No. 22-893

IN THE
Supreme Court of the United States

LIBERTARIAN PARTY OF NEW YORK, GREEN PARTY OF NEW YORK, ET AL.,
Petitioners,
v.

NEW YORK BOARD OF ELECTIONS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..ii

INTRODUCTION..1

ARGUMENT..3

I. Respondents' Effort to Resolve the Lower Courts' Split Regarding the Proper Application of *Anderson-Burdick* is Unavailing...................3

II. Respondents Largely Ignore Petitioners' Second and Third Certified Questions...........10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Celebrezze,
460 U.S. 780 (1983) 1-8, 10-12

Barr v. Galvin,
626 F.3d 99 (1st Cir. 2010) 6

Burdick v. Takushi,
504 U.S. 428 (1992) 1-8, 10

Buscemi v. Bell,
964 F.3d 252 (4th Cir. 2020) 5, 6

CNH Indus. N.V. v. Reese,
138 S. Ct. 761 (2018) 8

Cowen v. Sec'y of State of Georgia,
22 F.4th 1227 (11th Cir.), *cert. denied sub nom. Cowen v. Raffensperger*,
143 S. Ct. 214 (2022) 7

Crawford v. Marion Cnty. Election Bd.,
484 F.3d 436 (7th Cir. 2007) 3

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008) 1, 3-5, 7, 8, 9, 10

Fish v. Schwab,
957 F.3d 1105 (10th Cir. 2020) 8

Green Party of Arkansas v. Martin,
649 F.3d 675 (8th Cir. 2011) 13

Green Party of Tennessee v. Hargett,
791 F.3d 684 (6th Cir. 2015) 8

Hero v. Lake Cnty. Election Bd.,
42 F.4th 768 (7th Cir. 2022) 9

Indiana Green Party v. Sullivan,
2023 WL 5207924 (S.D. Ind. Aug. 14,
2023) 9

Jaquith v. Simon,
35 Misc. 2d 508, 513 (N.Y. Sup. Ct.),
aff'd, 185 N.E.2d 13 (N.Y. 1962) 10

Jenness v. Fortson,
403 U.S. 431 (1971) 11

Jones v. Bock,
549 U.S. 199 (2007) 8

Libertarian Party of Alabama v. Merrill,
2021 WL 5407456 (11th Cir. Nov. 19,
2021), *cert. denied*, 142 S. Ct. 2652
(2022) 6

*Libertarian Party of New Hampshire v.
Gardner*,
843 F.3d 20 (1st Cir. 2016) 11

Montana Green Party v. Jacobsen,
17 F.4th 919 (9th Cir. 2021) 6

SD Voice v. Noem,
60 F.4th 1071 (8th Cir. 2023) 8

Socialist Workers Party v. Rockefeller,
314 F. Supp. 984 (S.D.N.Y.), *aff'd*,
400 U.S. 806 (1970) 10

Storer v. Brown,
415 U.S. 724 (1974) 11, 12

Swanson v. Worley,
490 F.3d 894 (11th Cir. 2007) 6

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 12

Tripp v. Scholz,
872 F.3d 857 (7th Cir. 2017) 9

Williams v. Rhodes,
393 U.S. 23 (1968) 2

Other Authorities

U.S. Const. amend. I 4

U.S. Const. amend. XIV 4

INTRODUCTION

In the Petition for Writ of Certiorari (the "Petition" or "Pet."), Petitioners demonstrated the clear split among and between lower courts in applying the *Anderson-Burdick* framework in ballot access cases. Many courts have deviated from the relatively demanding weighing analysis called for in *Anderson* and have adopted a much more deferential approach akin to rational-basis review—as recognized by the conflicting opinions in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). That is what happened below: the courts summarily concluded that New York's historic threshold increases are not severely burdensome because they remain at or under 2% of the electorate and allow the continued existence of two fusion parties, but disregarded critical facts demonstrating the severe burdens imposed on minor parties that do not nominate by fusion, including Petitioners. As a result, the courts below improperly accepted the general interests asserted by Respondents as justification for New York's increased thresholds without engaging in the fact-intensive and comprehensive analysis that *Anderson-Burdick* requires.

Respondents' arguments to the contrary in their Brief in Opposition ("Opposition" or "Opp.") reduce down to a fervent denial of reality. They attempt to resolve the split by asserting that despite the irreconcilable conflicts in the lower courts' analysis and resolution of ballot access cases, they are all faithfully applying the same *Anderson-Burdick* framework. Respondents are incorrect.

Contrary to Respondents' insistence, this case is ideally suited to a reexamination of *Anderson-Burdick*. The facts and evidence are largely uncontested and the legal issues are squarely presented. In particular, Petitioners' second and third certified questions—that the courts below (1) erred by disregarding that the petition threshold's signature-per-day requirement far exceeds that of any other state to attain party status at over 1,071 signatures, and (2) improperly denied Petitioners' claims in large part because of the continued existence of so-called "fusion" parties without any analysis of their constitutional significance—provide the Court with discrete contexts in which to clarify *Anderson-Burdick*.

This Court should grant certiorari to resolve the split among lower courts because voters nationwide are being harmed by an improperly deferential analysis that leaves States free to "give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). The Court should also grant certiorari to correct the errors below, lest New York State voters lose ability to develop and vote for independent minor parties, and voters nationwide cannot vote for a presidential candidate with universal ballot access who does not have an "R" or "D" before their name. *See Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983) ("in a Presidential election a State's enforcement of more stringent ballot access requirements… has an impact beyond its own borders").

ARGUMENT

I. Respondents' Effort to Resolve the Lower Courts' Split Regarding the Proper Application of *Anderson-Burdick* is Unavailing.

In opposing the first certified question, Respondents argue that the Second Circuit's decision "does not implicate any jurisprudential conflict regarding" *Anderson-Burdick* and they insist that courts "have applied it faithfully for decades [and] have not splintered amongst themselves or diverged from this Court in any way." (Opp. 17–18.) This claim strains credulity and disregards this Court's internal split over the standard in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

Crawford concerned the constitutionality of an Indiana voter ID law and specifically a dispute over what the proper standard was to apply and whether sufficient evidence was presented to support a facial attack on the validity of the statute. *Id.* at 188–89 (noting that the dissent in the court below would have applied a "strict scrutiny light" standard). Indeed, the Court was reacting to a clear split among appellate justices about how to interpret *Burdick v. Takushi*, 504 U.S. 428 (1992). As Petitioners have demonstrated, the development of the *Anderson-Burdick* analysis has been woefully equivocal and inconsistent. (Pet. 23–24.) As such, the Seventh Circuit had essentially split on the question of whether the *Anderson-Burdick* weighing analysis had *any* lingering vitality. *See Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (dissent from denial of rehearing *en banc*) ("the

panel assumes that *Burdick* … means that strict scrutiny is no longer appropriate in *any* election case").

Crawford produced several opinions. Most justices agreed that the case was governed by the *Anderson-Burdick* analysis, but they disagreed simultaneously on the nature of the analysis, as well as its application. 553 U.S. at 188–90 & n.8, 204–205, 210–11, 223–24, 237.

Justice Scalia took the most aggressive position in a concurrence joined by Justices Thomas and Alito. He claimed that "[a]lthough *Burdick* liberally quoted *Anderson, Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule." *Id.* at 204–05. Justice Scalia thought *Burdick* created a "two-tracked approach." *Id.* at 205. If the challenged law imposes a severe burden, then a court is to apply strict scrutiny. *Id*. If it does not, then "[t]his calls for application of a deferential 'important regulatory interests' standard." *Id.* at 204. Justice Scalia was referring to the Court's ambiguous statement in *Burdick* that if a law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, [then] 'the State's important regulatory interests are generally sufficient to justify the restrictions.'" 504 U.S. at 434.

Justice Stevens's plurality opinion (joined by the Chief Justice and Justice Kennedy), by contrast, expressly disagreed with Justice Scalia's claim that the Court had created an "important regulatory interests" standard at all. 553 U.S. at 190 n.8. Instead, Justice Stevens found that *Burdick* reaffirmed the weighing

analysis established by *Anderson* and also its admonition that no litmus test should ever be applied. *Id.* at 190–91. Justice Stevens emphasized that the state has to provide "precise interests" (and that it did in that case). *Id.* at 190, 202–03.

Justice Souter's dissent (joined by Justice Ginsburg) similarly reaffirmed *Anderson*'s weighing analysis, but criticized the plurality for avoiding "a hard look at the State's claimed interest." *Id.* at 223–24. Unlike the plurality, Justice Souter quoted the *entire* description of the *Anderson* analysis, including that a court must determine "the *extent* to which [the State's precise] interests make it necessary to burden the plaintiff's rights." *Id.* (emphasis added).

Finally, Justice Breyer sought to apply a wholly different analysis. *Id.* at 237.

The three main opinions neatly represent the different approaches to *Anderson-Burdick* prevalent in and among the circuits. Like Justice Scalia, certain courts apply a very strict and explicit two-track analysis: they determine that a law does not impose a severe burden (as such burdens are described to be extremely rare), and then apply a near-rational basis analysis. In such cases, a state need only satisfy some minimal standard, such as to "articulate its important regulatory interests." *Buscemi v. Bell*, 964 F.3d 252, 263 (4th Cir. 2020) (cleaned up) (*see* Pet. 24–25). This approach may superficially impose a weighing analysis, but one entirely hypothetical and unmoored from evidence or tailoring. *E.g.*, 964 F.3d at 265–66 ("the

Board's stated interests in preventing ballot overcrowding and voter confusion easily constitute important regulatory interests sufficient to justify the modest burden of the state's election scheme").

Respondents attempt to recast such cases in the First, Fourth, Ninth, and Eleventh Circuits by claiming that each first found that the burdens imposed were "modest" and then purported to conduct the analysis required under *Anderson-Burdick*. (Opp. 31–33.) Other than the fact that the evidence of such "analysis" often consists of a single word or implication, Respondents elide the fact that all these cases applied a binary between "severe" and "modest" burdens with no in-between. *See Barr v. Galvin*, 626 F.3d 99, 111 (1st Cir. 2010) (clarifying that by "modest," it meant a burden that "is not so onerous as to present an equal protection problem"); *Buscemi*, 964 F.3d at 263 (describing a different analysis for "severe" and "modest" burdens); *Montana Green Party v. Jacobsen*, 17 F.4th 919, 926 (9th Cir. 2021) (stating that for non-severe burdens, a state need "only point[ ] to 'important regulatory interests'"). The Eleventh Circuit, for example, has made clear that for non-severe burdens, it interprets "the *Anderson-Burdick* test [to] only ask[ ] a court to 'identify and evaluate the interests put forward by the [s]tate as justifications for the burden imposed by its rule'" without any actual evidentiary showing. *Libertarian Party of Alabama v. Merrill*, 2021 WL 5407456, at *6 (11th Cir. Nov. 19, 2021), *cert. denied*, 142 S. Ct. 2652 (2022); *see Swanson v. Worley*, 490 F.3d 894, 912 (11th Cir. 2007) (refusing to scrutinize Alabama's purported interests for its ballot signature threshold and filing deadline because "the test

is not whether the regulations are necessary but whether they rationally serve important state interests"); *Cowen v. Sec'y of State of Georgia*, 22 F.4th 1227, 1233–34 (11th Cir.) (upholding Georgia's ballot access laws because once the court determined that they did not impose a severe burden on the minor party's rights, it needed to only find that "Georgia's ballot-access system is a 'rational way' to meet" the state's stated interests), *cert. denied sub nom. Cowen v. Raffensperger*, 143 S. Ct. 214 (2022).

The opinions below are among these cases. In *SAM Party II*, 987 F.3d 267, 278 (2d Cir. 2021) (App. 97), the Second Circuit only demanded that "[t]he State … set forth a coherent account of why the presidential-election requirement will help to guard against disorder and waste." Accordingly, the district court only required the same to uphold the historic increases in the vote and petition thresholds. (App. 35.)

The fact that these strict two-track opinions at times mention that the court must exercise its judgment does not mean that they "reflect adherence to the analytical approach this Court prescribed." Rational basis review also demands a judgment call, but Respondents concede that *Anderson-Burdick* demands more. (Opp. 29, 30.)

On the other side, certain courts, like Justice Stevens and Justice Souter, embrace *Anderson*'s weighing analysis on a "sliding scale" basis and reject Justice Scalia's binary, "deferential important regulatory interests standard." 553 U.S. at 190 n.8, 210. Respond-

ents' cited cases in the Sixth, Eighth, and Tenth Circuits qualify. (Opp. 33–34.) *See Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693–95 (6th Cir. 2015) (recognizing a middle approach between severe burdens and "reasonable" and "nondiscriminatory" burdens; finding 5% retention percentage unconstitutional because the state failed put forward "a sufficient rationale"); *SD Voice v. Noem*, 60 F.4th 1071, 1080 (8th Cir. 2023) (recognizing *Anderson-Burdick* to be a "sliding standard"); *Fish v. Schwab*, 957 F.3d 1105, 1127–1136 & n.6 (10th Cir. 2020) (evaluating the "concrete evidence" from the state and finding it insufficient, expressly adopting Justice Stevens's approach in *Crawford*). These cases cannot fairly be read to apply the same standard as the strict two-tracked cases cited above.

Respondents claim that the presence of intra-circuit splits undermines the case for certiorari. (Opp. 35 n.9.) This is unpersuasive for several reasons. First, this Court has found intra-circuit splits significant enough for certiorari review. *See CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 765 (2018). Second, certain circuits have clearly fallen on one side; for example, the Sixth Circuit has adopted a "muscular" approach (Pet. 29), and the Eleventh Circuit has adopted a deferential approach (*supra*). *See Jones v. Bock*, 549 U.S. 199, 220 n.9 (2007) (stating that certiorari was proper despite the development of an intra-circuit conflict because other circuits applied same approach as the panel opinion under review).

In addition, the rationale for *not* granting certiorari would be to give an opportunity to circuits to police themselves and settle on a consistent standard. However, the circuits have clearly demonstrated their inability or unwillingness to do so. After all, for 15 years, they have had the benefit of *Crawford* where five justices rejected Justice Scalia's position, and yet many courts continue to follow it. Respondents claim that the Seventh Circuit corrected its overly deferential approach in *Tripp v. Scholz*, 872 F.3d 857, 866 (7th Cir. 2017), and this is the process that should be allowed to occur. (Opp. 34–35.) Respondents are incorrect. *See Hero v. Lake Cnty. Election Bd.*, 42 F.4th 768, 775–77 (7th Cir. 2022) (applying strict two-track approach to striking of candidate's name from primary ballot at state political party's behest); *see also Indiana Green Party v. Sullivan*, 2023 WL 5207924, at *3 (S.D. Ind. Aug. 14, 2023) (applying a litmus test to Indiana's ballot access thresholds; "despite the more recent cases from the Seventh Circuit urging a careful balancing in each case, precedent compels this Court to conclude that the burden imposed is not unconstitutional").

Respondents' final point is that Petitioners allegedly fail to show how the case below would come out differently under another circuit's standard. But Petitioners demonstrated that if the courts below required anything more than a mere articulation from the State of its asserted interests, the State would have failed to meet its burden on summary judgment. (Pet. 13–21, 24–25.) Respondents ignore this essential point and instead attack Petitioners' case for severe burden.

(Opp. 36–39.) Not only are they incorrect for the reasons stated, but Respondents' silence speaks volumes: they do not believe that a state's justifications can or should be questioned.[1] That they would make such an argument underscores the need for certiorari. The Court has emphasized that "[h]owever slight [the] burden may appear," a court must scrutinize and weigh the state's justifications. *Crawford*, 553 U.S. at 191 (plurality op.).

II. Respondents Largely Ignore Petitioners' Second and Third Certified Questions.

Respondents do not meaningfully address Petitioners' Second and Third Certified Questions regarding the lower courts' analyses of New York's signatures-per-day requirement and the constitutional significance of fusion parties.

Respondents misconstrue Petitioners' contention with respect to the signatures-per-day question. (Opp. 24.) Petitioners contend that if the courts below properly analyzed the increased petition threshold's 1,071 signature-per-day requirement under an *Anderson-Burdick* analysis, they would have been compelled

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[1] Respondents continue to rely on the only explanation ever offered for the extent of the increases: to allegedly account for increases in registered voters. Not only is this a post-hoc reformulation (*see* Pet. 18–19), but the historical account is false. The 15,000-signature petition threshold was established for the first time in 1992, not 1922. In 1922 (and through 1971), it was 12,000. *See Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 989 (S.D.N.Y.), *aff'd*, 400 U.S. 806 (1970); *Jaquith v. Simon*, 35 Misc. 2d 508, 513 (N.Y. Sup. Ct.) (threshold was passed in 1896), *aff'd*, 185 N.E.2d 13 (N.Y. 1962) (*contra* Opp. 2–3).

to find a severe burden and apply a more exacting standard of review.[2] Respondents' dismissive characterization of the circuit split is unavailing; they simply do not take courts at their word. This Court has admonished courts against conducting "litmus-paper tests." *Anderson*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). If, despite this, courts say timing concerns are foreclosed by Court precedent preceding *Anderson*, then that is what they hold. (*See* Pet. 33–34.) *E.g.*, *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 26–27 (1st Cir. 2016) (refusing to consider the "combination of percentage and timeframe" of New Hampshire's requirement unless plaintiff could adequately distinguish the case from the regime upheld in *Jenness v. Fortson*, 403 U.S. 431 (1971)).

Courts that merely analogize to precedent are not conducting the comprehensive, fact-intensive analysis required under *Anderson-Burdick*. That is exactly what happened below where the district court simply claimed the argument "fails" based on this reasoning. (App. 26, 65–68.)

With regard to fusion, Respondents disregard the importance the district court and Second Circuit expressly placed on the continued existence of fusion parties after the 2020 election to dismiss the burden on Petitioners. (Opp. 25–26; *see* App. 61, 92–93.) The

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[2] A proper analysis would consider this in addition to all the other stifling aspects of New York's election regime. Nevertheless, this requirement could stand alone as a severe burden because it is by far the most burdensome among all states. (*See* App., Ex. A.)

courts ignored Petitioners' arguments that fusion parties should be irrelevant to the analysis because they do not run their own candidates for major office; rather, they "use the ballot itself to send a particularized message, to its candidate and to the voters" by providing a way to vote for a major party candidate to run with a different party title next to their name. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). The continued presence of fusion parties on New York's ballot in no way diminishes the severe burden that New York's increased thresholds impose on non-fusion parties like Petitioners. It does not vindicate their fundamental constitutional rights. *Id.* at 362–63.

Respondents invoke *Timmons*, but nevertheless claim that Petitioners *should* have to avail themselves of fusion. (Opp. 26–27.) Not only is this argument contradictory, but it ignores Petitioners' point: ballot access jurisprudence is based on vindicating fundamental rights that only relate to independent, non-fusion minor parties. *See, e.g.*, *Storer*, 415 U.S. at 745 ("the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other"); *Anderson*, 460 U.S. at 800 n.26 (stating that the opportunity for write-in votes "is not an adequate substitute for having the candidate's name appear on the printed ballot"). Petitioners are not trying to force the state to accommodate their strategic decisions—rather, even if Petitioner political parties used fusion and survived, voters' rights would still be violated because they

would exist in a neutered form unable to field unique candidates.[3]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[3] Respondents are also wrong that courts agree with them. (Opp. 27.) *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011), did not concern fusion.