No. 19-1783

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT S. JOHNSTON III
and LIBERTARIAN PARTY OF MARYLAND,

Plaintiffs-Appellants,

v.

LINDA LAMONE, in Her Official Capacity
as Administrator of the Maryland State Board of Elections

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland

REPLY BRIEF OF APPELLANTS ROBERT S. JOHNSTON III and LIBERTARIAN PARTY OF MARYLAND

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October 15, 2019

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INTRODUCTION

The briefs in this case present two radically different views of the *Anderson-Burdick* framework—the standard used to adjudicate constitutional challenges to election laws. In our opening brief, we explained that the *Anderson-Burdick* framework is a fact-intensive balancing test that depends on the facts alleged in the complaint or the evidence presented at trial. We explained that the district court erred by ignoring the facts we had alleged regarding the particular benefits and burdens at issue in this case. Instead, the court purported to determine the benefits and burdens "as a matter of law" based on prior cases that had examined signature-collection requirements under different circumstances. The fundamental problem with that approach is that the prior cases were decided based on the evidentiary record created in those cases, which is different than the facts we alleged here.

By contrast, the defendant argues that the *Anderson-Burdick* framework is not fact-intensive and that it was appropriate to weigh the burdens and benefits purely as a matter of law. The defendant does not dispute that this is contrary to the law in numerous other circuits but contends that the law in the Fourth Circuit is different: "Under the law of this Circuit, the district court was not required to conduct a 'fact-intensive inquiry,' either in evaluating the severity of the burden on the plaintiff's rights or in assessing whether the challenged law furthers important state interests." Def. Br. 14. Strangely, the defendant further argues that it was

appropriate for the district court to disregard the allegations regarding "the particular financial burdens" imposed by the statute because only more generalized burdens count in the *Anderson-Burdick* analysis. *Id.* at 33. And it argues that it can win by merely articulating an interest allegedly furthered by the statute—even if the complaint alleges facts showing that the statute furthers no such interest.

As explained below, the defendant's approach to the *Anderson-Burdick* framework is fundamentally wrong. The defendant's approach is contrary to the purpose of the framework, which is to provide a flexible standard that varies based on the specific facts and circumstances of the case. The approach is contrary to the purpose of an as-applied challenge, which is to test the constitutionality of a statute as applied to particular circumstances. And it is contrary to decisions of the Supreme Court, this Court, and numerous other circuits, which demonstrate that the *Anderson-Burdick* analysis depends on the facts alleged or the evidence presented.

The defendant's arguments regarding Count II are equally flawed. The defendant concedes that Count II presents a clear-cut legal issue that does not depend on any future event. Def. Br. 48–49. But the defendant argues that the Court should not answer the question because it "may never arise" and because (it claims) the plaintiffs will not suffer any hardship from a delay. That is incorrect. As explained in more detail below, the validity of the signature-verification

requirement is affecting the plaintiff's behavior *right now* as it begins collecting petition signatures, and it is a significant hardship to conduct those efforts without a resolution. Moreover, it would be a significant hardship for the Party to have to restart its signature-collection efforts on the eve of the election if its challenge is not successful. There is no good reason to put off this challenge—which we first attempted to raise nearly a decade ago—any longer. The Court should remand to the district court to resolve the issue.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING COUNT I UNDER RULE 12(B)(6).

In our opening brief, we argued that the district court had made a fundamental mistake by treating the magnitude and character of the burdens as a legal issue to be resolved without due regard for the specific facts alleged here. We similarly argued that the court had improperly ignored our factual allegations that, under the particular circumstances of this case, the statute does not actually further any legitimate state interests.

The defendant's response to these arguments is a masterful exercise in misdirection designed to draw attention away from the facts actually alleged. The defendant begins by arguing that under the *Anderson-Burdick* framework, the burdens are a purely legal issue and the district court "was not required to conduct a 'fact-intensive inquiry.'" Def. Br. 14. That is nonsense. As explained in Part

I.A below, the Supreme Court has made clear that the *Anderson-Burdick* framework is fact-intensive, and both this court and its sister circuits have so held. That is for good reason: the whole point of the *Anderson-Burdick* analysis is to apply a flexible standard that varies based on the specific circumstances of the case. This Court should decline the defendant's invitation to overrule its prior decisions and to split with the decisions of numerous other circuits.

The defendant next argues that it was proper for the district court to disregard the factual allegations regarding the specific financial burdens that the statutory scheme imposes on the Party. To justify that surprising request, the defendant suggests that the court should consider only generalized burdens and not "the particular financial burdens" imposed on "a particular political party." Def. Br. 33. As explained in Part I.B below, the defendant's proposal makes no sense because it would eliminate as-applied challenges under *Anderson-Burdick*. But ultimately, there is no need to consider this radical proposal because it is contrary to Supreme Court precedent, which demonstrates that it is appropriate to consider individualized burdens under *Anderson-Burdick.*

Regarding the state interests furthered by the statute, the defendant argues that the factual allegations become irrelevant as long as the State "articulate[s]" some interest that is supposedly furthered by the statutory scheme—even where the Complaint contains specific factual allegations demonstrating that the statutory

scheme does not further that interest. But as explained in Part I.C below, that has never been the law. While the State may not always be required to offer "elaborate empirical verification" regarding the weightiness of its interests, that does not mean the Court can ignore factual allegations (or evidence) showing that the statutory scheme in question does not actually further the interests articulated by the State.

Finally, the defendant asks this Court to affirm the district court's balancing of the relevant burdens and interests by speculating that the facts alleged in the Complaint might not be true. The defendant disputes that party affiliations are a more reliable indicator of political support than the signatures of random passers-by at Safeway. But the complaint alleges the opposite. Ultimately, this is a factual question on which the parties can present evidence. For example, how strong is the correlation between a party's current political support and its number of party affiliations? And how strong is the correlation between voters' willingness to sign a petition and their level of support for the Party? The defendant is free to offer evidence on this issue, as will the plaintiffs. But at this stage, the Court must accept the facts pled in the Complaint.

A. The *Anderson-Burdick* Test Depends on the Facts Alleged in the Complaint.

The defendant begins by arguing that the *Anderson-Burdick* framework did not require a fact-intensive analysis and that it was appropriate to determine the

character and magnitude of the burdens as a matter of law. As explained in our opening brief, that is contrary to this Court's decision in *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997), which held that *Anderson* requires a "fact-specific inquiry" and overturned the district court for holding that the *Anderson* analysis was "controlled" by prior Fourth Circuit precedent. As also discussed in the opening brief, it is also inconsistent with numerous holdings from other courts of appeals. *See* Pl. Br. 20–25, 38–40.[1]

In its brief, the defendant does not dispute that numerous federal courts of appeals have treated *Anderson-Burdick* balancing as a fact-intensive inquiry, nor does it even cite the vast majority of the cases cited in our opening brief. Rather, the defendant complains that we rely on cases from "the Third, Sixth, Ninth, and Eleventh Circuits" and says that these cases are "not the law of this Circuit." Def.

[1] These brief cited numerous cases which have not been addressed by the defendant: *Ariz. Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016) (extent of burden "is a factual question"); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 547 (6th Cir. 2014) ("Whether a voting regulation imposes a severe burden is a question with both legal and factual dimensions."); *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018) (reversing grant of 12(b)(6) where district court had rejected the plaintiff's "contention that *Anderson / Burdick* is inherently 'fact-intensive'"); *Wilmoth v. Secretary of N.J.*, 731 Fed. App'x 97 (3d Cir. 2018) (reversing grant of 12(b)(6) where parties were not "afforded an opportunity to develop an evidentiary record" regarding the benefits and burdens); *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993) (holding that procedural posture of case made it impossible to conduct *Anderson-Burdick* analysis because record was "devoid of evidence as to the state's interests").

Br. 19. That is a significant concession: the defendant apparently concedes that its position is contrary to the holdings of at least four federal courts of appeals. But it claims that the law in this circuit is different. As explained below, however, that is incorrect.

The defendant relies primarily on *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), a free-speech case that "borrowed" the *Anderson-Burdick* balancing test and applied it in a non-standard context. But *Fusaro* actually underscores the fact-intensive nature of the *Anderson-Burdick* framework. In *Fusaro*, this Court *reversed* the district court's decision to dismiss the complaint under Rule 12(b)(6) and remanded for the district court to apply the *Anderson-Burdick* framework. On remand, the district court did not attempt to conduct the *Anderson-Burdick* analysis under Rule 12(b)(6). It ordered the parties to proceed with discovery and to file any motions for summary judgment after the completion of discovery. *See* Order, Dkt. No. 50, *Fusaro v. Cogan*, No. 1:17-cv-03582-ELH (D. Md. Oct. 1, 2019).

The defendant nevertheless likes *Fusaro* because, although the Court emphasized that the *Anderson-Burdick* analysis is a "context-dependent inquiry," it also said that the severity of the burden "may" be resolved on a motion to dismiss. Def. Br. 20. But we have not argued that the *Anderson-Burdick* analysis can *never* be resolved under Rule 12(b)(6). If a complaint does not allege any facts demonstrating that the burdens outweigh any interest of the State, a motion to

dismiss may be possible. Our point is that the *Anderson-Burdick* weighing depends on the facts actually alleged in the complaint or the evidence presented on summary judgment—not on the burdens and benefits proven in other cases. The district court erred here by *ignoring* the facts alleged in the complaint and treating the issue as resolved by the evidentiary record created in other cases. Nothing in *Fusaro* supports that disposition.

Fusaro did state, at the motion-to-dismiss stage, that the burden was not "severe." But it did so based on the facts actually alleged, which did not suggest any serious interference with the plaintiff's First Amendment rights. The plaintiff alleged that the State was violating his First Amendment right to free speech by denying him access to Maryland's voter registration list because he was not a Maryland resident. The Court noted that this did not seriously interfere with Fusaro's ability to speak because he could place his message on billboards or on the Internet and could mail his message to every Marylander in the phonebook. The court specifically differentiated this from ballot-access laws: "By contrast, a petition initiative generally has no meaningful alternative to a boots-on-the-ground approach to gather signatures, particularly where electronic signatures do not satisfy a state's petition requirements." *Fusaro*, 930 F.3d at 260. Thus, the Court found that the law did not merit strict scrutiny because of (among other reasons) its "limited practical effect on the free speech interest asserted by Fusaro." *Id.* at 263.

Unlike the district court's ruling in this case, *Fusaro* was based on the facts alleged in the complaint, not prior precedents that relied on the facts developed in prior cases.

The defendant also relies on *Libertarian Party v. Alcorn*, 826 F.3d 708 (4th Cir. 2016), for the idea that the district court was not required to permit discovery. But *Alcorn* does not stand for this broad proposition. In *Alcorn*, the plaintiff challenged a law regarding the *order* in which candidates appear on the ballot but did not allege *any* burden on access to the ballot or on the right to vote. This Court held that the district court was not required to permit discovery because the Complaint had not alleged *any* cognizable burden on his constitutional rights: "The ballot ordering law does not deny anyone the ability to vote for him, nor his ability to appear on the Virginia ballot with his preferred party affiliation." *Id.* at 717–18. The allegations in the complaint thus failed to raise *any* "inference of any cognizable constitutional burden on First or Fourteenth Amendment rights." *Id.* at 719. The Court never suggested that it was permissible to ignore allegations in the complaint or to deny discovery when the complaint alleged an actual burden.

In any case, it bears emphasis that neither *Fusaro* nor *Alcorn* overruled (or *could* overrule) *Wood v. Meadows*, 117 F.3d at 776, which explicitly held that *Anderson* requires a "fact-specific inquiry" and remanded for development of the factual record regarding the burdens and benefits. The defendant responds that this

Court subsequently affirmed a grant of summary judgment in *Wood II*, but nothing in *Wood II* suggests that it would have been appropriate to conduct the *Anderson-Burdick* analysis without the benefit of a factual record or based on the factual record created in other proceedings. *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000). On the contrary, the Court emphasized that it had remanded to the district court to apply the "*Anderson* test in light of further factual development 'both as to the burdens' of the filing deadline on prospective candidates and 'the interests of the Commonwealth' in imposing the deadline." *Id.* at 710.

Nor could *Fusaro* overrule the Supreme Court precedents which make clear that the burden is a factual question to be resolved based on the evidence presented. For example, in *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000), the Court held that California's blanket primary system imposed a severe burden because "[t]he evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger." The court repeatedly cited evidence in "[t]he record," including testimony and surveys. *Id.* Courts have subsequently cited *California Democratic Party* for the proposition that "the severity of the burden that a primary system imposes on associational rights is a factual, not a legal, question." *See, e.g.*, *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1123 (9th Cir. 2016). In short,

Anderson-Burdick framework requires fact-intensive analysis, and the district court erred in failing to conduct such an analysis.

B. The Court Erred by Ignoring the Factual Allegations Regarding the Character and Magnitude of the Burdens.

The Complaint alleged that complying with the 10,000-signature requirement imposes a serious burden on the Party because it will consume virtually all of the party's financial resources and hobble its ability to perform its core functions. As we explained in our opening brief, that qualifies as a "severe" burden because it "affect[s] a political party's ability to perform its primary functions—organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election." *See* Pl. Br. 35 (citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006)). But even if that burden were not "severe," it is plainly not trivial, as the district court found.[2]

The defendant nevertheless argues that the district court was correct in holding, as a matter of law, that the burdens imposed on the Party are "modest." As explained below, these arguments are meritless.

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[2] As we argued in our opening brief, even if a burden is not severe, that does not necessarily mean it is "modest." *See* Pl. Br. 34–36. The Board's brief does not dispute that.

1. The Evidentiary Record Created in Other Cases Cannot Overcome the Facts Alleged in the Complaint.

The defendant begins by arguing that the 10,000-signature requirement imposes a "modest" burden because courts have treated various signature-collection requirements as "modest" in other cases. The defendant devotes nearly eight pages to arguing that the decisions in prior cases show that the burden of collecting 10,000 signatures is only "modest." Def. Br. 24–31. But this discussion misses the point entirely. First, there is no reason to believe that the burden of collecting signatures is static over time; indeed, there is good reason to believe that these burdens have increased over time as voters have become increasingly concerned about privacy. Second, the defendant does not contend that the plaintiffs in any of these prior cases sought to or did present evidence regarding the high cost of complying with the requirements or regarding the paralyzing effect that cost would have on the Party.

The defendant asks this Court to hold that 10,000 signatures is a modest requirement as a matter of law because the plaintiffs in other cases chose not to or could not put on evidence regarding the extent of the burdens. But that is not how the *Anderson-Burdick* analysis works. To give only one example, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court held that the plaintiffs had not put on sufficient evidence to prove that the burdens of Indiana's voter-identification law were "severe." But that did not stop subsequent

courts from evaluating the burdens of voter ID laws based on the different evidentiary records presented in those cases. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 249 (5th Cir. 2016) (distinguishing *Crawford* because, among other things, it "analyzed only a facial challenge that had been adjudicated in the district court on summary judgment," whereas "[h]ere, we have a multitude of factual findings about Plaintiffs' combined challenges, based on copious evidence from a bench trial and a record that spans more than one hundred thousand pages.").

In short, the character and magnitude of the burdens depends on the facts alleged or evidence presented in this case—not the facts alleged or evidence presented in prior cases.

2. The Court May Not Ignore Particularized Allegations Regarding the Financial Burdens Imposed on the Party.

The defendant next argues that it was proper for the district court to ignore our allegation that the statute would hobble the Party by requiring it to expend nearly all of its budget on requalifying. According to the defendant, "the particular financial burdens confronting a particular political party" are not a cognizable burden for purposes of the *Anderson-Burdick* analysis. Def. Br. 33. Of course, the Party has never alleged that its financial circumstances are unique; our point is that the signature-collection requirement imposes severe burdens on *any* smaller party—even one that "has enjoyed considerable success" in recent years. Def. Br. 7. What is unique to our as-applied challenge is our factual allegation that the

severe burden imposed on the Party yields no corresponding benefit of constitutional magnitude. The defendant cannot evade that challenge by denying the burden any more than by fabricating a potential benefit not supported by an evidentiary record. If this Court were to accept the defendant's argument that particularized burdens are *not* cognizable under *Anderson-Burdick*, it would effectively eliminate as-applied challenges to election laws, where the whole point is to show that a law is unconstitutional as applied to a plaintiff's particular situation.

In any event, the defendant's argument against considering particularized burdens contravenes Supreme Court precedent, which demonstrates that the court is not limited to considering general burdens on the population as a whole but must also consider individualized burdens imposed on particular plaintiffs. In *Crawford*, the plaintiffs challenged an Indiana statute requiring voters to present photo identification. The plaintiffs asked the Court "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity." *Crawford*, 553 U.S. at 200. A majority of the justices—including the lead (plurality) opinion and all of the dissents—accepted the plaintiffs' invitation to consider individualized burdens. The lead opinion engaged in a careful analysis of the *evidence* regarding the unique burdens

imposed on a small subset of voters but found that the plaintiffs had not met their evidentiary burden of proving that these burdens were severe. *See id.* (noting that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified"). The dissenters carefully considered this same evidence but would have found it to be sufficient to strike down the law.

Justice Scalia's concurring opinion (representing the views of only three justices) would have adopted the position now advocated by the defendant. *Id.* at 205. But Justice Scalia's opinion is not the controlling opinion in *Crawford* and was rejected by a majority of the justices in that case,[3] including the lead opinion and all the dissents. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (courts must follow the opinion of the justices "who concurred in the judgments on the narrowest grounds"); *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) ("Since *Marks*, several members of the Court have indicated that whenever a

[3] *See, e.g.*, *Brakebill v. Jaeger*, No. 1:16–cv–008, 2016 WL 7118548 at *4 (D.N.D. Aug 1, 2016) ("[T]his Court is required to follow the standard laid out in the plurality opinion of the Supreme Court in *Crawford* authored by Justice Stevens, which requires a particularized assessment of the burdens levied by an election law.") (citation omitted); *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2018 WL 4024895 at *3 (E.D. Mich. Aug. 23, 2018); *Obama for Am. v. Husted*, 697 F.3d 423, 441 n.7 (6th Cir. 2012) (White, concurring in part and dissenting in part) (noting that Justice Stevens' opinion was "the narrowest opinion, thus the controlling one for our purposes").

decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced."); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) ("As we have stated in discussing *Marks*, our goal in analyzing a fractured Supreme Court decision is to find 'a single legal standard ... [that] when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree.' To that end, we have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.") (citation omitted, alterations in original).[4]

The defendant's argument is also inconsistent with the Supreme Court's decisions prior to *Crawford*, which considered individual financial impacts in assessing the severity of a burden. For example, in *Lubin v. Panish*, 415 U.S. 709 (1974), the Supreme Court applied strict scrutiny to strike down a filing fee of $701.60. In concluding that this burden warranted strict scrutiny, the Court emphasized that the plaintiff was "without assets or income and cannot pay the $701.60 filing fee although he is otherwise legally eligible to be a candidate on the primary ballot." *Id.* at 714. Had the Court accepted the defendant's argument, the

[4] As the cited cases also discuss, the Supreme Court has also endorsed this analysis.

plaintiff's financial status would have been irrelevant, and it is doubtful that $701.60 would have been severe enough to warrant strict scrutiny. *See also Bullock v. Carter*, 405 U.S. 134, 144 (1972) (filing fees subject to scrutiny because they likely "fall more heavily on the less affluent segment of the community").

C. The Court May Not Assume, Contrary to the Factual Allegations in the Complaint, that the 10,000-Signature Requirement Furthers the Interests Articulated by the State.

After arguing (incorrectly) that the 10,000-signature requirement is modest as a matter of law, the defendant essentially assumes (as did the district court) that the game is over. That is because, according to the defendant, when an election law is not subject to strict scrutiny, the State prevails as long as it "articulate[s]" an interest that appears legitimate. Def. Br. 36. As the defendant explains it, facts and evidence do not matter at this stage: as long as the State articulates a legitimate interest and as long as it says that the statutory scheme furthers that interest, it wins.

Unfortunately for the defendant, that is not how the *Anderson-Burdick* analysis works. Even when the State articulates an interest, the *Anderson-Burdick* framework requires the Court to carefully evaluate whether the statutory scheme actually advances that interest and whether the overall scheme is "reasonable" in light of that interest. *See* Def. Br. 37-40.

It is true that the Supreme Court does not require a State to provide an "'elaborate, empirical verification'" of the *weightiness* of its interests when the burdens are minimal or non-existent, as they were in *Alcorn*, 826 F.3d at 719 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). But if the burden is greater, "a state must sometimes be required to offer evidence that its regulation of the political process is a reasonable means of achieving the state's desired ends"—even if that burden falls short of "severe." *Soltysik v. Padilla*, 910 F.3d at 448. In any case, even when the State does not have to offer elaborate proof of the *weightiness* of its interests, that does not mean that the court can ignore facts alleged or refuse to hear evidence regarding the extent to which a statute actually furthers the interest articulated by the State. Here, the plaintiffs alleged that, in the circumstances of this case, 10,000 signatures will not provide the state with any meaningful new information. It should have had the opportunity to collect and present evidence on this point.

1. It Was Not Proper for the District Court to Disbelieve the Allegations Regarding Lack of a State Interest.

The defendant attempts to defend the district court's opinion by suggesting that it was proper for the district court to reject the factual allegation in Paragraph 18 of the Complaint, which alleged that, under the particular circumstances of this case, the 10,000-signature requirement "yields almost no information of any value about the level of support within Maryland for the Libertarian Party." Def. Br. 43

(quoting JA12). That is true because "[t]he State's own records, which already show that that over 22,000 registered voters consider themselves Libertarians and have officially affiliated with the Libertarian Party, are both a more informative and a more reliable gauge of support for the Libertarian Party than the signatures of 10,000 registered voters who may not be Libertarians but who shop at Safeway would be." JA12.

The defendant argues that it was proper to disbelieve these allegations for two reasons. First, the defendant speculates that some voters who agree with the positions of the Libertarian Party so strongly that they chose to affiliate with the Party might actually prefer that the Party *not* be recognized. This assertion strains credulity. A voter who prefers for the Party not to exist would have little to gain by registering as a Libertarian—especially because voters who register as Libertarians must forgo the ability to vote in the closed primaries held by Republicans and Democrats. But regardless of whether the defendant's assertion could theoretically be true, it is an empirically verifiable question whether party affiliations are more strongly correlated with political support than the signatures of random-passers-by at Safeway. The Party is entitled to present evidence on that point—including, potentially, statistical or econometric evidence. For example, how strong is the correlation between party affiliations and current support for the Party? And how strong is the correlation between willingness to sign a petition

and actual support for the Party? The defendant is free to put on evidence regarding these questions. But at this stage, that question must be resolved in the Party's favor.

The defendant also argues that party affiliation is a less reliable indicator of political support than a petition because "voter registrations and petition signatures take place over different 'temporal ax[e]s.'" Def. Br. 44. The defendant speculates that party registrations might not be strongly correlated with political support because it is theoretically possible that some registered Libertarians no longer favor the Party. Again, however, whether party registrations are a reliable indicator of political support—and whether they are *more* or *less* reliable than petition signatures from non-Libertarians—is a factual dispute that must be resolved by the evidence. For our part, we think it highly unlikely that a substantial number of voters who no longer support the Party would continue their registration as Libertarians. That is because, as already explained, a registered Libertarian must forgo the ability to participate in Democratic or Republican primaries. A former Libertarian would therefore have a strong incentive to change his or her affiliation. But again, the question of whether petition signatures or party affiliations have a stronger correlation with actual political support for the Party is a factual question that must be resolved by evidence. Of course, the

defendant is free to present evidence supporting its theory, but at this stage, the question must be resolved in the Party's favor.

2. The Discussion of a Two-Tier System Is a Red Herring.

The defendant also claims that the requirement furthers Maryland's interest in obtaining a two-tiered election system. But as we explained in our opening brief, we do not challenge the State's ability to maintain a two-tiered system, and no part of our requested relief would require the State to abandon a two-tiered approach. The defendant nevertheless attempts to characterize our challenge as a challenge to two-tiered systems because our challenge would affect how Maryland implements its two-tiered system. But challenging one aspect of a system that happens to be two-tiered is not a challenge to the two-tiered nature of the systems. Def. Br. 39. The cases upholding two-tiered systems are a Red Herring.

II. THE DISTRICT COURT ERRED BY DISMISSING COUNT II.

A. Count II Is Ripe.

The district court also erred in determining that Count II is not ripe. The defendant concedes that "the questions presented are, indeed, legal." Def. Br. 48–49. It also concedes that they *can be* answered without need for any further factual development. Def. Br. 50. It nevertheless suggests that they *should not* be answered now because they "may never actually arise." *Id.* But as we explained in our opening brief, that is incorrect. The questions have *already* arisen because the Party has already begun collecting signatures in an effort to meet the 10,000-

signature requirement, and the signature-verification requirements at issue in Count II are currently affecting how it conducts these efforts.

It easy to see why that is true. Imagine that a petition circulator approaches a registered voter in the parking lot of Safeway. The registered voter has a gallon of ice cream in his cart, which he is trying to take home to his freezer before it melts, but he is willing to stop for 30 seconds to sign the Party's petition. If the signature-validation requirements are unconstitutional as alleged in Count II, the petitioner will allow him to sign and go on his way—so long as the voter provides sufficient information to make it clear who signed the petition, the Party will accept the signature confident that it is likely to be counted. On the other hand, if there is a substantial likelihood that the State will continue to enforce its arbitrary signature-validation requirements, the petitioner will have to ask a lot of intrusive questions before allowing the voter to sign: Is John short for "Jonathan"? Is it a nickname? How does the voter's name appear on the voter registration log? These intrusive questions may dissuade the voter from signing the petition, and even if they do not it will greatly increase the time it takes to collect each signature.

Moreover, as we also explained in our opening brief, the constitutionality of the signature-verification requirements challenged in Count II will also affect the number of signatures the Party will collect. If these requirements continue in effect, the Party will have to assume that a greater percentage of its signatures will

be invalidated and will therefore have to collect more signatures. The defendant suggests that the Party should collect 10,000 signatures, see how many are invalidated, and then file its challenge. But as we already explained, that is intensely impractical: in order to meet the deadlines to nominate candidates for the 2020 election, the Party does not have time to collect some subset of the required signatures, wait for the defendant to evaluate the petition, file suit in the district court, wait months for the Court to adjudicate the challenge, and then collect more signatures if necessary. After all this, there is a substantial likelihood that the court will not have time to adjudicate the issue—as happened with the Party's challenge nine years ago—or that the Party will not have time to collect additional signatures if the court determines that this is required. These undeniable hardships warrant hearing the issue now.

In a footnote, the defendant suggests that Count II requires further factual development regarding the percentage of invalidations attributable to different errors—for example, omission of a middle name versus use of a nickname. According to the defendant, that is because "omission of a middle initial might be deemed to be less problematic from the perspective of identifying the voter than the use of an uncommon nickname." Def. Br. 51 n.21. But this is a Red Herring. Count II challenges the invalidation of signatures *only* where the State has *actually* identified the voter and taken other actions (such as updating the voter's record)

based on the signature at issue. In those circumstances, there is no question about the State's degree of certainty—it has already identified the voter in question. Moreover, even if the State believes that omission of a middle initial is less problematic than use of a nickname, it can make that argument without knowing what percent of invalidations are attributable to each category.

B. Count II States a Valid Claim.

Ironically, after protesting that there are too many unanswered questions to adjudicate Count II, the defendant proceeds to ask this Court to conduct the *Anderson-Burdick* weighing itself—without the benefit of an opinion from the district court. But this Court has previously declined to conduct the *Anderson-Burdick* analysis in the first instance, noting that this Court is a "court of review, not of first view." *Fusaro*, 930 F.3d at 263–64 (quoting *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006)).

In any case, the defendant's argument is meritless. The defendant gets off on the wrong foot by asserting that this Court should apply rational-basis review because the burdens imposed by the signature-verification requirement are "not severe." *See* Def. Br. 55–56 n.24 (citing test applied under Maryland State Constitution). That, however, is *not* the standard prescribed by *Anderson-Burdick*. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) ("*Burdick* calls for neither rational basis review nor burden shifting."); *Soltysik*,

910 F.3d at 449 (rejecting argument that "would convert Anderson/Burdick's means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe"); *see also Crawford*, 553 U.S. at 190 n.8 (plurality opinion) (noting that "*Burdick* surely did not create a novel 'deferential "important regulatory interests" standard.'"); *Pub. Integrity All., Inc.*, 836 F.3d at 1024 n.2 ("Under *Burdick*, courts are to assess the 'character and magnitude' of the asserted burden, the proven strength of the state's interest, and whether the extent of the burden is 'necessary' given the strength of that interest, so as to ferret out and reject unconstitutional restrictions.") (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). As explained already, regardless of the level of the burdens, *Anderson-Burdick* is a "means-end fit framework" that tests whether the burdens imposed are justified by the State's interests.

Here—no matter how the burdens are classified—they cannot be justified by any legitimate State interests. The Complaint plainly alleges that the defendant is not counting petition signatures *even when it actually identifies the voter who signed the petition and uses the signature for other purposes*. JA15–16 ¶ 31. In cases like that, the interests asserted by the defendant (interest in preventing fraud) are simply not furthered. In short, the State has no legitimate interest in refusing to count signatures when it knows that those signatures came from a valid registered voter.

The cases cited by the defendant do not support a contrary view, and the defendant's reliance on these cases suffers from the same fundamental mistake it made regarding Count I. These cases suggest that, in certain cases, the State *may* have a legitimate interest in applying signature-verification requirements. *See Burruss v. Bd. of Cty. Comm'rs of Frederick Cty.*, 46 A.3d 1182, 1201 (Md. 2012) (adjudicating a facial challenge); *Kendall v. Balcerzak*, 650 F.3d 515, 525 (4th Cir. 2011) (case involving signature-verification requirements generally, not limited to cases where State had *actually identified* the voter). But the validity of the State's interests are different in cases where it can and actually has validated that a signature came from a qualified Maryland voter. As with Count I, the defendant erroneously asks this Court to blindly import holdings from cases that were decided on materially different facts. That is a mistake under *Anderson-Burdick*, and the Court should decline to do so.

CONCLUSION

For these reasons, the judgment of the district court should be REVERSED, and the case should be remanded for discovery.

Dated: October 15, 2019

Respectfully submitted,

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Dated: October 15, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I filed the foregoing brief on the Court's CM/ECF system, which caused a copy of the foregoing to be served electronically upon the following:

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