UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

Case No. 23-2756

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

Plaintiff-Appellants,

- v. -

DIEGO MORALES,

Defendant-Appellee.

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

APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2756

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

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

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

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

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

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

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

Center for Competitive Democracy

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

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

N/A

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

N/A

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

N/A

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

N/A

Attorney's Signature: /s/Oliver B. Hall Date: September 3, 2024

Attorney's Printed Name: Oliver B. Hall

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

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N/A

Attorney's Signature: /s/William P. Tedards, Jr. Date: September 3, 2024

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

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

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N/A

Attorney's Signature: /s/Mark Brown Date: September 3, 2024

Attorney's Printed Name: Mark Brown

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

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Pursuant to Federal Rule of Appellate Procedure 35 and 40 and Circuit Rule 35 and 40, Appellants Indiana Green Party, Libertarian Party of Indiana, John Shearer, George Wolfe, David Wetterer, A.B. Brand, Evan McMahon, Mark Rutherford, Andrew Horning, Ken Tucker and Adam Meuhlhausen respectfully move for rehearing or rehearing en banc of the Panel Opinion entered on August 19, 2024 ("Pan. Op."). (Dkt. No. 38.)

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(b)

Rehearing en banc is necessary to secure and maintain uniformity of the Court's decisions because the Panel Opinion conflicts with Supreme Court precedent recognizing that the constitutionality of state election laws must be analyzed under the *Anderson-Burdick* framework, *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and with this Court's decisions reaffirming that obligation. *See Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020).

INTRODUCTION

If there were ever a case that required reversal and remand of a District Court decision, this is it. The District Court declined to apply the proper legal standard – the *Anderson-Burdick* framework – despite acknowledging that this Court had recently reaffirmed its obligation to do so. The District Court compounded its error by disregarding the conceded facts and uncontested evidence in the record and

concluding that "precedent compels" it to uphold the constitutionality of the challenged election laws no matter what such facts and evidence may prove. That conclusion is clearly wrong. Time and time again this Court and the Supreme Court have reiterated that constitutional challenges to state election laws cannot be decided by rote reliance on precedent, but instead require fact-intensive analyses.

The District Court's clear errors should have compelled the Panel to reverse and remand with instructions to perform the analysis required by the *Anderson-Burdick* framework. Instead, the Panel excused the District Court's failure to conduct that mandatory analysis on the ground that this case is not a "close" one. But the *Anderson-Burdick* analysis does not contain such an exception to its application, and the Panel's attempt to fashion one here would set a dangerous precedent by inviting lower courts to evade the rigorous analysis that constitutional challenges to state election laws require.

Furthermore, the Panel is incorrect that the election laws challenged here "easily" withstand constitutional scrutiny. The Panel reached that erroneous conclusion only because it – like the District Court – repeatedly disregarded the conceded facts and uncontested evidence on which Appellants' claims rely. Had the Panel properly addressed such facts and evidence, it could not have concluded that the District Court decision granting summary judgment to Defendants should be

affirmed. Rehearing or rehearing en banc is therefore warranted.

ARGUMENT

I. The Panel Opinion Conflicts With Seventh Circuit and Supreme Court Precedent By Excusing the District Court's Willful Failure to Apply *Anderson-Burdick* Scrutiny to Appellants' Claims.

In clear violation of Supreme Court and Seventh Circuit precedent, the District Court expressly declined to conduct the "careful balancing" analysis of Appellants' claims that the *Anderson-Burdick* framework requires. (App. 10); *see Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. The District Court did so "despite the more recent cases from the Seventh Circuit" reaffirming its obligation to conduct that analysis. (App. 10); *see Gill*, 962 F.3d at 365. As this Court has held, a District Court's failure to perform the mandatory *Anderson-Burdick* analysis is error that requires reversal and remand. *See Gill*, 962 F.3d at 365 (reversing and remanding where District Court "was in error" because it "neglected to perform the fact-intensive analysis required for the *Anderson-Burdick* balancing test.").

The Panel's failure to reverse and remand this case, despite the District Court's willful failure to apply the *Anderson-Burdick* analysis, places its Opinion in direct conflict with *Gill*. In *Gill* the District Court declined to apply the *Anderson-Burdick* analysis because the plaintiffs "advanced the same challenges to the same restrictions" this Court upheld in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). *Gill*,

962 F.3d at 365. Concluding that it was "bound" by *Tripp*, the District Court granted summary judgment to the defendants without addressing the facts and evidence on which the plaintiffs relied. *Gill*, 962 F.3d at 365. This Court reversed, explaining that the District Court "erred by automatically concluding that the holding in *Tripp* controls this case instead of applying the fact-intensive analysis required by the *Anderson-Burdick* balancing test." *Id*. at 366.

This case is indistinguishable from *Gill*. As Appellants have explained, the District Court here committed the same error based on the same faulty reasoning as the District Court in *Gill*. (Br. of Appellants (Dkt. No. 11) at 28, 31-33.) Just as the District Court in *Gill* improperly disregarded the facts and evidence and erred by concluding it was "bound" by *Tripp*, the District Court here improperly disregarded Appellants' facts and evidence and erred by concluding that "precedent compels" it to reject their claims. (*Id.* at 31-32.) Indeed, the District Court's error here is even clearer, because the District Court expressly declined to perform the *Anderson-Burdick* analysis despite acknowledging this Court's recent precedent reaffirming its obligation to do so. (*Id.* at 32.)

The Panel conceded that the District Court committed the same error that warranted reversal and remand in *Gill*. (Pan. Op. at 19-20 ("We also agree with the plaintiffs that the district court in this case did not conduct the sort of analysis that

we and the Supreme Court have required.").) Unlike *Gill*, however, in which this Court reversed and remanded with instructions "for the district court to apply the fact-intensive *Anderson-Burdick* balancing test," *Gill*, 962 F.3d at 366-67, the Panel here affirmed. It reasoned that reversal and remand is unnecessary because this case "is not a close one." (Pan. Op. at 20.) That was error.

Anderson-Burdick is the controlling legal standard that governs the constitutional analysis of state election laws. There is no exception for cases a court deems not to be "close" ones. On the contrary, in *Gill* this Court repeatedly reiterated that lower courts are "required" to conduct the *Anderson-Burdick* analysis in every case involving a constitutional challenge to state election laws. *See Gill*, 962 F.3d at 365 ("precedent requires courts to conduct fact-intensive analyses when evaluating state electoral regulations."); *see also id.* at 366.

There is good reason for this requirement. Even before *Anderson* and *Burdick* were decided, the Supreme Court emphasized that in election law challenges "no litmus-paper test" can "substitute for the hard judgments that must be made" based on "the facts and circumstances behind the law…." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (citation and quotation marks omitted). Consequently, "the result of this process … in any specific case may be very difficult to predict…." *Id.* This Court has likewise recognized that it is "difficult to rely heavily on precedent" in deciding

ballot access cases, due to the "great variance among states' schemes." *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004). That is why lower courts are "required" to conduct the *Anderson-Burdick* analysis in all such cases. *See Gill*, 962 F.3d at 365-66.

The Panel Opinion cannot be reconciled with this precedent. Instead, it sets a dangerous new precedent by inviting lower courts to eschew the mandatory *Anderson-Burdick* analysis anytime they deem an election law challenge not to present a "close" case. There is no authority to support the Panel's attempt to fashion this new exception to the application of the *Anderson-Burdick* framework. Rehearing or rehearing en banc should be granted to bring the Panel Opinion into conformity with this Court's precedent.

II. The Panel Opinion's *De Novo* Analysis of Appellants' Claims Does Not Rectify But Repeats the District Court's Errors.

The Panel erroneously concluded that reversal and remand was not necessary because "[t]he restrictions challenged here easily pass the scrutiny that the Supreme Court and this court have employed in similar cases." (Pan. Op. at 19.) That is incorrect. The Panel reached this erroneous conclusion only because it, like the District Court, repeatedly disregarded the conceded facts and uncontested evidence on which Appellants' claims rely. (*See* Br. of Appellants at 8-11.) Had the Panel considered such facts and evidence, it could not have concluded that the burdens

imposed on Appellants' First and Fourteenth Amendment rights is less than severe.

Not only did the Panel disregard critical facts and evidence supporting Appellants' claims, but also, it committed the same legal errors as the District Court. Because it did not address the relevant facts and evidence, for example, the Panel resorted to the same improper "litmus test" reasoning on which the District Court relied. *See Gill*, 962 F.3d at 365. Additionally, like the District Court, the Panel disregarded Appellants' as applied in combination claim and improperly analyzed each challenged provision as applied in isolation without addressing their combined effect. (Pan. Op. at 9-12); *but see Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006) (challenged restrictions "must be addressed together and their constitutionality determined on the basis of their combined effect.").

The conceded facts and uncontested evidence establish that the combined effect of the challenged provisions is to erect a barrier to Indiana's ballot that is practically insurmountable for non-wealthy candidates and parties. (Br. of Appellants at 8-9.) No statewide petition drive has succeeded since 2000 and volunteer-led petition drives cannot succeed because Indiana's requirements are too onerous. (*Id.* at 8.) The last successful statewide petition drive cost more than $350,000 and, at current market rates, it would now cost between $465,345 and $565,750. (*Id.* at 8-9.) Based on these conceded facts, Appellants assert, *inter alia*,

that Indiana's statutory scheme violates Equal Protection by imposing prohibitive costs on them while guaranteeing major parties automatic access to the ballot by means of taxpayer-funded primaries. The Panel did not even address this claim.

To the extent that the Panel addressed Appellants' claims at all, it resorted to the "cursory or perfunctory analyses" this Court found to be prohibited by precedent in *Gill*. *Gill*, 962 F.3d at 365. The Panel concluded Indiana's signature requirement "does not itself impose a severe burden" simply because other courts have upheld "even higher minimum percentages…." (Pan. Op. at 9.) In reaching this conclusion, the Panel did not address a single fact on which Appellants rely to establish a severe burden. (Br. of Appellants at 8-10.) That is a textbook example of the improper litmus-test reasoning this Court have and the Supreme Court have repeatedly rejected. *See Gill*, 962 F.3d at 365 (citation omitted).

The Panel likewise disregarded every fact and all the evidence Appellants relied on to establish that Indiana's early filing deadline compounds the already-severe burden imposed by its signature requirement. (*Compare* Br. of Appellants at 16-17 *with* Pan. Op. at 10.) Additionally, the Panel failed to address Appellants' claim – and the voluminous evidence supporting it – that Indiana's 134-year-old petitioning procedure substantially increases the burden imposed because it requires candidates and parties to exceed Indiana's signature requirement by 50 percent or

more. (*Compare* Br. of Appellant at 17-19 *with* Pan. Op. at 10-11.)

Perhaps most important, the Panel failed to address the conceded fact and uncontested evidence establishing that volunteer petition drives cannot succeed at the statewide level and that the current cost of such an effort approaches $500,000 or more. (*Compare* Br. of Appellant at 8-9, 19-21 *with* Pan. Op. 10-11.) Instead, the Panel merely acknowledged that Appellants submitted unspecified evidence "regarding the costs" of a statewide petition drive, but failed to identify that evidence, much less explain why it was insufficient to establish a severe burden. (Pan. Op. at 11.) This was clear error. Under the "fact-intensive" analysis required by *Anderson-Burdick*, acknowledging that Appellants submitted unidentified evidence is no substitute for addressing that evidence on the merits. *See Gill*, 962 F.3d at 365. Hence, if the Panel concluded that a $500,000 cost does not establish a severe burden it must explain why.

The Panel's citation to *American Party of Texas v. White*, 415 U.S. 767 (1974), does not rectify its error. Unlike the record here, *American Party of Texas* did not involve evidence that the cost of a statewide petition drive approached $500,000 or more. Furthermore, it is a conceded fact that this cost is unavoidable and not a "potential expense" as the Panel incorrectly states. (*Compare* Br. of Appellant 8-9 *with* Pan. Op. at 11-12.) The Panel's conclusion that such cost does not impose a

severe burden directly conflicts with this Court's precedent. *See Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000) ("The uncontested record indicates that [plaintiffs'] ballot access took a lot of time, money and people, which cannot be characterized as minimally burdensome."). It also conflicts with other Circuits' precedent. *See*, *e.g.*, *Graveline v. Benson*, 430 F. Supp. 3d 297, 309, 311 (E.D. Mich. 2019) (finding a "severe" burden where evidence showed that "all volunteer efforts 'most often fail'" and independent candidates for statewide office therefore must "spend significant money for a professional signature-gathering firm on top of the money associated with volunteer efforts."), *aff'd*, 992 F.3d 524, 540 (6th Cir. 2021); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1350-51 (N.D. Ga. 2016) (same), *aff'd*, 674 Fed. Appx. 974 (11th Cir. 2017).

The Panel erred yet again when it purported to address the "past experience" of candidates seeking ballot access in Indiana. (Pan. Op. at 12 (citing *Storer*, 415 U.S. at 742.) The Panel disregarded the conceded fact that no statewide petition drive has succeeded in Indiana since 2000 – a period of more than 20 years, (Br. of Appellant at 8) – and asserted that this case was unlike *Lee*, where the evidence showed that no candidate had completed a petition drive since a challenged requirement was adopted. (Pan. Op. at 12 (citing *Lee*, 463 F.3d at 768-69).) But in *Lee*, no candidate had complied with the challenged requirement in 25 years – a

period of "complete exclusion" nearly identical to the period here. *Lee*, 463 F.3d at 770. Yet the Panel concluded – contrary to this Court in *Lee* – that this period of complete exclusion was insufficient to establish a severe burden. (*Compare* Pan. Op. at 12 *with Lee*, 463 F.3d at 769.)

The Panel committed additional errors – for example, it completely failed to address Appellants' claim that Indiana's failure to provide independent candidates or new parties in a presidential election cycle with *any* mechanism to maintain ballot access is unconstitutional. (*Compare* Br. of Appellants at 19, 21, 25-26 *with* Panel Op. at 16-18.) But Appellants need not catalogue every error the Panel committed. Rehearing is warranted because the Panel failed to conduct the "fact-intensive" it was required to do under Seventh Circuit and Supreme Court precedent, *Gill*, 962 F.3d at 365, and repeatedly disregarded conceded facts and uncontested evidence demonstrating the severity of the burdens imposed on Appellants' First and Fourteenth Amendment rights. But for these errors, the Panel could not have affirmed the District Court's order granting summary judgment to Appellees.

CONCLUSION

For the foregoing reasons, Appellants' Petition for Rehearing or Rehearing En Banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, I caused the foregoing document to be filed using the Court's CM/ECF system, which will cause service to be made upon all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Rehearing or Rehearing En Banc complies with the type-volume limit of Fed. R. App. P. 35(b) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the document contains 2,485 words.

I certify that the foregoing Petition for Rehearing or Rehearing En Banc complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief is prepared in Times New Roman 14 Point Font.

/s/Oliver B. Hall
Oliver B. Hall