No. 23-2756

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

DIEGO MORALES.
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division,
1:22-cv-518-JRS-KMB,
The Honorable James R. Sweeney, II, Judge.

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

The appellants' jurisdictional statement is not complete and correct. The Indiana Green Party, Libertarian Party of Indiana, and other named minor party members and independent voters/former candidates sued Indiana Secretary of State Diego Morales, in his official capacity, under 42 U.S.C. § 1983 claiming that four Indiana ballot-access laws, Indiana Code section 3-8-4-1 and sections 3-8-6-3, -6, and –10, violated their rights to cast votes, to speak and associate politically, and to equal protection under the First and Fourteenth Amendments (R.1).[1] Plaintiffs sought declaratory and injunctive relief (R.1 at 26). The district court had subject matter jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343 because they alleged a violation of their federal constitutional rights and seek only prospective injunctive relief. *See Nuñez v. Ind. Dep't of Child Servs.*, 817 F.3d 1042, 1044 (7th Cir. 2016).

On August 14, 2023, the district court entered summary judgment in favor of the Secretary of State (R.70). The district court entered final judgment the same day (R.71). On September 8, 2023, Plaintiffs timely filed their notice of appeal (R.72). This Court has subject matter jurisdiction over this appeal under 28 U.S.C. § 1291 because it is an appeal from a final judgment as to all claims and all parties.

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[1] At that time Holli Sullivan was the Indiana Secretary of State, but Secretary Morales was substituted as defendant after he took office (R.47).

STATEMENT OF THE ISSUE

Whether the challenged ballot-access provisions are reasonable, nondiscriminatory regulations that impose only a minor burden on ballot access and therefore constitutional under the *Anderson-Burdick* framework.

STATEMENT OF THE CASE

The Indiana Green Party of Indiana, the Libertarian Party of Indiana, a number of their members and candidates, and other independent voters and candidates brought this suit claiming four Indiana statutes governing minor party and independent candidates' access to the general election ballot, Indiana Code section 3-8-4-1 and sections 3-8-6-3, -6, and –10, violate their rights to vote, to speak and associate politically, and to equal protection under the First and Fourteenth Amendment (R.1 at 2).[2]

A. Indiana's Ballot-Access Regulations

In Indiana, a party or candidate can gain access to the general election ballot in one of four ways. The method of access for parties depends on how much voter support that party had in the most recent election for Indiana Secretary of State. *See* Ind. Code §§ 3-10-1-2, 3-10-2-15, 3-8-4-1.

First, a major party—one that secured at least 10% of the vote in the last Secretary of State election—nominates most of its candidates through a state-

[2] In addition to the political parties, the plaintiffs include individual party officials and candidates: the Green Party's chairman John Shearer, former chairman George Wolff, ballot access coordinator David Whetterer, and chair A.B. Brand; the Libertarian Party's chair Evan McMahon, former candidate Mark Rutherford, former candidate Andrew Horning; and Independents Ken Tucker and Adam Muehlhausen (R.1 at 2–7).

funded primary election. I.C. § 3-10-1-2. The party must secure at least 10% of the vote to maintain this process. In Indiana, the Democratic and Republican parties have this level of ballot access.

Second, a party that received between 2% and 10% of the vote in the last Secretary of State election nominates it candidates through a party convention. I.C. § 3-10-2-15. The party must maintain this level of support in each subsequent Secretary of State election to continue to select its candidates through a convention. I.C. § 3-8-4-1. In Indiana, the Libertarian Party has this level of ballot access.

Third, candidates of parties that received less than 2% of the vote in the last Secretary of State election, or independent candidates, can gain ballot access "by petition of voters." I.C. § 3-8-6-2. To gain ballot access by petition, a candidate must collect—from registered voters in the election district the candidate seeks to represent—a number of signatures equal to at least 2% of the votes cast in the last Secretary of State election within that election district. I.C. § 3-8-6-3. The Secretary of State election is conducted in a mid-term election (e.g., 2018, 2022, 2026), so the voter turnout is usually lower than that of a presidential election year (R.64-1 at 5 ¶27). Likewise, the total number of signatures required varies. For example, to qualify for the 2016 election, a candidate for statewide office had to obtain 26,700 signatures (R.60-12 at 1 ¶5). In 2022, the number of statewide votes in the Secretary of State election totaled 1,847,179, so 2% of that total is 36,944 (R.64-1 at 5 ¶22). Thus, a candidate for statewide office in Indiana in 2024 must collect 36,944

signatures. But a candidate needs to collect more than the number of signatures required to ensure they have enough valid signatures (R.60-3 at 1 ¶4).

Signatures do not need to be collected on the same paper (Indiana's form provides for up to 10 signatures on one page), but the signatures must be obtained in person and hand-signed by the voter, unless the voter has a disability and is unable to sign their own name. I.C. § 3-8-6-6. In that case, assistance may be provided and the affidavit of assistance completed on the back of the form. In addition to their signature, a voter must provide their name "legibly printed" and their address, as set forth in their voter registration. I.C. 3-8-6-6(a). After collected, the petition signatures must be filed with the signatories' county voter registration office for certification. I.C. § 3-8-6-10(a). In other words, only the county voter registration where the petitioner is registered to vote can certify the individual is a registered voter of that particular county and election district. Candidates may begin filing petition signatures to the counties for verification beginning 118 days before the primary (on January 10 in 2024), I.C. §§ 3-8-6-10(b), 3-8-2-4(a), and are required to submit them no later than noon on June 30. I.C. § 3-8-6-10(b).[3] The county voter registration office will then certify that each signature is from a person eligible to vote for the candidate being nominated and complete the certification found on the back of the form. The county certified petitions must be filed with the

[3] Candidates can begin collecting signatures once the Indiana Election Division has published the petition forms. The Indiana Election Division issued the CAN-19 petition form for the 2024 election during summer 2023.

Secretary of State by no later than noon on July 15. I.C. §§ 3-8-6-8, -10(c), and -10(e).

Aside from very small election districts that do not even comprise a whole precinct (a subdivision of a county or township), *see* I.C. § 3-8-6-3(c), there is no requirement that the voters who provide their signatures be dispersed throughout the election district, *see* I.C. § 3-8-6, *et seq*. Practically, this means that even for statewide office in 2024 the 36,944 could be collected from, and subsequently verified in, a small number of counties.

Fourth, Indiana permits write-in candidates so long as the candidate files a declaration of intent to be a write-in candidate. I.C. §§ 3-8-2-2.5, 3-8-7-30. After that declaration of intent is filed, "the write-in candidate is considered a candidate for all purposes." I.C. § 3-8-2-2.5(c).

B. Effect of Indiana's petitioning procedure on minor parties and independent candidates

In 1980, the General Assembly increased Indiana's signature requirement from 0.5% to 2% (R.64-1 at 3). Since that time, the Libertarian Party has successfully petitioned for ballot access twice: in 1992 and 1994 (R.60-7 at 2–3 ¶¶10, 11). During the 1994 petition drive, the Libertarian Party had to obtain 29,909 valid signatures (R.60-7 at 2 ¶11). The Libertarian Party has maintained automatic ballot access since 1994 by obtaining at least 2% of the votes for Secretary of State (R.60-7 at ¶11). For instance, in 2022, the Libertarian Party received more than 5% of the vote for Secretary of State (R.60-7 at 6 ¶27). To maintain automatic ballot access, the Libertarian Party spends resources and focus on the Secretary of State

elections during those election years (R.60-7 at 4–5 ¶¶17–23; R.60-11 at 2 ¶¶9–11). As a result, it states that it cannot divert appreciable time, money, and resources to support other Libertarian Party candidates during those years (R.60-7 at 4–7 ¶¶19–29).

The Green Party has never qualified for ballot automatic access by voter petition (R.60-2 at 1 ¶6; R.60-15 at 3 ¶ 9). As recent as 2018, the Green Party conducted a petition drive for Secretary of State (R.60-15 at 3 ¶10). The candidate that year submitted a petition but withdrew it before being notified of how many valid signatures he had so he could declare himself as a write-in candidate (R.60-9 at 4–5 ¶18). The Green Party candidates for statewide office always run as write-in candidates (R.60-2 at 2 ¶6).

Independent presidential candidates have obtained ballot access by voter petition (R.60-14 at 1–2 ¶¶5, 6; R.60-3 at 4 ¶15). In 1992 and 1996, presidential hopeful Ross Perot qualified for the ballot in Indiana first as an independent and then as a member of the Reform Party (R.60-14 at 1–2 ¶¶5, 6). To qualify in 1996, he was required to obtain 29,822 valid signatures (R.60-14 at 2 ¶7). During his petition drives, he relied on his own in-house team and hired professional petition circulators to obtain the required signatures (R.60-14 at 2 ¶¶8–10). In 2000, Patrick Buchanan qualified for the Indiana ballot by petitioning for signatures as an independent (R.60-3 at 4 ¶15). His campaign spent approximately $350,000 on his Indiana petition drive (R.60-3 at 4 ¶13). This required his campaign to be unable to

spend money on anything else while the Indiana petition drive was ongoing, and he was forced to use a credit card to travel to campaign events (R.60-3 at 4 ¶14).

Statewide petition drives take significant time and resources to be successful (R.60-9 at 2 ¶7). For example, Adam Muehlhausen, who worked on a petition drive for a Green Party Secretary of State candidate in 2018, testified that the petition drive required “significant funds and resources” to pay for volunteers’ travel and lodging (R.60-9 at 2 ¶7). David Wetterer, a ballot access liaison with the Green Party, testified that petition drives require a large amount of trained petition circulators and that the campaigns must fund the petition circulator’s lodging, food, and other travel expenses (R.60-15 at 2–3 ¶8). Neither the Green Party nor the Libertarian Party have the funds to pay for professional petitioning firms (R.60-7 at 8 ¶34; R.60-15 at 2 ¶7). Two quotes from professional petitioning firms obtained by the Green Party in preparation for the 2022 election were $465,345 and $565,750 depending on the number of signatures obtained and the rate for each signature (R.60-15 at 2 ¶¶5, 6). Because of Indiana’s requirements, some candidates choose not to petition to obtain ballot access in Indiana because it is cost or time prohibitive (R.60-5 at 2 ¶7; R.60-6 at 5 ¶16).

C. District court proceedings

On March 17, 2022, Plaintiffs sued the Secretary of State alleging that Indiana’s minor party ballot access statutes violated the First and Fourteenth Amendments (R.1). They sought a declaratory judgment declaring the ballot access statutes, Indiana Code sections 3-8-4-1, 3-8-6-3, -6, -10(a), and (b), unconstitutional as applied separately and in conjunction to Plaintiffs and that were

unconstitutional as applied separately and in conjunction with one another (R.1 at 26). Plaintiffs also sought an order enjoining the State from enforcing the statutory provisions and costs and attorney fees (R.1 at 26).

Plaintiffs moved for summary judgment and the Secretary cross-moved for summary judgment (R.60; R.64). Specifically, Plaintiffs argued that under the *Anderson-Burdick* test, Indiana's ballot-access laws imposed severe and unequal burdens on the rights of Plaintiffs and that those burdens are not narrowly tailored to the State's asserted interests (R.61 at 15–30). The Secretary, in contrast, argued that under *Anderson-Burdick*, the challenged provisions were not severely burdensome and the State's asserted legitimate interests justify the challenged provisions (R.65 at 12–16).

The State's asserted interests in regulating ballot access were:

- maintaining the ability to conduct orderly elections
- ensuring voter confidence in the accuracy and fairness of candidate selection for parties with significant support
- avoiding voter confusing and frustration with the democratic process
- avoiding ballot overcrowding
- ensuring that a party has at least a modicum of support to deserve ballot access
- ensuring widest-possible base of voter engagement in the political process
- ensuring parties with most support are complying with relevant campaign finance and other election-related statutes
- conserving its limited resources devoted to public financing of elections

(R.64-1 at 3–4 ¶17; R.64-2 at 3–10 and R.65 at 14–15). Further, the State asserted an interest in the June 30 filing deadline in order to allow the State enough time to

organize the electoral proceeding (R.64-1 at 4 ¶¶19, 20). Indiana has 92 counties, all of which are individually responsible for organizing and running its elections (R.64-1 at 5 ¶23). Given the number of counties, there are over 1,000 unique ballots across the State (R.64-1 at 5 ¶24). Those counties and the State election officials "need time to: confirm who will appear on the ballot; ensure their information is correct; prepare, print, and distribute ballots; and prepare them for election day" (R.64-1 at 5¶25).

The district court granted summary judgment in favor of the Secretary (R.70). The district court considered the facts and asserted burdens in this case and concluded that Indiana's minor party ballot access laws were not unconstitutional when compared to similar and more burdensome laws approved by this Court and U.S. Supreme Court precedent (R.70 at 9) (citing *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971); *Storer v. Brown*, 415 U.S. 724, 738 (1974); *Norman v. Reed*, 502 U.S. 279, 292 (1992)). Moreover, the court concluded that Indiana's filing deadline was within constitutional bounds because it was later than the mid-June deadline affirmed in *Jenness*, 403 U.S. at 433–34 (R.70 at 9). The court thus granted summary judgment in favor of the Secretary and denied Plaintiffs' motion for summary judgment because "under the Supreme Court's lenient standard for state burdens on minor-party ballot access, a two percent petition requirement, even accompanied by tedious procedural burdens, is constitutionally permissible" (R.70 at 9).

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment in favor of the Indiana Secretary of State.

A. Under *Anderson-Burdick*, the challenged ballot-access provisions are constitutional. First, the challenged provisions are constitutional under the lower-level of *Anderson-Burdick* scrutiny—which is the scrutiny that applies—because they are not overly burdensome or discriminatory and the State has asserted legitimate interests.

The challenged ballot-access provisions are not overly burdensome. Indiana's requirement that an independent candidate or minor party candidate petition with signatures of at least 2% of the vote from the last Secretary of State election is not overly burdensome. Instead, it is less than half of the requirement in other states that this Court and the Supreme Court have held to be constitutional. The June 30 deadline is not overly burdensome because a candidate has at least six months—if not more than a year—to obtain the approximately 37,000 signatures. It is well-established that obtaining more signatures in a shorter period is not burdensome. The provisions requiring the signatures be obtained in-person, separated by county of voter registration, and submitted to each county are also not overly burdensome. These provisions require only that petition circulators have different petitions for each county and that they have voters sign the correct petition for the county where they are registered. Further, the statute requires that petitions be submitted to a county only if the candidate has obtained signatures in that county. Finally, the provisions requiring ballot access be determined by the vote in the last Secretary of

State election is also not overly burdensome. Using the Secretary of State election as a measure of support limits the petitioning requirement because there is usually less voter turnout in a mid-term election. If a party obtains enough support for Secretary of State, presumably that support would trickle down to other candidates during that election. Further, it allows for minor parties to put all their resources into a presidential candidate during a presidential election year. None of the provisions are thus overly burdensome and the historical evidence Plaintiffs' point to support that under Indiana's current ballot-access laws, obtaining and maintaining ballot access is achievable. Indiana's allowance of write-in candidates is also further support that the ballot-access provisions as a whole are not overly burdensome on Plaintiffs' rights.

The challenged provisions are also not discriminatory. While the provisions place different requirements for ballot access determining on the level of support, States are permitted to do so and that does not automatically make an election law discriminatory. The same is true with Indiana funding primary elections. That does not make the statutes discriminatory where the basis for funding is determinative on the level of support. If one of the current major parties dropped below 10% of the vote, they too would not be entitled to state-funded primaries.

The State's interests justify the challenged ballot-access provisions. The State has important interests that have been previously recognized by this Court and the Supreme Court as justifying minor burdens on ballot access. The State's asserted interests here—maintaining orderly elections, ensuring voter confidence, avoiding

voter confusion, avoiding ballot overcrowding, ensuring a party has a modicum of support before appearing on the ballot, ensuring the widest-possible base of voter engagement, ensuring parties with most support comply with other election-related laws, conserving limited resources, allowing local election officials who have more familiarity with the community and more resources to certify signatures, and having sufficient time to prepare and organize the elections—justify the State placing the nonburdensome and nondiscriminatory restrictions on Plaintiffs' rights. The challenged restrictions thus do not violate the First and Fourteenth Amendments.

Second, even under *Anderson-Burdick's* strict scrutiny, the challenged ballot-access provisions are constitutional because they are narrowly tailored to the State's compelling interests. All of Plaintiffs' assertions that the provisions are not narrowly tailored focus on the State not using less restrictive means available, but that does not mean Indiana's ballot-access provisions as they stand are not narrowly tailored to its compelling interests. Indeed, Courts have recognized that petitioning requirements like Indiana's aim to curb voter confusion and that States are entitled to show that a candidate has a modicum of support by imposing petitioning requirements such as the one Plaintiffs are now challenging. Further, requiring independent candidates and minor party candidates to obtain ballot access through petitioning protects the State's legitimate resources. Not having such a requirement would result in an untenable use of the State's resources. What is more, requiring that the petitions be divided by county voter registration and

submitted to each county for certification is narrowly tailored because all 92 counties are responsible for organizing their own unique ballots, they are more familiar with the community and information presented on the petition, and they have more resources to certify voters than the State's Election Division. The June 30 deadline is also narrowly tailored because that allows election officials enough time to organize the elections, confirm the candidates appearing on the ballot, ensuring the information is correct, and to prepare, print, and distribute the ballots for election day.

The challenged ballot-access restrictions are constitutional under both *Anderson-Burdick's* more lenient and strict scrutiny standards.

B. Contrary to Plaintiffs' argument, the Secretary met its burden on summary judgment. Plaintiffs take issue with three main things the Secretary allegedly did not comply with that should result in reversal. But their assertions are incorrect and reversal is not warranted. First, the Secretary complied with the local rules because it incorporated Plaintiffs' section on material facts not in dispute. Second, General Counsel Bonnett's affidavit was admissible because the Secretary complied with Rule 26(a) when it informed Plaintiffs' that representatives from the Secretary of State's Office would have discoverable information. But even if it did not comply, failure to disclose Bonnett as a witness was harmless because Bonnett's affidavit was primarily used to show the State's interests, which the State had already asserted in response to interrogatories and his statement about the 1980 amendment is not material. Regardless, the Secretary properly asserted the State's

interests through its response to interrogatives and its summary judgment briefing. Third, the Secretary was not required to dispute Plaintiffs' evidence regarding the burdens where, even considering that evidence, the burdens imposed were minor and the State asserted legitimate interests for the challenged provisions.

C. The district court properly analyzed this case under the *Anderson-Burdick* framework. The court considered the challenged provisions, Plaintiffs' alleged burdens, and the State's asserted interest and applied *Anderson-Burdick* to conclude that the challenged ballot-access provisions were constitutional. Unlike this Court's opinion in *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020, the district court did not rely entirely on precedent to uphold the challenged provisions, but it instead considered the facts at issue in this case and compared it to well-established cases upholding higher signature requirements. But even if the Court had not conducted a proper *Anderson-Burdick* analysis, that does not require automatic reversal. This Court is tasked with reviewing the case under its own de novo review and can affirm on any basis in the record. Reversal is thus not required.

The Court should affirm the order granting summary judgment in favor of the Secretary.

ARGUMENT

The district court correctly granted summary judgment in favor of the Secretary of State because the challenged statutes are reasonable, nondiscriminatory regulations that impose only a minor burden on ballot access.

It is well-settled U.S. Supreme Court precedent that States can regulate elections, including limiting ballot access to those parties and candidates that have established a modicum of support. *Murno v. Socialist Workers Party*, 479 U.S. 189, 198 (1986); *American Party of Texas v. White*, 415 U.S. 767, 789 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). This is what Indiana's ballot access laws do. The district court correctly granted summary judgment in favor of the Secretary because the State's ballot access restrictions are not overly burdensome and further the State's myriad legitimate interests.

This Court reviews an order granting summary judgment de novo. *Gill v. Scholz*, 962 F.3d 360, 363 (7th Cir. 2020). Summary judgment is correctly granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (cleaned up); *see also* Fed. R. Civ. P. 56(a). On cross-motions for summary judgment, the Court makes reasonable inferences against the party whose motion is being evaluated. *Id.* (citing *Tripp v. Scholz*, 827 F.3d 857, 862 (7th Cir. 2017)). The challenged ballot-access laws do not severely burden Plaintiffs' rights to freely associate and equal protection and are within constitutional bounds. This Court should affirm the correct decision of the district court.

A. Under the *Anderson-Burdick* framework, the challenged ballot access provisions are constitutional.

Indiana's 2% voter signature requirement and the procedures for collecting and certifying those signatures are constitutional because they do not impose a severe burden and are justified by the State's legitimate regulatory interests. Ballot access challenges to the First and Fourteenth Amendment are analyzed under the framework set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Tripp*, 872 F.3d at 863–64. Voters and candidates both enjoy associational rights under the First and Fourteenth Amendments. *Anderson*, 460 U.S. at 787–89. But unlike the right to vote, the right to be a candidate is not a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972); *see also Claussen v. Pence*, 826 F.3d 381, 385 (7th Cir. 2016). The U.S. Constitution provides that States may prescribe the "Times, Places and Manner of holding Elections," and "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structing elections." *Burdick*, 504 U.S. at 433.

When considering the constitutionality of a State's ballot access statutes under the *Anderson-Burdick* standard, the Court weighs "'the character and magnitude of the asserted injury to the rights protected by First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at

789). The Court will apply a heightened standard—requiring a narrowly tailored regulation advancing a compelling state interest—only when the regulation subjects the rights of voters and candidates to severe restrictions. *Id.* at 434 (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Otherwise, when the regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon those rights, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

Based on this Court's precedent and that of the Supreme Court, Indiana's ballot-access laws are within constitutional bounds. They do not impose a severe burden on minor party or independent candidates and the State's legitimate interest are sufficient to justify its minor burdens under *Anderson-Burdick*. But even if the Court determined that the burdens imposed on these candidates is severe, the regulations are narrowly tailed to the State's important interests.

1. **The more lenient level of *Anderson-Burdick* scrutiny applies here.**

The challenged ballot access statutes do not impose a severe burden, so they are reviewed under the more lenient level of *Anderson-Burdick* scrutiny. While ballot access laws can "place burdens on … the rights of individuals to associate for the advancement of political beliefs …[,]" restrictions on access to the general election ballot do not necessarily impose severe restrictions triggering strict scrutiny. *Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013) (quoting *William v. Rhoades*, 393 U.S. 23, 30 (1968)). For "the mere fact that a State's system 'creates barriers … tending to limit the field of candidates from which voters might choose … does not itself compel close scrutiny.'" *Burdick*, 504 U.S. at 433 (quoting *Bullock*,

405 U.S. at 143). Applying strict scrutiny to all ballot-access regulations "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. at 433.

The Supreme Court and this Court have consistently applied the lower level of scrutiny to ballot access restrictions similar to and even more onerous than Indiana's. *See e.g., Jenness*, 403 U.S. at 438–442 (upholding Georgia's 5% petitioning requirement under a lower level of scrutiny); *Tripp*, 872 F.3d at 866 (upholding Illinois' 5% petitioning requirement under *Anderson-Burdick* lower-level scrutiny); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997) (upholding Illinois' 5% petitioning requirement under *Anderson-Burdick* lower-level scrutiny); *Hall v. Simcox*, 766 F.2d 1171, 1173, 1175–77 (1985) (upholding Indiana's 2% petitioning requirement under *Anderson's* lower-level scrutiny). When a ballot-access statute imposes a reasonable and nondiscriminatory restriction, like the ones challenged here, the State's legitimate regulatory interest is generally sufficient to justify such restriction. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788.

Further, in reviewing the same challenged 2% petitioning requirement at issue here, this Court applied the lower level of scrutiny because the requirement was not burdensome. In *Hall*, the Communist Party and some of its candidates challenged Indiana's 2% petitioning requirement as violating their rights under the First Amendment. 766 F.2d at 1172. The Communist Party petitioned for the presidential ballot in Indiana in 1984 but fell short of the 35,000-signature requirement and was "completely excluded from the ballot" since Indiana at that

time did not permit write-in candidates. *Id*. The Court upheld the regulation because the 2% requirement was within the bounds set by the Supreme Court even despite Indiana's prohibition (at that time) on write-in candidates. *Id*. at 1174–77. The Court weighed the burdens imposed by the regulations along with the benefits. *Id*. at 1175–76. It recognized that Indiana had an interest in preventing voter confusion. *Id*. at 1175. Then the Court reasoned that "[t]hirty-five thousand signatures in a state of millions of registered voters are not a lot to get; and a party that cannot get that many signatures is not likely to make much of an impression on the electorate even if it gets on the ballot." *Id*. at 1176. The Court came to this conclusion despite having recognized that "it costs money to circulate petitions; the more signatures are required, the higher the cost is; and minor parties usually are strapped for funds." *Id*. at 1174.

The challenges restrictions here protect Indiana's asserted interests and impose only reasonable and nondiscriminatory burdens so this Court should apply the same lenient standard of scrutiny that it did then.

a. The restrictions are reasonable and impose only a minor burden.

The challenged restrictions impose only a minor burden on Plaintiffs' rights. In Indiana, independent and minor party candidates without automatic ballot access are free to associate and to organize campaigns around their own ideas and beliefs. *See Jenness*, 403 U.S. at 438 (upholding Georgia's 5% petitioning requirement because "independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak,

to write, and to organize campaigns for any school of through they wish"). Candidates that establish sufficient support for their ideas and candidacy can freely access the ballot, and even those with no showing of support can run as write-in candidates. Plaintiffs argues that the following aspects of Indiana's ballot access provisions are burdensome individually and collectively: (1) the percentage and number of signatures required; (2) the filing deadline; (3) in-person collection of signatures and petitions must be separate by voter's county of residence and submitted to the different county election offices; and (4) automatic ballot access is based on vote totals for the Secretary of State election (Appellant's Br. 14–19). Despite what Plaintiffs argue, these restrictions do not amount to a severe burden, especially when compared to other burdens that this Court and the Supreme Court have found constitutionally permissible.

i. The 2% signature requirement is not a severe burden.

The number of signatures Indiana requires is not a severe burden. For access via voter petition, Indiana requires candidates to collect signatures equal to at least 2% of the vote in the last Secretary of State election, I.C. § 3-8-6-3, which, based on the 2022 election, is 36,944 signatures for the 2024 election (R.64-1 at 5 ¶22). This 2% requirement is less than half of the 5% that was found constitutionally permissible by this Court in *Libertarian Party v. Rednour,* 108 F.3d at 775–76*,* and *Tripp*, 872 F.3d at 866, and the Supreme Court in *Jenness,* 403 U.S. at 442. And Indiana's 2% is far less than the 10% and 15% found unconstitutional in *Lee,* 872 F.3d at 772, and *Williams,* 393 U.S. at 34. While percentage is more easily

comparable because some cases involve races that are not statewide or federal, *see Lee*, 463 F.3d at 766–67, Indiana's requirements are not burdensome based on the number alone. According to Plaintiffs' expert, *Jenness's* 5%, which was found constitutional, amounted to approximately 83,000 signatures for a presidential candidate in 1968 and 98,000 for one in 1972 (R.60-16 at 22).[4] *Jenness* is particularly instructive here.

In *Jenness*, Georgia required candidates whose party did not have at least 20% of the vote in the last gubernatorial or presidential election to petition for ballot access by obtaining "at least 5% of the number of registered voters at the last general election for the office in question." 403 U.S. at 432–33, 442. A candidate had 180 days to circulate the petition and was required to file it by the second Wednesday in June. *Id*. at 433–34. Though this case was decided before the *Anderson-Burdick* test was established, the Supreme Court did not apply strict scrutiny, but an analysis comparable to the lesser level of scrutiny under *Anderson-Burdick*. *Id*. at 438–42. The Court ultimately found that Georgia's ballot restrictions were constitutionally permissible and justified by the State's interest in ensuing that candidates show sufficient support to appear on the ballot. *Id*. at 441–42.

Similarly, this Court has already addressed Indiana's change from 0.5% to 2% and found the requirement constitutional under the particular facts in *Hall*. At

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[4] Even in *Storer*, which required candidates in California to collect 325,000 signatures, the Supreme Court remanded for a determination as to whether the available pool of voters was too limited by the disqualification of individuals that voted in the primary election as to impose too great a burden on independent candidates. 415 U.S. 724, 740–41.

the time that this Court addressed Indiana's petitioning requirement in *Hall*, the signature requirement for statewide and presidential candidates was just a little lower than that at 35,000. 766 F.2d at 1174. Still, this Court acknowledged that the 2% requirement "is much lower [than other states], and is, as we have stressed, applied to votes in an off-year election for a relatively minor post, that of the secretary of state, and hence yields only a modest number of required signatures." *Hall*, 766 F.2d at 1175. And this Court applied the lower level of scrutiny in *Rednour* and *Tripp*, where it analyzed Illinois's 5% requirement. *Tripp*, 872 F.3d at 866; *Rednour*, 108 F.3d at 775. Compared with well-established precedent, Indiana's 2% requirement is properly analyzed under the more lenient *Anderson-Burdick* standard and is constitutional.

What is more, Indiana's petitioning requirement is not overly burdensome because it does not impose "suffocating" restrictions on the person signing the petition. Unlike in many states, the signer is still free to participate in a primary election, voters who previously voted in a primary election are not disqualified from signing the petition, and the petition does not have to be notarized. *See Jenness.*, 403 U.S. at 438–39 (recognizing Georgia imposed "no suffocating restrictions" because a voter may sign multiple petitions, still participate in the primary election, and does not have to certify he intends to vote for the candidate). While a voter has to represent a "desire" to be able to vote for the candidate, Indiana does not prohibit the voter from signing more than one petition because there is still no requirement that the voter must vote for the candidate should his or her petition drive be

successful.[5] An undecided voter could still in good faith sign more than one petition in the hopes of having at least one of the prospective candidates that he or she desired to vote for appear on the general election ballot. Indiana's lack of requirements for those eligible to sign petitions opens up the pool of people that can sign the petition therefore making the 2% requirement even less burdensome.

ii. The June 30 deadline is not a severe burden.

The June 30 filing deadline is not a severe burden. Candidates can begin submitting petitions for certification 172 days before the June 30 deadline. I.C. §§ 3-8-6-10(b), 3-8-2-4(a). This means that at the very least, a candidate has nearly six months to collect signatures and complete his or her petition drive. For the 2024 election, candidates have at least the 172 days between the January 10 and the June 30 filing deadline—and even more considering the Election Division issued the petition in 2023 well in advance of the January 10 date. Six months—and likely longer—to obtain approximately 37,000 signatures for a statewide candidate or presidential candidate is not overly burdensome. *See Jenness*, 403 U.S. at 433–34 (upholding Georgia's requirement that candidates obtain signatures of 5% of those eligible to vote within 180 days); *Storer,* 415 U.S. at 740 (suggesting that "[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden"); *American Party of Texas*, 415 U.S. at 786 (recognizing that 55 days to circulate petitions to obtain approximately 22,000 signatures (1%) was not

[5] *See* Indiana petition of nomination for federal, state, state legislative, or certain local offices (CAN-19), available at https://www.in.gov/sos/elections/election-administrators-portal/election-forms/.

unduly burdensome). Specifically, in *Jenness*, the Court recognized that Georgia did not impose "an unreasonably early filing deadline for candidates not endorsed by established parties." 403 U.S. at 438. The filing deadline in that case was the second Wednesday in June, which is two weeks earlier than Indiana's June 30 deadline. *Id.* at 433–34. Indiana's June 30 filing deadline thus does not prove overly burdensome even considering it the other requirements.

iii. The requirements that the petitions be hand-signed, sorted by county, and delivered to each county for certification are not severely burdensome.

The requirements that the signatures be collected in person, sorted by county of residence, and submitted to the different 92 county election offices—also taking into account the 2% requirement and filing deadline—is not overly burdensome. Indiana requires that the signatures be obtained in person and that they be sorted by county of voter registration. I.C. § 3-8-6-6. Indiana also requires that the signatures then be submitted to the corresponding county for certification. I.C. § 3-8-6-10(a). This provision does not require a prospective candidate so submit a petition to all 92 counties. It requires only that the candidate submit the petitions for certification to the counties where the voters who signed the petition were registered to vote (using the address information included with their signature). But even if that required a candidate to submit a petition to all 92 counties in Indiana, that is not overly burdensome.

In *Tripp*, this Court acknowledged that states requiring an "extra step" in the petitioning process does not overly burden a candidate's access to the ballot. 872

F.3d at 869. In that case, Illinois required candidates to obtain signatures of 5% of the votes in the last election for the office they were seeking and that the signatures be notarized. 872 F.3d at 860. The plaintiffs argued that requiring signatures to be notarized created an "extra step," that required "additional time and effort" leading to some refusing to circulate petitions because of it. *Id.* at 867. The Court held that just because the notarization required imposed "some logistical burdens" did not make it a severe burden. *Id.* at 869.

The same is true here. The requirements that the petitions be hand-signed, divided by county of voter registration, and submitted to the respective county are not more burdensome than requiring signatures be notarized. A petition circulator would just have to keep separate petitions for each county in which or she obtained the hand-signed signatures or submit the petition to more than one county for certification. Presumably a petition circulator would obtain many of the signatures in one geographical area first and then move on to the next so they would already be sorted by county of voter registration. But even if the petition circulator were at a large political event or a place such as a college campus, it is not too onerous to have separate petitions separated by county and have the voter sign the petition under the county in which he or she is registered. Or, again, they can have more than one county on a petition and just have the petition submitted to more than one county for certification. And as to filing the petitions in all 92 counties, even if a candidate somehow obtained signatures from every county and had to file them in all 92 counties, that requirement is not burdensome. Given Indiana's size, it is

feasible for one campaign worker to file petitions at multiple county offices in one day. These minor logistical burdens are not severe.

iv. Using the Secretary of State election as a measure for voter support for both automatic ballot access and petitioning for ballot access is not a severe burden.

The provisions measuring voter support by the Secretary of State election is also not overly burdensome. Indiana uses the Secretary of State election as a way to measure support for a party to maintain and obtain automatic ballot access, I.C. 3-8-4-1, and to petition for ballot access as an independent candidate or minor party candidate, I.C. § 3-8-6-2. By using the Secretary of State's office as a measure for support instead of an office such as the governor, the total number of signatures required is typically lower because the election for Secretary of State is held during a mid-term election. In *Hall*, this Court recognized as much: "The percentage here is much lower, and is, as we have stressed, applied to votes in an off-year election for a relatively minor post, that of the secretary of state, and hence yields only a modest number of required signatures." 766 F.2d at 1175. If, for example, Indiana used the number of votes for governor in order for minor parties to maintain automatic ballot access, the number of signatures and votes required would be higher. The Secretary of State's election is during the midterms when voter turnout is usually lower (R.64-1 at 5 ¶27).

The General Assembly may reasonably choose a statewide election not on a presidential election year to measure whether a party has enough continued support in the state to give them automatic ballot access. By using the Secretary of

State election, this ensures that parties have a core group of support as opposed to those that only vote during a presidential election year (*see* R.51-5 at 13). If an individual is voting in an off-election year, they probably have an underlying interest in the party, not just the specific candidate for president. In addition, by using the Secretary of State election during a non-presidential election year, this helps minor parties focus resources on the presidential election race during those years. And presumably, the support a party gains for the Secretary of State candidate will trickle down to other candidates of that party running during that election cycle. So just because a party puts its resources in ensuring it has more than 2% of the vote for Secretary of State does not mean that other party candidates during that election are not reaping the benefits.

Further, using the Secretary of State election as a measure for support is not overly burdensome for new parties or independent candidates (*contra* Appellant's Br. 19). While new parties cannot obtain automatic ballot access during a presidential election year, it is not overly burdensome for them to re-petition during a year the Secretary of State is up for reelection and then maintain the 2% vote thereafter. The same is true for independent candidates. While the automatic ballot access provision does not apply to independent candidates, they can still petition for ballot access with 2% of the vote from the last Secretary of State election and can also appear on the ballot as a write-in candidate. The challenges provisions do not overly burden their rights to associate.

v. Plaintiffs' historical evidence does not show that the challenged provisions are severely burdensome.

Plaintiffs argue that the ballot-access regulations as a whole are unduly restrictive because it is difficult and expensive to successfully complete a hand-signed petitioning campaign in Indiana and imposes a burden to maintain ballot access once qualified (*see* Appellant's Br. 16–19). They designated evidence to show historically how difficult it has been based on the expense and time it takes to complete a successful petition drive. But as the Supreme Court recognized in *American Party of Texas*, "[h]ardwork and sacrifice by dedicated volunteers are the lifeblood of any political organization." 415 U.S. at 787. The fact that independent candidates and minor party candidates have to put in effort and expend their financial resources on petitioning for ballot access does not mean the restrictions are overly onerous. *See Id*.

In fact, the evidence Plaintiffs designated shows that the Libertarian Party has successfully petitioned for ballot access since the petitioning requirement was increased to 2% and that it has maintained ballot access since 1994 (R.60-7 at 2–3 ¶¶10, 11). In 2022, the Libertarian Party received more than double the vote necessary to maintain ballot access (R.60-7 at 6 ¶27). In addition, in 1992, 1994, and 2000, independent and minority party presidential candidates obtained ballot access through successful petition drives (R.60-14 at 1–2 ¶¶5, 6; R.60-3 at 4 ¶15). While Plaintiffs presented affidavits from other parties that they did not attempt petition drives in Indiana because they were too burdensome, that does not show that they would not have been successful had they tried (R.60-5 at 2 ¶7; R.60-6 at 5

¶16). Indiana's restrictions require only that those candidates and parties that have enough support are able to obtain ballot access by petitioning and that those other candidates who are unable to obtain enough support to have their names on the ballot may have to use the write-in method. The challenged ballot-access laws are thus reasonable where they aim to ensure voter support before placing a candidate's name on the ballot. *See Murno*, 479 U.S. at 196, 198.; *American Party of Texas*, 415 U.S. at 782, 789; *Jenness*, 403 U.S. at 442.

This Court's opinion in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), is not instructive to whether the Court should apply the more lenient level of scrutiny because there are key differences (*contra* Appellant's Br. 14–16). Plaintiffs rely on *Lee's* acknowledgement that historical evidence can show the burden imposed is severe. (Appellant's Br. 15). But *Lee* struck down, under *Anderson-Burdick's* strict scrutiny standard, an Illinois requirement that independent candidates petition with 10% of those that voted in the last election for that office at least 323 days before the general election. *Id.* at 772. The Court relied on Illinois having "the most demanding signature collection requirement *and* by far the earliest filing deadline of all 50 states." *Id.* at 769. It also noted that while three independent candidates initially qualified for ballot access in the first year since the increase, no independent candidate had done so in the 25 years since. *Id.* But here, to start, Indiana's restrictions are not nearly as demanding as Illinois' in *Lee*. The petitioning requirement is only a fifth of Illinois' and the petition is due only approximately four months before the general election—not 323 days. These are

significant distinctions that are important and recognized in the Supreme Court's opinion in *Jenness*, which this Court in *Lee* distinguished itself from. *See Lee*, 463 F.3d at 771. In addition, as already shown, Indiana's ballot access history is not as devoid of minor party candidates and independent candidates obtaining ballot access. This evidence shows that with enough support, minor party and independent candidates can successfully petition to obtain and maintain ballot access in Indiana.

vi. Indiana's allowance of write-in voting lessens the burden of the challenged ballot-access provisions.

What is more, a candidate's ability to participate in the electoral process through write-in voting is further evidence that the challenged ballot-access provisions are not overly burdensome. The Court is required to look at Indiana's ballot-access regulations as a whole. *See Burdick*, 504 U.S. at 435–36 (considering not only the challenged prohibition on write-in candidates but Hawaii's other means for parties to get on the ballot). Indiana allows for write-in candidates. I.C. §§ 3-8-2-2.5, 3-8-7-30. The addition of write-in candidates means the burden is less than it was when the Court upheld it the last time. *See Hall,* 766 F.2d at 1172–73 (acknowledging that Indiana at that time did not allow write-in voting). Indiana's write-in option lessens the burden imposed by the petitioning requirement because it provides another avenue for candidates and parties to be involved in the political process instead of foreclosing the political process to them entirely. *See Jenness*, 403 U.S. at 438 (recognizing that the availability of write-in voting in Georgia lessened the burden of Georgia's 5% petitioning requirement). Because write-in voting is

available to all qualified independent and minor party candidates, Indiana's regulations as a whole do not place an unreasonable burden on those candidates and their party's ability to freely associate.

b. The provisions are nondiscriminatory.

The challenged provisions are also nondiscriminatory. Ballot access regulations are not discriminatory just because they recognize different methods for obtaining ballot access for major parties as compared to minor parties and independent candidates. *See* I.C. §§ 3-10-1-2, 3-10-2-15, 3-8-6-3. Indeed, different procedures for smaller parties to select their candidates compared to larger parties is not evidence of discrimination. *See American Party of Texas*, 415 U.S. at 781–82 (recognizing an appellant's burden to show discrimination "is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election"). In *Jenness*, the Supreme Court recognized that "the grossest discrimination can lie in treating things that were different as though they were exactly alike." 403 U.S. at 442. There are differences between the needs of major political parties who have historically established significant support from smaller political organizations. *Id*. The Supreme Court also recognized that the premise that it is in inherently more burdensome to petition for signatures than to win votes in a major party primary "cannot be uncritically accepted." *Id*. at 440.

Here, Indiana's requirement for minor party candidates and independent candidates is no more burdensome than the requirement for parties who select their

candidates by primary election. Indeed, under Indiana's primary election system, candidates have to spend money and resources to get enough votes to win the primary election and to make it to the general election. If the primary contains only two parties, that means only two candidates make it to the general ballot. Whereas, when petitioning for ballot access, the party petitioning is guaranteed to be on the general election ballot if he or she is able to comply with the petitioning requirement. The fact that Indiana—like most other states—has a different method for major parties and minority parties/independent candidates to obtain ballot access does not mean the regulations are discriminatory. *See American Party of Texas*, 415 U.S. at 781–82; *Jenness,* 403 U.S. at 442. Each require a showing of support before being placed on the general ballot despite the different methods to get there.

Further, while Indiana taxpayers fund primary elections for its major parties, and minor parties and independent candidates must pay the cost of their petition drives, that does not show the restrictions are discriminatory (*contra* Appellant's Br. 19–21). It is true that the undisputed evidence shows that Indiana taxpayers pay for primary elections to select major parties' candidates (R.60-18). But there is no evidence that Indiana funds those candidates' campaigns to work toward getting his or her name on the general election ballot. In addition, Indiana's statutes do not discriminate which parties' primary elections it will fund. Selecting a candidate based on a primary election is based on the percentage of the vote the party receives in the election for Secretary of State. I.C. § 3-10-1-2. For instance, if the Green

Party or the Libertarian Party received at least 10% of the vote in the last Secretary of State election, they would be eligible to nominate their candidates through a primary election. The same is true if the Democratic Party or Republican Party were to fall under the 10% support—that party then would no longer qualify for a state-funded primary election. If a party receives that percentage of support, regardless of what party it is, that party is allowed to select candidates by primary election. It is only those parties who have a significant amount of support in Indiana that are eligible to select candidates by a state-funded primary election. That is not evidence of discrimination. *See American Party of Texas*, 415 U.S. at 781–82.

For what it is worth, Plaintiffs raise this argument, but do not engage in an ordinary equal protection argument wherein they establish discrimination between similarly situated persons (or entities) premised on invidious discrimination or lacking a rational basis. Here, Indiana may rationally choose to fund primary elections for parties that meet large enough thresholds of voters but require smaller parties to select their candidates by other means. Indiana's ballot-access provisions are nondiscriminatory because they apply equally to all parties depending on the level of support that party has in Indiana.

c. The State has asserted important interests justifying the challenged provisions.

The State's asserted interests are sufficient to justify the challenged ballot-access provisions. "A reasonable, nondiscriminatory restriction on ballot access will pass muster if it serves an important regulatory interest." *Navarro*, 716 F.3d at 430.

Here, the Secretary asserted that the challenged regulations are necessary for a variety of reasons, including to maintain orderly elections, ensure voter confidence, avoid voter confusion, avoid ballot overcrowding, ensure a party has a modicum of support deserving ballot access, ensure widest-possible base of voter engagement, ensure parties with most support are complying with campaign finance and other election-related statutes, and conserve the limited resources devoted to financing elections (R.64-1 at 3–4 ¶17). Further, as to the June 30 deadline, all 92 counties in Indiana run their own elections so the State and the counties need enough time before the general election to confirm who will appear on the ballot, ensure all information is correct, and to prepare, print, and distribute ballots (R.64-1 at 5 ¶¶23–25).

The State's many important interests are similar or identical to interests that this Court and the Supreme Court have found sufficiently justify placing nonburdensome and nondiscriminatory restrictions on ballot access. *See Jeness*, 403 U.S. at 444 (recognizing that States have an interest in showing that a candidate has a "modicum of support" before placing his name on the ballot to avoid confusion and frustrate the democratic process); *Rednour*, 108 F.3d at 774 ("States have not only an interest, but also a duty to ensure that the electoral process produces order rather than chaos"); *American Party of Texas,* 415 U.S. at 782 (recognizing a state's interest in ensuring "that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support"); *Navarro*, 716 F.3d at 431 (citing a collection of cases recognizing that "ballot access laws

serve the important, interrelated goals of preventing voter confusion, blocking frivolous candidates from the ballot, and otherwise protecting the integrity of elections"). The State's important regulatory interests thus sufficient to justify the challenged regulations.

Former Representative Harper's opinion as to why Indiana's General Assembly amended the petitioning requirement in 1980 does not negate the Secretary's asserted interests (*contra* Appellant's Br. 26). Plaintiffs argue that Former Representative Harper's declaration shows that the 2% signature requirement was not intended to serve a legitimate purpose and that it is evidence of "invidious intent." But his declaration shows only one opinion of a former representative as to why the legislation was introduced and passed. That is not enough to show invidious intent or to negate the State's asserted interests. *See A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 110 (Ind. 1996) (recognizing that when interpreting an Indiana statute courts "do not impute the opinions of one legislator, even a bill's sponsor, to the entire legislature unless those views find statutory expression"). And Indiana does not have published legislative history. *Jackson v. State*, 50 N.E.3d 767, 772 (Ind. 2016). Former Representative Harper's opinion is not relevant to the State's current regulatory interests in limiting access to the ballot.

What is more, as recognized by this Court in *Hall*, at the time that the Indiana General Assembly raised the petitioning requirement to 2%, it was facing a crowded presidential ballot. *See Hall*, 766 F.2d at 1175 (recognizing that while the

2% requirement was passed in March well before the November election, "[t]he legislators could well have foreseen a crowded ballot"). It was therefore not impossible for the General Assembly to have passed the 2% requirement, in part, to address potential ballot-crowding issues that it foresaw with the 1980 presidential race.

Well-established precedent by this Court and the Supreme Court have applied the more lenient *Anderson-Burdick* scrutiny where the restriction on the plaintiff's rights was minor. Just as in those cases, the more lenient level of scrutiny should apply here because the challenged restrictions' burden on Plaintiffs' access to the ballot is minor. These restrictions are reasonable and nondiscriminatory and are justified by the State's legitimate interest in regulating elections and limiting ballot access to those candidates who have shown strong support. The challenged regulations do not violate Plaintiffs' rights under the First and Fourteenth Amendments.

2. Even if strict scrutiny applies, the challenged statutes are narrowly tailored to the State's compelling interests.

Even if the Court determines that the restriction here is severe—it is not—summary judgment for the Secretary was correct because the regulations are narrowly tailored to advance the State's compelling interests. State ballot-access restriction that impose a severe burden on First and Fourteenth Amendment rights, must be narrowly tailored to the State's legitimate interest. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788. A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the

regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The regulation does not need to be the least restrictive way of furthering the government's goal—it need not be a perfect fit—but it cannot substantially burden the asserted right more than necessary. *Id.* at 800; *see also Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000) ("The State need not use the least restrictive means available, as long as it's present method does not burden more speech than is necessary to serve its compelling interests").

The challenged ballot-access regulations do not burden Plaintiffs' access to the ballot more than is necessary to further the State's compelling interest. The State has well-established interests in maintaining orderly elections, ensuring voter confidence, avoiding voter confusion, avoiding ballot overcrowding, ensuring a party has a modicum of support deserving ballot access, ensuring widest-possible base of voter engagement, ensuring parties with most support comply with campaign finance and other election-related statutes, and conserving the limited resources devoted to financing elections (R.64-1 at 3–4 ¶17). *Munro*, 479 U.S. at 194–95; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995); *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). These accepted State interests are furthered by Indiana's ballot access requirements without substantially burdening Plaintiffs' rights more than necessary.

All of Indiana's challenged ballot access provisions are narrowly tailored to further the State's well-accepted, compelling interests, including ensuring candidates appearing on the ballot have a modicum of support, preventing ballot

overcrowding and voter confusion, managing State election resources, and maintaining orderly elections. All of Plaintiffs claims to the contrary amount to a challenge to the State's accepted interests or assertions that the State must use the least restrictive means. Plaintiffs claim that Indiana's ballot access laws are not narrowly tailored because the State should be able to accommodate eight or more presidential candidates and could limit the number to less than eight with the 0.5% provision in place in 1980 (Appellants' Br. 23–24). Also, they assert that in the past, Indiana has operated with a later deadline than the current June 30 filing deadline and that there are alternative procedures for candidates to demonstrate a modicum of support (Appellants' Br. 24–25). Lastly, Plaintiffs argue that Indiana's ballots have never been overcrowded and that the requirement for 2% support in the Secretary of State election for automatic access to the ballot is not necessary to protect Indiana's interest (Appellants' Br. 25). But the fact that there are less restrictive means available does not mean that Indiana's ballot-access statues as they stand are not narrowly tailored to its legitimate interests. *Ward*, 491 U.S. at 799; *Krislov*, 226 F.3d at 863. Plaintiffs do not get to dictate what Indiana's election laws should be. That is left to the General Assembly to decide so long as the laws are constitutional—which they are. And as the Court mentioned in *Hall*, Indiana should not be punished now for previously having a lower petitioning requirement where its current requirement is reasonable and not overly burdensome. 766 F.2d at 1175.

Indiana's 2% signature requirement is narrowly tailored to the State's asserted interests of avoiding ballot overcrowding to reduce ballot confusion and ensure voter confidence. In *Hall*, this Court recognized that voter confusion should not be dismissed as trivial and that when some voters go into a voting booth, they become confused and "the longer the ballot, the greater confusion is likely to be." 766 F.2d at 1175. States are entitled to require a showing of a modicum support before placing a candidate's name on the general election ballot. *See Jenness*, 304 U.S. at 442; *American Party of Texas*, 415 U.S. at 782, 789. The 2% petitioning requirement ensures that only those candidates who actually have support from Indiana voters appear on the ballot. The 2% petitioning requirement limits the number of candidates appearing on the election ballot to only those candidates who truly have support. This keeps the ballots shorter and keeps voter confusion to a minimum. Plaintiffs argue that the State's interest is still served even if there are eight or more presidential candidates on the ballot (Appellants' Br. 23–24). And this Court in *Hall* acknowledged under Indiana's lower percentage in 1980, the general election ballot was crowded. 766 F.2d at 1175.

Plaintiffs' argument also ignores that ballots contain local and state elections, which the ballot access provision also limit. As *Hall* illustrates, the possibility of an overcrowded, confusing ballot is real, and Indiana's 2% requirement is narrowly tailored to address this legitimate state interest. This 2% requirement is in the same vein as major party primaries, which ensure that only the two candidates with the most support from the major parties appear on the general election ballot.

Ultimately, the point of the ballot is to elect candidates, and if a candidate does not have enough support to obtain signatures of 2% of the vote in the last Secretary of State election—a burden this Court deemed not very substantial—then it is "not likely to much of an impression on the electorate even if it gets on the ballot." *Hall,* 766 F.2d at 1176.

What is more, requiring independent and minor party candidates to obtain ballot access by securing signatures from 2% of the voters rather than through primary elections also protects the State's limited election resources. If the State were required to fund a primary election for every candidate that wished to have his or her name on the general ballot—regardless of a showing of support for that candidate or party—it would result in an untenable use of the State's resources. Indiana's 2% petitioning requirement is narrowly tailored to the State's legitimate interests.

Additionally, the requirement that a party secure 2% of the vote in the Secretary of State election to automatically appear on the ballot in the following elections preserves the State's resources and ensures that candidates show they have continued voter support before the State guarantees ongoing automatic ballot access. Plaintiffs cite *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984), to suggest that the State cannot put in place this requirement to limit automatic access to the general election ballot (Appellants' Br. 25). But *Goldman-Frankie* is clearly distinguishable. There, Michigan law completely barred access to the general election ballot for state board of education to an aspiring independent

candidate. *Goldman-Frankie*, 727 F.2d at 604–05. The Sixth Circuit struck down the complete ban on independent candidates access to the ballot—aside from use of the courts—as categorically unconstitutional. *Id*. at 607. The situation here is obviously different. Independent and minor party candidates have open access to the ballot through the petitioning requirement or as a write-in candidate. And Indiana's requirement that a party secure sufficient voter support in the general election for Secretary of State in order to automatically appear on the ballot in the following elections is narrowly tailored to promote the State's clear interest in preserving its resources and ensuring candidates have a modicum of support.

The requirement that petitions be submitted to the county where the petitioner is registered to vote is also narrowly tailored to the State's compelling interest. All 92 counties in Indiana are responsible for managing their voter registration and organizing their own ballots (R.64-1 at 5 ¶23). And county election officials are more familiar with the community and the information presented on the petition (R.51-5 at 10). In addition, the counties have more resources to certify the signatures than the State's Election Division (R.51-5 at 10). Plaintiffs claim the Secretary conceded that there was no important interest for the 92-county requirement (*see* Appellant's Br. 27–28), that is not accurate. In a Rule 30(b)(6) deposition, a representative for the Secretary affirmed these legitimate state interests of keeping the certification of whether signatories are valid, registered voters where the information and resources exist (R.51-5 at 10). This requirement

that candidates submit voter signatures to their county of residence for verification is narrowly tailored to the State's interests.

And the June 30 deadline is narrowly tailored to the State's legitimate interest in ensuring ballots will be prepared in time for election day (R.64-1 at 5 ¶25). After prospective candidates submit their petitions, county voter registration officials will process the petitions and certify the number of valid signatures of voters from their county. Candidates then have until noon on July 15 to submit their county certified petitions to the state or, if for local office, to the county election board. I.C. § 3-8-6-10(c). For federal, statewide, state legislative, and judicial offices, the Indiana Election Division will count the number of certified signatures and send notice to the Secretary of State if the candidate met the petition requirements. The Secretary will then certify the candidate to appear on the general election ballot if the candidate filed the requisite number of signatures, or the Secretary of State will deny the certification of the candidate to appear on the ballot if not enough certified petition signatures are filed and notify the candidate of that denial. I.C. § 3-8-6-12(e), (h). For local office, the county circuit court clerk will confirm if the candidate met the threshold requirements and either certify the candidate or deny the candidate certification if he did not meet the requirements. I.C. § 3-8-6-10(d), (h). Thereafter, county and state election officials need time to organize for the election, confirm the candidates appearing on the ballot, ensure information is correct, and prepare, print, and distribute ballots for absentee voting and election day (R.64-1 at 5 ¶25). This is a significant undertaking given the

number of counties and many unique ballot styles throughout the State (R.64-1 at 5 ¶24). Providing these officials four months to complete these tasks is not an unreasonable amount of time especially since prospective candidates have at least six months—if not almost a full year—to complete their petition drives prior to the June 30 deadline. The deadline is narrowly tailored to the State's important interests because it gives the State and county election officials enough time to prepare and coordinate the general election ballots while still allowing prospective candidates significant time to petition for ballot access.

It is beyond dispute that this Court and the Supreme Court have recognized the state has compelling interests in regulating elections. Each of Plaintiffs arguments either disregard the State's well-settled interests or a suggestion that the State must use the least restrictive means. But the existence of less restrictive means does not mean that Indiana's ballot-access statues are not narrowly tailored to its legitimate interests. *Ward*, 491 U.S. at 799; *Krislov*, 226 F.3d at 863. Strict scrutiny should not apply here. But even if it did, Indiana's ballot access laws are narrowly tailored to promote the State's compelling interests.

B. The Secretary met his burden on summary judgment.

The undisputed facts show that the Secretary is entitled to judgment as a matter of law. To prevail as a matter of law here, the State must only put forward interests that justify any burden placed on Plaintiffs' asserted rights. The Secretary has done so. Plaintiffs incorrectly argue that the Secretary did not meet his burden on summary judgment in providing a statement of material facts, in designating admissible evidence, and in challenging their evidence to dispute an element of

their claim (*see* Appellant's Br. 33–42). Accepting the facts designated by Plaintiffs, Indiana's ballot access provisions are constitutional because the burden on Plaintiffs protected rights is justified as a reasonable and nondiscriminatory burden when balanced with the State's asserted interests. The district court properly granted summary judgment in favor of the Secretary and Plaintiffs' evidentiary argument are not grounds for reversal.

1. **The Secretary's adoption of the Plaintiffs' statement of material facts was sufficient and is not grounds for reversal.**

The Secretary's statement of material facts complies with the Local Rules (*contra* Appellant's Br. 35). Southern District of Indiana Local Rule 56-1(a) requires that the brief of a party seeking summary judgment "include a section labeled 'Statement of Material Fact Not in Dispute' containing the facts: (1) that are potentially determinative of the motion; and (2) as to which the movant contents there is no genuine issue." The Rule does not provide any guidance for cross-motions for summary judgment. *See* S.D. Ind. L.R. 56-1. Here, the Secretary's brief contains a section accepting and incorporated Plaintiffs' statement of material facts (R.65 at 8). This does not violate the local rules. And even if it did, it was within the district court's discretion to overlook a violation of local rule. *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013). The district court accepted and granted the Secretary's cross-motion for summary judgment (R.70).

Plaintiffs' brief thoroughly sets out the facts (*see* R.61 at 4–13). The point of summary judgment is that the material facts are not in dispute and that the case can be decided as a matter of law. *Gill*, 962 F.3d at 363; *see also* Fed. R. Civ. P.

56(a). Based on the facts set of by Plaintiffs and accepted and incorporated by the Secretary, the district court correctly found that the Secretary is entitled to judgment as a matter of law (R.70 at 1-9). The district court did not abuse its discretion by deciding the case as a matter of law based on the undisputed material facts. The Secretary's acceptance of the Plaintiffs' statement of facts did not violate the district court's local rules and is not grounds for reversal.

2. Mr. Bonnet's affidavit was admissible, but regardless, the Secretary effectively asserted the State's interests.

The State properly asserted its interests for consideration under the *Anderson-Burdick* test, which balances the injury to the protected rights against the "interests put forward by the State as justification." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Here, the State asserted its interest in response to Plaintiff's interrogatories (R.64-2 at 3–10), in General Counsel for the Secretary of State Jerold Bonnet's affidavit (R.64-1 at 3–4), and in the Secretary's brief in support of summary judgment (R.65 at 14–15).

Plaintiffs argue that Bonnet's affidavit is inadmissible and insufficient to establish the State's asserted rights under the summary judgment standard (Appellant's Br. 35–38). Bonnet's affidavit was admissible. But even if it was not, the State asserted its interests in at least two other ways (*see* R.64-2 at 3–10 and R.65 at 14–15). This Court reviews whether evidence is admissible for an abuse of discretion. *Perez v. Staples Contract & Commercial LLC*, 31 F.4th 560, 568 (7th Cir. 2022). Federal Rules of Civil Procedure 26(a) requires the disclosure of all individuals likely to have discoverable information. If a party fails to comply with

Rule 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Here, Plaintiffs admitted in their summary judgment briefing that the Secretary disclosed that "Representatives from the Secretary of State's office would have discoverable information …" (R.66 at 18 n.2). General Counsel Bonnet submitted his affidavit as a representative from the Secretary of State's office to explain Indiana's voting laws and the State's interests in those procedures (*see* R.64-1).

But even if this is not enough to technically comply with Rule 26(a), the failure to disclose Bonnet as a witness is harmless, so the evidence was still admissible. When determining whether failing to disclose a witness is harmless, courts look to "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar, Inc*., 324 F.3d 851, 857 (7th Cir. 2003). Outside of setting forth Indian's voting procedures, most of Bonnet's affidavit is used in this case to showcase the State's interest in the challenged voting provisions (R.64-1 at 3–5). These are state interests that the Secretary had previously disclosed to Plaintiffs in their response to Plaintiff's interrogatories (*see* R.64-2 at 3–10). So, while Plaintiffs may not have had a specific name for the Secretary's office representative, they were aware of the State's asserted interests, for which Bonnet's affidavit was primarily used for in the Secretary's summary

judgment motion and the district court's order (R.65; R.70). Because Plaintiff were already aware of the State's asserted interests there is no evidence of bad faith, and any error in not specifically disclosing Bonnet as the Secretary's representative is harmless.

Further, as to Plaintiffs' argument about Bonnet's inability to attest to the General Assembly's reason for increasing the signature requirement in 1980, Bonnet's statement is not material to whether the State currently has legitimate regulatory interest for the challenged procedures. Nor is it a statement the district court relied on (*see* R.70). So, any error in whether Bonnet had personal knowledge of the reasons for the 1980 amendment is harmless.

Regardless, even if the affidavit was not admissible, the State is required only to *assert* a legitimate interest—not present evidence to support it. *See Anderson*, 460 U.S. at 780 (providing that Courts "must then identify and evaluate the interests *asserted* by the State" (emphasis added)). States do not need to marshal actual evidence of voter confusion to assert a legitimate interest. *Munro*, 479 U.S. at 194–95; *Navarro*, 716 F.3d at 432. Such a requirement would lead to States having to sustain damage to their political systems before the legislature could pass a corrective measure. *Navarro*, 716 F.3d at 432. It is therefore enough without Bonnet's affidavit that the State asserted its legitimate interests through its responses to interrogatories and subsequent briefing.

3. On summary judgment, the Secretary was not required to designate evidence to dispute Plaintiffs' evidence.

The Secretary was not required to negate Plaintiff's evidence regarding the burdens the challenged regulations imposed (*contra* Appellant's Br. 38–41). Plaintiffs suggest that the Secretary was required to designate evidence to contradict their evidence of the burdens imposed by the regulations. But at the summary judgment stage, any contradictory evidence that the challenged provisions did not impose those burdens, would have led to an issue of material fact precluding summary judgment. *See Gill*, 962 F.3d at 363 (providing that summary judgment is appropriate only if there "is no genuine dispute as to any material fact"). The Secretary is not disputing the existence of those burdens, but instead is disputing that they are minor as opposed to severe as Plaintiffs claim. The State has shown that even considering the evidence Plaintiffs designated, i.e., the costs of a successful petition drive, the historical data on independent and minor parties obtaining ballot access, and the other burdens associated with petition drives, the ballot-access provisions are not overly burdensome. In addition, the State asserted legitimate and compelling interests for the challenged regulations. To obtain summary judgment that was all the State was required to show: that, taking Plaintiffs' evidence as true, the challenged regulations were not overly burdensome and the State had legitimate interest justifying the minor burden on Plaintiffs' rights. *See Tripp*, 872 F.3d at 864 (setting out the *Anderson-Burdick* framework). As shown above, the State showed the challenged ballot-access regulations were constitutional and that it was entitled to summary judgment.

C. The district court conducted a fact sensitive *Anderson-Burdick* analysis.

The district court's analysis was particularized and sufficient. The district court considered the specific facts of this case, the Plaintiffs' alleged burdens, and the State's asserted interests and applied the *Anderson-Burdick* framework to find that Indiana's ballot access provisions are constitutionally permissible (R.70 at 8–9). Plaintiffs allege that the district court improperly relied wholly on precedent without performing any case or fact specific analysis, claiming this case is indistinguishable from *Gill* (Appellant's Br. 28–33). In *Gill*, this Court reversed the district court's finding that the challenged Illinois ballot-access restrictions were constitutional. 962 F.3d at 365–67. There, the district court had found that this Court's previous decision in *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017), was "directly on point" and concluded it was "bound by *Tripp*." *Gill*, 962 F.3d at 365. This Court reversed because the district court did not conduct a fact-intensive analysis, the facts in *Tripp* did not "align with Gill's challenge," and *Tripp* reference candidates governed by different provisions of the Illinois Election Code. *Id*. at 366.

Unlike, *Gill*, where the district court relied unquestioningly on *Tripp*, the district court here consider fully considered how the facts this case and how they fit within the *Anderson-Burdick* framework and multiple cases decided by this Court and the U.S. Supreme Court (R.70 at 2–9). The district court began by setting out this Court's and the Supreme Court's ballot-access case law and the *Anderson-Burdick* test (R.70 at 2–6). Then, the district court discussed the issues in this case, including the challenged statutes, the historical evidence showing the burden imposed, and the State's compelling interests (R.70 at 7). But then the district court

found, based on precedent, that the 2% petitioning requirement, in conjunction with the county specific filing requirement and the June 30 deadline, was not burdensome (R.70 at 8–9). The district court recognized that *Hall* evaluated the same 2% requirement and "came to the same conclusion" (R.70 at 8) (citing *Hall*, 766 F.2d at 1175). The court also cited other cases from this Circuit and the Supreme Court showing that higher nominating petition requirements have been upheld (R.70 at 9) (citing *Tripp*, 872 F.3d at 865; *Jenness*, 403 U.S. at 438; *Storer*, 415 U.S. at 738; *Norman*, 502 U.S. at 292; *American Party of Texas*, 415 U.S. at 787). The court also found that the June 30 deadline was within "established bounds" (R.70 at 9) (citing *Jenness*, 403 U.S. at 433–34).

Just because the district court felt compelled by precedent to find Indiana's ballot access provisions constitutional does not mean it did not engage in the required case-specific analysis. Nor is its analysis deficient because it indicated it might agree with Plaintiffs if this was an issue of first impression (R.70 at 8). The district court acknowledged the specific facts of this case and then compared it to well-established cases that have found higher signature requirements and other more significant procedural burdens constitutional (R.70 at 9) (citing *Tripp*, 872 F.3d at 865; *Jenness*, 403 U.S. at 438; *Storer*, 415 U.S. at 738; *Norman*, 502 U.S. at 292; *American Party of Texas*, 415 U.S. at 787). The court's application of precedent to the facts of this case is not the sort of "litmus test" that the Court in *Anderson* was trying to avoid. *See Anderson*, 460 U.S. at 789 (providing that "[c]onstitutional challenges to specific provisions of a State's election laws therefore cannot be

resolved by any 'litmus-paper' test that will separate valid from invalid restrictions"). Moreover, the fact that the district court previously denied the Secretary's motion to dismiss because it was not willing to find the regulations constitutional based solely on this Court's precedent in *Hall* further supports that it weighed the specific facts and assertions of this case on summary judgment (*see* R.35).

Ultimately, even if the district court's application of the *Anderson-Burdick* balancing test was not exhaustive enough, this Court reviews the summary judgment order de novo, and it can affirm on any basis found in the record. *Equal Employment Opportunity Comm'n v. Wal-Mart Stores E., L.P.*, 46 F.4th 587, 593 (7th Cir. 2022). But here, the district court's analysis and application of precedent from multiple cases, though somewhat reluctant, is based on the specific facts and claims of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting summary judgment in favor of the Secretary of State and denying Plaintiffs' motion for summary judgment.

Respectfully submitted,

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FED. R. APP. P. 32(g) WORD COUNT CERTIFICATE

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the Appellee certifies that this brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains approximately 13,704 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word Century Schoolbook typeface in font size 12 for the text and font size 11 for the footnotes. *See* Cir. R. 32(b).

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using CM/ECF system. I further certify that the other participant in this case is a CM/ECF user.

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