

No. 22-893

IN THE
Supreme Court of the United States

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

v.

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

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

**AMICI CURIAE BRIEF FOR COALITION FOR
FREE AND OPEN ELECTIONS (COFOE),
FORWARD PARTY, RAINEY CENTER, AND
OPEN PRIMARIES IN SUPPORT OF
PETITIONERS**

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Interests of Amici Curiae¹

The Coalition for Free and Open Elections (COFOE) is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy. COFOE is a group of independents and representatives from minor political parties. Since 1985 the group has supported efforts to remove barriers to ballot access that prevent non-major-party candidates and would-be voters from fully participating in the electoral process. The third-party candidates and voters that make up COFOE's constituency have an interest in the question presented because New York has altered its ballot access laws to effectively screen out alternative candidates and views.

The Forward Party is a new political party that works for the people, not those on the extremes of the political divide. It believes that everyday American citizens should be able to decide what is best for them on the local level, not the out-of-touch power-brokers in Washington, D.C. It seeks to deliver a 50-state strategy designed to empower local leaders to unlock policy solutions that work in their communities. It and its hundreds of thousands of American members have

¹ All parties to this proceeding were notified pursuant to Supreme Court Rule 37.2 ten days in advance of COFOE's filing this brief that it intended to do so. No counsel for a party authored this brief in whole or in part or assisted in its preparation. No person or entity, other than the amici, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

an interest in fair and inclusive ballot access and party recognition laws that allow the organization of bottom-up representation to influence local politics, building the Party up from local races, state by state.

The Rainey Center is a public policy research organization in honor of Representative Joseph H. Rainey, Republican of South Carolina, who in 1870 became the first former slave elected to the U.S. House of Representatives. The Rainey Center specializes in providing expert policy analysis across a wide range of issues, seeking to promote practical solutions and coalition-building on topics including energy, national security, healthcare, technology and innovation, and elections. As part of its commitment to the legacy of Joseph Rainey, the Rainey Center believes in the value of representative government where all voices are freely heard. On election policy, the Rainey Center advocates reforms to reduce polarization, protect election integrity, increase public confidence, and produce more representative outcomes. To that end, the Rainey Center supports the First Amendment rights of speech, association, and assembly for all participants in the electoral process, including voters, candidates, and political parties, and opposes laws which improperly burden those fundamental rights.

Open Primaries is a 501(c)(4) national advocacy organization. It is building a movement of diverse Americans who believe in a simple, yet radical idea: no American should be required to join a political party to exercise their right to vote. The mission of Open Primaries is to advocate for open and nonpartisan primary systems, counter efforts to impose closed

primaries, educate voters and policymakers, advance litigation, train spokespeople, conduct and support research, and participate in the building of local, state and national open primaries coalitions. It provides information to the public about open and nonpartisan primaries and engages all sectors—voters, policy makers, good government and civic organizations, business leaders, community activists—to educate, build bridges and develop the primary reform movement.

Summary of Argument

As a result of its statutory changes, New York is now one of only five states that requires new and minor political parties to run presidential candidates in order to retain ballot access. History teaches that this requirement can squelch local organizing efforts and prevent the emergence of successful and important local political movements. For example, if Minnesota and Wisconsin had followed this practice during the 1930s and 1940s neither the Farmer-Labor Party nor Progressive Party would have emerged in Minnesota and Wisconsin, respectively.

Minor political parties across the United States continue to focus their attentions on local matters rather than national office. The Progressive Party of Vermont is one, the proposed Forward Party of New York another. Faced with a presidential ticket requirement like that enacted by New York, these parties would either have to re-tool or cease to exist. In either case, the marketplace of ideas suffers severely.

Argument

New York, unlike most states, today requires that political parties run presidential tickets in order to retain ballot access. It achieves this result through its 2020 changes to New York Election Law § 1-104.3, which following these changes now states that political parties remain qualified only by winning the greater of 2% of the gubernatorial vote or 130,000 votes at the “last preceding election for governor” *and* the same number of votes “for its candidate for president ... in a year when a president is elected.” N.Y. ELEC. LAW § 104.3 (2023).

Because New Yorkers cast votes for governors and presidents in different election cycles, retaining ballot access beyond two-year intervals is dependent upon parties running candidates for president. For example, a party that successfully petitions for ballot access in 2026 and then wins 2% of the gubernatorial vote that year will retain its ballot line for the 2028 election, but will then automatically forfeit that access if it does not run a presidential ticket in that 2028 election. In order to retain its ballot access, a political party in New York must now run a presidential candidate in every presidential election year.

New York’s ballot access requirements for new and minor political parties are thus doubly draconian. Not only does New York impose severe requirements for initial access, *see* *Petition for Writ of Certiorari, Libertarian Party of New York v. New York Board of Elections*, No. 22-893, at 10-11 (U.S., March 16, 2023), it then requires that these parties run presidential

tickets whether they want to or not in order to remain officially recognized and qualified for ballot access.

Only Arkansas, *see* ARK. CODE ANN. § 7-1-101(27(A) (West 2023), Iowa, *see* IOWA CODE § 43.2 (2023), Kentucky, *see* KY. REV. STAT. ANN. §§ 118.015 & 118.325(1) (West 2023), and Washington, *see* WASH. REV. CODE § 29A.04.086 & .097 (2023), join New York in requiring that political parties win percentages of presidential votes in the last election in order to maintain ballot access.

The modern trend has been for states to drop singular presidential vote-test requirements in favor of vote tests that include other offices and that provide opportunities beyond presidential contests. Ohio, for example, which once took New York's current position on the necessity of participating in presidential elections, in 2014 passed legislation that now affords new parties two election opportunities, one gubernatorial and the other presidential, to win enough votes for continuing ballot access. *See* OHIO REV. CODE ANN. § 3501.01(F)(2)(b) (West 2023).²

² Before 2014, Ohio defined a recognized political party as one that had polled 5% for president or governor during the last election. New legislation passed in 2013 provided that a party need only win 3% for president or governor over the course of two election cycles to remain a recognized political party. *See* 2013 OHIO LAWS FILE 43 (Am. Sub. S.B. 193). *See generally* Mark R. Brown, *A Critical and Historical Analysis of Ohio's Post-Millennium Regression to Major-Party Monopoly*, 50 HAST. CON. L.Q. 227, 297-98 (May 2023) (discussing application of Ohio's law) (forthcoming).

Arizona, *see* ARIZ. REV. STAT. ANN. § 16-804 (2023),³
Maine, *see* ME. STAT. TIT. 21-a, § 301.1.E (2023),⁴
Oklahoma, *see* OKLA. STAT. TIT. 26, § 1-109 (2023),⁵
and Virginia, *see* VA. CODE ANN. § 24.2-101 (2023),⁶
which at one time were like New York, have also

³ Before 1992, Arizona defined a qualified party as one that had polled 5% for president or governor in the last election. In 1992 the definition of political party was changed in § 16-804 to include groups that had registered memberships of at least two-thirds of 1% of the state total. *See* 1992 ARIZ. LEGIS. SERV. CH. 255 (H.B. 2378) (West).

⁴ Before 1999, Maine defined a qualified party as one that had polled 5% for president or governor at the last election. In 1999 Maine passed legislation that allowed groups that polled 5% at either of the last two statewide elections, including for governor, remained parties. *See* 1999 ME. LEGIS. SERV. CH. 450 (S.P. 217) (L.D. 639) (West). In 2009 the definition was changed again to state that political parties also include groups that have a minimum number of registered members. *See* 2009 ME. LEGIS. SERV. CH. 426 (H.P. 716) (L.D. 1041) (West).

⁵ Before 2018, Oklahoma defined a political party as one that had polled 2.5% for either president or governor in the last election. In 2018 the definition was changed to allow groups an opportunity to win sufficient votes at either of two elections, including one which was for governor. *See* 2018 OKLA. SESS. LAW SERV. CHAP. 189 (S.B. 350) (West).

⁶ Virginia before 1993 defined a political party as one that had polled 10% for a statewide race at the last statewide election. When the presidency was the only statewide office on the ballot, political parties would have to run presidential candidates in order to remain qualified. In 1993 the law was changed to define party as one that had polled 10% for a statewide office at either of the last two elections. *See* 1993 VA. LEGIS. SERV. CH. 641 (S.B. 649) (West).

passed legislation providing alternatives beyond presidential vote tests for continuing ballot access.

History teaches that local minor parties can be both successful and politically important notwithstanding their eschewing presidential elections. The Minnesota Farmer-Labor Party, which chose not to run presidential tickets, won congressional elections in Minnesota beginning in 1922 and through 1942, *see* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 495, 747-97 (1975), while also winning the Governor's mansion in 1930, 1932, 1934, and 1936. *See id.* at 415-16. The Wisconsin Progressive Party, which also chose not to run candidates for the White House, won congressional elections in Wisconsin in all elections from 1934 until 1942. *See id.* at 508, 780-85. It also won gubernatorial elections in 1934, 1936 and 1942. *See id.* at 436. If Minnesota and Wisconsin had followed New York's 2020 law, neither the Farmer-Labor Party nor Progressive Party would have remained on those states' ballots.

The importance of local political parties is not merely an historical artifact. The Progressive Party of Vermont continues to seat state legislators without running presidential tickets, just as it has over the last twenty years. *See* Vermont Progressive Party, <https://www.progressiveparty.org/> (last visited April 8, 2023); Vermont Progressive Party, WIKIPEDIA, https://en.wikipedia.org/wiki/Vermont_Progressive_Party (last visited April 7, 2023). The A Connecticut Party elected the Governor in 1990, remained a qualified party through 1994 without running

presidential tickets, and may prove relevant again in local elections. *See* Jodi Latina, *A political shake-up brings back the ‘A Connecticut Party’*, May 14, 2021, News8/WTNH.com, <https://www.wtnh.com/news/politics/a-political-shake-up-brings-back-the-a-connecticut-party/>; A Connecticut Party, WIKIPEDIA, https://en.wikipedia.org/wiki/A_Connecticut_Party (last visited April 7, 2023). La Raza Unida won partisan county elections in Texas in 1970, 1972, 1974 and 1976 without presidential nominees. *See* Raza Unida Party, WIKIPEDIA, https://en.wikipedia.org/wiki/Raza_Unida_Party (last visited April 7, 2023); Alex Ura, *At one last reunion, veterans of La Raza Unida political movement pass along their torch*, Sep. 19, 2022, TEX. TRIBUNE, <https://www.texastribune.org/>.

In New York the Forward Party, founded by Andrew Yang, *see Break-away Democrats and Republicans form new ‘Forward Party,’* Nov. 5, 2022, CBSNEWS, <https://www.cbsnews.com/video/break-away-democrats-and-republicans-form-new-forward-party/>, announced that it does not want to run candidates for president but instead “is focused on trying to decrease partisan gridlock within Congress and state legislatures.” *See* Forward Party (United States), WIKIPEDIA, [https://en.wikipedia.org/wiki/Forward_Party_\(United_States\)](https://en.wikipedia.org/wiki/Forward_Party_(United_States)) (last visited April 7, 2023). Part of its concern is that it does not want to become a “spoiler” in that all-too-important contest. *Id.* Under New York’s law, however, the Forward Party must run a presidential candidate in order to be a recognized political party. New York thus insists

that the Party forego one of its founding principles in order to maintain a ballot line.

This Court has previously accepted thirteen cases for full review that address the processes that surround political parties' initial access to ballots. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Jeness v. Fortson*, 403 U.S. 431 (1971); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *Mandel v. Bradley*, 432 U.S. 173 (1977); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Norman v. Reed*, 502 U.S. 279 (1992). The Court did not address in any of these cases whether states can after allowing minor parties ballot access routinely remove them from ballots based on unrealistic vote tests.

This case provides the Court an opportunity to not only address the arduous initial-entry requirements put in place by New York, but also the practice of forcing minor parties to run presidential tickets in order to remain qualified. A vast majority of states recognize that singularly using presidential vote tests is not only constitutionally objectionable, but is also politically unwise. Forcing minor parties to run presidential tickets not only places undue burdens on those parties that prefer not to, it also threatens to unnecessarily increase the number of presidential

tickets on local ballots. If avoiding ballot clutter and confusion is a true goal of access restrictions, requiring presidential tickets makes no sense.

Conclusion

Petitioners' writ of certiorari should be granted.

Respectfully submitted,

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