No. 23-50537

In the United States Court of Appeals for the Fifth Circuit

Mark Miller; Scott Copeland; Laura Palmer; Tom Kleven; Andy Prior; America's Party of Texas, also known as APTX; Constitution Party of Texas, also known as CPTX; Green Party of Texas, also known as GPTX; Libertarian party of Texas, also known as LPTX,

Plaintiffs-Appellees/ Cross Appellants,

v.

John or Jane Doe, in his or her official capacity as the Secretary of State of the State of Texas; Jose A. Esparza, in his official capacity as the Deputy Secretary of the State of Texas,

Defendants-Appellants/ Cross Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division 1:19-cv-00700

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, Defendants-Appellants/Cross-Appellees, as governmental parties, need not furnish a certificate of interested persons.

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INTRODUCTION

The Secretary of State Defendants' (SOS Defendants) opening brief appropriately addressed solely the finite issue central to their appeal. They now respond to the litany of issues Plaintiffs' challenge through their cross-appeal, including Plaintiffs' evidence in support of their claims. But the only thing Plaintiffs' evidence indisputably substantiates is the district court's decision to deny most of Plaintiffs' constitutional claims. Plaintiffs either have ballot-access and have continuously maintained it for a substantial period of time, in spite of Texas's ballot-access framework purportedly rendering it "impossible" for minor parties to place candidates on the general election ballot, or the Plaintiffs clearly lack a substantial modicum of support amongst Texas voters. For the Plaintiffs without ballot access, it is their own lack of support, organizing, and fundraising that severely burdens their ability to gain a place on the statewide ticket, not Texas's ballot-access laws.

Plaintiffs otherwise attempt to patch together an unconstitutionally severe burden by challenging all of Texas's petitioning requirements collectively, but their arguments fall apart at the seams. Plaintiffs steeply discount that these very same ballot-access provisions have been challenged and held constitutional as reasonable and nondiscriminatory restrictions that advance important regulatory interests. Plaintiffs argue that the Court should depart from these prior rulings because the

foreseeable growth in Texas's electorate requires the collection of more signatures each election cycle, and because professional petition circulators have predictably increased their fees over the decades. But neither the continued growth in Texas's electorate nor the increased charges assessed by petition circulators is a reason for invalidating ballot-access provisions already upheld as constitutional. The same reasonable modicum of 1% voter support has been upheld time and time again—alongside the same time limitations, primary screen-out, and other petition requirements. None of these provisions amount to a wealth-based violation of the Equal Protection Clause, either. The district court's decision in these regards should be affirmed.

The only error committed by the district court was its holding that paper petitions with wet ink signatures, as opposed to electronic petitioning procedures, was unconstitutional. This Court recently held that requiring original, wet ink signatures for Texas voter registration applications was constitutional and did not impose a severe burden despite available alternatives to electronically capture images of signatures or provide electronic signatures. *Vote.Org v. Callanen*, 89 F.4th 459, 490 (5th Cir. 2023). Texas similarly has substantial, if not compelling, interests in requiring wet ink signatures on paper petitions to protect against fraud and ensure

that voters signing petitions fully understand the qualifications and effect of what they are signing.

ISSUES PRESENTED ON CROSS-APPEAL

1. This Court and the Supreme Court have rejected numerous challenges to Texas's ballot-access framework for minor candidates and independents, including almost all of the provisions challenged by Plaintiffs. Did the district court properly dismiss Plaintiffs' constitutional challenges based on this binding precedent?

2. Plaintiffs' evidence demonstrated that no Plaintiff is burdened by any provision of Texas's ballot-access framework because the Plaintiffs either have ballot access or lack a substantial modicum of voter support to gain ballot access. Did the district court properly find that Plaintiffs failed to substantiate anything more than a slight burden to them resulting from any Texas law, whether standing alone or in conjunction with others?

3. Texas Election Code section 181.0311 permits minor party candidates nominated by convention to either pay a filing fee or submit a petition with 5,000 signatures to demonstrate that the candidate has a reasonable modicum of electorate support. Did the district court correctly reject Plaintiffs' challenges to section 181.0311 because the provision does not condition participation in the electoral process on financial status?

4. The district court held that the lack of electronic petitioning methods burdened Plaintiffs, rendering Texas's requirement that petitions be completed on paper with original signatures unconstitutional. Did the district court err because Texas's original signature requirement is rationally related to numerous substantial state interests, as recently recognized by this Court in *Vote.Org v. Callanen?*

SUMMARY OF THE ARGUMENT

The district court properly applied the *Anderson/Burdick* framework in holding that Texas's ballot-access laws impose only slight, and at times speculative, burdens

on Plaintiffs. Indeed, Plaintiffs' as-applied challenges to the following provisions are foreclosed by precedents from this Court or the Supreme Court: (1) petition signature requirements (*Nader v. Connor*, 332 F. Supp. 2d 982, 989 (W.D. Tex. 2004), aff'd, 388 F.3d 137 (5th Cir. 2004); *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974); (2) deadline to file for independent presidential candidates (*Nader*, 332 F. Supp. 2d at 989); (3) prohibition on signing the petition of more than one candidate for the same office in the same election (*Storer v. Brown*, 415 U.S. 724, 741 (1974)); (4) deadlines for minor party nominating petitions and candidate declarations of intent (*Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184-86 (5th Cir. 1996); (5) requirements that petition signatures be gathered after primary election (*Am. Party of Tex. v. White*, 415 U.S. at 785-86); and (6) the requirement that signatures on petitions be notarized (*Id.* at 787).

Analyzing each provision challenged by Plaintiffs, in light of the various opportunities for ballot access available under Texas law and Plaintiffs' evidence, compels the same result. ROA.2320-2327. None of the Plaintiffs established that they are severely burdened by Texas's ballot-access procedures: LPTX and GPTX have maintained ballot access for extended periods of time, and the remaining Plaintiffs either have not shown a substantial modicum of voter support sufficient for ballot access or are burdened by their minor party's lack of organization and

fundraising efforts rather than the law. ROA.2314-16, 2321-2324. Minor Party Plaintiffs continue to have multiple paths to general ballot access, including a lower threshold to automatic ballot access based on past election performance. ROA.2307-09, 2321-22. The additional provisions Plaintiffs challenge—to the extent those provisions were not already considered in prior decisions—impose only slight burdens, if any. Each provision advances important state interests in avoiding voter confusion, ballot overcrowding, and frivolous candidacies. ROA.2327.

The district court also appropriately rejected Plaintiffs' Equal Protection claims. States may impose different requirements on major parties, minor parties, and independents without violating the Equal Protection Clause. ROA.2328-29 (citing *Nader*, 332 F. Supp. 2d at 988–89; *Kirk*, 84 F.3d at 184–86; *Meyer v. Texas*, Cause No. H-10-3860, 2011 WL 1806524 at *3–5 (S.D. Tex. 2011). Texas's ballot-access provisions, and particularly Texas Election Code Section 181.0311, do not limit political participation based on viewpoint or economic status. ROA.2324. None of these provisions require a mandatory fee or the equivalent of a poll tax. ROA.2323-24. Instead, Section 181.0311 provides minor party candidates that like financial means the alternative of submitting a petition with 5,000 signatures (or less, depending on the office sought) to demonstrate that the candidate has a substantial

modicum of voter support in lieu of paying a filing fee. The district court's decision on these issues should be affirmed.

The district court's only error was in holding that it is unconstitutional for Texas to require that petitioning be carried out in paper format, stating that the "lack of electronic methods does burden Plaintiffs." ROA.2325-26, 2329. But all candidates, whether from major parties, minor parties, or independents, must complete any required petition on paper. The district court relied on laws permitting major parties to transmit forms to the Secretary of State electronically (ROA.2329), but minor parties and independents have the option to submit their petitions by electronic means as well. And the district court's decision failed to take into account that electronic petitions are only available in one state, the District of Columbia, and one city. ROA.674, 743-744. All admittedly pale in comparison to the size of Texas and its electorate.

The district court's holding also cannot be squared with this Court's recent holding in *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023). The district court specifically took issue with Texas's requirement that a petition "signers signature be in their own handwriting," holding that this requirement did not reasonably relate to the State's interests advanced by its ballot-access framework and could not withstand rational basis review. ROA.2327-28. But the paper petition process with

wet ink signatures serves substantial state interests just like the original signature requirement applicable to voter registration applications. *Vote.Org*, 89 F.4th at 490-91. The paper petition process serves Texas's substantial (if not compelling) interests in reliability, security, election integrity, and its interest in avoiding voter confusion by making sure voters understand what they are signing and the requirements for signing a candidate's petition. *Id.* Since paper petitioning applies equally and serves substantial state interests, the district court erred in holding that the paper petition process imposed unequal and unconstitutional burdens on Plaintiffs.

ARGUMENT

I. The District Court Properly Held That Texas's Petitioning Procedures, Individually and When Taken Together, Are Constitutional.

The Supreme Court recognizes that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. at 730); *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992). But state election codes governing "the selection and eligibility of candidates, or the voting process itself, inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788.

As outlined below, Texas's ballot-access procedures for minor party and independent candidates have been exhaustively litigated and consistently upheld as constitutional. Plaintiffs argue that the facts on the ground today justify revisiting and reversing these prior decisions. But those facts merely boil down to Texas's continuing population growth—hardly surprising as the second most populous state—and the increasing prices charged by professional petition circulators—also not surprising due to inflation.

A. Binding precedent forecloses Plaintiffs' challenges.

"[T]he severity analysis" is not limited "to the impact that a law has on a small number of voters" such as the Plaintiffs here. *Richardson v. Texas Sec'y. of State*, 978 F.3d 220, 236 (5th Cir. 2020). Even if a law places a somewhat heavier burden on a limited number of persons, it will not be considered severe under *Anderson-Burdick*. *Crawford v. Marion Cnty. Elec. Bd.,* 553 U.S. 181, 199 (2008) (plurality op.). Indeed, Supreme Court "precedents refute the view that individual impacts are relevant to determining the severity of the burden' that a voting law imposes." *Richardson*, 978 F.3d at 236 (quoting *Crawford*, 553 U.S. at 205 (Scalia, J., concurring)). Examining burdens on a plaintiff-by-plaintiff basis "would effectively turn back decades of equal-protection jurisprudence." *Crawford,* 553 U.S. at 207, (Scalia, J., concurring). To hold otherwise "would subject virtually every electoral regulation to strict

scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)).

Additionally, the court must consider all opportunities that the Plaintiffs can take advantage of to gain ballot access—it cannot view the petitioning process at the crux of Plaintiffs' lawsuit in isolation. *Vote.Org*, 89 F.4th at 490 ((citing *Richardson*, 978 F.3d at 236). For example, an independent can seek to run in a primary election or as a minor party candidate (like Mark Miller did); otherwise, they can submit a petition. ROA.680, 2316. Minor parties can automatically qualify for the general election, qualify by convention, or by petition to make up any convention participant deficit. Tex. Elec. Code §§ 181.005; 181.006.

This Court, and in some instances the Supreme Court, have upheld Texas's statutes governing general ballot access for minor party candidates. In *American Party of Texas*, the Court upheld Texas's requirement that parties demonstrate support from "electors equal in number to 1% of the vote for governor at the last general election." 415 U.S. at 767. The Court held that this provided adequate access to the ballot and did not violate the Constitution, reasoning that, "[s]o long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously

treated, may be required to establish their position in some other manner." *Id.* at 782-83. This is precisely what the nominating convention process does: guarantee ballot access for any minor party that demonstrates support from one percent of the electorate. That process is constitutional. *Kirk*, 84 F3d at 184-86.

A party that fails to get 1% participation in its convention gets a second bite at the apple under § 181.006, which provides additional time to drum up support via petitioning to show the requisite 1% of support. The petitioning signature requirements, restrictions on signers, deadlines, primary screen-out, and notarization requirements have all withstood challenges similar to those presented here. *Id.*; *Nader*, 332 F. Supp. 2d at 989; *Storer*, 415 U.S. at 741; *Kirk*, 84 F.3d at 184-86. And, failing that, a minor party is *still* guaranteed a place for its candidates on the ballot if in *any* of the previous five general elections, *any* of its candidates received two percent of the vote for *any* statewide office. Tex. Elec. Code § 181.005(c). This lower threshold makes it easier for minor parties to maintain ballot access if they demonstrate a small amount of voter support—magnitudes less than that required to qualify for ballot access as a major party. Plaintiffs' claims focus on the petitioning requirements, but each should be dismissed based on this precedent, and their arguments that facts on the ground today warrant a different result were properly rejected by the district court.

B. No Plaintiff substantiated that any combination of requirements severely burdened their First or Fourteenth Amendment rights.

Minor Party Plaintiffs have not provided any evidence regarding the costs or burdens of holding a convention,[1] and do not appear to dispute that requiring minor political parties to nominate candidates through convention is constitutional. *Kirk,* 84 F.3d at 185. "[T]he Texas electoral system, with a convention nominating process linked to the date of the primary election, "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life" and "affords minority political parties a real and essentially equal opportunity for ballot qualification." *Id.* at 185 (citing and quoting *White*, 415 U.S. at 780-81, 774, 787-88).

Instead, the Minor Party Plaintiffs solely argue that Texas's petitioning framework is severely burdensome and unconstitutional. Their failure to account for the other opportunities for ballot-access weakens their burden argument. Especially since Plaintiffs' own evidence—that they repeatedly tout as a comprehensive evidentiary record—fails to demonstrate that they are burdened by the petitioning requirements at all in light of the alternative avenues to ballot access. ROA.2314-16, 2321-23.

[1] To the extent that Plaintiffs challenge the timing of their nominating conventions, it fails under existing precedent. *Kirk*, 84 F.3d at 180-81 (noting timing of precinct, county, and district nominating conventions is linked to the primary election date and discussing timeline and upholding such convention nominating process as constitutional).

The district court properly rejected that Texas's petitioning framework imposed a severe burden on Plaintiffs as applied because any burden imposed is slight at best and hypothetical or speculative at worst. ROA. 2321-23. LPTX and GPTX have ballot access, and the district court properly refused to find a severe burden "when the thrust of the burden is theoretical or speculative." ROA.2021. LPTX has had ballot access consistently for over two decades, and the only time it did not automatically qualify for the general ballot it was able to successfully complete a petition drive under the very regulatory scheme it now challenges as "impossible" or severely burdensome. ROA.581-82, 678, 2316. GPTX similarly has had ballot access since 2010, when it successfully submitted a petition under the challenged procedures. ROA.595-98, 677, 2315. It has remained eligible for the general ballot in part due to Texas *lowering* the threshold for automatically qualifying for the general election ballot in 2019. ROA.596, 2322. Indeed, in 2022 both LPTX and GPTX had candidates on the general election ballot for Governor, but neither received more than 1% of voter support.[2] This alone demonstrates that Texas's laws do not freeze the status quo. *Kirk*, 84 F.3d at 185.

[2] *See* https://results.texas-election.com/races (last visited January 31, 2024). Notably, if either LPTX or APTX's A candidate for governor had received at least 2% of the vote, that party would have been eligible to nominate general election candidates primary election *or* by nominating convention in the following election cycle, demonstrating yet another avenue to ballot access available to Plaintiffs. *Id.* §§ 172.002(a), 181.002.

Turning to APTX and CPTX, the undisputed evidence clearly shows that neither can credibly claim to have "a significant, measurable quantum of community support" but are prevented from obtaining ballot access by Texas's laws. *Am. Party of Tex.*, 415 U.S. at 782-83 (quoting *Jenness v. Fortson*, 403 U.S. 431, 439 (1970)). It is not Texas's ballot-access laws that are severely burdening APTX and CPTX, but each party's respective failure to make any real effort to secure ballot access and neither party can point to a showing of significant support based on their organization, membership, or funding. ROA.548-49, 565, 567-69, 679, 2322-23.

The Constitution does not require a State with over 17.5 million registered voters[3] to adopt regulations that would permit statewide general ballot access available to parties with roughly 10 (APTX)[4] and 130 (CPTX)[5] supporters. ROA.2314-15. "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jenness*, 403 U.S. at 442. And the State has no constitutional obligation "to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general

[3] See Tex. Sec'y of State, November 2022 Voter Registration Figures, https://www.sos.state.tx.us/elections/historical/nov2022.shtml (last visited January 31, 2024).

[4] APTX has held one state-wide convention (in 2018) in which roughly 10 individuals attended, including four officers. ROA.550.

[5] CPTX has approximately 130 members statewide. ROA.565. CPTX has not held a convention, made an effort at a volunteer-based petition drive for ballot access, or reached out to any outside firms to obtain an estimate of the cost for such a petition drive. ROA.569.

election ballot." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986). This is precisely the type of frivolity or chaos that states are permitted to avoid by enacting election laws without coming close to approaching a severe burden on the right to vote or right to political association.

The remaining Plaintiffs fare no better. ROA. 680-82, 2316, 2323, 2326. For example, Plaintiff Miller ran as a LPTX nominee on a general election ballot for statewide office and, while he has considered creating his own political party, he has admittedly taken no steps toward doing so. ROA.680, 2316. None of the other Plaintiffs, who are independents, voters, or members of a minor party, demonstrate a severe burden or a burden different in kind or magnitude than that imposed on the Minor Party Plaintiffs. ROA.681-82, 2316.

C. Population growth and increased costs do not render Texas's ballot-access laws unconstitutional.

Texas's population has steadily and predictably grown since the percentage-based requirement for ballot-access was first adopted over 100 years ago. As the second most populous state, it is no surprise that Texas has the second highest signature requirement for ballot-access by petition. ROA.673, 2321. Similarly, the costs of everyday items—like gasoline and milk[6]—as well as professional services,

[6] See generally https://libraryguides.missouri.edu/pricesandwages/1950-1959, showing the 1950 price of gasoline as $.27 and $.41 for a half-gallon of milk.

like petition circulators that tend to charge a per-signature fee, have increased due to inflation and other economic factors. ROA.672. None of this is surprising or unexpected. Yet these two factors are the driving forces behind Plaintiffs' arguments that Texas's ballot-access laws are unconstitutional, not the laws themselves. "States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro*, 479 U.S. at 194 (internal quotation marks and citation omitted). Plaintiffs have not cited a single case requiring a state to lower a previously upheld percentage requirement for showing a modicum of support due to population growth and inflation, and the district court properly dismissed Plaintiffs' claims.

1. Signature Requirements.

Courts have upheld Texas's petition signature requirement as a reasonable way to gauge whether a candidate has a significant modicum of support amongst the electorate before qualifying for ballot access. *Nader*, 332 F. Supp. 2d at 989; *White*, 415 U.S. at 783. Plaintiffs' effort to undermine these decisions based on the passage of time falls flat. They argue that "the burden imposed by the one percent signature requirement has steadily increased over time" (at 5, 35), but that consideration was also present when *White* was decided. At the time, Texas's population had nearly quintupled since Texas had first began utilizing a percentage-base criteria for ballot

access in 1905.[7] As the electorate grows, the metric for gauging a modicum of support must keep track—which is exactly what Texas's ballot-access provisions do. Increases in Texas's population do not somehow render the analysis in *White* irrelevant. Because *White* "has direct application in [this] case, . . . [this Court] should follow" it, "leaving to [the High] Court the prerogative of overruling its own decisions." *Rodriquez de Quijas v. Shearson/Am. Ex., Inc.*, 490 U.S. 477, 484 (1989).

A percentage-based "preliminary showing of a significant modicum of support" makes good sense and remains constitutional regardless of the growing size of the electorate. After all, more registered voters translates into a candidate needing to garner far more votes to win an election. The Ninth Circuit has rejected the argument that a one-percent signature requirement is unduly burdensome in California, which requires even more signatures than Texas. *De La Fuente v. Padilla*, 930 F.3d 1101, 1106 (9th Cir. 2019) (citation omitted). "This low percentage threshold prevents candidates without established support from appearing on the ballot—satisfying California's interests—without seriously restricting the availability of political opportunity." *De La Fuente*, 930 F.3d at 1106 (citation omitted).

[7] *See United States and Texas Populations 1850-2017*, Texas State Library and Archives Commission, *https://www.tsl.texas.gov/ref/abouttx/census.html* (last visited January 31, 2024).

Stricter signature requirements—either in terms of number or percentage—have been held constitutional. *Id.* at 1106—07 (citing *Storer*, 415 U.S. at 740); *Jenness*, 403 U.S. at 442 (upholding law requiring independent candidates to gather signatures equivalent to five percent of the number of registered voters in the previous presidential election); *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010) (concluding that the burden of collecting signatures equivalent to one percent of the state's voters in the previous presidential election was low)). "Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden [and] ... would not appear to require an impractical undertaking for one who desires to be a candidate for President." *Storer*, 415 U.S. at 740.

There were over 17.6 million registered Texas voters as of November 2022.[8] Yet Plaintiffs claim that any signature requirement over 5,000 is superfluous (at 48). Meaning that any candidate that can garner support from .028% of Texas registered voters should be permitted on the statewide general election ballot. Surely that is not sufficient to serve what the Supreme Court has long recognized as the "important state interest in requiring some preliminary showing of a significant modicum of support" before a candidate may appear on the ballot and "in avoiding confusion,

[8] See Tex. Sec'y of State, November 2022 Voter Registration Figures, https://www.sos.state.tx.us/elections/historical/nov2022.shtml (last visited January 31, 2024).

deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442.

Plaintiffs also point to historical data in arguing that ballots were not overcrowded 60 years ago before Texas's current petitioning requirements went into effect, and surely the same would be true today. So, according to Plaintiffs (at 48), Texas's requirements pose an unnecessary barrier to ballot access and a severe burden. This is pure speculation. Texas is not required "to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194-95.

Finally, Plaintiffs point to certain petition requirements as onerous, including the oath (at 7, 19), circulator affidavit (at 19), and the inability to verify a voter's registration and primary participation status (at 17), which leads petitioners to collect greater than the required number of signatures (at 20). But these petition requirements apply to major party candidates that choose to submit petitions as well. Tex. Elec. Code §§ 141.063-141.065, 172.025. Each serves substantial state interests, including promotion of "one person, one vote," avoiding voter confusion through informed signature requirements, reliability, and deterring fraud. These requirements were also in place and upheld in *White*, *Kirk*, and *Nader*, and it was

appropriate for the district court to follow these precedents. *White*, 415 U.S. at 783; *Kirk*, 84 F3d at 184-86; *Nader*, 332 F. Supp. 2d at 989.

Plaintiffs' evidence does not demonstrate a severe burden resulting from the petition signature requirements, but rather shows that the signature requirement poses no burden to Plaintiffs. Neither APTX nor CPTX are suffering from the burden of the 1% threshold—they do not have the support to get them to that 1% nor have they taken any genuine action towards gaining that support. ROA.565-68, 548-49, 679, 2314-15, 2322-23. In turn, the voter Plaintiffs are not burdened by this 1% requirement because any burden on their right to political association or to vote is caused from the party they support failing to make any effort garner a modicum of electorate support. ROA.680, 2316. Meanwhile, LPTX and GPTX *currently have ballot access in Texas*. ROA.581-82, 587-88, 596, 2321-22. LPTX has only had to collect sufficient signatures once in the last two decades in order to appear on a Texas election ballot; and they did. ROA.581. GPTX only had to obtain sufficient signatures in 2010 and they collected nearly 92,000 when doing so. ROA.595. Thus these parties, and their voters, suffer no burden from the 1% requirement.ROA.2321-22 Indeed, Plaintiffs' evidence indicates that the signature requirement is difficult because voters are strongly affiliated with the two primary parties and disinterested in an alternative. ROA.820-21. Plaintiffs' insistence that the 1% requirement is "hard

to meet" is belied by their own evidence, and the district court's decision should be affirmed.

2. Petitioning Time Limits.

Plaintiffs cannot distinguish their case from others upholding the timing requirements for minor party candidates to obtain petition signatures, either. Texas's petition-gathering period for minor party candidates was upheld in *White* and again in *Kirk*: "the amount of time allotted for obtaining the petition signatures also is constitutional." *Kirk*, 84 F.3d at 186 (citing *White*, 415 U.S. at 782–83, 784–85, 786–88).

Shorter petitioning time periods for independents have also been upheld. *Storer*, 415 U.S. at 740 ("Standing alone, gathering 325,00 signatures in 24 days would not appear to be an impossible burden [and] ... would not appear to require an impractical undertaking for one who desires to be a candidate for President."). Other than taking broad issue with having a "shorter" deadline to obtain ballot access combined with needing to gather a greater quantity of signatures today due to Texas's population growth (at 35-36), Plaintiffs do not present evidence or argument as to why the district court, or now this Court, should deem this to be unconstitutional when other courts have not.

The legislature reasonably concluded that there must be a deadline for a minor party or independent candidate's petition well in advance of the August deadline in order for the Secretary of State to timely certify the general election ballot's slate of candidates. ROA.602-606. Even a facial review of nominating petitions must be carefully performed and can take two weeks. ROA.604. Then, because of the likelihood of challenges to the petition by others, the process must factor in time for a line-by-line review of applications that could exceed eight thousand pages in length. *Id.* ROA.603, 609. While the district court and Plaintiffs claim this process could be expedited by permitting, purchasing, integrating, and maintaining third-party software, this proffered solution runs afoul of Texas's original signature requirement on petitions and undoubtedly poses data security, integrity, and potential fraud concerns.

Plaintiffs have not shown that the petitioning period burdens them at all—let alone a *severe* burden—for the same reasons they are not burdened by Texas's signature requirements. ROA.2324. Petition drives have been successful, unnecessary, or not undertaken. ROA.565-68, 548-49, 581, 595, 679, 2314-16. Given the slight or nonexistent burden demonstrated by Plaintiffs, the timeframe to gather signatures is not unconstitutional in light of the state's legitimate interests. And Plaintiffs cobbling together a challenge to numerous provisions collectively does not

require a different constitutional result or a break from existing precedent. The time limitations for gathering petition signatures, even when considered alongside the primary screenout, signature requirement, oaths, and affidavits (as was the case in *White* and *Kirk*), do not establish an unconstitutional burden in light of the state's legitimate regulatory interests and the totality of ballot-access opportunities available to minor party candidates. The district court's holding should be affirmed.

3. The Primary Screenout.

The primary screenout is nothing new, and the Supreme Court has previously held it is constitutional. *White*, 415 U.S. at at 785-86 (upholding requirements that petition signatures be gathered after primary election). So has this Court in the context of independent candidates. *Kirk*, 84 F.3d at 180-81. "In light of *White*, we are naturally reluctant to categorize the petitioning deadlines as a significant burden." *Id.* "Because the burdens are not severe, the State need not present narrowly tailored regulations to advance a compelling state interest." *Id.* at 186. This Court found that Texas's "important regulatory interests" in "equal treatment of candidates," "requiring a demonstration of sufficient public support to gain access to the ballot," and "fostering an informed electorate provide ample reason for the deadlines." *Id.* at 186-87. The *Nader* opinion also addressed the effect of the primary screen-out in the context of independent candidates, holding it was constitutional as

part of the totality of "the ballot-access requirements for independent candidates." *Nader*, 332 F. Supp. 2d at 954, 989.

Plaintiffs' evidence that Texas is the only state to employ a primary screenout and that primary election day is often the most successful day for gathering petition signatures (at 19) is not enough to overcome this binding precedent. Texas has a substantial interest in promoting the integrity of the electoral process and a "one person, one vote" principle through an entire election cycle. *Meyer*, 2011 WL 1806524, at *4 (citations omitted). "[A] State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot." *Storer*, 415 U.S. at 741 (citing *White*, 451 U.S. at 785-86).

Plaintiffs otherwise argue (at 43) that because primary elections occur before a minor party can hold its convention or collect petition signatures, major parties are somehow given an exclusive first right to solicit voters' support. But nothing prevents minor parties from campaigning before the primary elections or making sure their supporters know that a voter cannot participate in both a primary election for one party and a nominating convention or petition drive for another political

party or candidate. If a voter wants to support an independent or minor party candidate, they can choose not to participate in a primary election and instead wait to sign a nominating petition. "[O]ne strains to see how [this] burdens voting at all." *Vote.org*, 30 F.4th at 308.

Plaintiffs also claim that the uncertainty of minor party and independent candidates making the general ballot acts as a deterrent, causing voters to instead opt for major party candidates that will certainly appear on the ballot. ROA.676-79. Yet Plaintiffs' own evidence indicates that the real problem is that voters are strongly affiliated with the two primary parties and disinterested in an alternative party. ROA.820-21. Additionally, primaries themselves are fraught with uncertainty; there is no guarantee that a voter's chosen major party candidate will win the primary and appear on the general election ballot. Yet the voter cannot hedge their bets by voting for two candidates or by voting in both the Democratic and Republican primaries. It follows that a voter cannot lend their support to a primary candidate and a minor party or independent candidate running in the same race before the general election.

The primary screenout serves the legitimate purpose articulated in *Storer* to help ensure that voters are limited to participating in just one of the alternative

procedures available for supporting a candidate. Given the lack of any severe burden[9] under *Anderson-Burdick*, the district court appropriately applied rational basis review in upholding Texas' ballot-access laws since they further important state interests. *See, e.g., Burdick*, 504 U.S. at 434. This Court should affirm.

4. Section 181.0311.

This section merely applies the same filing fee or petition requirement imposed on major party candidates on minor party candidates that seek a minor party's nomination by convention. *See* Tex. Elec. Code §§ 172.024 (filing fees for primary candidate), 172.025 (number of signatures required on petition in lieu of filing fee for primary candidate); 181.0311 (imposing same fee and signature requirement on candidate seeking nomination by convention). The goal was to serve the State's recognized interest that candidates—whether nominated via primary election or convention—appearing on the general ballot have demonstrated "a significant, measurable quantum of community support" via petition or filing fee.

[9] Notably, Plaintiffs have attached declarations from their expert, Richard Winger (ROA.1738-1747), and Redpath (ROA.818-4) regarding their claim that Texas' ballot-access laws are the most restrictive in the nation. However, that is the same tagline they have used to challenge ballot-access provisions *unsuccessfully* in other states. *See, e.g.*, *Fishbeck v. Hechler*, 85 F.3d 162, 169 (4th Cir. 1996) ("Richard Winger…recites that West Virginia's ballot-access laws make it the most inaccessible state in the country for third party and independent candidates. He also testified that, during the period of 1944 through the date of his affidavit, 'no other state has had as few third party or independent candidates on the ballot for state office or for Congress as West Virginia.' Finally, William Redpath…testified that, in his experience, West Virginia was the most difficult state in the country in which to qualify candidates for state offices.").

White, 415 U.S. at 782-83 (quoting *Jenness*, 403 U.S. at 439).[10]

Plaintiffs take issue (at 53) with a minor candidate's filing fee going to the State while a primary candidate's fee goes to the primary party. But the holder of the fee is not constitutionally relevant, let alone dispositive, and Plaintiffs offer nothing to the contrary.

What's more, Plaintiffs' evidence shows that the minor parties took no policy or fundraising steps after the 2019 filing fees were introduced. ROA.582, 595, 597. LPTX could not provide specific examples of a candidate not running for office because of the filing fee. ROA.582. GPTX similarly has not adopted any policy changes in response to the filing fees requirement introduced as part of the 2019 amendments to the Texas Election Code. ROA.595-98.

5. Petitioning Costs.

Plaintiffs generally argue that they are severely burdened by the costs associated with petitioning, and that these requirements generate inequalities since major party primary election expenses are reimbursed by the State but minor party expenses are not (at 40-41). Texas predicted fifty years ago that these precise claims of discrimination would be asserted when the Supreme Court ruled that Texas should

[10] Several Plaintiffs, including LPTX, have separately mounted a challenge to this provision, which is still ongoing. *Bilyeu v. Scott*, No. 1:21-CV-1089-RP, 2022 WL 607889, at *1 (W.D. Tex. Mar. 1, 2022).

pay for primary elections. *Bullock v. Carter,* 405 U.S. 134, 145 (1972). The Supreme Court discounted these types of concerns by acknowledging that the State would not be responsible for paying the costs for all political parties, and further stated that "the Court has recently upheld the validity of a state law distinguishing between political parties on the basis of success in prior election. We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries." *Id.* at 147 (cleaned up). The Supreme Court again held that States need not "finance the efforts of every nascent political group seeking to organize itself" in *White*, 415 U.S. at 794. Yet here we are.

Plaintiffs' arguments suffer from a fatal flaw: the State reimburses a major party's costs of holding a primary election, but not a major party candidate's costs for running in a primary election, including any filing fee, petitioning costs, campaigning, or volunteer costs they might incur to participate in the primary election. Plaintiffs have not provided evidence of the costs to a minor party for holding a nominating convention. They instead complain about the costs to a minor party candidate to gain ballot access, particularly if the minor party is not eligible to nominate by convention or otherwise fails to meet the nomination by convention requirements.

Plaintiffs' mismatched comparison aside, they attempt to equate severe burden with the increasing costs charged by professional petition circulators for their services. First, none of the declarations Plaintiffs use are from declarants that have attempted, and failed at, gaining ballot access through volunteer-led petitioning. *See generally* Dkt. Nos. 59-3—71, ROA.732-824. Neither the Secretary nor the Election Code requires a party to pay petitioners in order to gather signatures. Thus, Plaintiffs' injuries, if any, do not arise from any aspect of the provisions they challenge. In fact, none of the challenged provisions are the reasons the parties cannot obtain enough donations throughout any given year to obtain the resources to hire professional petitioners, if necessary to gain ballot access. And Plaintiffs' own evidence shows that the only times LPTX and GPTX had to meet the petitioning requirements in the last two decades, they were able to do so. ROA.581-82, 597-98, 677, 678, 2315-16.

Plaintiffs also rely (at 37) on costs quoted to a non-plaintiff party to support the costs of petitioner circulators today. The district court appropriately discounted this evidence in light of Plaintiffs' as applied claims. In sum, the *State* is not conditioning participation in its electoral process on financial status by virtue of *Plaintiffs* choosing to hire paid petitioners, choosing not to make adjustments to their policies to address

requirements, and their failure to garner donations or a sufficient number of supporters to take advantage of the other avenues available for ballot access.

The district court appopriately held that the costs of petitioning do not pose a severe burden to Plaintiffs because they are not akin to a statutorily mandated fee and alternatives to ballot access was offered. ROA.2323-24. The mere fact that some financial obligations arise in obtaining ballot access is not comparable to statutory provisions that expressly condition voter or candidate access to the election process on financial capabilities. *See Libertarian Party of Texas v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016). While requiring a threshold percentage of supporters "may impose some financial costs on the Libertarian Party and the Constitution Party to the extent that meeting the threshold may require greater campaign efforts, those costs certainly do not constitute exclusion or virtual exclusion from the ballot."*Id.*

D. The challenges to Texas's ballot-access framework for independent candidates similarly fail.

A candidate that does not qualify or does not wish to run as a major party candidate or minor party candidate can choose to gain ballot access as an independent.[11] The same petition requirements that apply to minor parties apply to

[11] Statewide independent candidates must file a declaration of intent the December before the election, submit a ballot application within 30 days after the runoff primary election, and be certified to local election authorities at least 68 days before the general election. Tex. Elec. Code §§ 142.002 (declaration); 142.006 (application deadline); 142.010(b) (certification).

independent candidates wishing to enter a statewide race, and the district court appropriately rejected Plaintiffs' claims for the reasons discussed above.

Challenges to the petitioning requirements for independents have previously been rejected, but Plaintiffs argue (at 56-57) that these precedents did not address Texas's petitioning requirements at issue here. Not so. *Nader* addressed challenges to Tex. Elec. Code 192.032(a), 192.032(b)(3)(A), 192.032(c), and 192.032(d)), and held that Texas's petitioning procedure as applied to independents under the *Anderson-Burdick* framework, including the higher signature requirement, time restraints, and primary screenout, were constitutional. *Nader*, 332 F. Supp. 2d at 985–86. To be sure, a bench trial explored "whether the requirement that an independent candidate for president obtain more signatures in fewer days than a minor political party unduly burdens and restricts the First and Fourteenth Amendment rights." *Id.* This Court affirmed, including the district court's holding that the petitioning procedures serve as a "winnowing process" that helps "eliminate frivolous candidates and field only serious candidates." *Id.* at 990. Since independents were not subject to the "winnowing" process of a nominating convention (or a primary election, for that matter), the more restrictive signature and filing deadline requirements were constitutional since independents enjoyed

more flexibility in choosing whether and when to run as compared to other candidates. *Id.* at 988-990.

Plaintiffs here do challenge a few additional petitioning requirements applicable to independent candidates that were not directly before this Court in *Nader*, but none of those requirements call for a different outcome. These provisions go to the mechanics of the petitioning process: Texas Election Code §§ 141.063 (requiring signer to be a registered voter and provide signature, name and address), 141.064 (requiring circulator to witness each signature and point out each statement pertaining to the signer), and 141.065 (requiring affidavit of circulator)—and apply to both independent and minor party candidates. These requirements were in place at the time *Nader* was decided, as well as this Court and the Supreme Court's decisions in *Kirk* and *White*, respectively. They also apply to petitions submitted by a major party candidate. Tex. Elec. Code §§ 141.063-141.065, 172.025.

These provisions promote the State's interest in enforcing the "one person, one vote" principle through an entire election cycle and maintaining the integrity of the electoral process by providing a process for verifying that petition signatures are genuine and that signers are eligible to sign. Limiting signers to verifiable registered voters is not burdensome and clearly advances the state's interest in the process, as do the requirements placed on both the signers and circulators to safeguard against

fraud. It also helps avoid voter confusion by making sure petition signers are aware of what they are signing and its ramifications for their ability to pledge support to another nominee for the same office before the general election.

The ballot-access requirements for independents, individually and collectively, serve the long recognized, important state interest of "assur[ing] itself that the candidate is a serious contender truly independent, and with a satisfactory level of community support" before placing an independent candidate on the ballot. *Storer*, 415 U.S. at 746; *Nader*, 332 F. Supp. 2d at 987. Indeed, "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" *Burdick*, 504 U.S. at 438 (quoting *Storer*, 415 U.S. at 735, 730). "Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* Texas has "several legitimate interests to support" its ballot-access requirements, including preserving "the integrity of the electoral process" and regulating "the number of independent candidates on the ballot by ensuring that (1) the electorate is enough aware of the candidate either to know his views or to learn and approve of them in a short period, and (2) that at least a minimum of registered voters are willing to take him and his views seriously." *Nader,* 332 F. Supp. 2d at 992.

Those interests continue to be served by Texas's petitioning procedures today, as applied to both independent candidate statewide and presidential ballot access. The district court's decision rejecting Plaintiffs' constitutional challenges to the petitioning procedures governing independent candidates should be affirmed.

E. The State's interests pass rational basis review.

The district court properly applied rational basis review to Texas's ballot-access laws because Plaintiffs did not substantiate with evidence that any challenged provision, whether standing alone or taken together, imposed a severe burden on a Plaintiff. ROA.2327. When a state election law imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788. The mere fact that a State's system "creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny." *Bullock,* 405 U.S. at 143.

The State clearly has an important interest in ensuring that candidates demonstrate a "significant modicum of support" before gaining access to the ballot. *Jenness*, 403 U.S. at 442.This State interest helps to avoid voter confusion, ballot overcrowding, and frivolous candidacies. *Id.* The Supreme Court has held that, "as a practical matter, there must be a substantial regulation of elections if they are to be

fair and honest and if some order, rather than chaos, is to accompany the democratic process." *Storer*, 415 U.S. at 730. "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials" and states have a "strong interest in the stability of their political systems." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Therefore, under a rational basis review, the State's goals of avoiding voter confusion, ballot overcrowding, integrity, and frivolous candidacies are rationally served by the challenged provisions, even if this Court determines that "there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

Plaintiffs' disagreements and representations that Texas could adopt lower signature requirements and longer petitioning periods while still protecting its legitimate regulatory interests (at 50) are not a basis for finding a constitutional infirmity. *E.g.*, *Richardson*, 978 F.3d at 240 (citation omitted). Courts "do not force states to shoulder 'the burden of demonstrating empirically the objective effects' of election laws." *Munro*, 479 U.S. at 195. How each provision ties into the State's interests has been outlined above, and these interests have been deemed sufficient to support Texas's ballot-access framework by the Supreme Court and this Court on numerous occasions. None of the challenged provisions lack a "reasonably conceiveable" relationship to the State's well-established interests. *Id.*

Even when taken together, the challenged provisions do not create an unconstitutional impediment to ballot access simply by creating a different path to the ballot than one that major parties take. Under *Jenness,* alternate ballot-access rules for major and minor political parties are not *per se* unconstitutional. 403 U.S. at 441–42."[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Id.* The same was recognized in *Bullock*. 405 U.S. at 147. Instead, "States may...impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." *Lubin v. Panish*, 415 U.S. 709, 718 (1974).

That is what Texas's laws do, while providing multiple paths to minor party ballot access which have permtted LPTX and GPTX to place candidates on the statewide ballot for decades. Accordingly, the district court properly held that SOS Defendants have more than met the requirement of identifying "important regulatory interests" furthered by Texas' ballot-access framework. Since a rational basis exists for the imposition of the challenge provisions, the district court's

decision should be affirmed in all respects except its singular finding that requiring the petition process to be carried out on paper does not pass rational basis review.

F. Plaintiffs' Equal Protection claims fail.

The district court appropriately rejected Plaintiffs attempt to repackage their claims as wealth-based violations of the Equal Protection Clause. The district court aptly held that "[s]tates may impose different requirements on Minor Parties" and in Texas "appearing on the ballot is not conditioned on being able to pay a fee" because alternative avenues to access are available. ROA.2329. Additionally, "Plaintiffs have not shown that the challenged provisions 'operate as a mechanism to exclude certain classes of candidates from the electoral process.'" *Id.* (citing *Anderson*, 460 U.S. at 793). Substantially similar equal protection challenges have been previously rejected. *Id.* (citing *Nader,* 388 F.3d 137; *Kirk*, 84 F.3d at 184–86; *Meyer*, 2011 WL 1806524, at *3–5).

Texas's petition requirements and overall ballot-access scheme are reasonably related to the State's interests and pass constitutional muster, regardless of the fact that they affect non-primary parties differently from primary parties. *See, e.g.*, *Nader,* 332 F. Supp. 2d at 988-89; *Kirk*, 84 F.3d at 184-86; *Meyer,* 2011 WL 1806524, at *3; *White*, 415 U.S. at 767. Texas is well within the law and its legitimate, substantive interests to set limitations on Plaintiffs that may not exist for every party on the

ballot. Plaintiffs are not unconstitutionally burdened by having to demonstrate a modicum of support under the challenged provisions. Nor is it a violation of the Equal Protection Clause to fund primary elections using taxpayer funds but to not reimburse minor party or independent candidates their costs of petitioning—particularly since major party candidates are not reimbursed their filing fees or petitioning costs. *See White*, 415 U.S. at 794 (noting that the States need not "finance the efforts of every nascent political group seeking to organize itself"); *Bullock*, *supra.*

Plaintiffs claim (at 39, 65) that Texas cannot justify its ballot-access framework because it limits political participation "by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," citing *Anderson.* 460 U.S. at 793. But Plaintiffs do not elaborate on this beyond stating that the costs of hiring professional circulators makes it difficult for some parties to gain ballot access—namely CPTX and APTX that lack a legitimate modicum of support in Texas. ROA. 548-50, 565, 567-69, 679, 2314-15. Since LPTX and GPTX both have retained ballot access for numerous election cycles, they cannot sustain an Equal Protection claim premised on Texas's petition requirements limiting their political participation. ROA.2315-16.

Plaintiffs also argue (at 55, 65) that the district court erred in not specifically calling out and addressing Section 181.0311 during its Equal Protection analysis. It did not, and that section does not run afoul of the Equal Protection Clause. All party candidates that seek ballot access through a primary or a nominating convention, whether from major or minor parties, must demonstrate that they are serious candidates with some public support by submitting *either* a filing fee *or* a nominating petition. *See* Tex. Elec. Code § 181.0311.

Supreme Court precedent explicitly permits a state to require candidates to submit a fee or an alternative means of demonstrating reasonable voter support, including for litigants similarly situated to the Plaintiffs. In *Bullock v. Carter*, the Supreme Court concluded that a state violates the Equal Protection Clause by "providing *no reasonable alternative* means of access to the ballot" other than paying a filing fee—a fact which was "critical to [the Court's] determination of constitutional invalidity." 405 U.S. at 149 (emphasis added). Such a system violates Equal Protection, the Court concluded, because office seekers could be "precluded from seeking the nomination of their chosen party, no matter how qualified they might be, *and no matter how broad or enthusiastic their popular support*." *Id.* at 143 (emphasis added). This stands in stark contrast to Texas's system, which provides for candidates who are qualified, have a modicum of popular support, but cannot

afford the filing fee to file a petition that requires only 5,000 signatures—the very number Plaintiffs' otherwise tout (at 48) as a reasonable threshold to avoid ballot overcrowding.

Texas law does not measure whether a candidacy is serious or spurious "*solely* in dollars." *Lupin*, 415 U.S. at 716. And Texas is not required to let "every voter [] be assured that a candidate to his liking will be on the ballot." *Id.* Plaintiffs' Equal Protection claims additionally fail because Plaintiffs have not suffered any actual burden as a result of Texas' ballot-access framework. As explained further, *infra*, Plaintiffs fail to demonstrate any exclusion from the ballot: LPTX and GPTX have both met Texas' petition requirements for ballot access in the past and retain ballot access currently, and CPTX and APTX have not and currently could not make genuine efforts to gain ballot access. As a result, Plaintiffs do not appear to have suffered any burden—beyond any other frivolous candidate who cannot meet the ballot-access requirements—as a result of Texas' current ballot-access framework. Therefore, the district court's decision should be affirmed in all respects except its finding that the requirement to conduct petitions on paper violates Equal Protection.

II. The District Court Incorrectly Held That Otherwise Constitutional Petitioning Provisions Could Not Be Carried Out in Paper Format.

A. Paper petitions impose minor burdens and serve substantial—if not compelling—state interests.

Original signature requirements "are a common fact of life" that impose only a slight burden or inconvenience on voters and candidates. *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). The district court held that Texas requiring original signatures on paper petitions imposed a burden on Plaintiffs that did not pass rational basis review because the paper requirement did not relate to the State's interests in ensuring candidates demonstrate a significant modicum of support largely because electronic methods would reduce the burden on Plaintiffs. ROA.2327-28. But it was inappropriate for the district court to consider the burdens imposed by the generally applicable paper petition requirement in isolation. Additionally, the district court failed to recognize that completing the petitions on paper serves the State's important regulatory interests by guaranteeing that registrants attest to meeting the qualifications for signing the petition—such as that the individual has not voted in a primary or signed another petition for a candidate for the same office—that are geared toward streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion. *Anderson v. Celebrezze*, 460 U.S 780, 788 (1983). The district court specifically taking issue with the original signature requirement for petitions also runs afoul of this Court's rulings in other ballot-access cases.

1. The district court erred in considering the petitioning on paper requirement in isolation.

Since the paper petition requirement is generally applicable, the severity of the burden posed by it must be viewed in light of other ballot-access options. *Vote.Org*, 89 F.4th at 490 (citing *Richardson*, 978 F.3d at 236). The district court failed to do so, instead focusing solely on the paper petition route to ballot access. ROA.2327-28. As the opening brief points out, all nominating petitions regardless of major or minor party affiliation (or no affiliation) must be signed on paper in the presence of a circulator. Tex. Elec. Code §§ 141.063-141.065. Any such petition can be transmitted to the applicable filing authority by electronic means. While Plaintiffs take issue that most major party candidates do not choose this ballot-access route, Minor Party Plaintiffs do not have too, either. For minor parties that automatically qualify for the general election ballot like LPTX and GPTX, their candidates can choose to pay the filing fee in lieu of a petition. CPTX and APTX could also qualify for the ballot via a nominating convention, if they had the requisite level of voter support, and their candidates could avoid filing a petition as well. It was error for the district court to hold that completing petitions on paper was unconstitutional without considering the alternative opportunities for ballot access available to minor parties.

2. The district court erred in holding that petitioning on paper is not rationally related to Texas's legitimate interests, particularly in light of this Court's recent original signature decision.

The district court also erred in holding that the paper petition process was not rationally related to one of Texas's legitimate state interests. ROA.2327. Like this Court's recent decision addressing challenges to Texas's voter registration wet ink signature requirement, an original signature on a paper petition helps guarantee that signers attest to meeting the qualifications for signing the petition. *Vote.org*, 89 F.4th at 490. The oath ensures that voters are making an informed decision to sign the petition, may dissuade ineligible voters from signing, and protects against a voter or the circulator overlooking—or bypassing a screen display—noting the important limitations on petition eligibility. *Id.* It also helps detect and deter fraud. "Texas 'indisputably has a compelling interest in preserving the integrity of its election process.'" *Richardson*, 978 F.3d at 239. The reliability and security accompanying a wet ink signature, as opposed to a third-party software or other electronic petition process suggested by the district court (ROA.2327-28), promotes the integrity and stability of Texas's elections in a manner that should not be overlooked.

Electronic petitioning, with electronic signatures, poses increased risks of fraud. A single person at a computer could plug in information for multiple voters, including electronic signatures, with relative ease. The same cannot be said of the

paper petition process. The concerns for fraud, reliability and security are amplified by the use of third-party electronic devices and software as advocated by Plaintiffs. *Vote.org,* 89 F.4th at 490-491. Such software developed by outside parties has not been utilized by a State or city anywhere near the size of Texas. ROA.674. The state's interest in election security and streamlining the ballot-access process is well-served by requiring an original signature on paper, collected in person, without passing it through an out-of-state, third-party intermediary's software that has never been utilized at such a large scale. *See Vote.org,* 89 F.4th at 490-491; *Richardson*, 978 F.3d at 238.

Actual evidence that the electronic petitions would result in increased fraud during petitioning is not required, as such evidence "has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration." *LULAC v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020). "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro*, 479 U.S. at 195. The State has a compelling interest in ensuring that it has broad access to information that may deter and detect fraud. *Crawford*, 553 U.S. at 191; *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2340(2021).

The paper petition process, with its wet ink signature requirement, furthers these interests.

Each of these important interests is undermined absent reversal of the district court's preliminary injunction and final judgment holding that Texas cannot require its otherwise constitutional petitioning process to be carried out with wet ink signatures on paper. The paper petition with original signature requirement is carefully tailored to serve the State's interests: it helps guarantee that signers attest to meeting the petition's requirements, impresses upon the signer the seriousness of signing the petition in a way that filling out an electronic form will not, and ensures that election officials can review those signatures to verify the signer's voter registration and identity if necessary. *Vote.org v. Callanen,* 39 F.4th 297, 308 (5th Cir. 2022).

As this Court recently acknowledged, Courts must give weight to a state legislature's judgment and discretion in creating evenhanded restrictions that protect the integrity and reliability of the electoral process. *Vote.Org*, 89 F.4th at 480. The "Federal Constitution gives states, not federal courts, 'the ability to choose among many permissible options when designing elections,'" and courts do not "'lightly tamper' with that authority." *Thompson v. DeWine*, 976 F.3d 610, 620 (6th Cir. 2020) (per curiam) (quotation omitted). Plaintiffs did not meet their weighty

obligation to substantiate that Texas's otherwise constitutional petitioning process somehow runs afoul of the First or Fourteenth Amendments when conducted in paper format, and the district court's ruling in solely this regard should be reversed.

3. The district court erred in holding that petitioning on paper violated Equal Protection for not providing an electronic alternative to Minor Parties.

For many of the same reasons that the district court erred in holding that petitioning on paper violated the constitution under *Anderson/Burdick*, the district court erred in holding that completing petitions in paper format violated the Equal Protection Clause. The district court concluded that since Plaintiffs "cannot use electronic methods for petitioning whereas Texas allows Major Parties to use electronic methods as part of their procedures for accessing the ballot," Plaintiffs were denied equal protection. ROA. 2328-29. Essentially, in the district court's view, Texas's petitioning procedures violate equal protection because an electronic process is not offered. Indeed, the final order states that "the paper nomination petition process, as opposed to an electronic process, imposes an unequal burden on Plaintiffs." ROA.2378.

This finding is unsubstantiated in the record. Major parties are permitted to submit forms to the applicable filing authority (ROA.2329) and can electronically transmit any paper petitions in the same manner as Plaintiffs. Plaintiffs have not

otherwise substantiated that electronic methods of gaining ballot access are provided to major parties but not minor parties in an unequal way. The burdens of completing paper petitions are equally shared by all candidates seeking a party's nomination (major or minor) and are non-discriminatory. *See Anderson*, 460 U.S. at 788. It is the district court's order, which effectively directs Texas to permit solely these Plaintiffs to comply with its petitioning requirements by alternative means such as electronic petitions with electronic signatures would itself create inequalities.

Additionally, Plaintiffs only provided evidence that a single state, a single city, and the District of Columbia make electronic petitioning available. ROA.674. None are close to the size of Texas, nor has any evidence been provided that electronic petitioning software would be effective, reliable, or secure on such a large scale. It would also require acceptance of electronic signatures or electronic images of original signatures, which has been rejected by this Court in other voting contexts. *Vote.org, supra.* Any burden on Plaintiffs is slight and supported by the State's above outlined compelling interests. The district court's final judgment and permanent injunction enjoining Texas from carrying out its petitioning process in paper format should be reversed.

B. The relief granted by the district court is overly broad and attempts to compel acceptance of electronic signatures.

Plaintiffs' brief posits that the district court's permanent injunction was narrowly tailored and deferential to the Texas Legislature (at 26). But as SOS Defendants argued to the district court (ROA.2332-2341), the permanent injunction likely posits improper affirmative relief and seeks to "control" SOS Defendants in direct violation of *Ex Parte Young*, 209 U.S. 123 (1908). The district court enjoined carrying out Texas's otherwise constitutional petitioning provisions on paper, specifically pointing to electronic petitioning as the new standard for constitutional ballot access. ROA.2327-30. Setting aside the lack of evidence supporting the feasibility of electronic petitioning that has only been implemented in three much smaller jurisdictions—and concomitant security, reliability, and fraud concerns—the district court erred by effectively directing affirmative action by SOS Defendants to adopt and implement alternate electronic procedures. The court may not direct such affirmative action because SOS Defendants have not refused or neglected to perform a ministerial duty. *Young*, 209 U.S. at 158 (citation omitted). SOS Defendants have no affirmative statutory duty—much less authority—to implement such a procedure, or to do so only for Plaintiffs as ordered by the court. Any attempt by SOS Defendants to comply with the district court's judgment "would place the court on the wrong side of the line thought to divide 'discretionary' from

'ministerial' functions." *Vann v. Kempthorne*, 534 F.3d 741, 753 (D.C. Circuit 2008) (quoting *Hagood v. Southern*, 117 U.S. 52, 69 (1886).

The district court also erred in granting the permanent injunction because Plaintiffs did not meet the high burden for obtaining such relief. To succeed with a claim for permanent injunctive relief, a plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

For all the reasons explained herein, Plaintiffs have not established any injury, let alone an irreparable one. The balance-of-hardships and public-interest factors also counsel against a permanent injunction in light of the State's substantial and compelling interests in streamlining the ballot-access process and its integrity. The district court's permanent injunction should be reversed.

PRAYER

Defendants respectfully request that this Court affirm the district court's judgment in all respects except for its holding that requiring Plaintiffs to carry out

Texas's petitioning requirements in paper format is unconstitutional. That particularly holding should be reversed.

Respectfully submitted.

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Certificate of Compliance

I certify that this brief was prepared with Microsoft Word and uses Equity Text A Tab, which is a proportionally spaced typefaces, in 14-point height for body text and 12-point text for footnotes. I further certify that the portions of the brief subject to Tex. R. App. P. 9.4(i)(1) contain 10,914 words, as determined by Word's word-count function.

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Certificate of Service

On February 1, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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