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

REPLY BRIEF OF PLAINTIFF-APPELLEES

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Plaintiff-Appellees[1] respectfully submit this Reply Brief in response to the Response and Reply Brief submitted by Defendant-Appellants/Cross-Appellees on February 1, 2024 (ECF No. 56) ("Appellants' Rep.").

INTRODUCTION

The parties to this cross-appeal have presented the Court with opposing views regarding the burdens imposed by the Challenged Provisions, but only Plaintiff-Appellees have supported their arguments *with evidence*. That evidence is uncontroverted, and it demonstrates the Challenged Provisions impose severe and unequal burdens and operate as a near-absolute barrier to non-wealthy Independents and Minor Parties. (Br. of Appellees (ECF No. 38) at 29-47.) In response, the Secretary argues – without citation to countervailing *facts* – that any burden the Challenged Provisions impose is not severe and is merely the natural and innocuous consequence of population growth and cost increases. (Appellants' Rep. 2.) The Secretary's arguments should be rejected. Not only do they lack evidentiary support, but also, it is immaterial whether inflationary forces exacerbate the severe and unequal burdens the Challenged Provisions now impose. Constitutional review instead requires analysis of the "character and magnitude" of those burdens and "the

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Brief of Appellees and its Appendix A.

practical effect" of the Challenged Provisions "viewed in their totality." *Nader v. Connor*, 332 F. Supp. 2d 982, 987-88 (W.D. Tex. 2004) (citations omitted), *aff'd*, 388 F.3d 137 (5th Cir. 2004).

ARGUMENT

I. The Secretary Fails to Rebut Plaintiff-Appellees' Claims That the Challenged Provisions Are Unconstitutional

A. Plaintiff-Appellees' Claims Are Not "Foreclosed" by Precedent

The Secretary incorrectly asserts that Plaintiffs-Appellees' claims are "foreclosed" by binding precedent. (Appellants' Rep. at 8-10.) It appears that in the Secretary's view, any provision of the Texas Election Code that has previously been upheld as constitutional can never be challenged again, no matter what the facts and evidence may show. This is the very definition of the "litmus-paper test" argumentation the Supreme Court has repeatedly rejected. *See Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Storer v. Brown*, 415 U.S. 724, 730; *see also Voting for America, Inc. v. Steen*, 732 F.3d 382, 387-88 (5th Cir. 2013).

The record here establishes that the Challenged Provisions operate as a near-absolute barrier to Independents' and Minor Parties' participation in Texas's electoral

process.[2] ROA.672-673, 733-736, 746-747, 749-751, 755-757, 759, 762, 768-772, 776, 777, 778-780, 787-788, 789-790, 793, 801-803, 804, 816-817, 2197-2200. No state interest can justify such a heavy burden. *See Williams v. Rhodes*, 393 U.S. 23, 31-33 (1968). The Challenged Provisions thus fail scrutiny under the fact-intensive analysis required by *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992). The relevant precedent, when applied to the record evidence developed here, supports Plaintiffs-Appellees' argument that the District Court erred in holding the Challenged Provisions constitutional as presently applied. (Br. of Appellees at 29-51.)

The Secretary points to the Supreme Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974), to suggest that Texas's one-percent signature requirement is valid (Appellants' Rep. 9), but *White's* 50-year-old holding does not control the outcome here for several reasons the Secretary disregards. As a preliminary matter, *White* was decided prior to *Anderson* and *Burdick*, and thus the

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[2] The Secretary incorrectly suggests that Plaintiff-Appellees' claims rely on the "heavier burden" the Challenged Provisions impose on "a limited number of persons." (Appellants' Rep. 8.) Not so. As discussed in Section I.B, *infra*, the record establishes that in the last 50 years or more ***no*** Independent or Minor Party has successfully completed a statewide petition without spending substantial sums of money, and that the cost of doing so has drastically increased over time, such that it now approaches $1 million or more. This is an insurmountable barrier to any non-wealthy Independent or Minor Party, including Plaintiff-Appellees.

Supreme Court did not apply the more "stringent framework" prescribed by those cases. *LULAC v. Hughs*, 978 F.3d 136, 144 n.6 (5th Cir. 2020); *see also Graveline v. Johnson*, 747 F. App'x 408-414 (6th Cir. 2018) (unpublished) (citing *Anderson*, 460 U.S. at 817 (Rehnquist, J. dissenting) (describing the less demanding legal standard applied in pre-*Anderson* cases)).

More importantly, the holding in *White* could not account for the heavy burden imposed by the Challenged Provisions as they apply today. Texas's one-percent signature requirement amounted to only 22,000 signatures in 1972, *see White*, 415 U.S. at 777, whereas in 2022 it amounted to 83,434 signatures. Furthermore, the one-percent signature requirement did not apply to Minor Parties until 1968, *see* TEX. ELEC CODE. ANN. art. 13.45 (2) (West Supp. 1968), and two such parties were able to comply with it in 1972. *See White*, 415 U.S. at 779. Thus, while the Court concluded it was not "immediately obvious" the one-percent signature requirement "imposes insurmountable obstacles" based on the evidence available then, *id.* at 784, the uncontested evidence here demonstrates the requirement is in fact insurmountable for non-wealthy Independents and Minor Parties as presently applied. ROA.733-736, 746-747, 749-751, 755-757, 759, 762, 768-772, 776, 777, 778-780, 787-788, 789-790, 793, 801-803, 804, 816-817, 2197-2200. Far from

foreclosing Plaintiff-Appellees' challenge, *White* implicitly anticipates it given the facts and circumstances that presently exist.

The Secretary cites several other cases in passing but makes no attempt to explain which cases bar which claims, or why. (Appellants' Rep. 10.) As Plaintiff-Appellees explain below, none of these cases "foreclose" Plaintiff-Appellees' claims – indeed, they do not even address them.

B. The Secretary Fails to Rebut the Uncontroverted Evidence That the Challenged Provisions Are Severely Burdensome as Presently Applied

It is beyond dispute that the Challenged Provisions are the most restrictive in the nation, by far, based on the high number of signatures required and the short time permitted for obtaining them. (Br. of Appellees 30-36); ROA.671. Further, Texas imposes unique requirements and restrictions that make petitioning there more difficult and expensive than any other state. ROA.672, 736, 773, 788-789, 801-802, 807, 810-813, 822-824. The Secretary nonetheless asserts – without support and without addressing such facts – that "any burden" the Challenged Provisions impose on Plaintiff-Appellees is "slight at best and hypothetical or speculative at worst." (Appellants' Rep. 12.) The Secretary is incorrect.[3]

[3] The Secretary also asserts that the Court must consider "all opportunities" available to Plaintiff-Appellees to qualify for the ballot, as if these purported alternatives allow

The uncontested evidence demonstrates that Independents and Minor Parties cannot complete a successful statewide petition drive unless they spend substantial funds to do it, and that the cost of doing so now approaches $1 million or more. ROA.672-673. This heavy burden is not hypothetical or speculative but supported by a voluminous evidentiary record spanning five decades. ROA.672, 733-736, 746-747, 749-751, 755-757, 759, 762, 768-772, 776, 777, 778-780, 787-788, 789-790, 793, 801-803, 804, 816-817, 2197-2200; *see Storer*, 415 U.S. at 742 (observing that "past experience" is "helpful" to determine whether ballot access requirements are unconstitutionally burdensome).

The Secretary repeatedly urges this Court to disregard these severe burdens, because LPTX and GPTX are currently ballot-qualified and APTX and CPTX lack

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Plaintiff-Appellees to avoid the prohibitive cost of conducting a petition drive. (Appellants' Rep. 9.) They do not. For example, the Secretary contends that an Independent can avoid this heavy burden by choosing to run as a partisan candidate, *id.*, but the Supreme Court has categorically rejected this view. *See Storer*, 415 U.S. at 745 ("[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other."). The Secretary also misleadingly suggests that a Minor Party can "automatically qualify" for the ballot pursuant to § 181.005(c) – that is, by *retaining* ballot access based on the performance of its candidates for statewide office – without acknowledging that it must first *qualify* pursuant to the convention process prescribed by § 181.005(a) or the petitioning process prescribed by § 181.006. No Minor Party has qualified for the ballot via the convention process in more than 50 years, ROA.2307, which demonstrates that this alleged 'opportunity' is "merely theoretical." *White*, 415 U.S. at 783 (citation omitted).

the resources to undertake a statewide petition drive. (Appellants' Rep. 12-13, 19-20.) This argument is inconsistent with precedent recognizing that the cost of complying with ballot access requirements "inherently burdens [the] electioneering activity" of the candidates and parties subject to them, and that the resultant injuries are both "actual and threatened." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 364-65 (3rd Cir. 2014) (citations omitted); *see Graveline v. Benson*, 430 F. Supp. 3d 297, 309, 311 (E.D. Mich. 2019) (relying on cost of complying with signature requirement to support finding of severe burden), *aff'd*, 992 F.3d 524, 540 (6th Cir. 2021); *Green Party of Ga. v. Kemp*, 171 F.Supp. 3d 1340, 1350-51, 1363 (N.D. Ga. 2016) (same), *aff'd*, 674 Fed. Appx. 974 (11th Cir. 2017) (unpublished); *Constitution Party of Pa. v. Cortes*, 116 F. Supp. 3d 486, 502-06 (E.D. Pa. 2015) (same), *aff'd*, 824 F.3d 386 (3rd Cir. 2016).

Moreover, the uncontested evidence establishes that neither LPTX nor GPTX has completed a successful statewide petition drive in decades, and that neither party can afford to do so now. (Br. of Appellees 33-34.) LPTX's ability to complete a petition drive 20 years ago, in 2004, does not negate the uncontested evidence establishing that it cannot do so now. ROA.676-677, 763. The 2004 effort cost only $140,000 – a fraction of the current cost – and it still put the party in debt. ROA.759, 810. Likewise, GPTX did not "collect[] nearly 92,000" signatures in 2010, as the

Secretary avers, (Appellants' Rep. 19) – another entity did, without GPTX's involvement (at a cost of $525,000) – and this fact does not negate the uncontested evidence establishing that GPTX cannot comply with the one-percent requirement now. ROA.777, 2321. Additionally, APTX and CPTX need not demonstrate they "have the support" to comply with the one-percent signature requirement as a prerequisite to establishing that it is severely burdensome as applied to them, and the Secretary fails to cite any authority for this misstatement of law. (Appellants' Rep. 19.) The evidence thus demonstrates that the Challenged Provisions are severely burdensome as applied to LPTX, GPTX, APTX and CPTX even if they are not presently engaged in a petition drive, and the Secretary offers nothing to rebut it. The uncontested evidence also demonstrates that the burdens imposed injure all Plaintiff-Appellees. ROA.746-748, 762-763, 780, 785-786, 793-794, 796-797.

Plaintiff-Appellees acknowledge that the Constitution does not "require" Texas to "permit statewide general ballot access" to Minor Parties with few members. (Appellants' Rep. 13). However, the Constitution does prohibit Texas from imposing requirements "so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot." *White*, 415 U.S. at 783. The uncontested evidence establishes that the Challenged Provisions do just that.

C. The Secretary's Reliance on "Population Growth" and "Inflation" Is Immaterial and Does Not Diminish the Severity of the Burden the Challenged Provisions Impose

The Secretary's unsupported assertion that Plaintiff-Appellees' claims against the Challenged Provisions amount to quibbles over "population growth and inflation" rather than cognizable constitutional challenges to "the laws themselves" (Appellants' Rep. 15) is erroneous and inconsistent with the applicable legal standard. *Anderson-Burdick* prohibits ballot-access schemes – like the Challenged Provisions – that prevent "reasonably diligent" Independents and Minor Parties from satisfying the requirements without paying hundreds of thousands of dollars or more. *Storer*, 415 U.S. at 742; *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."). There is no exception for severe burdens that are exacerbated over time by natural forces like population growth or inflation, and the Secretary fails to cite any authority recognizing one. Instead, it is well-settled that courts must give "due consideration … to the practical effect of election laws of a given state, viewed in their totality." *Nader*, 332 F. Supp. 2d at 988 (citation omitted); *see also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006) (courts must consider "evidence of the real impact" of a restriction). Here,

that includes evidence establishing the prohibitive cost of complying with the Challenged Provisions.

1. Signature Requirements

The Secretary contends that Plaintiff-Appellees seek to "undermine" two prior decisions that "upheld" Texas's one-percent signature requirement, (Appellants' Rep. 15 (citing *Nader*, 332 F. Supp. 2d 982; *White*, 415 U.S. at 783)), but once again it is the Secretary's fact-free, litmus-test reasoning that falls flat.[4] As Plaintiff-Appellees have explained, *see supra* Part I.A, *White's* 50-year-old holding does not control here for several reasons – not least because *White* did not address the ever-increasing burden imposed by that requirement. The Secretary insists this "consideration" was "present" at the time but fails to provide any citation for this assertion, (Appellants' Rep. 15), and for good reason: it played no part in the Court's rationale or holding in *White*.

The Secretary would have this Court "follow" *White* by turning a blind eye to the uncontroverted record here, (Appellants' Rep. 16), but that is not faithful adherence to precedent. *See Libertarian Party of Tex. v. Fainter*, 741 F.2d 728, 730 (5th Cir. 1984) (observing that *White* did not "foreclose" plaintiffs' claim because it

[4] Plaintiff-Appellees explain why the Secretary's reliance on *Nader* is misplaced *infra* at Part I.D.

"was not addressed," and because new facts may have arisen that demonstrate "the original justification [for the challenged requirement] no longer exists."). In sharp contrast with *White*, 415 U.S. at 783-84, the record here establishes that no statewide Independent or Minor Party has complied with the one-percent signature requirement in nearly two decades. ROA.676, 679. The Court should thus follow *White* not by treating its 50-year-old outcome as dispositive, regardless of new facts and evidence, but by adhering to its admonition that the Constitution forbids states from adopting ballot access requirements "so excessive or impractical" that reasonably diligent Independents and Minor Parties cannot comply. *White*, 415 U.S. at 783; *see Storer*, 415 U.S. at 742.

Without citing any facts, evidence or authority, the Secretary opines that Texas's "percentage-based" signature requirement "makes good sense and remains constitutional" no matter how many signatures are required in the same fixed period. (Appellants' Rep. 16.) The uncontested evidence proves otherwise. Further, it is not especially relevant that California's one-percent signature requirement was upheld in another case where, unlike here, the evidence showed that Minor Party candidates "consistently" complied with it. (Appellants' Rep. 16 (citing *De La Fuente v. Padilla*, 930 F.3d 1101 (9th Cir. 2019)); *see De La Fuente*, 930 F.3d at 1105. Additionally, the plaintiff in *De La Fuente* presented "no evidence" to establish a

severe burden – including a financial burden. *See De La Fuente v. State*, 278 F. Supp. 2d 1146, 1152 (C.D. Cal. 2017). Plaintiff-Appellees face no such deficiency of proof. ROA.672-673.

The Secretary's string citation to other cases that upheld other states' signature requirements is similarly unavailing. (Appellants' Rep. 17 (citing *Storer*, 415 U.S. at 740; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010)).) In *Jenness* – another pre-*Anderson* case – the state allowed a six-month window for signature-collection and the record showed that candidates had complied with the signature requirement in each of the two preceding elections. *See Jenness*, 403 U.S. at 438-39. In *Cronin*, the signature requirement amounted to only 3,711 signatures and the state allowed a lengthy petitioning period that extended until 60 days before the general election. *See Cronin*, 620 F.3d at 1216. And in *Storer*, the Court did not uphold California's signature requirement but remanded for further proceedings to determine the severity of the burden it imposed. *See Storer*, 415 U.S. at 740. These cases thus have little bearing on the constitutionality of Texas's signature requirement as presently applied. *See Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004) (Posner, J.) (observing that it is "difficult to rely heavily on precedent in evaluating [ballot access] restrictions, because there is great variance among the states' schemes.").

Plaintiff-Appellees do not claim that "any signature requirement over 5,000 is superfluous," as the Secretary avers, (Appellants' Rep. 17), but they have presented uncontested evidence demonstrating that in the nation's entire history of state-regulated ballots, a requirement of more than 5,000 signatures has proven sufficient to protect the state interests the Secretary asserts here. ROA.1743, 1745, 1759. Such evidence supports Plaintiff-Appellees' claim that the 83,434 signatures and 113,151 signatures demanded of Minor Parties and presidential Independents, respectively, are excessive. ROA.671. The Secretary has presented no evidence to the contrary.

Plaintiff-Appellees' uncontested evidence that Texas never had problems with overcrowded ballots, even when Minor Parties did not have to meet *any* signature requirement, ROA.826-828, 1856:9 – 1865:18, also supports their claim that the one-percent signature requirement is excessive as currently applied. It is probative of the "legitimacy and strength" of the Secretary's asserted interest in avoiding ballot overcrowding. *Anderson*, 460 U.S. at 789; *see Blackwell*, 462 F.3d at 593 (rejecting state's reliance on "generalized and hypothetical interests identified in other cases."). And while Texas need not "make a particularized showing" that such interests are threatened before enacting "reasonable restrictions on ballot access," (Appellants' Rep. 18 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986))),

Plaintiff-Appellees' evidence is relevant precisely because it demonstrates that Texas's signature requirements are not reasonable but excessive.

The Secretary attempts to defend several requirements and restrictions relating to the petitioning process on the ground that they "apply to major party candidates that choose to submit petitions as well," (Appellants' Rep. 18), but disregards a critical distinction: major party candidates must submit 5,000 signatures, at most, to access the primary ballot. *See* § 172.025(1). The burden these requirements impose on Major Party candidates is therefore minimal compared to the burden they impose on statewide Independents and Minor Parties, who must submit 16 or 20 times that number to appear on the general election ballot. *See Constitution Party of Pa.*, 116 F. Supp. 3d at 505 (rejecting assertion that petitioning requirements equally burdened Major Party candidates where "minor party candidates, on average, must file ten times as many signatures…"). Further, the Secretary's assertion that these requirements and restrictions were previously "upheld" is false: the relevant provisions were not even challenged in the cases the Secretary cites. (Appellants' Rep. 18-19 (citing *Nader*, 332 F. Supp. 2d at 989; *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184-86 (5th Cir. 1996)).)

2. Petitioning Time Limits

The Secretary asserts – again, without addressing the relevant facts – that "Plaintiffs cannot distinguish their case" from *White* and *Kirk*, which purportedly "upheld" Texas's short petitioning periods as applied in combination with the other Challenged Provisions. (Appellants' Rep. 20.) Not so. Plaintiff-Appellees have already addressed *White*, *see supra* Part I.A, and *Kirk* did not address Plaintiff-Appellees' claim at all.

In *Kirk*, the Minor Party plaintiffs challenged Texas's deadlines for holding nominating conventions and submitting petitions on the ground that they "are simply too early…." *Kirk*, 84 F.3d at 180, 185. The Court rejected that claim but did not address, much less reject, Plaintiff-Appellees' claim that the deadlines are unconstitutional as applied in conjunction with the other Challenged Provisions because they establish an unnecessarily short, fixed period for gathering an ever-increasing number of signatures, nor did it address Plaintiff-Appellees' evidence that this makes compliance prohibitively expensive for non-wealthy Minor Parties. *See id.* at 186-87.[5]

[5] Additionally, *Kirk* did not address the manifestly unequal burden Texas imposes on Independents and Minor Parties: while Texas allows Major Party candidates up to 2-1/2 years to meet their modest signature requirements for primary election ballot

Similarly, the petitioning periods challenged in *Storer* were not "upheld" as the Secretary avers, (Appellants' Rep. 20), but rather the case was remanded for further proceedings to determine whether they were unconstitutionally burdensome as applied in combination with California's signature requirement. *See Storer*, 415 U.S. at 738; *see also id.* at 764-65 (distinguishing California's statutory scheme from the Georgia scheme upheld in *Jenness* on the ground that Georgia allowed "six full months to circulate petitions….") (Brennan, J., dissenting). Moreover, as Justice Brennan explained, remand was unnecessary because the available evidence left "no room for doubt" that California's statutory scheme was unconstitutional. *See id*. at 763 (Brennan, J., dissenting). And, following remand, California reduced its five-percent signature requirement by 80 percent. *See De La Fuente*, 930 F.3d at 1104.

The Secretary's unsupported assertion that Texas's petitioning period only imposes a "slight or nonexistent burden" cannot be reconciled with the uncontested record evidence. (Appellants' Rep. 21.) There is no genuine dispute that volunteer petition drives have not succeeded in Texas in decades, if ever, and they cannot succeed now, ROA.672; that the current cost of a petition drive now approaches $1 million or more, ROA.672-673; and that the extreme time constraints Texas imposes

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access, ROA.666-667, 1870:10 – 1871:5, the time constraints it imposes on Minor Parties and Independents are the most severe in the nation. ROA.671.

are a primary factor contributing to the heavy burden the Challenged Provisions impose as presently applied. ROA.671-672, 734-735, 750-751, 768-773, 788-789, 801, 808-811, 824. By relying on this evidence to support their as-applied in combination claim, Plaintiff-Appellees are not "cobbling together a challenge" but following well-settled precedent governing the constitutional analysis of ballot access restrictions. (Appellants' Rep. 21); *see Nader*, 332 F. Supp. 2d at 987 (citing *Storer*, 415 U.S. at 737). It is the Secretary who conspicuously fails to address the gravamen of that claim or the evidence supporting it.

3. The Primary Screenout

The Secretary admits Texas arbitrarily affords Major Parties a first, exclusive statutory right to affiliate with voters via the primary election process at a time when Independents and Minor Parties are statutorily prohibited from doing so via the nominating petition or convention process. ROA.1979-1986. The Secretary also admits Texas could protect the interests the Secretary asserts as justification for the primary screenout without imposing this unequal burden. (Appellants' Rep. 22-25); ROA.1979-1986. The evidence demonstrating the primary screenout substantially increases the burden of the petitioning process – that it makes petitioning significantly more difficult and less productive in Texas than any other state – is also

uncontested. ROA.673.[6] It is therefore undisputed that the primary screenout is neither "reasonable" nor "nondiscriminatory" and that the unequal burdens it imposes are not justified by *any* legitimate state interest. *Anderson*, 460 U.S. at 789. It is unconstitutional.

4. Section 181.0311

The scant discussion the Secretary devotes to § 181.0311 does nothing to rebut Plaintiff-Appellees' arguments that this facially discriminatory provision serves no legitimate state interest and is unconstitutional as applied. (*Compare* Br. of Appellees 51-55 *with* Appellants' Rep. 25-26.) None of the Secretary's three points has merit.

First, the Secretary asserts that § 181.0311 furthers Texas's interest in ensuring that "candidates—whether nominated via primary election or convention" demonstrate sufficient "community support" to justify their placement on the general election ballot. (Appellants' Rep. 25.) That is incorrect. As the Secretary has

[6] The Secretary seeks to impugn the credibility of Plaintiff-Appellees' expert Richard Winger and witness William Redpath by noting that they previously testified – *decades ago* – that West Virginia's ballot access requirements were the most restrictive in the nation, (Appellants' Rep. 25 n.9 (citing *Fishbeck v. Hechler*, 85 F.3d 162, 169 (4th Cir. 1996)). That testimony was true and accurate when *Fishbeck* arose 28 years ago. Since then, however, West Virginia substantially improved its requirements by repealing its primary screenout provision, *see* W. VA. CODE § 3-5-23(c)-(d) (1999), and by moving its filing deadlines for all offices from May to August. *Id.* § 3-5-24 (2009).

conceded, a ballot-qualified Minor Party demonstrates that it "has sufficient support in the state of Texas to justify its placement on the [general election] ballot" by submitting the petitions required by § 181.006. ROA.1832. By the Secretary's own admission, therefore, Section 181.0311 is entirely unnecessary to serve the only interest the Secretary asserts in this appeal. (Appellants' Rep. 25); *see Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 776 & n.12 (7th Cir. 1997) (explaining that an "established party has already jumped the hurdle of demonstrating … public support" for its candidates by complying with the requirements to become ballot-qualified).

Second, the Secretary asserts, without authority, that it is "not constitutionally relevant" the State retains the filing fees Minor Party candidates pay pursuant to § 181.0311 but permits Major Parties to retain the identical fees their candidates pay pursuant to § 172.024. (Appellants' Rep. 26.) That, too, is incorrect. This is relevant because it demonstrates that § 181.0311 is facially discriminatory and enables Texas to *profit*, financially, from Minor Parties' participation in its electoral process. ROA. 1838:14 – 1839:5; 1839:6 – 1839:10; 1837:15 – 1837:22. The Secretary cannot cite any case recognizing that states have a legitimate interest in turning such a profit.

Third, the Secretary asserts in passing that Plaintiff-Appellees fail to cite evidence of the severe and unequal burdens that § 181.0311 imposes on LPTX and

GPTX, (Appellants' Rep. 26), but Plaintiff-Appellees have cited this extensive and uncontested evidence and demonstrated its relevance to the constitutional analysis. (Br. of Appellees 51-52.) The Secretary simply fails to address it.

5. Petitioning Costs

The Secretary's discussion of the cost of complying with the Challenged Provisions fails to address Plaintiff-Appellees' actual claims. (Appellants' Rep. 26-29.) Plaintiff-Appellees do not claim that Texas is required to "finance" their efforts to qualify for the ballot, as the Secretary avers. (Appellants' Rep. 26.) Instead, Plaintiff-Appellees claim the prohibitive cost of complying with the Challenged Provisions is severely burdensome, and this burden is unequal because Texas guarantees Major Party nominees automatic ballot access at taxpayer expense.

According to the Secretary, Plaintiff-Appellees' arguments "suffer from a fatal flaw" in that they have not provided "evidence of the costs to a minor party for holding a nominating convention." (Appellants' Rep. 27.) But no Minor Party has ever qualified for the ballot pursuant to the convention process prescribed by § 181.005; they have only qualified by submitting the petitions required by § 181.006. ROA.668. Hence the evidence the Secretary finds lacking does not exist.

To the extent the Secretary attacks Plaintiff-Appellees' evidence demonstrating the futility of volunteer efforts, that too fails. (Appellants' Rep. 28.)

The uncontested evidence establishes that the cost of hiring paid petition circulators is a necessary and unavoidable concomitant of complying with the Challenged Provisions as presently applied. ROA.672-673. The Secretary offers nothing to rebut this evidence. Further, the Secretary's assertion that such cost is not legally required is irrelevant, (Appellants' Rep. 28-29), because the financial burden the Challenged Provisions impose is integral to their "practical effect" as applied. *Nader*, 332 F. Supp. 2d at 988 (citation omitted).

Plaintiff-Appellees have demonstrated that the District Court violated black-letter law by discounting evidence of the current cost of complying with the Challenged Provisions. (Br. of Appellees 37 (citing Fed. R. of Evid. 401, 402).) The Secretary insists the District Court properly did so but cites no authority for this assertion and makes no attempt to show the evidence is irrelevant or otherwise inadmissible. (Appellants' Rep. 28.) The Secretary thus offers no basis for the Court to sustain the District Court's error in discounting such evidence.

The Secretary concedes the Challenged Provisions "may impose some financial costs" on Plaintiff-Appellees but asserts that such costs "do not constitute exclusion or virtual exclusion from the ballot." (Appellants' Rep. 29 (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016)).) This unsupported assertion contradicts the uncontroverted evidence demonstrating that

here, unlike *Grimes*, *no* non-wealthy Independent or Minor Party can afford the cost of complying with the Challenged Provisions. ROA.672-673, 733-736, 746-747, 749-751, 755-757, 759, 762, 768-772, 776, 777, 778-780, 787-788, 789-790, 793, 801-803, 804, 816-817, 2197-2200. There is no evidentiary basis for the Secretary's assertion to the contrary.

D. The Secretary Fails to Defend the Challenged Provisions as Applied to Independents

The Secretary's attempt to defend the Challenged Provisions as applied to Independents rehashes the same points made with respect to Minor Parties and fails for the same reasons. The Secretary disregards the undisputed facts and evidence and improperly invokes prior cases as litmus tests that purportedly "rejected" Plaintiff-Appellees' claims, (Appellants' Rep. 30), even though the cases did not address Plaintiff-Appellees' claims or the uncontroverted record supporting them.

Plaintiff-Appellees have refuted the Secretary's assertion that *Nader*, the primary case the Secretary cites, "rejected the very arguments" they raise here. (Br. of Appellees 56-57.) Now the Secretary shifts gears and asserts that *Nader* involved "challenges" to some of the same provisions that Plaintiff-Appellees challenge. (Appellants' Rep. 30.) But Plaintiff-Appellees have already demonstrated that *Nader* decided a discrete legal issue and did not "reject" their claims or arguments. (Br. of Appellees 57.) The Secretary does not dispute that point.

Additionally, *Nader* rests on a critical factual error that undermines its rationale. The Court in *Nader* erroneously concluded a Minor Party's presidential candidate was subject to §§ 181.031-33, including the January 2nd filing deadline they impose – a finding to which it attributed "greater significance," *see Nader*, 332 F. Supp. 2d at 989 – but in fact such candidates are governed by an entirely different chapter of the Texas Election Code that imposes a much later deadline only 71 days before the general election. *See* § 192.001 *et. seq*; § 192.031(a)(3). That error is reason enough not to rely on *Nader*, because the Court's conclusion that presidential Independents "enjoy[] more flexibility in determining whether to run" than a Minor Party's presidential candidate rests on a mistake of fact. *Nader*, 332 F. Supp. 2d at 989.

Further, *Nader* does not address Plaintiff-Appellees' claim that the Challenged Provisions are unconstitutional as applied to presidential Independents because they are more burdensome than the requirements that Texas imposes on statewide Independents. *See id.* at 985-86; (Br. of Appellees 45-47). The Secretary offers no defense to that claim. Finally, *Nader* was decided on an expedited basis and on a limited record that only included evidence of a single candidate's attempt to qualify for the ballot. *See Nader*, 332 F. Supp. 2d at 986. By contrast, Plaintiff-Appellees have presented the Court with a comprehensive evidentiary record spanning the last

five decades, which demonstrates that the burden the Challenged Provisions impose on presidential Independents is much more severe now than when *Nader* was decided. The Secretary's reliance on *Nader* – like the other cases the Secretary cites – is therefore misplaced.

E. The Secretary Fails to Defend the District Court's Incorrect Application of the Rational Basis Standard

The record flatly contradicts the Secretary's assertion that Plaintiff-Appellees did not "substantiate with evidence" their claims that the Challenged Provisions impose severe and unequal burdens as applied. (Appellants' Rep. 33.) Plaintiff-Appellees have cited such evidence herein and in their opening brief, but the Secretary disregards it. Because that evidence establishes the Challenged Provisions are neither "reasonable" nor "nondiscriminatory," the District Court's application of rational basis review to uphold them with *no analysis* of the "strength" or "legitimacy" of the Secretary's asserted interests, or of the extent to which they make it "necessary" to burden Plaintiff-Appellees' rights, was error. *Anderson*, 460 U.S. at 788; ROA.2327.

In the ballot access context, "each case must be decided on its own facts," *Nader*, 332 F. Supp. 2d at 988 (citation omitted), and the undisputed facts establish heightened scrutiny is warranted here. That the Secretary's asserted interests have been "deemed sufficient" in other cases applying rational basis review is not

especially relevant, much less dispositive. (Appellants' Rep. 34.) The Challenged Provisions cannot withstand *Anderson-Burdick* scrutiny unless the Secretary demonstrates that their "practical effect … viewed in their totality" is justified by the interests the Secretary asserts. *Nader*, 332 F. Supp. 2d at 988 (citation omitted). The Secretary makes no attempt to do so.

II. The District Court Correctly Concluded the Secretary's Asserted Interests Are Insufficient to Justify the Burdens the Paper Petitioning Procedures Impose

According to the Secretary, the District Court erred in holding Texas's nearly 120-year-old petitioning procedures unconstitutional as presently applied "without considering the alternative opportunities for ballot access available to minor parties." (Appellants' Rep. 41.) That is incorrect. The uncontested evidence establishes that unqualified Minor Parties, like Independents, cannot qualify for the general election ballot except by submitting petitions pursuant to § 181.006. ROA.668; *see supra* at 5 n.3. The District Court did not err by analyzing the petitioning requirements in light of this undisputed fact.

Next, relying on *Vote.org v. Callanen*, 89 F.4th 459 (5th Cir. 2023), the Secretary asserts the District Court erred by concluding the state's asserted interests were insufficient to justify the severe and unequal burdens Texas's petitioning procedures impose. (Appellants' Rep. 42-44.) It did not. The District Court's

conclusion is firmly grounded in undisputed facts and amply supported by uncontested evidence, and there is no basis to disturb it on appeal. (Br. of Appellees 15-26.) The Secretary offers *no evidence* for its position to the contrary and instead relies entirely on unsupported assertions of fact. (Appellants' Rep. 42-44.)[7]

Further, *Vote.org* arises from a starkly different factual context and the Secretary's reliance on it is misplaced. *Vote.org* involved a challenge to Texas's "wet signature" requirement as applied to its voter registration requirements – not the

[7] The Secretary is incorrect that "actual evidence" to support its position at summary judgment "is not required." (Appellants' Rep. 43 (citing *LULAC*, 978 F.3d at 147).) In *LULAC* – a decision staying a preliminary injunction – the District Court erred by requiring "actual examples of voter fraud" to support the *interests* the State asserted as justification for the provisions the plaintiffs challenged. *See LULAC*, 978 F.3d at 140, 147; *see also Munro*, 479 U.S. at 194-95 (observing that a state need not "make a particularized showing" that its legitimate interests are implicated to justify imposition of reasonable ballot access restrictions). Here, by contrast, the Secretary improperly seeks to rely on unsupported assertions of fact to rebut Plaintiff-Appellees' evidence demonstrating the Challenged Provisions, as applied, impose a severe burden on Plaintiff-Appellees and are ill-suited to serve the state's asserted interests. (*Compare* Br. of Appellee 15-22 *with* Appellants' Rep. 42-44.) Neither *LULAC* nor *Munro* absolve states of their evidentiary burden as to that issue – particularly where, as here, the record establishes that the restrictions are severely burdensome. *See Blackwell*, 462 F.3d at 593 (citations omitted). On the contrary, it is well-settled that a party cannot defeat "a properly supported motion for summary judgment" by resting on mere allegations "without any significant probative evidence tending to support [them]." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986) (citation omitted).

petitioning procedures challenged here. *See Vote.org*, 89 F.4th at 467-68. That distinction is critical.

In *Vote.org*, the Court concluded the burden the wet signature requirement imposed was "only slight" because it amounted to a single signature signed by a single voter who wishes to register. *Id.* at 490 (citation omitted). The burden here, by contrast, arises from the requirement that Minor Parties and presidential Independents obtain 83,434 and 113,151 separate signatures, respectively – all within the extreme time constraints Texas imposes on them. That burden is exponentially greater than the "slight" burden imposed on a single voter in *Vote.org*. Moreover, it is compounded by the petitioning procedures' inherent inefficiencies, which compel Plaintiff-Appellees to exceed Texas's signature requirements by approximately 50 percent and substantially increase the already-exorbitant cost of complying with the Challenged Provisions. (Br. of Appellees 18-20.) That distinction alone renders *Vote.org's* rationale inapposite.

Additionally, voters could avoid the slight burden in *Vote.org* altogether by availing themselves of the "panoply of registration options available" them, including using "digital signatures" to register through the Department of Public Safety. *Vote.org*, 89 F.4th at 489, 490. Plaintiff-Appellees have no such options.

They must submit petitions pursuant to § 181.006 and bear the heavy burdens of doing so.

The Secretary insists the petitioning procedures "are non-discriminatory" and burden all candidates "equally," (Appellants' Rep. 46), but once again the record proves otherwise. Only Independents and Minor Parties must conduct statewide petition drives. ROA.666. Therefore, only they must bear the heavy burden and prohibitive cost of doing so. (Br. of Appellees 18-22.)

The record also refutes the Secretary's assertion that the District Court's finding the petitioning procedures impose an "unequal burden" is "unsubstantiated." (Appellants' Rep. 45.) The District Court properly supported that finding by citation to undisputed facts and the uncontested evidence supports it. (Br. of Appellees 16-17, 19-22.) The Secretary simply fails to address the basis for the District Court's finding or the facts and evidence supporting it. (Appellants' Rep. 45-46.)

Finally, contrary to the Secretary's assertion, Plaintiff-Appellees' evidence establishes that alternative procedures are available, Texas could adopt them, and they would more than adequately protect its legitimate regulatory interests. ROA.743-44. While the Secretary contends that this Court has "rejected" the use of electronic signatures, (Appellants' Rep. 46), the Secretary elsewhere asserts that Independents and Minor Parties already "have the option to submit their petitions by

electronic means as well." (Appellants' Rep. 12, 45.) The Secretary's contradictory assertion should not be credited.

The uncontroverted record establishes that the burden imposed by the petitioning procedures falls heavily, and unequally, on Independents and Minor Parties. The "considerable leeway" the Court accorded the State in *Vote.org* is therefore improper here. *Vote.org*, 89 F.4th at 491 (citation omitted). The District Court did not err by holding the Secretary's asserted interests were insufficient to justify the burdens imposed.

III. After Finding the Paper Petitioning Procedures Unconstitutional, the Relief Granted by the District Court Was Appropriate

Contrary to the Secretary's arguments, the District Court did not improperly grant "affirmative" relief. (Appellants' Rep. 47-48.) The District Court did not order the Secretary to do anything and instead appropriately enjoined the unconstitutional paper petitioning provisions, leaving the nature and scope of any remedy to the Texas Legislature. ROA.2378, 2381. The District Court also stayed its Order and Final Judgment without objection from Plaintiff-Appellees, ROA.21, thus allowing the Legislature unfettered discretion to enact an appropriate remedy. 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).

CONCLUSION

For the foregoing reasons, and those stated in Plaintiff-Appellees' opening brief, the District Court should be affirmed insofar as it ruled in Plaintiff-Appellees' favor and reversed insofar as it upheld the constitutionality of the Challenged Provisions.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2024, the foregoing brief was filed using the Court's CM/ECF system, which will effect service upon all parties.

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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)(C) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,337 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.

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