" to the ballot for Independents, Minor Parties and Major Parties without violating the Equal Protection Clause. *Jenness*, 403 U.S. at 440-41 (observing that no particular alternative "can be assumed to be inherently more burdensome than the other."). In this case, however, Plaintiff-Appellees do not rely on assumptions, but rather a comprehensive evidentiary record demonstrating that the Challenged Provisions impose a near-absolute barrier to non-wealthy Independents' and Minor Parties' participation in Texas's electoral process, while the alternative path available to Major Parties guarantees their nominees automatic access to the general election ballot at taxpayer expense. Ballot access in Texas costs Major Parties nothing; for Independents and Minor Parties, it is cost-prohibitive. The Challenged Provisions impose many additional burdens that fall on Independents and Minor Parties alone, and place them at a significant disadvantage to Major Parties. Such a scheme violates the Equal Protection Clause. *See Anderson*, 460 U.S. at 793 ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.") (footnote omitted).

1. Texas Guarantees Major Party Nominees Ballot Access at Taxpayer Expense but Requires Independents and Minor Parties to Bear the Prohibitive Cost of Complying With the Procedures They Must Follow.

In sharp contrast to the inherently laborious, inefficient and prohibitively expensive petitioning procedures that Independents and Minor Parties must follow to access the ballot, Texas guarantees Major Party nominees automatic access to the general election ballot once they are selected in taxpayer-funded primary elections. Texas has used taxpayer funds to pay for Major Parties' primary elections in each election cycle since 1972. *See American Party of Tex.*, 415 U.S. at 791-92; RAO.1816:4 – 1817:3, 1924:1 – 1924:21. In 1972, Texas spent approximately $3 million in taxpayer funds on the Major Parties' primary elections. *See American Party of Tex.*, 415 U.S. at 792. In each election cycle since then, Texas has spent millions more, culminating with the 2020 election cycle, when it spent approximately $18 million in taxpayer funds on the Major Parties' primary elections. RAO.1924:1 – 1924:21.

Major Parties use the taxpayer funds they receive from the state for virtually every expense they incur in connection with their primary elections. This includes but is not limited to precinct workers and other elections officials, transportation, polling place rentals, office rentals, office personnel, office equipment such as computers, printers and telephones, and office supplies, among many other expenses. ROA.838, 1876:4 – 1893:4. In short, Major Parties need not pay for so much as a paper clip to place their nominees on the ballot. Taxpayers pick up the bill.

Texas does not use any taxpayer funds to facilitate Independents' and Minor Parties' compliance with the procedures they must follow to access the ballot. ROA.1838:14 – 1839:5. Texas does not even provide paper copies of the petitions they are required by law to circulate. ROA.771, 808-809, 812, 1986:18 – 1987:4. Given the exorbitant cost of complying with the Challenged Provisions, this unequal treatment places Independents and Minor Parties at a disadvantage that is practically impossible to overcome.

The single paragraph the District Court devoted to this claim fails to provide a valid basis for its rejection. ROA.2328-2329. The District Court began by observing that the "alternative ballot access rules" Texas imposes on Independents and Minor Parties "are not per se unconstitutional," RAO.2328 (citing *Jenness*, 403 U.S. at 441-42), but that is not relevant because Plaintiff-Appellees do not claim they are. Likewise, it is not relevant that "other district courts in Texas" have rejected other Equal Protection claims, RAO.2329 (citations omitted), because none of the cases the District Court cites addressed Plaintiff-Appellees' claim here, much less the comprehensive and uncontroverted evidentiary record on which it relies.

The sole basis for the District Court's rejection of Plaintiff-Appellees' claim thus reduces to its conclusion that they fail to show the Challenged Provisions "'operate as a mechanism to exclude certain classes of candidates from the electoral process,'" ROA.2329 (quoting *Anderson*, 460 U.S. at 793), but that is precisely what

the uncontroverted evidence establishes. As Plaintiff-Appellees have explained, *see infra* at Part II.B.3, the District Court improperly disregarded that evidence in clear violation of the federal rules governing relevance and admissibility. *See* Fed. R. Evid. 401; Fed. R. Evid. 402. Moreover, such evidence demonstrates that the Challenged Provisions restrict participation by the very classes the Court was concerned to protect in *Anderson* – "political groups whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. The District Court's rejection of Plaintiff-Appellees' claim is therefore wholly without merit.

2. The Challenged Provisions Impose Additional Substantial and Unequal Burdens That the District Court Failed to Address.

Plaintiff-Appellees assert that the Challenged Provisions violate Equal Protection on several additional grounds that the District Court failed to address. ROA.648-653. These claims were fully developed and firmly grounded in the undisputed facts and uncontested evidence. The District Court's failure to address each of these claims was error.

a. The District Court Failed to Address Plaintiff-Appellees' Claim That the Primary Screenout Violates Equal Protection.

Despite acknowledging the unequal burdens the primary screenout imposes, ROA.2325, the District Court failed to address Plaintiff-Appellees' claim that it

violates the Equal Protection Clause. ROA.2328-2329. But the uncontested evidence establishes that the burdens are substantial. In addition to limiting the pool of voters eligible to sign petitions and increasing the rate of invalid signatures that Independents and Minor Parties obtain, *see infra* Part I.B.1; ROA.673, the primary screenout gives Major Parties the right to win voters' support – and their partisan affiliation – at a time when Independents and Minor Parties are statutorily prohibited from affiliating with them by obtaining their signatures on a petition. No legitimate state interest can justify such unequal treatment, which explains why no other state imposes a primary screenout. ROA.2325.

Furthermore, Texas allows Major Party candidates to start petitioning for access to the primary election ballot as early as they want, thus allowing them up to 2-1/2 years to meet their requirements. ROA.1870:10 – 1871:5. Yet Independents and Minor Parties must wait until after primary election day to start collecting their signatures. The only justification for this unequal burden, the Secretary admits, is to prevent voters from being "confused" about whether they are eligible to vote in the primary if they have already signed a petition for an Independent or Minor Party. ROA.1981:7 – 1986:14. Yet the Secretary also admits that voters can be just as easily confused as to whether they are permitted to sign a petition after voting in the primary. ROA.1982:14–24. Texas has simply chosen, arbitrarily, to advantage Major Parties and to disadvantage Independents and Minor Parties.

b. The District Court Failed to Rule on Plaintiff-Appellees' Claim That the Challenged Provisions Violate Independents' Right to Equal Protection.

Independents who wish to run for office in Texas face a unique quandary, unlike Independents in any other state: they do not know when their petitioning period will begin until it starts. If both Major Parties select their nominees in the primary election, then the Independent's petitioning period begins the next day. *See* § 142.009(1). If either Major Party has a runoff primary election, however, the Independent's petitioning period starts the day after that. *See id*. The uncertainty created by this provision imposes a considerable burden by itself. A petition drive – and especially a petition drive for statewide office – is a massive undertaking that must be completed in a sharply limited time. *See supra* at Part I.B.1. Because Independents do not know in advance when that time will begin, however, they cannot take reasonable measures to ensure their petition drive is ready for launch on day one. ROA.750, 751, 769, 801. Most important, Independents cannot assemble a full team of petition circulators to be at the ready, because petition circulators are paid on a per-signature basis, and the only way to ensure their availability is to pay a substantial premium to compensate them for their time in the event the petition drive does not start until after the primary runoff. ROA.750, 751, 769, 801, 802-804.

Section 142.009(1) imposes an even more severe – and unequal – burden on Independents unlucky enough to run in a race for which there is a primary runoff: their petitioning period is cut to just 30 days. That is because the filing deadline for all Independents falls 30 days after the runoff primary, regardless of when the petitioning period starts. *See* § 142.006. Thus, in 2020, statewide Independents in races that did not have primary runoffs had 114 days to collect the 83,434 valid signatures they needed, while statewide Independents running in races that did have primary runoffs had just 30 days to obtain the same number of valid signatures.

Additionally, Texas does not provide any procedure by which Independents may retain ballot access. ROA.788. Consequently, Independents must petition to qualify for the ballot in each election cycle – even if they received enough votes in the prior election to retain ballot access pursuant to § 181.005(c). *See id.* An Independent who won the previous election is therefore still required to petition for ballot access as the incumbent office holder.

c. The District Court Failed to Rule on Plaintiff-Appellees' Claim That the Requirements Imposed on Presidential Independents Violate Equal Protection.

Both the Supreme Court and this Court have made clear that states may not impose more severe ballot access requirements on candidates for president than they do on candidates for other statewide offices. *See Texas Independent Party*, 84 F.3d at 183 (citing *Anderson*, 460 U.S. at 794-95). That is because presidential elections

implicate a "uniquely important national interest," and "in a presidential election a state's stringent ballot access requirements … ha[ve] an impact beyond its borders." *Id.* (quotation marks and citation omitted). Consequently, "'the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.'" *Id.* (quoting *Anderson*, 460 U.S. at 795); *see Bergland v. Harris*, 767 F.2d 1551, 1554-55 (11th Cir. 1985) (recognizing that challenges to presidential ballot access restrictions "require[] a different balance" under *Anderson*).

The signature requirement that Texas imposes on Independent presidential candidates violates this precedent. *See* § 192.032(d). Whereas statewide Independents and Minor Parties must obtain signatures equal in number to 1 percent of the last vote for Governor, *see* § 142.007, presidential Independents must obtain signatures equal in number to 1 percent of the last vote for President. *See* § 192.032(d). The latter requirement is invariably substantially higher. In 2016, for example, Texas required statewide Independents to obtain 47,183 signatures, but required presidential Independents to obtain 79,939. ROA.833.

Texas also imposes more severe time restrictions on presidential Independents than on statewide Independents (or Minor Parties). That is because presidential Independents may not circulate their petitions until after the presidential primary,

but they must submit them by the second Monday in May, *see* §§ 192.032(c),(g), 41.007(c). *See Nader*, 332 F. Supp. 2d at 991-92 (acknowledging that Texas's filing deadline for presidential Independents was the earliest in the nation). In 2020, for example, presidential Independents had only 69 days to obtain their signatures, *see* §§ 192.032(c),(g), 41.007(c), whereas statewide Independents had 114 days. *See* §§ 142.004-06, 142.009, 202.007.

The more stringent requirements that Texas imposes on presidential Independents cannot be reconciled with *Anderson* and *Kirk*. *See*, *e.g.*, *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1359-60 (N.D. Ga. 2016) (striking down Georgia's 1 percent signature requirement for presidential candidates on ground that "the State's interest in regulating presidential elections is not sufficiently important" to justify it). As this Court has observed, such requirements are subject to "a more severe level of scrutiny …." *See Nader*, 332 F. Supp. 2d at 988. Yet the District Court did not scrutinize Texas's requirements for presidential Independents at all.

D. 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. They are not narrowly tailored and certain provisions do not serve *any* legitimate state interest.

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 imposed a requirement of more than 5,000 signatures for statewide office has ever had more than eight candidates on the ballot. ROA.1744-1745; ROA.1759. Texas's regulatory interests would not be implicated if eight candidates appeared on its general election ballot. *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."). Texas frequently accommodates eight or more candidates on its presidential primary ballot without problem. ROA.664. Other states do too. ROA.1743-1744. Furthermore, until 1968 Texas did not impose any signature requirement at all upon Minor Parties but permitted them to place their nominees on the general election ballot simply by submitting their nominee lists to the Secretary. *See* TEX. ELEC. CODE ANN. art. 13.45 (2) (West Supp. 1968). Before 1968, Texas did not have a history of overcrowded ballots, voter confusion, or any other problems associated with Minor Parties' appearance on the general election ballot. ROA.826-828; 1856:9 – 1865:18.

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. *Am. Party of Tex.*, 415 U.S. at 783. Here, however, the uncontested evidence establishes that Texas's signature requirements are greater, by orders of magnitude, than necessary to protect its legitimate regulatory interests. They are not narrowly tailored.

Likewise, the extreme time constraints that Texas imposes upon Independents and Minor Parties are wholly unnecessary to protect its legitimate regulatory interests. Most states do not impose any limit whatsoever on the time that Minor Parties have to obtain their required signatures, and no state imposes the short petitioning periods and high signature requirements that Texas does. ROA.671. The Secretary cannot advance any legitimate interest that makes it necessary for Texas to do so. ROA.1976:17 – 1980:14, 2012:5 – 2013:12.

The Secretary also cannot show that Texas's filing deadlines are narrowly tailored to serve its legitimate regulatory interests. Every other state in the nation, except North Carolina, has a later filing deadline for presidential Independents, and there is nothing unusual about Texas's statutory scheme that makes its early filing deadline necessary. In fact, Texas expressly authorizes the Secretary to presume the validity of Independents' and Minor Parties' petitions, or to validate them by statistical sample. *See* §§ 141.065(b), 141.069. The two-month period that Texas provides the Secretary to validate the petitions is therefore excessive. *See* §§ 142.010(b), 181.007(b). Moreover, to the extent that the Secretary is burdened by

the obligation to validate petitions in a timely fashion, that burden arises entirely from Texas's legislative choice to require that Independents and Minor Parties submit far more signatures than necessary to protect any legitimate regulatory interests, and to do so using an obsolete, laborious and inefficient paper petitioning procedure.

Despite these facts, the District Court accepted the Secretary's asserted state interests as justification for the Challenged Provisions without analysis. ROA.2327.

2. Less Burdensome Alternatives Are Available to Protect Texas's Legitimate Regulatory Interests.

Texas could adopt lower signature requirements and allow Independents and Minor Parties longer petitioning periods and still protect its legitimate regulatory interests. Texas could also reduce the burdens imposed by the Challenged Provisions by updating the procedures that Independents and Minor Parties must follow, as it has done for Major Parties. Electronic petitioning platforms are available, which greatly alleviate the administrative burden and costs imposed by Texas's archaic paper-based procedures. ROA.741-742. Both the District of Columbia and the State of Arizona have adopted such platforms. ROA.743; *see also* Arizona Secretary of State, *E-Qual*, https://apps.azsos.gov/equal/ (last visited November 26, 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 not only reduce

Independents' and Minor Parties' costs by eliminating the need for them to exceed the requirement by 50 percent, but also reduce the Secretary's burden by validating signatures automatically.

III. The District Court Decision Upholding § 181.0311 Should Be Reversed Because the Provision Is Burdensome, Facially Discriminatory and Serves No Legitimate State Interest.

If there is one Challenged Provision that is most clearly unconstitutional, even standing alone, it is § 181.0311. That provision was enacted in 2019 (as the former § 141.041) and requires candidates to submit a petition or pay a filing fee to seek the nomination of a Minor Party. Section 181.0311 substantially increases the burden the Challenged Provisions impose on Minor Parties, it is facially discriminatory, and it does not even implicate, much less serve, any legitimate state interest. The District Court nonetheless upheld § 181.0311 without even addressing Plaintiff-Appellees' Equal Protection challenge. That decision requires reversal.

A. Section 181.0311 Substantially Increases the Burdens the Challenged Provisions Impose on Minor Parties.

Section 181.0311 has only been in effect a short time, but the evidence shows that it has already had an exclusionary impact, and one that falls most heavily on non-wealthy candidates and their supporters. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974). When GPTX was last ballot-qualified in 2016, before § 181.0311 was enacted, it ran 33 candidates. ROA.778. But when GPTX regained ballot access in 2020, after § 181.0311 was

enacted, it ran only seven (in addition to its presidential ticket), and those candidates only qualified after the Supreme Court of Texas ruled that § 181.0311 had been improperly enforced. ROA.779. LPTX candidates were also excluded, notwithstanding the intervention of the Supreme Court of Texas. ROA.813. Further, had that Court not intervened, the 87 candidates that LPTX ran for federal and state office in 2020 would have had to pay a total of $149,450 in filing fees or submit petitions pursuant § 181.0311. ROA.762. The cost of complying with either alternative would have exhausted LPTX's $40,000 annual budget several times over. ROA.762. The additional heavy burden imposed by § 181.0311 will therefore reduce LPTX's field of candidates to a fraction of their historical totals. ROA.759-761.

The record is replete with uncontroverted evidence demonstrating that § 181.0311 burdens GPTX and LPTX by harming their ability to recruit candidates, ROA.761-762, 779-780, and that it burdens their voter-supporters by limiting the field of candidates from whom they can choose. ROA.785-786, 796-797, 813; *see Anderson*, 460 U.S. at 787-88 ("The exclusion of candidates also burdens voters' freedom of association because … a candidate serves as a rallying point for likeminded citizens.") Yet the District Court incorrectly concluded, on the basis of a single candidate's declaration, that "without more" Plaintiff-Appellees fail to show that § 181.0311 – standing alone – "imposes severe burdens on them." ROA.2326-

2327. But the foregoing evidence establishes that § 181.0311 is severely burdensome by itself and in combination with the other Challenged Provisions. The District Court simply failed to address that evidence.

B. Section 181.0311 Is Facially Discriminatory and Serves No Legitimate State Interest.

Unlike the filing fees that Major Party candidates pay to access the primary election ballot pursuant to § 172.024, which the Major Parties retain and use to defray the costs of their primary elections, *see* §§ 172.022(a), 173.031, 173.032, the identical filing fees that Minor Party candidates must pay pursuant to § 181.0311 are deposited in the state or county general revenue fund. *See* §§ 181.0311(c),(d). Section 181.0311 is therefore discriminatory on its face. It requires that Minor Party candidates pay filing fees identical to those paid by Major Party candidates, but while the Major Parties retain the fees their candidates pay, the State retains the fees that Minor Party candidates pay.

Further, Minor Parties do not nominate by primary election, but by their own self-funded conventions. *See* § 181.001 *et seq.* The State does not play any role in the funding or administration of Minor Party conventions, nor does it incur any cost in connection with their nominating processes. ROA.1838:14 – 1839:5. The State therefore *profits*, financially, from each filing fee that Minor Party candidates pay. ROA.1839:6 – 1839:10; 1837:15 – 1837:22. Indeed, when § 181.0311 was originally enacted (as the former § 141.041), the Texas Legislative Budget Board

projected that it will have "a positive impact of $230,000 to general revenue related funds through fiscal 2020-21." *See* Texas House Research Organization, *HB 2504 Bill Analysis*, available at https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=HB2504# (last visited October 7, 2023). Texas does not have a legitimate interest in profiting from Minor Parties' participation in its electoral process.

Nor does Texas have a legitimate interest in limiting the field of candidates who may seek a Minor Party's nomination. Not only does the State play no role and incur no expense in connection with Minor Parties' nomination processes, but also, Minor Parties do not even use a primary election ballot when they nominate by convention. Thus, the Secretary's asserted interest in avoiding "voter confusion" that might result from "ballot overcrowding" is not implicated. ROA.2327. Nor is the only other interest the Secretary asserts – ensuring that candidates demonstrate a "modicum of support" to qualify for placement on the general election ballot. ROA.2327. Minor Party candidates demonstrate that support the same way Major Party candidates do: by winning the nomination of a ballot-qualified party. *See Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997) (explaining that ballot-qualified parties demonstrate the "modicum of public support" necessary to justify placement of their nominees on the ballot by fulfilling the requirements to

become ballot-qualified). Section 181.0311 adds nothing to that process. It serves no legitimate state interest.

Even if the Secretary could show that § 181.0311 serves a legitimate state interest – and the Secretary cannot – the Secretary concedes that nothing justifies the State's facial discrimination against Minor Parties by retaining the filing fees their candidates pay and profiting from their participation in its electoral process while it permits Major Parties to retain the filing fees their candidates pay. ROA.1837:20 – 1837:25. No other state imposes such an unequal requirement, and for good reason: § 181.0311 is invidiously discriminatory, in clear violation of the Equal Protection Clause. The District Court decision upholding that provision without addressing Plaintiff-Appellees' Equal Protection claim was error.

IV. The Secretary's Arguments for Reversal of the Narrow Relief Granted by the District Court Are Unavailing.

Faced with a "comprehensive evidentiary record" that demonstrates the increasingly severe burdens the Challenged Provisions have imposed over the past five decades, ROA.2320, to the point that they are now insurmountable for non-wealthy Independents and Minor Parties, ROA.675-679, the Secretary conspicuously fails to address the undisputed facts and uncontested evidence almost entirely. The Secretary's brief is nearly devoid of citation to the record and relies almost exclusively on the generic assertions of counsel, many of which have no bearing on the specific issues raised in this case. In the ballot access context,

however, "each case must be resolved on its own facts …." *Nader*, 332 F. Supp. 2d at 988. Consequently, the Secretary's attempt to defend the Challenged Provisions in the abstract, without addressing the uncontroverted evidence demonstrating the severe and unequal burdens they impose as applied, necessarily fails. *See*, *e.g.*, *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020) (explaining that *Anderson-Burdick* requires a "fact-intensive analysis").

A. The Secretary's Reliance on Cases That Did Not Address Plaintiff-Appellees' Claims or the Issues They Raise Is Misplaced.

Because the Secretary does not and cannot dispute the facts in the record, ROA.2310, the Secretary resorts to generalized assertions like "[t]his Court has upheld Texas's ballot-access laws before." [Sec. Br. at 14 (citations omitted).] That is not relevant. *See Bergland*, 767 F.2d at 1554 (recognizing that prior cases upholding election laws "do not foreclose [a plaintiff's] right to present the evidence necessary" to bring a new challenge based on new facts and evidence); *Nader*, 332 F. Supp. 2d at 988 (same). None of the cases the Secretary cites addressed the claims Plaintiff-Appellees assert here, and none of them relied on the comprehensive and uncontested evidentiary record that Plaintiff-Appellees present. [Sec. Br. at 14-15.] The Secretary's assertion that the cited cases "have rejected the very arguments" Plaintiff-Appellees assert here is simply not true. [Sec. Br. at 14.] Notably, the Secretary does not even acknowledge the specific claims that Plaintiff-Appellees assert or the factual or legal basis for them, much less does the Secretary attempt to

show that any case has "rejected" Plaintiff-Appellees' arguments. [Sec. Br. at 14-16.] The Secretary makes no attempt to do so because the Secretary cannot. There is no such case.

Nader is the only case the Secretary addresses on the merits, and that case did not involve a challenge to Texas's petitioning procedures. [Sec. Br. at 15-16.] The severe and unequal burden the petitioning procedures impose on Independents and Minor Parties was not raised as an issue, even tangentially, in *Nader*. Instead, *Nader* involved a discrete question of law: "whether … the requirement that an independent candidate for president obtain more signatures in fewer days than a minor political party" violated the plaintiff's rights as an independent candidate. *Nader*, 332 F. Supp. 2d at 985-986. Thus, the only issue to be decided was whether this "disparity" was "discriminatory and unconstitutionally burdensome to independent candidates." *Id.* at 986. The Court resolved that issue by determining that the disparity was "reasonable" and therefore "justified" by the asserted state interests. *See id.* at 991-92. Not once did the Court address the burdens imposed by the petitioning procedure itself. *See id.* at 986-92.

The Secretary's assertion that Plaintiff-Appellees' challenge to Texas's petitioning procedures are "without merit" based on *Nader*, or any other case the Secretary cited, is therefore without merit. [Sec. Br. at 16.] It demonstrates nothing

more than the deficiency of the Secretary's attempt to defend this case without addressing the facts.

B. The Secretary Fails to Defend the Constitutionality of Texas's Petitioning Procedures Because the Secretary Does not Address the Factual or Legal Basis for Plaintiff-Appellees' Claims.

The Secretary's attempt to demonstrate that Texas's petitioning procedures "are constitutional" begins with another misleading assertion: these procedures, the Secretary contends, are applicable to "***any*** candidate in a state-wide election." [Sec. Br. at 16 (emphasis in original).] But Major Party candidates are not required to conduct petition drives to access the general election ballot. Instead, they only petition to access the primary election ballot, if they choose (though most elect to pay the filing fee), *see* § 172.021(b), and a candidate who chooses to petition is only required to submit 5,000 signatures for statewide office. *See* § 172.025(1). By contrast, to qualify for the general election ballot in 2022 a Minor Party had to submit 83,434 valid signatures, and a presidential Independent must submit 113,151 in 2024 – and they have no alternative path to the ballot. ROA.671. Further, unlike Major Party candidates, who have virtually unlimited time to obtain signatures (should they choose to submit a petition), ROA.666-667, the time constraints that Texas imposes on Minor Parties and Independents are the most severe in the nation. ROA.671. And the burden of complying with these requirements now carries with it a cost approaching $1 million or more. ROA.672-673. The Secretary's assertion that

Texas's petitioning procedures are "reasonable" and "nondiscriminatory" cannot be squared with these facts. [Sec. Br. at 16.]

1. The Secretary Fails to Demonstrate That the Burdens Imposed by the Petitioning Procedures Are Reasonable.

The Secretary does not address or offer any defense of the severe and unequal burdens imposed by Texas's petitioning procedures, but merely parrots the District Court's reasoning and thus repeats its flaws. [Sec. Br. at 16.] According to the Secretary, Plaintiff-Appellees "fail to tie" the petitioning procedures "to any severe burdens placed specifically on them." [Sec. Br. at 16.] Plaintiff-Appellees have already refuted that assertion. *See supra* at Part II.B.3.

Pressing on, the Secretary asserts that "candidates have the option of paying a filing fee or meeting the nomination petition requirements." [Sec. Br. at 16.] But here again the Secretary's fact-free approach breaks down. Independents do not have the "option" to pay a filing fee to access the general election ballot, and neither do Minor Parties. ROA.668, 670. They must file petitions.

Candidates seeking the nomination of a ballot-qualified Minor Party do have the "option" to pay a fee or submit a petition pursuant to § 181.0311 (which the Secretary incorrectly cites as § 141.041), but that does not alleviate the Minor Party's obligation to petition for ballot qualification in the first instance. ROA.668. Furthermore, the Secretary is incorrect that Plaintiff-Appellees have not "presented evidence" that § 181.0311 imposes severe and unequal burdens. [Sec. Br. at 16-17].

Plaintiff-Appellees have presented such evidence but the Secretary disregards it because the Secretary disregards the entire evidentiary record in this case. *See supra* at Part III.A.

2. The Secretary Cannot Show That the State Interests Asserted Are Sufficient to Justify the Burdens Imposed Because the Secretary Does Not Address the Burdens.

The Secretary's discussion of the state interests that purportedly justify the Challenged Provisions suffers from the same defect as the Secretary's prior discussion. The Secretary offers a broad defense of the "generalized and hypothetical interests identified in other cases" without attempting to show that the Challenged Provisions, and specifically Texas's petitioning procedures, are sufficiently tailored to protect them. *Libertarian Party of Ohio*, 462 F.3d at 593. Plaintiff-Appellees do not dispute that Texas has legitimate interests in regulating ballot access, but they have submitted a veritable mountain of evidence demonstrating that the Challenged Provisions are not "'reasonable restrictions on ballot access,'" as the Secretary asserts, [Sec. Br. at 18 (citation omitted)], and the Secretary fails to address it.

The Secretary blithely insists that "neither a party nor a candidate are required to pay a fee to appear on the ballot," [*id.* at 18], but disregards the undisputed fact that Independents and Minor Parties must petition to access the general election ballot, and the cost of doing so now approaches $1 million or more because volunteer

efforts cannot succeed. ROA.672; ROA.817. Contrary to the Secretary's suggestion, no court has ever concluded that such a burden "pass[es] constitutional muster …." [Sec. Br. at 18.] No court has even considered that question. The Secretary's assertion that *Nader* decided it, when the issue was never raised, is false. [*Id.* at 19.]

Additionally, the District Court did not hold that "Texas is required" to follow the lead of the "many other states [that] have instituted digital petitioning procedures." [Sec. Br. at 19.] It only concluded that the burdens imposed by Texas's petitioning procedures as presently applied cannot be justified by the state interests the Secretary asserts, ROA.2328, 2330, and properly left the question of an appropriate remedy to the unfettered discretion of the Legislature. ROA.2378, 2381; *see supra* at Part I.C. Rather than attempting to demonstrate that those burdens are justified, however, the Secretary again resorts to obfuscation: Texas has not "chosen" to require that Minor Parties access the general election ballot "either [by submitting] paper petitions or the payment of a filing fee," as the Secretary asserts. [Sec. Br. at 19-20.] Minor Parties, like Independents, must file petitions. ROA.668, 670.

The Secretary's assertion that Texas's petitioning procedures are "appropriately tailored" to ensure that Independents and Minor Parties demonstrate a "modicum of support" is flatly contradicted by the undisputed facts. [Sec. Br. at

20-21.] The undisputed facts establish that the petitioning procedures are so ill-suited to the task that Independents and Minor Parties must exceed the requisite level of support by 50 percent or more, which amounts to tens of thousands of signatures in a statewide petition drive. ROA.674, 734, 747, 749-750, 771, 802-803, 808, 811, 816-817, 823. This inefficiency, in turn, vastly increases the burden and expense of demonstrating the necessary support, such that it now costs approximately $1 million or more. ROA.672-673. The Secretary does not address those facts.

The Secretary next asserts that Texas's petitioning procedures are "tailor[ed]" because "the filing fee or signatures required increases in proportion to the support required to win the office for which the candidate wants to run," [Sec. Br. at 21], but fails to acknowledge that this is true only of the requirements imposed by § 181.0311. Once again, Independents and Minor Parties cannot pay a fee to access the general election ballot. ROA.668, 670. Further, the uncontroverted evidence establishes that the signature requirements they must meet are not tailored, but grossly excessive, by many orders of magnitude, to serve the Secretary's asserted interests. ROA.664-666, 671, 1742-1747.

The Secretary cites no evidence to support the Secretary's assertion that Texas's petitioning procedures "are powerful tools to combat voter fraud." [Sec. Br. at 22.] In the absence of evidence, the Secretary falls back on "common sense" to buttress the assertion that the petitioning procedures are more effective than the

alternatives. [*Id.*] At summary judgment, however, the Secretary must cite facts and evidence, and the Secretary cannot. The uncontroverted evidence establishes that alternatives exist which more than adequately protect the state's interest in the integrity of its elections. ROA.741-744. The Secretary's reliance on *Texas Democratic Party v. Scott*, 617 F. Supp. 3d 598 (W.D. Tex. 2022), *aff'd sub nom*. *Cascino v. Nelson*, 2023 WL 5769414 (5th Cir. Tex. Sept. 6, 2023), is similarly unavailing: that case did not even involve Texas's petitioning procedures, much less did it suggest that they promote election integrity. And the record here establishes that the petitioning procedures routinely infringe the rights of thousands of voters who sign petitions only to have their signatures invalidated due to technicalities, and that they are also prone to sabotage by political adversaries who seek to block Independents and Minor Parties from accessing the ballot. ROA.671, 734, 740-741, 768, 770, 788, 808.

Finally, according to the Secretary, Texas's petitioning procedures promote a "one person, one vote" principle by "prevent[ing] a voter from supporting more than one candidate during the infancy of an election cycle," [Sec. Br. at 22], but it is not clear that this is a legitimate state interest at all. Signing a petition is not the same as casting a vote, and notably, no other state seeks to accomplish this objective. ROA.2325. Moreover, to the extent Texas has such an interest, any method of registering voter support would protect it as well as Texas's 118-year-old procedures

do. And the Secretary asserts no justification for the unequal burden Texas imposes on Independents and Minor Parties by prohibiting them from petitioning until after the Major Parties have had the opportunity to win voters' affiliation through the primary election process.

The critical element missing from the Secretary's discussion of state interests is any attempt to show they are sufficient to justify the burdens Texas's petitioning procedures impose on Independents and Minor Parties who seek access to the general election ballot. *See Crawford*, 553 U.S. at 191. The Secretary's attempt to defend the petitioning procedures imposed on candidates seeking the nomination of a Minor Party pursuant to § 181.0311 does not remedy this defect because, as the District Court correctly recognized, ROA.2327-2328, the burdens imposed by the petitioning procedures are far more severe in the context of statewide petition drives. The Secretary's attempt to defend the petitioning procedures without addressing the factual basis for Plaintiff-Appellees' challenge to them thus fails.

C. The Secretary Fails to Rebut Plaintiff-Appellees' Equal Protection Claims.

Like the District Court, the Secretary fails to address Plaintiff-Appellees' claims that the Challenged Provisions violate Equal Protection except insofar as they relate to the financial burdens imposed. And, following the District Court's lead, the Secretary attempts to defend the Challenged Provisions on the ground that they do not impose statutorily-mandated filing fees like those struck down in *Bullock* and

Lubin. [Sec. Br. at 23-24.] As a threshold matter, the uncontroverted evidence in the record – which the Secretary disregards – proves this is a distinction without a difference. It is not possible for Independents and Minor Parties to complete a statewide petition drive in Texas without paying for it, nor has it been for decades, if ever. ROA.664-666, 672. And it is undisputed that the cost of such an effort now approaches $1 million or more (not $600,000, as the Secretary avers). ROA.672-673; [Sec. Br. at 23.]

Moreover, even if the cost of conducting a petition drive could be meaningfully distinguished from a statutorily-mandated filing fee – and on this record it cannot – that cost is still relevant to the constitutional analysis of the Challenged Provisions. *See supra* at Part II.B.3. It cannot be excluded from the fact-intensive analysis required under *Anderson-Burdick* simply because it is a practical necessity rather than a legal requirement. The cost is relevant because it demonstrates that the Challenged Provisions "limit participation by an identifiable political group whose members share a particular … economic status." *Anderson*, 460 U.S. at 793. The Secretary's assertion that "there is no requirement that nomination petitions be completed via paid petition circulators" is therefore insufficient to defeat Plaintiff-Appellees' claim. ROA.2387

The Secretary next asserts that the District Court's conclusion that Texas's petitioning procedures unequally burden Independents and Minor Parties was

"misguided" because all candidates may "transmit" a petition to the Secretary of State electronically. [Sec. Br. at 25.] But as the District Court correctly observed, ROA.2327-2328, the burden imposed by the petitioning procedures arises primarily from the petitioning process itself – not merely transmitting the petitions at the conclusion of that process. ROA.672-674. Moreover, scanning thousands of pages of petitions and compressing them sufficiently to allow submission by email, as the Secretary contemplates, [Sec. Br. at 26], would be as laborious and time-consuming as delivering them by hand. And while Minor Party candidates "may elect to pay a filing fee" in lieu of circulating petitions pursuant to § 181.0311, [Sec. Br. at 25], Minor Parties themselves may not, and Independents may not. ROA.668, 670.

The Secretary's assertion that the District Court "erroneously believed" that Major Party candidates "are exempt" from complying with Texas's petitioning procedures is flatly contradicted by the portion of the District Court opinion to which the Secretary cites. [Sec. Br. at 25 (citing ROA.2328-2330).] There, the District Court discusses the electronic procedures that Texas adopted to reduce the Major Parties' burden of administering their primary elections, and contrasts them with "'the same hard copy paper procedures enacted almost 120 years ago'" that Independents and Minor Parties must follow. ROA.2362 (citation omitted). The District Court correctly concluded that those procedures burden Independents and Minor Parties unequally.

Finally, the Secretary's assertion that "all candidates," regardless of affiliation, "must either remit the filing fee or submit a petition" to qualify for the ballot is false. [Sec. Br. at 26.] Independents cannot pay a filing fee; they must submit a petition. *See* §§ 142.004; 192.032. So too is the Secretary's assertion that Minor Parties' "decision" to qualify for the ballot via the petitioning process "is not forced on [them] by Texas law." [Sec. Br. at 26.] Unless they qualify pursuant to § 181.005(a) – and no Minor Party has done so in more than 50 years, if ever, ROA.2307 – Minor Parties must submit a petition pursuant to § 181.005(b). The unequal burdens that Texas's petitioning procedures impose on Independents and Minor Parties are therefore unavoidable, and the Secretary's assertions to the contrary are demonstrably false.

The Secretary's attempt to defend the Challenged Provisions without addressing the undisputed facts and uncontested evidence in this case should give this Court pause. It is tantamount to the claim that there is *no set of facts* that would allow Plaintiff-Appellees to prevail. That is not only wrong as a matter of law, *see Anderson*, 460 U.S. at 789-90; *Storer*, 415 U.S. at 730; *Nader*, 332 F. Supp. 2d at 988, but a threat to "diversity and competition in the marketplace of ideas," *Anderson*, 460 U.S. at 794 ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political

mainstream."). The Challenged Provisions' stifling effect on Texas's electoral process is abundantly clear. Plaintiff-Appellees – and all Texans – are entitled to relief.

CONCLUSION

For the foregoing reasons, the District Court should be affirmed insofar as it held unconstitutional and enjoined enforcement of "any provision of Chapters 141, 142, 162, 181, and 202 of the Texas Election Code that contemplates, relies upon, or requires paper nomination petitions or a paper nomination petitioning, verification, or submission process," and it should be reversed insofar as it denied Plaintiff-Appellees' claims that the Challenged Provisions are unconstitutional as applied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, the foregoing brief was filed using the Court's CM/ECF system, which will effect service upon all parties.

/s/Oliver B. Hall

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This document complies with: (1) the word limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 15,128 words; and (2) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.

/s/Oliver B. Hall

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Appendix A: The Challenged Provisions

Statutory Provision	Applies To	Requirement
§ 141.041 (now codified as § 181.0311)	Non-Primary Parties	Candidates seeking nomination at convention must pay filing fee or submit petition in lieu thereof; filing fees and petition requirements equal to those imposed on candidates seeking access to primary election ballot.
§ 141.063	Independents and Non-Primary Parties	Petition signature valid only if signer is registered and includes registration number or birth date; the date of signing; printed name; petition also must include required affidavit and oath.
§ 141.064	Independents and Non-Primary Parties	Petitioner must point to and recite required oath to each petition signer; witness each signature; verify signing date; and verify signer's registration status and that registration number is correct.
§ 141.065	Independents and Non-Primary Parties	Petitioner's affidavit must be notarized and state that petitioner pointed out and read oath to each signer; witnessed each signature; verified each signer's registration status and believes each signature to be genuine.
§ 141.066(a),(c)	Independents and Voters	A person may not sign the petition of more than one candidate for the same office in the same election, and if a person does, each subsequent signature after the first is invalid.
§ 142.002	Independents	Declaration of Intent due in December of the year before the election.
§ 142.006	Independents	Petitions due within 30 days of runoff primary.
§ 142.007	Independents	Establishes petition signature requirements: for statewide Independents, one percent of total vote for Governor in previous election.
§ 142.008	Independents	Oath must appear on each petition page.

§ 142.009	Independents	Signatures on petitions invalid if obtained before the primary election, or the runoff primary, if there is one, or if the signer voted in a primary election or runoff primary for the office the Independent seeks.
§ 142.010(b)	Independents	Secretary not required to certify petitions until 68 days before general election.
§ 162.001	Voters	Must be affiliated with party to participate in convention.
§162.003	Voters	Voters become affiliated with party by voting in primary.
§ 162.012	Voters	Affiliated voters ineligible to affiliate with another party in same voting year.
§162.014	Voters	Establishes criminal penalties for unlawful participation in convention or primary.
§ 181.0311 (formerly codified as § 141.041)	Non-Primary Parties	Candidates seeking nomination at convention must pay filing fee or submit petition in lieu thereof; filing fees and petition requirements equal to those imposed on candidates seeking access to primary election ballot.
§ 181.005(a)	Non-Primary Parties	Party must submit lists within 75 days of their precinct conventions showing that the number of participants equaled at least one percent of the entire vote for governor in the last general election.
§ 181.005(c)	Non-Primary Parties	Party does not qualify to retain ballot access unless one of its candidates for statewide office received at least two percent of the vote at least once in the preceding five elections. **(Plaintiff-Appellees do not challenge this requirement, enacted in 2019, which appears to supersede the prior requirement established by § 181.005(b)).**
§§ 181.006(a),(b)	Non-Primary Parties	If party fails to comply with § 181.005(a), it must submit petitions containing enough

		valid signatures to make up for the deficiency (with notarized affidavits from each petition circulator, *see* §§ 141.063, 141.065).
§ 181.006(f)	Non-Primary Parties	Oath must appear on each petition page.
§ 181.006(g)-(j)	Non-Primary Parties	Petitions must be signed by registered voters, after the date of the primary election, who did not vote in a primary election or previously sign a petition to place another party's nominees on the ballot for the same election.
§ 181.007(b)	Non-Primary Parties	Secretary not required to certify petitions until 68 days before general election.
§§ 181.031, 181.032, 181.033	Non-Primary Parties	Potential nominees must submit candidate applications in December of the year before an election.
§ 181.0041	Non-Primary Parties	Party must register with the Secretary no later than January 2 of the election year.
§§192.032(a),(b),(c),(d)	Presidential Independents	Petitions must be submitted by the second Monday in May and contain valid signatures equal in number to 1 percent of the total vote for president in Texas in the last presidential general election.
§ 192.032(f)	Presidential Independents	Oath must appear on each petition page.
§ 192.032(g)	Presidential Independents	Petitions must be circulated after the presidential primary election; and any signature collected before that date, or from a signer who voted in a presidential primary that year is invalid.
§ 202.007	Independents	If a vacancy occurs after runoff primary election day, an Independent's petitions for that office are due 30 days after vacancy occurs or the 70th day before the general election, whichever is earlier.