No. 22-893

IN THE

Supreme Court of the United States

LIBERTARIAN PARTY OF NEW YORK, *et al.*,

Petitioners,

v.

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Second Circuit correctly concluded, based upon an application of the framework established by this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) to the robust factual record developed in this case, that the party-status and ballot-access measures enacted by the New York state legislature in 2020 did not violate petitioners' rights under the First and Fourteenth Amendments to the U.S. Constitution.

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STATEMENT OF THE CASE

A. The Nearly Century-Old Pre-2020 Criteria Governing Party Status and Ballot Access in New York

By statute, the State of New York has long provided two ways for political organizations to place their preferred candidates on the election ballot. First, an organization can qualify as a "party" by demonstrating a specified level of success in past elections. N.Y. Election Law § 1-104(3). Each party is guaranteed dedicated space on the ballot, known as a "berthing," listing its candidate and displaying an emblem signifying the candidate's affiliation with the party. *See id.* §§ 6-102, 6-104, 6-106, 6-114. A political organization that cannot meet the threshold level of support to qualify as a party is deemed an "independent body." *Id.* § 1-104(12). Independent bodies do not enjoy so-called "automatic" ballot access, but can still access the ballot by submitting an "independent nominating petition" with a specified number of signatures from registered New York state voters. *Id.* §§ 6-138, 6-142.

Since 2020, to become or remain a recognized party in New York, a political organization need only obtain the greater of 2% of the actual votes cast or 130,000 votes (which is less than 1% of New York's more than 13 million registered voters) in a single, top-of-the-ticket race, every two years. N.Y.

Election Law § 1-104(3). Independent bodies and candidates need only secure, within a prescribed 42-day period, the lesser of 45,000 signatures (which amounts to less than 1/3 of 1% of the aforementioned more-than-13-million-person electorate) or 1% of the total votes cast at the last gubernatorial election. *Id.* § 6-142(1).

Before 2020, these thresholds were significantly lower, and had long remained stagnant. The New York state legislature had established the prior threshold for independent nominating petitions for statewide office—15,000 signatures—more than a century ago, in 1922. C.A. App. 170.[1] In 1935, New York set the threshold for a political organization to qualify as a party so long as its candidate in the prior gubernatorial election received at least 50,000 votes. C.A. App. 162. And in 1946, the legislature instituted the aforementioned 42-day period for gathering nominating petition signatures. Pet. App. 48.

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[1] The appendix filed in the court of appeals consists of seven volumes, all of which can be accessed via the U.S. Court of Appeals for the Second Circuit's Electronic Case Filing/Case Management System under that court's docket number 21-1464. The first two volumes were filed in connection with petitioners' appeal from the denial of their motion for preliminary injunction, and the remaining five volumes were filed in connection with their appeal from the grant of summary judgment dismissing their complaint. *See* C.A. Dkt. Sheet. The appeals were consolidated, but the preliminary injunction appeal was ultimately dismissed as moot. C.A. Dkt. No. 175 at 1.

For decades, these support thresholds were not meaningfully adjusted.[2] Meanwhile, the number of registered voters in the State of New York skyrocketed—from under five million in 1935 to over 13.5 million in 2020. C.A. App. 162–163. Because the pre-2020 thresholds had been set as absolute numbers rather than percentages, they became less and less meaningful over time. As a result, ballots turned into unreadable sheets of microscopic fine print, cluttered with entries for candidates lacking credible electoral support, let alone a realistic chance of winning office. *See* C.A. App. 164–166, 278–281, 283–284, 286–287, 289–291.

Both thresholds contributed to this problematic state of affairs. As an illustration, between 1998 and 2020, 15 independent bodies placed gubernatorial candidates on the general election ballot by filing independent nominating petitions. C.A. App. 171. Some of these organizations had platforms that have been described as colorful or exotic, and very few of them ever enjoyed any meaningful or lasting support of the electorate. C.A. App. 171. Examples include the Rent is Too Damn High Party, the Sapient Party, and the Marijuana Reform Party. C.A. App. 171.

The proliferation of parties with guaranteed ballot access also contributed to ballot clutter. The

[2] In 1971, the signature threshold was raised to 20,000, but in 1992 it was lowered back down to 15,000. C.A. App. 170.

ease with which political organizations could achieve party status under the pre-2020 thresholds was due in part to New York's allowance of "fusion voting," a practice whereby a single candidate may appear on the ballot as the candidate for multiple political organizations. *See* C.A. App. 339. For party-qualification purposes, an organization is entitled to count votes received by the candidate on that organization's ballot line. C.A. App. 339. Fusion voting enables smaller political organizations to more easily obtain party status by cross-nominating other candidates, typically popular major-party candidates. C.A. App. 339. New York is one of only a small number of states in which fusion voting is allowed. C.A. App. 338.

B. The Long-Overdue 2020 Updates to New York's Party-Status and Ballot-Access Framework

In 2019, the New York state legislature determined that the time had come to review its election laws. The legislature created a commission to develop a system of public campaign financing for statewide offices, in which certain campaign contributions would be matched by taxpayer dollars. 2019 N.Y. Laws, ch. 59, pt. XXX, § 1(a). The objective was to further "the goals of incentivizing candidates to solicit small contributions, reducing the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns, and encouraging qualified candidates to run for office." *Id.* To protect the public fisc,

the annual cost of operating the system was not permitted to exceed $100 million. *Id.*, § 3.

As instructed, the commission made various recommendations for establishing a public campaign financing system, including recommendations for long-overdue updates to both the party-qualification criteria and the criteria for ballot access via independent nominating petition. *See* New York State Campaign Finance Reform Commission, *Report to the Governor and the Legislature*, at 17–36 (Dec. 1, 2019), available at https://opengovernment.ny.gov/2019-annual-report. The commission recommended that a political organization be permitted to qualify as a party if, at the last general election (whether presidential or gubernatorial), the organization's candidate received at least 130,000 votes (which is less than 1% of the total number of registered voters in New York) or 2% of all votes cast, whichever is greater. *Id.* at 36. The commission also recommended that, in order for an independent candidate to petition onto the ballot for a statewide election, he or she must obtain 45,000 signatures (which is less than 1/3 of 1% of the total number of registered voters in New York), or the number of signatures equal to 1% of all votes cast at the last gubernatorial election—whichever is less—during the prescribed 42-day period. *Id.* The independent nominating petition signature requirements for local or regional positions are far less. *Id.*

In a report explaining its rationale, the commission observed that "voter turnout in recent elections showcases the necessity of instituting a proportional increase in party ballot access thresholds to reflect current voter registration and voter turnout statistics." *Report to the Governor and the Legislature*, at 41–42. The proposed increase would help ensure that organizations recognized as parties have "bona fide representative status for [their] voters," the commission reasoned. *Id.* at 14. Additionally, the new threshold would help "increase voter participation and voter choice, since voters will now be less confused by complicated ballots with multiple lines for parties that may not have any unique ideological stances." *Id.* at 14–15. By making ballots "simpler in appearance" and ensuring that "the parties listed on those ballots [embody] concrete ideological perspectives that voters can identify with," the increased threshold would let voters "make more resolute choices between candidates appearing under those party lines and rely upon the knowledge that such parties have sufficient popular support from the electorate." *Id.* at 15. The proposed increase in the level of support required to obtain a place on the ballot via independent nomination petition reflected a "corollary" to the increased party-qualification threshold, the commission explained. *Id.* at 15.

The commission further noted that these updates were essential in order to ensure operation of a public campaign finance system for an annual

cost of no more than $100 million. *Report to the Governor and the Legislature*, at 14. As one of the commissioners noted in a separate statement, from 1994 until the time of the commission's report, there had been seven gubernatorial elections, each of which involved between five and ten gubernatorial candidates. *Id.* at 65 (statement of Commissioner Jacobs). Assuming an average field of seven gubernatorial candidates, the matching funds for those candidates could run the taxpayers nearly $25 million, leaving only $75 million left over to cover the matching funds due candidates for all other statewide offices, as well as program operating costs. *Id.* (statement of Commissioner Jacobs).

In April 2020, the New York legislature enacted the commission's recommendations into law. 2020 N.Y. Laws, ch. 58, pt. ZZZ, §§ 9–10.

C. The 2020 New York General Election

The Libertarian Party of New York is an affiliate of the national Libertarian Party. As of 2020, it had 21,551 enrolled members, representing roughly 0.16% of New York state registered voters. C.A. App. 161.

The Libertarian Party of New York has nominated candidates for President of the United States and Governor of the State of New York every general election since 1974. C.A. App. 161. In 2018, the group achieved party status for the first time when its candidate for governor received 95,033 votes—

by far the largest measure of voter support the organization has ever obtained. C.A. App. 161. In no prior gubernatorial election had a Libertarian Party of New York candidate satisfied the then-applicable 50,000-vote threshold necessary for party status. The organization's candidates generally fell well short of that mark, securing only between 0.1% and 0.2% of the vote in gubernatorial and presidential races. *See* C.A. App. 161.

The Green Party of New York is an affiliate of the national Green Party. As of November 2020, it counts 28,501 members in its ranks, representing about 0.2% of New York registered voters. C.A. App. 161. Since the 1998 general election, the Green Party of New York gained and lost party status as its support from the electorate fluctuated. C.A. App. 164.

The Libertarian Party of New York and the Green Party of New York both enjoyed party status going into the 2020 presidential election, and both organizations ran candidates in that contest. C.A. App. 164. Neither candidate achieved the electoral support necessary under the 2020 updates for the organizations to retain their party status, however. The Libertarian Party of New York's candidate received only 60,234 votes, corresponding to 0.7% of the electorate. C.A. App. 161. And the candidate run by the Green Party of New York received only 32,753 votes, corresponding to an electoral share of just 0.38%. C.A. App. 160.

Four parties did retain their party status on the basis of their 2020 election performance: the Democratic Party, the Republican Party, the Working Families Party, and the Conservative Party, all of which cleared the newly applicable threshold by a wide margin. C.A. App. 164. Indeed, the Working Families Party obtained more than 386,000 votes on its party line, more than twice what was necessary to retain party status. C.A. App. 263.

D. Proceedings Below

1. The Libertarian Party of New York, the Green Party of New York, and certain of their officials and candidates—all petitioners here—sued respondents the New York State Board of Elections and several of its members in the U.S. District Court for the Southern District of New York, challenging the State's 2020 party-qualification and ballot-access updates. C.A. App. 19–63. As relevant here, petitioners advanced claims under 42 U.S.C. § 1983 asserting that, both facially and as applied, the statutory updates violate the First Amendment right of individuals to associate for the advancement of political beliefs as well as the Fourteenth Amendment right of qualified voters to cast their votes effectively regardless of political persuasion. *See* C.A. App. 57–61. Petitioners sought a declaratory judgment that the party-qualification and ballot-access updates are unconstitutional, a permanent injunction prohibiting the New York State Board of Elections from enforcing the increased

thresholds against petitioners, and an order directing the Board to apply the prior party-qualification threshold and petition threshold "until such time as the [New York state] Legislature enacts legislation establishing constitutional thresholds." C.A. App. 62–63.

2. Petitioners moved for a preliminary injunction, which the district court (Koeltl, J.) denied. Pet. App. 44–80. The court determined that petitioners failed to satisfy any of the elements necessary for preliminary injunctive relief.

3. Following discovery, the district court (Koeltl, J.) granted respondents' motion for summary judgment. In a thorough opinion and order, the court rejected the entirety of petitioners' federal constitutional challenge. Pet. App. 4–39.

The district court applied the legal framework developed by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Pet. App. 19–21; *see* Pet. App. 8 n.2. Under that test, in evaluating a state election law, a court must first determine "the burden that the state law imposes on First and Fourteenth Amendment rights." Pet. App. 19–20. Then, it must evaluate "the State's asserted justifications." Pet. App. 20. Finally, the court must weigh the interests against the burdens.

As the district court noted, when performing this weighing, courts "vary the level of scrutiny to be applied depending upon the burden that the

state law imposes on First and Fourteenth Amendment rights." Pet. App. 19–20. "When a challenged state election regulation imposes 'severe restrictions' on First or Fourteenth Amendment rights, it 'must be narrowly drawn to advance a state interest of compelling importance.'" Pet. App. 20 (quoting *Burdick*, 504 U.S. at 434). "However, 'when a state election law provision 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.'" Pet. App. 20 (quoting *Burdick*, 504 U.S. at 434).

At the first step of the *Anderson-Burdick* analysis, the district court determined that New York's 2020 party-qualification and ballot-access updates "do not impose severe burdens" on the electoral process. Pet. App. 20. The court rejected the notion that the updates "make it virtually impossible for minor parties to qualify for the ballot." Pet. App. 22. "In fact, two minor parties, including [the Working Families Party], retained party status under the revised law based on their performances in the 2020 presidential election," the court noted. Pet. App. 22. New York's party-qualification threshold was "middle of the pack among the three-dozen states that require parties to obtain a certain level of support in a statewide race" in order to retain their party status, the court observed. Pet. App. 23. "Eighteen states other than New York re-

quire parties to meet specific requirements to retain party status at least biennially, and some states require that political organizations obtain 3, 4, 5, 10, or even 20% of the vote in a specific election to qualify as parties"—as compared with New York's criteria making the greater of 130,000 votes or 2% of all votes cast sufficient. Pet. App. 24.

Further on the burden analysis, the district court explained that those organizations which cannot meet the party-qualification threshold may place their candidates on the ballot via independent nominating petition. The requirement that, within a 42-day period, a candidate collect signatures from 45,000 registered voters, or from the number of registered voters equal to 1% of all votes cast during the last gubernatorial election—whichever is less—is "in line with other states' [petition] requirements." Pet. App. 25. "New York, the fourth most populous state, ranks seventh in terms of absolute number of signatures required for nominating petitions for statewide office." Pet. App. 25. "When compared by population of eligible signatories, there are seventeen states with independent nominating petition requirements stricter than New York." Pet. App. 25.

Additionally, the district court explained that, in terms of the average number of signatures that must be collected per day, New York's requirement is less onerous than similar requirements upheld by this Court. For example, in *Storer v. Brown*, 415 U.S. 724, 730 (1974), this Court rejected a facial

challenge to ballot-access measures that required candidates seeking to petition onto the ballot to collect 13,542 signatures per day. Pet. App. 27. By contrast, "[g]athering 45,000 signatures * * * in 42 days would require a candidate to gather 1,072 signatures per day"—a full order of magnitude less than the per-day figure approved in *Storer*. Pet. App. 26.

The district court concluded that, all told, "[a] reasonably diligent organization could be expected to satisfy New York's signature requirement" for its candidate. Pet. App. 25. Satisfying the requirement might require hard work and sacrifice, but—as this Court has observed—"hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization," the district court noted. Pet. App. 26 (quoting *American Party of Texas v. White*, 415 U.S. 767, 787 (1974)).

Moving to the next step of the *Anderson-Burdick* analysis, the district court evaluated the interests the State of the New York asserted are served by the 2020 updates. The court concluded that the updates did indeed serve those interests: "help[ing] gauge whether a political organization enjoys a sufficient modicum of support such that it deserves automatic ballot access," particularly "in light of New York's new public campaign finance system and the need to keep that system operating within the $100 million annual limit set by the legislature," "maintain[ing] organized, uncluttered ballots" so as to "prevent voter confusion," and

"preserv[ing] proportionality between the thresholds required for ballot access and the number of registered voters in the State." Pet. App. 30–32; *see* Pet. App. 33. The court recognized that all of these interests are "important." Pet. App. 30.

Finally, the district court conducted the requisite *Anderson-Burdick* "balancing," Pet. App. 30, and determined that the important interests advanced by New York's 2020 party-qualification and ballot-access updates "outweigh any burdens imposed." Pet. App. 34. The court held that "[i]ncreasing the party qualification and nominating petition thresholds are reasonable steps to take to prevent ballot overcrowding and assure that political organizations appearing on the ballot enjoy a sufficient modicum of support from the electorate." Pet. App. 33. The increased thresholds also represent "a reasonable way to ensure that only candidates with a reasonable amount of support benefit from the State's public campaign finance program." Pet. App. 34.

4. Petitioners appealed from the district court's final judgment.[3] C.A. 1868–1869. On ap-

[3] Petitioners had filed an interlocutory appeal from the district court's preliminary injunction ruling, which was still pending at the time they appealed from final judgment. *See* C.A. App. 524–527. The Second Circuit consolidated the appeals but later dismissed the preliminary injunction appeal as moot. *See* C.A. Dkt. No. 175 at 1.

peal, the U.S. Court of Appeals for the Second Circuit unanimously affirmed "substantially for the reasons stated by the district court in its Opinion and Order" granting summary judgment. Pet. App. 1–3. Petitioners sought panel rehearing and rehearing *en banc*, both of which were denied without any recorded dissents. Pet. App. 42–43.

REASONS FOR DENYING THE PETITION

Nothing about the Second Circuit's decision upholding New York's 2020 party-qualification and ballot-access updates warrants this Court's review. The Second Circuit concluded that these measures pass constitutional muster based upon a careful application of this Court's *Anderson-Burdick* test to the detailed factual record developed in this case. That record shows that the important interests that motivated New York to update the thresholds—including reducing ballot clutter and voter confusion and ensuring that candidates who appear on the ballot have a non-trivial level of voter support—far outweigh the manageable burden that the new measures impose.

The 2020 updates hardly make New York an outlier among state election laws. Rather, New York's current party-status threshold is "middle of the pack" among States, Pet. App. 23, and its independent nominating petition requirements "pale in comparison" to similar requirements that have been approved by this Court, Pet. App. 93. After the

most recent election cycle, four political organizations still enjoy party status in New York, and a relatively unknown independent candidate was able to present a petition with over 64,000 signatures and appear on the ballot for a U.S. Senate race. *See* Affirmation in Supp. of Motion to Dismiss at 3, *Bullis v. Sambevski,* 171 N.Y.S.3d 872 (N.Y. Sup. Ct. 2022) (No. 905003-22) (referencing senatorial candidacy of Diane Sare).[4]

Contrary to petitioners' contentions, the Second Circuit's fact-bound decision does not deepen any extant jurisprudential conflicts concerning the *Anderson-Burdick* test. Indeed, the asserted conflicts themselves are illusory; petitioners do not even assert (let alone demonstrate) that the 2020 updates would have been struck down in any other circuit. Finally, the relative recency of New York's updates, in addition to other factors, renders this case an exceptionally poor vehicle for reviewing any issues the Court might find certworthy in the abstract. The petition for writ of certiorari should be denied.

[4] This publicly available court document may be accessed through the New York State Courts Electronic Filing System at https://iapps.courts.state.ny.us/nyscef/HomePage.

I.

THE SECOND CIRCUIT'S DECISION DOES NOT IMPLICATE ANY JURISPRUDENTIAL CONFLICT REGARDING THE *ANDERSON-BURDICK* INQUIRY INTO THE SEVERITY OF THE BURDEN IMPOSED BY STATE ELECTION LAWS

The *Anderson-Burdick* test prescribes what is essentially a three-step procedure. In evaluating a state election law, a court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 788. The court "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it "must weigh" the asserted injuries against the asserted justifications, "taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434.

This analysis, including the requisite weighing and comparing of interests against burdens, will vary in rigor "depend[ing] upon the extent to which [the] challenged regulation burdens First and Fourteenth Amendments rights." *Burdick*, 504 U.S. at 434. Elections laws that impose "severe" burdens in that regard "must be 'narrowly drawn to advance a state interest of compelling importance'" in order to pass muster. *Id.* (quoting

Norman v. Reed, 502 U.S. 279, 289 (1992)). By contrast, if the law imposes nothing more than "reasonable, nondiscriminatory restrictions," *id.* (quoting *Anderson*, 460 U.S. at 788), then the State need only show that its "legitimate interests * * * are sufficient to outweigh the limited burden." *Id.* at 440.

To be sure, the *subject* of the *Anderson-Burdick* framework—voting rights—is of utmost importance. But the *procedure* involved—assessing burdens, evaluating interests, and balancing them all against each other—is highly familiar and "parallels [the] work" that courts perform everyday "in ordinary litigation." *Anderson*, 460 U.S. at 789. Unsurprisingly, then, the courts of appeals, including the Second Circuit, understand it well. They have applied it faithfully for decades. And they have not splintered amongst themselves or diverged from this Court in any way that requires the Court's nationwide intervention.

A. The Decision Below Does Not Deepen Any Circuit Conflict

Contrary to petitioners' contention (Pet. 35), the Second Circuit's decision does not conflict with the Sixth or Eighth Circuits regarding whether "the *Anderson-Burdick* analysis requires that lower courts address the time limitations that states impose on signature collection" when evaluating the burden imposed by party-qualification and ballot-access measures. The Second Circuit

agrees with those courts that addressing such time limitations is essential, and its decision below reflects that position.

The Second Circuit upheld New York's 2020 party-qualification and ballot-access updates, including the new threshold for independent nominating petition signatures, "substantially for the reasons stated by the district court in its Opinion and Order" granting summary judgment. Pet. App. 3. Those reasons included an analysis of the impact of the "42-day collection period" in which the signatures must be gathered. *See* Pet. App. 26–28. As part of that analysis, the court noted that the average number of signatures that must be collected per day under the New York provision is a full order of magnitude less than the per-day figure this Court approved in *Storer*.[5] Pet. App. 27. Before 2020, New York's minimal, stagnant party-status and ballot-access requirements did not impose any meaningful burdens on political organizations.

[5] The Court in *Storer* rejected a facial challenge to ballot-access updates that required candidates seeking to petition their way onto the ballot to collect what amounted to 13,542 signatures per day. 415 U.S. at 740. The Court remanded for a determination of whether the requirement posed a severe burden to independent candidates based upon the additional restriction that signatures could not be gathered from persons who had voted in the relevant primary election. *Id.* However, New York's 2020 updates do not contain that restriction.

While those thresholds were in effect, ballots became increasingly cluttered with candidates who never received any meaningful level of electoral support. *See supra* 3–4. The new thresholds represent necessary updates. Moreover, far from imposing a severe burden, the new thresholds have already proven to be quite attainable with the "[h]ard work and sacrifice" that "are the lifeblood of any political organization." *White*, 415 U.S. at 787.

The Second Circuit is in accord with the Sixth and Eighth Circuits on the issue petitioner identifies. All three of those courts perform the *Anderson-Burdick* test on state election laws containing signature-collection requirements by evaluating the law in full, including the time period in which the necessary signatures must be gathered.

So, too, do the First, Third, Seventh, Ninth, and Eleventh Circuits, notwithstanding petitioners' protestations to the contrary (Pet. 33–34). Every one of the appellate decisions petitioners cite regarding the application of *Anderson-Burdick* to laws involving signature-collection requirements likewise "address[es] the time limitations" (Pet. 35) in which the necessary signatures had to be collected. *See Tripp v. Scholz*, 872 F.3d 857, 865 (7th Cir. 2017); *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016); *Stein v. Alabama Sec'y of State*, 774 F.3d 689, 699 & n.12 (11th Cir, 2014); *Stone v. Board of Election Comm'rs for the City of Chicago*, 750 F.3d 678, 684 (7th Cir. 2014); *Barr v. Galvin*, 626 F.3d 99, 110

(1st Cir. 2010); *Rogers v. Corbett*, 468 F.3d 188, 191 (3d Cir. 2006); *Nader v. Keith*, 385 F.3d 729, 733–736 (7th Cir. 2004); *Valenti v. Mitchell*, 962 F.2d 288, 299–300 (3d Cir. 1992); *Andress v. Reed*, 880 F.2d 239, 242 (9th Cir. 1989); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983); *see also Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 178–179 (2d Cir. 2020); *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994); *LaRouche v. Kezer*, 990 F.2d 36, 40 (2d Cir. 1993). In each of these decisions, the courts applied *Anderson-Burdick*[6] with reference to the total number of signatures that had to be gathered in combination with the time period within which candidates had to gather them.[7] None of the cases analyzed the absolute number of required signatures in isolation.

Similarly, neither the Second Circuit's decision below nor the cited decisions of the First,

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[6] In *Valenti*, *Andress*, and *Libertarian Party of Florida*—all of which pre-date *Burdick*—the courts applied this Court's decision in *Anderson*.

[7] Although the Ninth Circuit in *Andress* did not cite *Anderson*, it nevertheless applied the *Anderson* analysis. Namely, it upheld a California law requiring non-party U.S. Senate candidates seeking to appear on the ballot to gather 10,000 signatures within a period of approximately 45 days because the law imposed "not an impossible burden," served the state's "legitimate interest to ensure the seriousness of a candidate for statewide office," and was "reasonable" all things considered. 880 F.2d at 242.

Third, Seventh, Ninth, and Eleventh Circuits clash with the Sixth and Eight Circuits over whether and to what extent this Court's decisions in *Jenness v. Fortson*, 403 U.S. 431 (1971), *Storer*, 415 U.S. 724, and *White*, 415 U.S. 767—which address signature-collection requirements—should factor into *Anderson-Burdick* analysis of state laws with a signature-collection component. *See* Pet. 32–34. The various circuit rulings simply reflect the entirely unremarkable proposition that lower courts apply this Court's signature-collection precedents in cases they determine to be analogous, but decline to apply those precedents when they perceive salient distinctions. This same proposition demystifies petitioners' observation (Pet. 34–35) that district courts' reliance on *Jenness*, *Storer*, and *White* sometimes varies even within a given circuit. Like the circuits, district courts endeavor to apply these precedents to cases in which they are relevant and to refrain from applying them in cases in which they are not.

That is all part and parcel of how the system works, because this Court's decisions "remain binding precedent" unless and until this Court says otherwise. *Hohn v. United States*, 524 U.S. 236, 252–253 (1998). And petitioners do not contend that this Court should grant review in the present case for the purpose of saying otherwise and deeming *Jenness*, *Storer*, and *White* no longer good law. Indeed, such a contention would be utterly implausible.

In *Anderson* itself, the Court cited *White* for what would become the *Anderson-Burdick* framework: When confronted with a challenge to the constitutionality of a state election law, courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments," then "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and in the final analysis "must not only determine the legitimacy and strength of each of those interests" but also "must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789. Also in *Anderson*, the Court cited *Jenness*, *Storer*, and *White* for the continuing vitality of the proposition that States have "the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Id.* at 788 n.9.

In *Burdick*, the Court upheld a Hawaii signature requirement partly because the Court had "previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome" in *Jenness* and *White*, as well as in *Norman*, 502 U.S. 279, another pre-*Burdick* decision regarding signature collection. 504 U.S. at 435 n.3. And in cases post-dating both *Anderson* and *Burdick*, this Court has continued to rely on its

signature-collection precedent in evaluating the constitutionality of state law signature-collection requirements. *See, e.g.*, *New York State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 204 (2008) (citing *Norman*, *White*, and *Jenness* in upholding requirement of gathering 500 signatures within a 37-day period).

Further, petitioners do not even assert—let alone prove—that, had the present case been litigated in the Sixth Circuit or the Eighth Circuit (whose level of reliance on *Jenness*, *Storer*, and *White* petitioners approve), the outcome would have been any different. On the issue of burden in particular, petitioners do not contend that New York's 2020 ballot-access updates would have been found to constitute a severe burden on the electoral process, or even a larger non-severe burden than the Second Circuit here perceived.

Indeed, neither the Sixth or Eighth Circuits—nor any other circuit, for that matter—would have any trouble upholding New York's 2020 updates on the strength of the robust factual record regarding the opportunities for party qualification standing alone, *i.e.*, even setting to one side the back-up option of ballot access via independent nominating petition. The updates present no constitutionally problematic obstacle to political organizations that nominate candidates enjoying bona fide electoral support.

In sum, even indulging the existence of the conflicts petitioners posit, there is no reason to think that resolving them would make any difference in the outcome of the present case when the rubber meets the road. Plenary review by this Court would be pointless.

B. The Decision Below Does Not Conflict With Precedent of This Court

Petitioners (Pet. 37–39) and their *amici* (*Amici* Br. 4–10) are flat wrong in their assertion that the Second Circuit's ruling conflicts with this Court's precedent recognizing the importance of political organizations beyond the Democratic Party and the Republican Party.[8] The factual record developed in this case demonstrates that New York's 2020 election updates stand as no insurmountable obstacle to the participation of "minor parties." In every general election held in New York since 1996—all 14 of them—political organizations other than the Democratic Party and the Republican Party have achieved electoral performance meeting or exceeding the 2020 party-qualification thresholds. *See* C.A. App. 174–264 (results from elections held between 1996 and 2020); New York State

[8] Notably, the petition's block-quoted passage from *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) regarding minor parties, which petitioners attribute to "the Court" (Pet. 37), is not part of that case's majority opinion. It is actually an excerpt from the concurring opinion filed by Justice Douglas, which no other Justice joined.

Board of Elections, *2022 Elections Results – Governor/Lt. Governor*, https://www.elections.ny.gov/NYSBOE/elections/2022/General/2022GovernorResults.xlsx.

To be sure, some minor parties have achieved party status by taking advantage of fusion voting to cross-nominate candidates also backed by the Democratic Party or the Republican Party. *See supra* 3–4. But that fact does not establish that the 2020 thresholds severely burden minor parties who opt not to do so, as petitioners argue. It simply reflects that certain minor parties have tended not to take full advantage of fusion voting and have instead selected candidates who do not command the support of a sufficient share of the electorate. There is no federal constitutional requirement that fusion voting be allowed in the first place, and New York is one of only a few States to offer it. C.A. App. 338. A fortiori, there certainly is no constitutional requirement that States which allow fusion voting craft their election laws to enable minor parties to attain full-fledged party status notwithstanding the popularity (or lack thereof) of the candidate they choose to endorse.

This Court has said as much. It has squarely held that political organizations' decisionmaking relative to fusion voting is their business: "The Constitution does not require that [a State] compromise the policy choices embodied in its ballot-access requirements to accommodate [a party's] fusion strategy." *Timmons v. Twin Cities Area New*

Party, 520 U.S. 351, 367 (1997). Petitioners have not asserted the existence of a circuit split on this issue, and indeed the circuits that have addressed it have agreed with respondents here. For example, the Eighth Circuit observed, in rejecting an electoral challenge brought by the Green Party, that "[t]he Constitution does not require that Arkansas compromise the policy choices embodied in its ballot-access requirements to accommodate the Green Party's strategy." *Green Party of Arkansas v. Martin*, 649 F.3d 675, 681–684 (8th Cir. 2011) (alteration marks omitted).

More broadly, the Constitution simply does not require States to bend and flex in order to accommodate the chosen strategies of any particular individual political organization. The *Anderson-Burdick* test concerns burdens that the states impose upon participants in the electoral process, not burdens that those participants impose upon themselves. If a political organization opts not to employ a particular available electoral strategy to the fullest extent possible, then the organization must abide by the consequences. That includes the consequences of avoiding available opportunities for fusion voting, as well as the consequences of choosing not to run candidates for president, *see Amici* Br. 7–9.

Further, history demonstrates that minor parties can attain the numbers required by New York's 2020 party-qualification and ballot-access updates *even without* using fusion voting to cross-nominate

candidates endorsed by the Democratic Party or the Republican Party. For example, the Green Party (of which the Green Party of New York is a local affiliate) cleared 2020-level thresholds in the 2000 presidential election and the 2014 gubernatorial election with candidates whom neither of the two major parties had endorsed. Pet. App. 69–70 n.10; C.A. App. 229, 249. The Green Party's 2020 presidential candidate, Howie Hawkins, received approximately 5% of the vote (184,419 votes) when he ran for governor in 2014. C.A. App. 249.

Simply put, the major force preventing certain minor parties from obtaining party qualification, or otherwise being able to place their candidates on the ballot, is the relative unpopularity of those candidates. That is a feature of the electoral system, not a bug. And it is certainly not a part of the system that warrants this Court's review.

II.

THE SECOND CIRCUIT'S DECISION DOES NOT IMPLICATE ANY CONFLICT REGARDING THE APPLICATION OF *ANDERSON-BURDICK* TO ELECTION LAWS IMPOSING ONLY NON-SEVERE BURDENS

After determining that New York's new party-qualification and ballot-access thresholds do not impose a severe burden, the Second Circuit here properly applied the balancing test required under

the *Anderson–Burdick* framework. Contrary to petitioners' position, the Second Circuit did not excessively defer to the State (Pet. 24–25), nor did it conduct a "relatively superficial analyses" (Pet. 27), in a way that supposedly conflicts with the approach of the Third, Sixth, Seventh, and Ninth Circuits. Rather, the Second Circuit here applied "the requisite scrutiny" (Pet. 25) in assessing New York's asserted governmental interests. Indeed, the Second Circuit has led the field with exceptional clarity in this regard.

In *SAM Party of New York v. Kosinski*, 987 F.3d 267 (2d Cir. 2021) (reprinted at Pet. App. 81–98), a case that was litigated in tandem with petitioners' case here, the Second Circuit confronted a parallel constitutional challenge to New York's 2020 election updates brought by a different political organization. The court applied *Anderson-Burdick*, found the burden not to be severe, and, after carrying out the rest of the analysis, upheld the updates as constitutional. In doing so, it emphasized that the scrutiny applicable to non-severe burdens "is not 'pure rational basis review.'" Pet. App. 90 (quoting *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008)). "Rather, the court must actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, and the court must take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Pet. App. 90. The court performed exactly that

weighing, explaining its process in a dedicated subheading entitled "Weighing the State's Interests" that spanned three pages of the Federal Reporter. Pet. App. 94–97.

The district court here was bound by, and dutifully applied, *SAM Party of New York*'s proper conception of the *Anderson-Burdick* test. The district court rejected petitioners' challenge to the 2020 election updates because the legitimate state interests advanced by the updates "*outweigh* any burdens imposed on [petitioners]." Pet. App. 34 (emphasis added). That is "the burdens imposed on [petitioners] by the challenged amendments *are justified*." Pet. App. 35 (emphasis added). The district court did not simply note that the updates furthered the State's interests and then call it a day. The Second Circuit affirmed "substantially for the reasons stated by the district court in its Opinion and Order" granting summary judgment. Pet. App. 3. Panel rehearing and rehearing *en banc* were subsequently denied without a single recorded dissent. Pet. App. 42–43.

Contrary to petitioners' perception (Pet. 25–27), the First, Fourth, Sixth, Ninth, and Eleventh Circuits faithfully apply the *Anderson-Burdick* test as well. Notwithstanding those courts' occasional stray references to rational-basis review, a full reading of those courts' decisions—including the decisions petitioners single-out for scorn—reflect adherence to the analytical approach this Court prescribed.

Start with *Barr*. In that case, the First Circuit applied the *Anderson-Burdick* test to a Massachusetts law requiring candidates for president and vice president who are not affiliated with recognized political parties to obtain signatures from 10,000 registered voters in order to appear on the ballot. 626 F.3d at 102. The court recognized that this law imposed no more than a "modest burden," acknowledged that it served the state's "legitimate interest in ensuring that the candidates who appear on the statewide ballot have demonstrable support among the voting public," and upheld it upon determining that "*[i]n light of* the state's legitimate interest" the burden "is not so onerous" as to present a constitutional problem. *Id.* at 111 (emphasis added). That is, the First Circuit performed the requisite weighing and did not simply rest its decision on an appraisal of the State's interest in isolation.

The Fourth Circuit also follows this approach, as illustrated in *Buscemi v. Bell*, 964 F.3d 252 (4th Cir. 2020). There, the court used *Anderson-Burdick* to analyze a North Carolina law requiring candidates for statewide office who are unaffiliated with a political party to obtain signatures of at least 1.5% of voters who voted in the last gubernatorial election. *Id.* at 263–264. The court observed that the law imposed a "modest burden" on participants in the electoral process, and that it served the state's "interests in preventing ballot overcrowding and voter confusion easily constitute important

regulatory interests." *Id.* at 266. But the court upheld the law only after further determining that these interest were "*sufficient to justify* the modest burden" imposed by the signature law. *Id.* (emphasis added); *accord id.* at 257 (stating that the law "impose[s] only a modest burden *that is justified by* the state's interest in regulating elections" (emphasis added)).

The Ninth Circuit adheres to this approach, as *Montana Green Party v. Jacobsen*, 17 F.4th 919 (9th Cir. 2021) indicates. In that case, the court confronted a challenge to the constitutionality of a Montana law requiring candidates not affiliated with recognized parties to gather 5,000 signatures at least 123 days prior to the election in order to appear on the ballot. The court found that the challengers had "not shown a severe burden on ballot access," that the law "serves the interest of ensuring that a new party has broad-based support and that only nonfrivolous parties appear on the ballot," and that the law "*is justified* on the ground that election administrators need time to perform the many required tasks after a party submits its petitions to county officials." *Id.* at 926, 927 (emphasis added).

The Eleventh Circuit uses the same rubric, as shown in *Independent Party of Florida v. Florida Secretary of State*, 967 F.3d 1277 (11th Cir. 2020). At issue there was a Florida law requiring political organizations not recognized as parties to affiliate with parties or obtain the signatures of 1% of all

registered voters in order to run a candidate for president. *Id.* at 1279. The court found that the law did not impose a severe burden on the electoral process, that it furthered the state's "important interest in ensuring that political parties have a significant modicum of support before appearing on the ballot," and that this interest "*justifies* the one-percent signature requirement." *Id.* at 1282–1283 (emphasis added).

The Sixth Circuit's decision in *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015) is pellucid evidence that it takes *Anderson-Burdick* seriously even as applied to non-severe burdens. The court there struck down a Tennessee election law under which so-called "minor parties," which are entitled to their own line on the ballot, must obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election in order to retain that line. *Id.* at 693. The court held that "[e]ven if we assume the burden is not severe, it is not justified by a sufficiently weighty state interest," because it "imposes a greater burden on minor parties without a sufficient rationale." *Id.* at 694–695; *see also SD Voice v. Noem*, 60 F.4th 1071, 1080 (8th Cir. 2023) (striking down a South Dakota law that imposed a filing deadline on petitions to place on the ballot proposed changes to state statutes because the law "fails under scrutiny for burdens that are less than severe"); *see also Fish v. Schwab*, 957 F.3d 1105, 1127–1136 & n.6 (10th Cir. 2020) (striking down

Kansas law that conditioned voter registration on documentary proof of citizenship, which imposed a burden "somewhere in between the two poles [of] 'severe' and 'nonsevere'").

Petitioners are right about one thing: The Seventh Circuit does appear to have deviated from proper *Anderson-Burdick* analysis in *Tripp*. *See* Pet. 28. But that deviation is now in the rear-view mirror. The Seventh Circuit promptly self-corrected, as evidenced by *Acevedo v. Cook County Officers Electoral Board*, 925 F.3d 944, 949 (7th Cir. 2019), in which it upheld an Illinois law providing that a candidate not affiliated with a party must obtain signatures from 0.5% of the voters in the primary race that he sought to join. The court reached this result upon determining that the "slight burden" imposed by the law "*is justified by* Illinois's relevant and legitimate state interests." *Id.* at 949 (emphasis added). Further, as petitioners' themselves recognize (Pet. 28), in *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020), the Seventh Circuit chastised a district court for having employed "cursory or perfunctory analyses" to assess the constitutionality of state elections laws, rather than the "fact-intensive analyses" that *Anderson-Burdick* requires. Plainly, the Seventh Circuit is now doing

exactly what petitioners are demanding that courts do.[9]

Thus, like the other conflicts petitioners posit, the supposed conflict regarding the circuits' application of *Anderson-Burdick* to state laws that impose non-severe burdens on the electoral process is entirely illusory.[10] Also like those other hypothesized conflicts, it is entirely irrelevant. Again, petitioners do not even assert that the outcome of this case would have been any different had it been litigated in any of the circuits that apply *Anderson-*

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[9] Conflicts *within* a circuit generally militate *against* this Court's review, inasmuch as they reveal a need for further percolation, and perhaps *en banc* consideration, to allow the circuit to settle on a definitive position that this Court can then consider. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.6 (10th ed. 2013).

[10] The decisions discussed in the main text demonstrate that there is no circuit conflict today concerning the application of *Anderson-Burdick* to state laws that impose only a non-severe burden on the electoral process. Further, petitioners are wrong to suggest (Pet. 26) that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) is evidence that such a conflict ever existed. The petitioners in *Crawford* did not assert a circuit conflict. They asked the Court to resolve issues related to the constitutionality of laws requiring voter identification "despite the lack of a circuit conflict." Pet. for Writ of Cert. at 22, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (No. 07-21). And in the *Crawford* decision, the Court confirmed that it had taken the two cases that had been consolidated for review because of its "assessment of the importance of the[] cases," saying nothing about conflicting circuit rulings. 553 U.S. at 188 (op. of Stevens, J.).

Burdick the way petitioners think it should be applied. Nor does the record in this case plausibly permit that conclusion; it amply demonstrates that New York's reforms were long overdue. This Court's intervention is unwarranted.

III.

THIS CASE IS A POOR VEHICLE FOR FURTHER REVIEW OF ANY ISSUES THE COURT MIGHT FIND CERTWORTHY IN THE ABSTRACT

Finally, to the extent this Court perceives the Second Circuit's decision below as presenting any certworthy legal issues about the application of the *Anderson-Burdick* test, this case is emphatically the wrong vehicle for addressing them.

A large part of the dispute in this case centers on the extent to which a candidate's ability to petition onto the New York general election ballot represents a viable means of ballot access for candidates backed by political organizations unable to attain party status. In affirming the district court's grant of summary judgment to respondents, the Second Circuit correctly concluded that petitioners had presented no evidence plausibly suggesting that the increased number of petition signatures that must be gathered under the 2020 reforms stood as an unconstitutional obstacle in this regard. And one of the *reasons* for that dearth of evidence counsels strongly against using this case as a vehicle for further judicial review: Because the

increased petition threshold is so new, candidates have only just begun even *trying* to clear it. Accordingly, it would be premature to choose this case as a vehicle for further review of *Anderson-Burdick* issues in the ballot-access context.

It is worth reiterating, however, that the track record that does exist shows that the new threshold is attainable, including by candidates who are neither celebrities nor billionaires. Case-in-point: An unknown independent candidate was able to comfortably clear the signature requirement and obtain ballot access for a U.S. Senate race in the last election cycle. *See supra* 16. Thus, any failure of petitioners to regain party status or place candidates on the ballot is not because the thresholds are too high, but rather because—at this given time—they lack sufficient support from the New York voters.

The lesson of this case is, in the end, a simple and straightforward one. In order for political organizations to obtain party status and ballot access, they should run a get-the-vote out campaign and try to craft a message that resonates with voters. Many organizations and candidates have successfully done so before in New York, and if the Green and Libertarian Parties of New York can run on a platform that even a small percentage of the New York electorate will vote for, they can once again enjoy the party status and ballot access they seek to achieve here, despite currently lacking that support from the New York electorate.

The reason why petitioners appear not to have taken that route further exposes why this particular case is not the right one for taking up the potential *Anderson-Burdick* issues that petitioners claim it raises. The electoral burdens with which the First and Fourteenth Amendments are concerned are burdens making it more difficult to elect candidates. Namely, "[b]allots serve primarily to elect candidates, not as fora for political expression." *Timmons*, 520 U.S. at 363. But petitioners admitted below that the latter objective is their chief concern. They told the Second Circuit that "[t]he Greens and the Libertarians, these are ideological parties. They don't care about getting somebody in office. They want to change the conversation [relative to certain substantive issues]." C.A. Oral Arg. Recording 06:36–06:46. Indeed, petitioners have also conceded that they do not view New York as fertile ground *even for the (constitutionally secondary) purpose of agenda promotion*. For example, a representative of the Libertarian Party of New York admitted at a deposition that its national party views New York as "pretty much a lost cause" because New York "is not seen as a state [where] money would be well spent promoting [its] agenda." C.A. App. 891.

All of the above suggests that petitioners are not the parties best situated to litigate their side of the *Anderson-Burdick* controversy in this Court. If the Court is interested in the legal issues petitioners have raised, it should examine them in a case

brought by political organizations that actually do want to use the ballot for electoral purposes, and that plan to put "[h]ard work and sacrifice," *White*, 415 U.S. at 787, into their efforts to do so.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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