

# THE BALLOT IS STRONGER THAN THE BULLET: ALASKA'S SUPERIOR STRICT SCRUTINY APPROACH TO BALLOT ACCESS LAWS

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## ABSTRACT

*Restrictive ballot access laws are the most burdensome requirement for third-party candidates. Such laws implicate First Amendment freedoms to associate both publicly and privately with like-minded individuals in order to advance political causes. Alaskan courts review state ballot access laws under the demanding standard of strict scrutiny. This standard was adopted through the efforts of Joe Vogler and his Alaskan Independence Party. The authors contend that such a standard has fostered Alaska's unique openness toward third-party candidacies. Nonetheless, the Supreme Court of the United States does not utilize this same strict scrutiny review, instead using the Anderson-Burdick test, which balances the interests of the state in election maintenance with the burden on First Amendment rights. The authors argue that Alaska's strict scrutiny approach is superior to the Supreme Court's Anderson-Burdick balancing test because it creates a predictable test and protects First Amendment associational freedoms.*

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## I. INTRODUCTION

All indications suggest that Americans want a third party.<sup>1</sup> In 2018, sixty-eight percent of voters said they believed that the two major parties did not represent the United States.<sup>2</sup> Despite this, “third-party candidates rarely see success in the ballot box.”<sup>3</sup> Commentators explain this paradox through a panoply of reasons, including insufficient media coverage,<sup>4</sup> lack of ranked choice voting,<sup>5</sup> winner-take-all elections,<sup>6</sup> gerrymandering,<sup>7</sup> financial barriers,<sup>8</sup> fear of voting for a “spoiler

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1. “For the purposes of this [Article], ‘third party’ will be used interchangeably with ‘minor party’ and ‘independent candidate’ to describe candidates who are not members of mainstream political parties.” Noaman Barkatullah, Note and Comment, *Restricting the “Marketplace of Ideas”: Third Parties, Media Candidates, and Forbes’ Imprecise Standards*, 18 ST. LOUIS U. PUB. L. REV. 485, 485 n.2 (1999).

2. Alexi McCammond, *Most Americans Want a Third Party. The Agreement Stops There*, AXIOS (Sept. 26, 2018), <https://www.axios.com/most-americans-want-third-party-midterm-elections-30c9c26e-caf9-417d-979c-760526c32e64.html>.

3. Natalie Bruzda, *Third-Party Candidates and the 2020 Election*, UNIV. NEV. LAS VEGAS NEWS CTR. (Oct. 9, 2020), <https://www.unlv.edu/news/release/third-party-candidates-and-2020-election>; see also Gary D. Allison, *Protecting Our Nation’s Political Duopoly: The Supremes Spoil the Libertarians’ Party*, 41 TULSA L. REV. 291, 291–92 (2005) (providing data on limited third-party success throughout United States history).

4. See Bernard C. Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections*, 23 COLUM. J.L. & SOC. PROBS. 441, 448–49 (1990) (discussing the paucity of media coverage for third-party candidates and the reasons behind it).

5. See Peter Ackerman & Douglas Schoen, *Ranked Choice Voting is the Best Road Forward to Save Democracy*, THE HILL (Oct. 10, 2020, 10:00 AM), <https://thehill.com/opinion/white-house/519512-ranked-choice-voting-is-the-best-road-forward-to-save-democracy> (explaining how ranked choice voting would create more opportunities for third-party candidates); Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 IDAHO L. REV. 107, 108–09 (2020) (discussing alternatives to the winner-take-all system, including ranked-choice voting).

6. Robert Cooter, *Constitutional Consequentialism: Bargain Democracy Versus Median Democracy*, 3 THEORETICAL INQUIRIES L. 1, 17 (2002); see also Joseph Isola, *Why New Jersey Should Abandon Winner-Take-All Electoral Allocation*, 17 RUTGERS J.L. & PUB. POL’Y 141, 172 (2019) (providing brief explanation of winner-take-all system); see generally, Kristina Nwazota, *Third Parties in the U.S. Political Process*, PBS NEWSHOUR (Sep. 20, 2021), [https://www.pbs.org/newshour/politics/politics-july-dec04-third\\_parties](https://www.pbs.org/newshour/politics/politics-july-dec04-third_parties) (“Perhaps the most significant of the obstacles facing third-party candidates is the winner-take-all system.”).

7. See Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 10–11 (1998) (citing Supreme Court decisions upholding gerrymandering); Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 n.28 (1978) (“In a two-party system . . . it is nearly impossible for a small group to amass sufficient strength to dominate a district.”).

8. James L. Buckley & Montgomery N. Kosma, *Dialogue, Reflections on Law*

candidate,”<sup>9</sup> and debate exclusion for third-party candidates.<sup>10</sup>

However, ballot access laws may be the most troubling barrier to third-party candidates.<sup>11</sup> Although ballot access laws were originally proposed as a necessary “shield” against voter intimidation and corruption,<sup>12</sup> they have instead emerged in practice as a “sword” against third-party candidates, as the two major parties drafted laws to exclude third-party candidates.<sup>13</sup> Just in the last few election cycles, restrictive ballot access laws partially stymied the potential third-party presidential candidacies of Justin Amash,<sup>14</sup> Mark Cuban,<sup>15</sup> Howard Schultz,<sup>16</sup> and

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& *Public Life*, 1 GREEN BAG 2D 391, 397–98 (1998); Allan Smith, ‘*Nothing Happening*’: *Third-Party Candidacies Appear Less a Factor in 2020*, NBC NEWS (Oct. 10, 2020, 8:05 AM), <https://www.nbcnews.com/politics/2020-election/nothing-happening-third-party-candidacies-appear-less-factor-2020-n1240433> (discussing the fundraising challenges faced by third-party candidates in 2020).

9. Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 262 (2017) (considering psychological explanations for wasted vote phenomenon).

10. Tyler Yeagain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO. L. REV. 129, 180 (2020) (discussing the use of polls by debate commissions to determine who can participate); Samuel F. Toth, Note, *The Political Duopoly: Antitrust Applicability to Political Parties and the Commission on Presidential Debates*, 64 CASE W. RES. L. REV. 239, 240–41 (2013).

11. See Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 417–20 (2005) (describing the history and prevalence of ballot access laws); Scott Benowitz, *The American Ballot Access Is Really Rigged Against Third Party Candidates*, PAVLOVIC TODAY (May 4, 2017), <https://www.thepavlovictoday.com/american-ballot-access-really-rigged-third-party-candidates/>.

12. Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 359–60 (1996).

13. *Burdick v. Takushi*, 504 U.S. 428, 444 (1992) (Kennedy, J., dissenting) (“[The law] imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.”); Hall, *supra* note 11, at 408; see also Fred H. Perkins, Note, *Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines*, 11 HOFSTRA L. REV. 691, 692 (1983).

14. Todd Spangler, *Justin Amash Abandons Presidential Hopes, Says It’s Too Hard to Break Through*, DETROIT FREE PRESS (May 16, 2020, 2:49 PM), <https://www.freep.com/story/news/politics/elections/2020/05/16/justin-amash-drops-out-presidential-race-wont-run-libertarian/5206513002/>.

15. See Tom Fontaine, *Billionaire Cuban: System Stacked Against Third-Party Candidates*, TRIBLIVE (June 5, 2016, 10:40 PM), <https://archive.triblive.com/news/politics-election/billionaire-cuban-system-stacked-against-third-party-candidates/> (quoting Mark Cuban’s refusal to run for president despite being approached by “anti-Trump Republicans”).

16. See Mike Allen, *Scoop: Howard Schultz to End Presidential Campaign*, AXIOS (Sept. 6, 2019), <https://www.axios.com/howard-schultz-starbucks-end-2020-presidential-campaign-bd42be3c-4582-499c-9121-1bd5ec6ec7d2.html> (discussing Howard Schultz’s end-of-campaign letter to supporters about the “broken” election system).

Mike Bloomberg.<sup>17</sup> Historically, even the more successful third-party candidacies of Robert La Follette, George Wallace, Eugene McCarthy, John B. Anderson, and Ross Perot were all constrained to some degree by ballot access laws.<sup>18</sup>

Alaska is described as having a historical “love affair” with third-party candidates.<sup>19</sup> In 2020, independent candidates placed second in the Alaskan races for U.S. Senator and U.S. House of Representatives.<sup>20</sup> In addition, Alaskan voters adopted ranked choice voting in 2020, which better supports third-party candidates.<sup>21</sup> What makes Alaska such fertile ground for third-party candidates? Perhaps one reason is that Alaskan courts review ballot access restrictions with strict scrutiny.<sup>22</sup> Alaskan courts assert that ballot access laws implicate First Amendment freedoms.<sup>23</sup> Alaska adopted this demanding standard through the efforts of Joe Vogler, a perennial candidate for Alaskan elected offices under the Alaskan Independence Party (“AKIP”) banner.<sup>24</sup> Vogler’s efforts led to Alaska becoming one of the friendliest states for third-party campaigns.<sup>25</sup>

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17. See Eric Garcia, *Bloomberg Skips 2016 Presidential Run*, ROLL CALL (Mar. 7, 2016, 5:26 PM), <https://www.rollcall.com/2016/03/07/bloomberg-skips-2016-presidential-run/>.

18. J. DAVID GILLESPIE, *POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA* 35–36 (1993).

19. Jesse Walker, *Alaska’s Love Affair with Third Parties*, REASON (Aug. 16, 2016, 2:40 PM), <https://reason.com/2016/08/16/alaskas-love-affair-with-third-parties/>; Nate Cohn, *Alaska Is More Competitive, but Republicans Still Lead*, N.Y. TIMES: UPSHOT (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/upshot/poll-alaska-2020-election.html> (noting Alaska’s “fondness” for third-party candidacies); Julia Azari, *The States That Love (And Hate) Third-Party Candidates*, FIVETHIRTYEIGHT (July 6, 2016, 1:59 PM), <https://fivethirtyeight.com/features/the-states-that-love-and-hate-third-party-candidates/>.

20. See Ben Hohenstatt, *Gross and Galvin Concede Respective Races*, JUNEAU EMPIRE (Nov. 13, 2020, 5:19 PM), <https://www.juneauempire.com/news/gross-and-galvin-concede-respective-races/> (reporting election results from the 2020 congressional elections in Alaska).

21. Kelsey Piper, *Alaska Voters Adopt Ranked-Choice Voting in Ballot Initiative*, VOX (Nov. 19, 2020, 6:20 PM), <https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results>.

22. See *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998) (citing *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (“Strict scrutiny review is necessary in ballot access cases . . . .”). Strict scrutiny is sometimes called exacting scrutiny. Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 125 (2019).

23. See *Vogler v. Miller (Vogler I)*, 651 P.2d 1, 2–6 (Alaska 1982) (interpreting article I, section 5 of the Alaska Constitution to be “at least as broad” as the First Amendment to the U.S. Constitution).

24. *Id.*

25. See Paul Jenkins, *Commentary, Democrats Long for a Third-Party Spoiler*, ANCHORAGE DAILY NEWS (June 29, 2016),

The Supreme Court of the United States does not share the Alaskan courts' viewpoint. Instead, the Court reviews ballot access laws under the *Anderson-Burdick* balancing test.<sup>26</sup> The Court balances the burden on First Amendment freedoms with the state's interest in election management.<sup>27</sup> This test often allows restrictive election laws to stand.<sup>28</sup> During the 2020 election, this test became problematic, as restrictions created in response to the COVID-19 pandemic made signature-gathering particularly difficult.<sup>29</sup>

This Article argues for the superiority of Alaska's strict scrutiny review of ballot access laws. Part II showcases the peculiar life of Joe Vogler and his efforts to redefine Alaskan jurisprudence for third-party candidates. Part III examines the history and jurisprudence surrounding American ballot access laws. Part IV highlights the superiority of Alaska's approach to ballot access laws against the Supreme Court's *Anderson-Burdick* balancing test, which offers little predictability and constrains First Amendment associational freedoms.

## II. THE DEVELOPMENT OF ALASKA'S STRICT SCRUTINY APPROACH

The following section introduces the reader to the life of Joe Vogler, an Alaskan miner who formed AKIP.<sup>30</sup> His court battles led to the adoption of Alaska's strict scrutiny approach to state ballot access laws, which greatly protects associational freedoms and third parties.

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<https://www.adn.com/commentary/article/democrats-long-third-party-spoiler/2014/07/13/> (citing Vogler as a major third-party candidate for Alaskan elected office).

26. *Garbett v. Herbert*, 458 F. Supp. 3d 1328, 1337 (D. Utah 2020).

27. *See, e.g., Libertarian Party of Ill. v. Pritzker*, 455 F. Supp. 3d 738, 743 (N.D. Ill. 2020).

28. Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 141-43 (2021).

29. Meg Cunningham & Kendall Karson, *As Coronavirus Upends Elections, Ballot Access Becomes Next Point of Concern*, ABC NEWS (Apr. 22, 2020, 2:54 PM), <https://abcnews.go.com/Politics/coronavirus-upends-elections-ballot-access-point-concern/story?id=70288113> (chronicling the potential exposure to COVID-19 signature gatherers faced); Eugene D. Mazo, *Voting During A Pandemic*, 100 B.U. L. REV. ONLINE 283, 294 (2020) ("The pandemic has made gathering in-person petition signatures and other common activities that states require for ballot access more cumbersome, if not outright dangerous . . .").

30. *See* Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENV'T L. REV. 485, 501 (1994) (providing background information about Vogler).

### A. Meet the Litigants: Joe Vogler and AKIP

In 1958, Alaska voted in favor of statehood by a five-to-one margin,<sup>31</sup> and on January 3, 1959, Alaska officially became a state.<sup>32</sup> Joe Vogler, an outspoken Alaskan, resented statehood because he believed it created unwanted federal intrusion in local land use.<sup>33</sup> Vogler found irregularities in the statehood voting procedure for Alaska Natives and American soldiers.<sup>34</sup> In particular, the statehood process infuriated Vogler because he believed Alaska Natives “were disenfranchised because voters had to be able to read and write English,” while American soldiers should not have voted on whether to become a state, territory, commonwealth, or independent nation because they were not truly Alaskan citizens.<sup>35</sup>

Vogler’s anger reached a boiling point in the 1970s when the federally-owned Alaskan Pipeline<sup>36</sup> authorized its service company a right of way on each edge of the pipeline.<sup>37</sup> This, in Vogler’s opinion, amounted to outright theft by the federal government.<sup>38</sup> Subsequently, he formed Alaskans for Independence, a group that pursued nationhood for Alaska in 1973.<sup>39</sup> The Alaskans for Independence group grew into AKIP, which became an Alaskan third party in 1978.<sup>40</sup>

In 1974, Vogler ran for governor of Alaska<sup>41</sup> and received 4,770 votes, 4.8% of the total votes cast.<sup>42</sup> He made several more unsuccessful runs for elected office in Alaska, but AKIP’s crowning achievement came in 1990.<sup>43</sup> That year, Vogler, as AKIP chair, convinced former Republican Governor

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31. STATEHOOD ELECTION: FINAL RESULTS OF SPECIAL REFERENDUM ELECTION, ALASKA DIV. OF ELECTIONS (Aug. 26, 1958), <https://www.elections.alaska.gov/Core/Archive/58STATE/1958-statehood.pdf>.

32. G. Alan Tarr, *Of Time, Place, and the Alaska Constitution*, 35 ALASKA L. REV. 155, 155–56 n.1 (2018).

33. KATHLYN GAY, *AMERICAN DISSIDENTS: AN ENCYCLOPEDIA OF ACTIVISTS, SUBVERSIVES, AND PRISONERS OF CONSCIENCE* 603–04 (2011).

34. See Rebecca Luczycki, *The Country of Alaska?*, ALASKA MAG., Oct. 2008, at 22, 25.

35. *Id.* at 24–25.

36. *Id.*

37. *Id.*

38. *Id.*

39. Timo Christopher Allan, *Locked Up!: A History of Resistance to the Creation of National Parks in Alaska* 95, 191 (2010) (Ph.D. dissertation, Washington State University) (on file with Washington State University).

40. Elizabeth Helen Essary, *Latent Destinies: Separatism and the State in Hawai’i, Alaska, and Puerto Rico* 106 (2008) (Ph.D. dissertation, Duke University) (on file with Duke University Library).

41. *Vogler I*, 651 P.2d 1, 6 (Alaska 1982).

42. *Id.* at 2 n.1.

43. Essary, *supra* note 40, at 108.

Walter Hickel and sitting Republican State Senator John B. Coghill<sup>44</sup> to run on the AKIP ticket for governor and lieutenant governor, respectively.<sup>45</sup> The duo went on to win the election.<sup>46</sup>

### B. Vogler's Election Litigation

Vogler and AKIP never achieved their goal of Alaskan independence, but they effectively transformed Alaskan election jurisprudence by litigating cases that caused the Alaska Supreme Court to adopt a strict scrutiny review of ballot access laws. The first election case involving Vogler occurred during the 1982 Alaska gubernatorial election.<sup>47</sup> In *Vogler v. Miller (Vogler I)*, Vogler and AKIP sought declaratory and injunctive relief from an Alaska Division of Elections decision denying Vogler's application for ballot access in both the 1982 primary and general elections.<sup>48</sup> The Division of Elections denied Vogler's ballot access petition because the Alaska legislature enacted a statute in 1980 requiring that a candidate receive three percent of the vote in the prior election to appear on the ballot.<sup>49</sup> Previously, only one thousand signatures were required; the new law required 4,880 signatures, nearly a five-fold increase.<sup>50</sup>

Vogler challenged the statute under the free speech guarantee and equal protection provisions of the Alaska Constitution.<sup>51</sup> Because the Alaska Supreme Court could not find any Alaska cases dealing with ballot access, they considered relevant federal cases to guide their analysis.<sup>52</sup>

First, the court examined the nature of the rights involved.<sup>53</sup> The court held that restrictions on ballot access diminish the rights of both political candidates and voters.<sup>54</sup> These restrictions impinge on the right

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44. At the time, Coghill was the running mate of the Republican candidate Arliss Sturulewski. *O'Callaghan v. State*, 826 P.2d 1132, 1133 (Alaska 1992).

45. Essary, *supra* note 40, at 108.

46. *Id.* The Hickel/Coghill ticket is the only statewide victory for AKIP. *Id.* Hickel won by capitalizing on his extensive personal wealth, name recognition, extensive media coverage, and debate inclusion. Howard J. Gold, *Explaining Third-Party Success in Gubernatorial Elections: The Cases of Alaska, Connecticut, Maine and Minnesota*, 42 SOC. SCI. J. 523, 525-26 (2005).

47. *Vogler I*, 651 P.2d at 2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 2-3.

52. *See id.* at 3 ("Since there are no Alaskan cases on ballot access much of our analysis deals with cases applying the federal standard. However, we are not necessarily limited by those precedents in interpreting Alaska's constitution.").

53. *Id.*

54. *See id.* at 5 (considering free speech implications of the new law).

of voters to cast their votes freely and of individuals to associate freely for the advancement of political beliefs.<sup>55</sup> The Alaska court relied on the Supreme Court case *Williams v. Rhodes*<sup>56</sup> for its holding that the right to vote and associate freely regarding political beliefs was fundamental.<sup>57</sup> The court found the following holding by Justice Hugo Black particularly persuasive:

Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.<sup>58</sup>

Because the court, like Justice Black, deemed this right fundamental, it proceeded to consider the strict scrutiny's second step, asking whether the state had a compelling interest in creating the signature requirement.<sup>59</sup> The State had the burden of providing a compelling interest.<sup>60</sup> The State articulated several justifications for the three percent signature requirement.<sup>61</sup> The State's primary goal was to unify petition requirements for public office.<sup>62</sup> The State selected a percentage requirement to avoid adjusting the number of signatures required over time.<sup>63</sup> Finally, the State argued that the presence of many candidates would confuse voters and that a signature requirement would remedy this confusion.<sup>64</sup>

The court acknowledged these "legitimate concerns."<sup>65</sup> Nonetheless, the court rejected the State's arguments, finding that the State's interest was neither narrowly tailored nor compelling enough to subsume allowing voters to express their support for third-party candidates as a protest against the status quo.<sup>66</sup> The court questioned the merit of the State's goal of preventing joke candidacies because the court found that Alaska's previous requirement of one thousand signatures sufficiently

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55. *Id.* at 3.

56. 393 U.S. 23 (1968).

57. *Vogler I*, 651 P.2d at 5-6 (citing *Williams*, 393 U.S. at 41 (Harlan, J., concurring)).

58. *Id.* at 3 (quoting *Williams*, 393 U.S. at 32).

59. *Id.* at 5-6.

60. *Id.* at 3.

61. *Id.* at 4.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 5-6.



prevented frivolous candidates from reaching the ballot.<sup>67</sup> The three percent requirement was excessive, and, according to the court, “[t]he ballot box is our established means of effecting change, and excessive restrictions on it may redirect the pressure for change into other, less legitimate channels.”<sup>68</sup>

The court closed the opinion by discussing a remedy.<sup>69</sup> Because AKIP received greater than one percent of the vote in the previous two elections,<sup>70</sup> held periodic meetings and a party convention, and published a newsletter,<sup>71</sup> it was not a frivolous political party.<sup>72</sup> These facts led the court to order that Vogler be placed on the November 1982 gubernatorial ballot, despite not achieving the one thousand signature requirement.<sup>73</sup> The court did not address the remaining issue of the new statutory requirements to determine eligibility for a party to participate in a primary.<sup>74</sup>

Vogler’s and AKIP’s election law challenges continued in *Vogler v. Miller (Vogler II)*,<sup>75</sup> which addressed other important issues related to third-party candidate and voter rights. In *Vogler II*, the court considered the requirement that a political party receive ten percent in the previous gubernatorial election to conduct a primary.<sup>76</sup> Vogler and AKIP argued that the ten percent requirement was invalid under the free speech and equal protection clauses of the Alaska Constitution.<sup>77</sup>

The court reiterated that ballot access laws implicate the fundamental rights of freedom of association and voting.<sup>78</sup> Consequently, a restriction on ballot access is subject to strict scrutiny and must be justified by a compelling state interest.<sup>79</sup> The court questioned whether a less restrictive means could satisfy the state’s interest in preventing

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67. *Id.* at 5.

68. *Id.*

69. *Id.* at 6.

70. *Id.*

71. *Id.*

72. *See id.* (quoting *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976)) (finding justification “to assume the requisite community support”).

73. *See id.* at 2, 6. Justice Connor believed that the three percent requirement was valid because it was not an insurmountable burden for serious candidates. *Id.* at 7 (Connor, J., dissenting). Other requirements for signatures of that amount were upheld by other courts. *Id.* (citing *Jeness v. Fortson*, 403 U.S. 431 (1971); *Am. Party of Texas v. White*, 415 U.S. 767 (1974); *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *aff’d*, 403 U.S. 925 (1971)). Justice Connor would have deferred to the legislature and upheld the three percent requirement. *Id.*

74. *See id.* at 6 (majority opinion).

75. 660 P.2d 1192 (Alaska 1983).

76. *Id.* at 1193.

77. *Id.*

78. *Id.*

79. *Id.* at 1194.

additional primaries.<sup>80</sup>

First, the court considered the importance of having a political primary.<sup>81</sup> The court found that primaries “compel attention, build votes, [and] change minds.”<sup>82</sup> The primary process draws media coverage of a party’s platform and candidates.<sup>83</sup> By contrast, a party seeking placement on the general election ballot through the petition process receives scant coverage because of the unexciting nature of signature gathering.<sup>84</sup>

Second, the court considered the ten percent requirement’s impact on campaign funding.<sup>85</sup> In particular, the Alaska Supreme Court was concerned that only recognized political parties could contribute an *unlimited* amount of funds toward or against a political campaign.<sup>86</sup> By contrast, non-recognized political parties could *only* contribute \$1,000.<sup>87</sup> Thus, the court found that the requirement hindered a smaller party’s fundraising effort and, by extension, their fundamental rights because small parties need monetary resources to wage effective political campaigns.<sup>88</sup>

After these considerations, the court turned to the constitutionality of the ten percent requirement.<sup>89</sup> The State argued that the ten percent requirement served state interests in promoting a two-party system.<sup>90</sup> Specifically, the State claimed that a two-party system encouraged compromise and political stability and ensured officials were elected by a majority of voters.<sup>91</sup> The State also asserted that the ten percent requirement served the interests of preventing frivolous candidacies and preventing voter confusion.<sup>92</sup>

The court, however, was not convinced by either argument. The court acknowledged that the state had a valid interest in promoting a two-party system<sup>93</sup> but then iterated that this was not a compelling interest because it suppressed the expression of political views outside of two political parties.<sup>94</sup> The court also acknowledged the requirement’s

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80. *Id.*

81. *Id.*

82. *Id.* (quoting THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 1972, at 71 (1973)).

83. *Id.* at 1195.

84. *Id.*

85. *Id.*

86. *Id.* at 1194–95 (emphasis added).

87. *Id.*

88. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

89. *Id.* at 1195.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

purpose in preventing frivolous candidacies as a legitimate state goal.<sup>95</sup> Nonetheless, the court found that many other states had requirements of five percent or less.<sup>96</sup> Therefore, the State's requirement of ten percent, absent any significant explanation for the higher threshold, was unconstitutional.<sup>97</sup>

The *Vogler* cases transformed Alaskan judicial precedent by greatly expanding election rights for third-party candidates by subjecting Alaskan election laws to strict scrutiny. To survive strict scrutiny the state must show that the law: (1) is narrowly tailored and (2) serves a compelling state interest.<sup>98</sup> An oft-repeated maxim holds that strict scrutiny is "strict in theory, fatal in fact"<sup>99</sup> because it requires the state to overcome such a high bar to justify new election laws.<sup>100</sup>

### III. AMERICAN BALLOT ACCESS LAWS AND JURISPRUDENCE

#### A. The History of U.S. Ballot Access Laws

The earliest elections in the American colonies occurred in the Virginia House of Burgesses in 1619.<sup>101</sup> Many elections were uncontested during the colonial period and into the nineteenth century.<sup>102</sup> Consequently, states exercised little influence over ballot access.<sup>103</sup> Instead, political parties printed ballots supporting their cause.<sup>104</sup> This

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95. *Id.*

96. *Id.*

97. *Id.* at 1195-96.

98. "The precise question thus presented is whether the . . . requirement . . . impinges on the rights to vote and associate freely to the least degree possible consistent with the achievement of any compelling state goals." *Id.* "[O]nly a regulation which impinges on the right to speak and associate to the least degree possible consistent with the achievement of the state's legitimate goals will pass constitutional muster." *Vogler I*, 651 P.2d 1, 3 (Alaska 1982).

99. *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment).

100. *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1003 (Alaska 2019) (applying strict scrutiny to reproductive rights); *see also* Julie M. Murphy, *First Amendment – Freedom of Association – Alaska Constitution Allows Political Parties to Use Combined Ballots in Primary Elections*, 37 RUTGERS L.J. 1423, 1436 (2006) (stating that the Alaska Supreme Court embraces a narrower application of strict scrutiny than the U.S. Supreme Court); Susan Orlandy & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1, 13 (1998) (discussing Alaska Supreme Court cases in which the court applies strict scrutiny to privacy cases).

101. Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 776 (1988).

102. Cofsky, *supra* note 12, at 359; ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 86 (1990).

103. Cofsky, *supra* note 12, at 359.

104. THE EVOLUTION OF POLITICAL PARTIES, CAMPAIGNS, AND ELECTIONS 119

system enabled wide-spread harassment, fraud, and voter intimidation.<sup>105</sup>

Massachusetts, New York, and the City of Louisville, Kentucky, printed the earliest official government ballots in 1888.<sup>106</sup> The primary purposes of these government-sponsored ballots were ensuring voter privacy and preventing voter intimidation.<sup>107</sup> As more states adopted official state ballots, so, too, came requirements for the inclusion of prospective candidates.<sup>108</sup> While many states imposed no requirements on prospective candidates beyond a simple request, other states required a small number of signatures.<sup>109</sup> States enacted fairly lax requirements, with the most common being obtaining 500 or 1,000 signatures.<sup>110</sup>

Ballot access laws departed from this relaxed standard first during the “Red Scare” after World War I.<sup>111</sup> Some states adopted restrictive ballot access laws to thwart the growth of the Communist Party (“CPUSA”).<sup>112</sup> In the 1930s, the CPUSA sued the states of Florida and

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(Randall E. Adkins, ed. 2008).

105. *Burson v. Freeman*, 504 U.S. 191, 202 (1992); Hall, *supra* note 11, at 417. Edgar Allan Poe may have fallen victim to the voter fraud practice of “cooping,” in which the victim is kidnapped, disguised, made to drink, and forced to vote multiple times. Natasha Geiling, *The (Still) Mysterious Death of Edgar Allan Poe*, SMITHSONIAN MAG. (Oct. 7, 2014), <https://www.smithsonianmag.com/history/still-mysterious-death-edgar-allan-poe-180952936/>.

106. Rachel Entman, *Picket Fences: Analyzing the Court’s Treatment of Restrictions on Polling, Abortion, and Labor Picketers*, 90 GEO. L.J. 2581, 2584 (2002). These ballots were called “Australian ballots” because they originated in Australian provinces that experienced voter intimidation and voter fraud problems. Michael Freiberg, *“Anticipating an Evil Which May Never Exist”: Minnesota’s Anachronistic Identifying Mark Statute*, 36 WM. MITCHELL L. REV. 45, 48–49 (2009).

107. See Entman, *supra* note 106, at 2584 (stating that voters lacked privacy and faced intimidation from political parties before the implementation of the Australian system).

108. Hall, *supra* note 11, at 417.

109. *Id.*

110. *Id.*

111. The Appleseed Ctr. for Electoral Reform & The Harv. Legis. Rsch. Bureau, *A Model Act for the Democratization of Ballot Access*, 36 HARV. J. LEGIS. 451, 452 (1999); Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191, 240 n.278 (1982). *But see* John B. Anderson et al., *Presidential Elections – The Right to Vote and Access to the Ballot*, 29 NOVA L. REV. 571, 605 (2005) (arguing that early ballot access laws were enacted after President Theodore Roosevelt’s powerful third-party Progressive Party presidential campaign). Some states even banned the Communist Party. See Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367, 1393–94 (2008) (explaining that states restricted ballots in an effort to ban the Communist Party from the ballot).

112. See Bligh, *supra* note 111, at 1393; Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281, 288 (1993).

Illinois over restrictive ballot access laws but lost both cases.<sup>113</sup> Regarding the Illinois ballot access requirement, the U.S. Supreme Court held in *MacDougall v. Green*<sup>114</sup> that nothing in the U.S. Constitution regulated state laws regarding ballot access and therefore Illinois's restrictive scheme was constitutional.<sup>115</sup> Consequently, other states created stringent ballot access requirements whenever a new third party attempted to disturb the political status quo.<sup>116</sup> This proliferation occurred at third-party candidates' expense.<sup>117</sup>

## B. The Supreme Court's Inconsistent Approach to Ballot Access Laws

### 1. *Williams and Jenness: One Step Forward, Two Steps Back*

In 1968, the Supreme Court addressed one of the foremost third-party challenges to ballot access laws in *Williams v. Rhodes*.<sup>118</sup> The American Independent Party (AIP) challenged an Ohio ballot access law requiring new party candidates to submit 433,100 signatures by February of an election year.<sup>119</sup> AIP nominee and former Alabama Governor George Wallace submitted over 450,000 valid signatures but did so after the February deadline had already passed.<sup>120</sup> Ohio excluded the AIP from the ballot, and Wallace sued.<sup>121</sup> The Court held that the Ohio ballot access law infringed on the First Amendment freedom of association as well as vital voting freedoms.<sup>122</sup>

The *Williams* decision is a mixed bag at best. It discouraged ballot access laws by reversing *MacDougall*, which held that nothing in the Constitution pertains to ballot access.<sup>123</sup> *Vogler I* relied on *Williams* in

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113. See *State ex rel. Barnett v. Gray*, 144 So. 349, 353–56 (Fla. 1932) (upholding a Florida state law that required at least thirty percent of the vote for any office in the prior two elections); *Blackman v. Stone*, 101 F.2d 500, 501, 505 (7th Cir. 1939) (upholding an Illinois state law that required 25,000 signatures and at least 200 signatures from each of the state's fifty counties).

114. 335 U.S. 281 (1948).

115. *Id.* at 284.

116. Richard Winger, *How Ballot Access Laws Affect the U.S. Party System*, 16 AM. REV. POL. 321, 328 (1995) [hereinafter Winger, *Ballot Access Laws*].

117. *Id.*

118. 393 U.S. 23 (1968).

119. *Id.* at 36. The AIP was formed on July 8, 1967. Lauren Moore, *The American Independent Party*, INDEP. VOTER NEWS (July 24, 2012), <https://ivn.us/2012/07/24/the-american-independent-party>. The party was closely tied to avowed segregationist Alabama Governor George Wallace and his political ambitions. Christine Mai-Duc, *The 'Angry Man's Candidate': George Wallace and the Roots of the American Independent Party*, L.A. TIMES (Apr. 17, 2016), <http://static.latimes.com/american-independent-history/>.

120. *Williams*, 393 U.S. at 26.

121. *Id.*

122. *Id.* at 29.

123. Winger, *Ballot Access Laws*, *supra* note 116, at 339.

striking down Alaska's aforementioned three percent requirement.<sup>124</sup> Nonetheless, the precedential effect of *Williams* is minor because of the Court's limiting language in its holding.<sup>125</sup> In *Williams*, the Court did not precisely state which aspects of Ohio's ballot access laws were unconstitutional. The Court criticized the early February petition deadline, the failure to permit access to independent presidential candidates, and the high number of signatures required for ballot access<sup>126</sup> but did not declare any of these individual aspects unconstitutional.<sup>127</sup> Consequently, many lower courts held that other ballot access laws are unconstitutional only when *all* of these characteristics are present.<sup>128</sup> In 1969, merely one year after *Williams*, five states *increased* their ballot access requirements.<sup>129</sup>

The Court's next major ballot access case came in 1971.<sup>130</sup> In *Jeness v. Fortson*,<sup>131</sup> the Georgia Socialist Workers Party candidates for governor and House of Representatives, in tandem with various concerned voters, sued for ballot access.<sup>132</sup> The plaintiffs alleged that Georgia's signature requirement of five percent of registered voters for ballot access was unconstitutional.<sup>133</sup>

The Court, however, disagreed.<sup>134</sup> The Court's relatively short decision in *Jeness* focused on distinguishing the case from *Williams*. In doing so, the Court found multiple relevant distinctions: Georgia permitted write-in voting unlike Ohio; Georgia allowed independent presidential candidates; and the Georgia petition deadline was not unreasonably early.<sup>135</sup>

*Jeness* is a troubling precedent<sup>136</sup> for ballot access proponents because it gave states permission to raise their ballot access requirements

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124. *Vogler I*, 651 P.2d 1, 3 (1982).

125. See Cofsky, *supra* note 12, at 355 (describing the Supreme Court's ballot access jurisprudence after *Williams* as inconsistent and vague).

126. *Williams*, 393 U.S. at 32-33.

127. See *id.* (stating that only "the totality of the Ohio restrictive laws taken as a whole" violate the Equal Protection Clause).

128. Winger, *Ballot Access Laws*, *supra* note 116, at 339.

129. *Id.* at 339-40 (emphasis added).

130. See E. Jon A. Gryskiewicz, Note, *Williams v. Rhodes: How One Candidate, One State, One Week, and One Justice Shaped Ballot Access Law*, 28 J.L. & POL. 185, 213 (2013).

131. 403 U.S. 431 (1971).

132. *Id.* at 432 n.3.

133. *Id.* at 432.

134. *Id.* at 442.

135. *Id.* at 438.

136. See Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1290 (2005) (stating that the *Jeness* Court opened the door to allowing states "to prohibit primaries for minor parties").

to five percent of the number of registered voters.<sup>137</sup> By 1981, thirteen states had drastically increased their signature requirements.<sup>138</sup> For example, in 1976, Pennsylvania changed its ballot access requirement from 8,601 signatures to 35,624 signatures.<sup>139</sup> No state voluntarily lowered their requirements during this time.<sup>140</sup>

## 2. Anderson-Burdick: *The Creation of a Balancing Test*

After *Jenness*, the Supreme Court redefined its approach in *Anderson v. Celebrezze*.<sup>141</sup> There, the Court analyzed a challenged Ohio election law that mandated candidates submit signatures by March 20.<sup>142</sup> On April 24, 1980, Representative John B. Anderson declared his intention to run for president as an independent candidate.<sup>143</sup> Anderson previously ran unsuccessfully in the 1980 Republican presidential primaries.<sup>144</sup> On May 16, Anderson submitted the necessary signatures for the Ohio ballot, after the March deadline.<sup>145</sup> The Ohio Secretary of State refused to certify Anderson's petition because it was late.<sup>146</sup>

When evaluating Anderson's challenge, the Supreme Court found that the Ohio law placed heavy restrictions on voters' rights.<sup>147</sup> First, the Court held that third parties give voters a chance to voice their values and beliefs.<sup>148</sup> Second, the Court held that denying third-party candidates a place on the ballot also implicated freedom of association rights because third parties allow people with similar ideas and values to come together to support a particular candidate.<sup>149</sup>

However, the Court also held that states can enact regulations to

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137. Winger, *Ballot Access Laws*, *supra* note 116, at 340.

138. *Id.*

139. *Id.* at 329 (collecting other examples).

140. *Id.*

141. 460 U.S. 780 (1983); see Darla L. Shaffer, *Ballot Access Laws*, 73 DENV. U. L. REV. 657, 657 (1996) ("In 1983, however, the Court set out to end the confusion with its decision in *Anderson v. Celebrezze*. In *Anderson*, the Court announced that the proper approach for determining the level of scrutiny in ballot access cases is a balancing of interests test.").

142. *Anderson*, 460 U.S. at 782.

143. See *id.* at 780. Anderson demonstrated his independence by his unique political positions on taxes, women's rights, and civil rights, which differed from the Republican and Democratic party platforms. See Brief for the Pacific Legal Foundation as Amici Curiae Supporting Respondents at 16, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1997) (No. 96-779), 1997 U.S. S. Ct. Briefs LEXIS 352 [hereinafter *Pacific Legal Foundation Amicus Brief*]. In the general election, Anderson captured seven percent of the popular vote. *Id.*

144. *Anderson*, 460 U.S. at 784 n.2.

145. *Id.* at 783.

146. *Id.*

147. *Id.*

148. *Id.* at 787.

149. *Id.* at 787-88.

ensure free and fair elections.<sup>150</sup> Because of this importance, the Supreme Court established a balancing test where courts must weigh First Amendment rights against the state's interest in ensuring election integrity.<sup>151</sup> Applying this new test, the Court held that Ohio's interest in imposing a March deadline outweighed the limitation imposed on freedom of association and freedom of choice.<sup>152</sup>

The Supreme Court would refine *Anderson's* balancing test for ballot access in *Burdick v. Takushi*.<sup>153</sup> In *Burdick*, a Hawaii law mandated nominating papers prior to the primary election in order to be listed on the general election ballot as a write-in candidate. The Hawaii law had effectively banned write-in candidates in Hawaii.<sup>154</sup>

The Court first held that this voting restriction created a minor burden because Hawaii's election system provided ample opportunity for candidate participation in the state's open primary.<sup>155</sup> Next, the Court considered Hawaii's proffered interests.<sup>156</sup> The Court found several benefits to the ban on write-in voting, such as discouraging sore-loser candidacies and preventing voter confusion.<sup>157</sup> The Court held that these interests outweighed a voter's interest in writing in a candidate.<sup>158</sup> Moreover, *Burdick* turned *Anderson's* unstructured "flexible standard" into something resembling an administrable rule, applying strict scrutiny only to laws that "severely" burden political rights while extending a more deferential review to all other challenged conditions.<sup>159</sup>

*Anderson-Burdick* created a bifurcated inquiry into ballot access laws,<sup>160</sup> establishing that, when a court determines that a ballot access law

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150. *Id.* at 788.

151. *Id.* at 806.

152. *Id.*

153. 504 U.S. 428 (1992); see Shaffer, *supra* note 141, at 658 ("The *Anderson* test, as refined in *Burdick v. Takushi*, now stands as the definitive standard for evaluating any constitutional challenge to a state election scheme.").

154. See Brian Boyd, *Stepping Over What Towers to the Sky: The Role of Animus Review in Election Law*, 47 U. TOL. L. REV. 495, 504 (2016) ("Under Hawaii law, any person seeking to run for a seat in the House of Representatives must file certain nominating papers prior to the primary election; that is, write-in candidates were effectively banned under Hawaii law."); Rebecca L. Covert, Note, *Burdick v. Takushi: Yes to Equal Voice in Voting, No to a Fundamental Right to Vote for Any Particular Candidate*, 14 U. HAW. L. REV. 715, 715 (1992).

155. *Burdick*, 504 U.S. at 435-37.

156. *Id.* at 439.

157. *Id.*

158. *Id.* at 439-40.

159. See Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 523 (2008).

160. Henry L. Chambers, Jr., *Technological Change, Voting Rights, and Strict Scrutiny*, 79 MD. L. REV. 191, 212 (2019); Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 SEVENTH CIR. REV. 465, 471



imposes a less severe restriction, it should weigh the state's interest with the voters' interest.<sup>161</sup> This approach is deferential to state ballot access laws,<sup>162</sup> which are often written to restrict third-party participation.<sup>163</sup> Thankfully, a better approach exists.

#### IV. THE DESIRABILITY OF ALASKA'S STRICT SCRUTINY APPROACH TO BALLOT ACCESS LAWS

Alaska's approach to ballot access laws is preferable to the Supreme Court's *Anderson-Burdick* balancing test because courts can apply it more consistently and it better protects important associational rights.

##### A. Alaska's Standard Provides Predictability

Alaska's judicial review of election laws creates predictable results because it is not an overly complex balancing test. By contrast, *Anderson-Burdick* offers inconsistent outcomes.<sup>164</sup> Specifically, *Anderson-Burdick* relies on a sliding scale to weigh the burden on First Amendment rights against the corresponding state interest in election integrity.<sup>165</sup> This test, however, does not clarify what factors a judge must balance.<sup>166</sup>

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(2015).

161. Pikor, *supra* note 160, at 471–72.

162. Nicole R. Gabriel, *Resurrecting the Nineteenth Amendment: Why Strict Voter ID Laws Unconstitutionally Discriminate Against Transgender Voters*, 56 IDAHO L. REV. 155, 164 (2020); Anthony J. Gaughan, *Notice, Due Process, and Voter Registration Purges*, 67 CLEV. ST. L. REV. 485, 512 (2019); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1883 (2013).

163. Anderson et al., *supra* note 111, at 609 (“The major parties are not an endangered species needing government . . . or judicial protection, or the legislative hurdles posed by ballot access laws conjured up in state legislature either by state legislators seeking their own entrenchment or at the behest of party officials.”); Evseev, *supra* note 136, at 1330.

164. See *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (noting the difficulty of predicting the Court's case law on elections laws that burden voting and associational interests); Recent Case, *Democratic National Committee v. Hobbs*, 134 HARV. L. REV. 862, 870–71 (2020); Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1288–89 (2018); Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board*, 42 LOY. L.A. L. REV. 629, 641 (2009).

165. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); Aaron J. Lyttle, *Constitutional Law – Get the Balance Right: The Supreme Court's Lopsided Balancing Test for Evaluating State Voter-Identification Laws*; *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), 9 WYO. L. REV. 281, 304–05 (2009).

166. *Buckley*, 525 U.S. at 208 (Thomas, J., concurring); Christopher S.

Unlike Alaska's strict scrutiny approach, which provides a bright line rule, *Anderson-Burdick* relies heavily on a judge's subjective determination.<sup>167</sup> Bright line rules, however, offer many advantages, including predictability and certainty.<sup>168</sup> They also constrain judges from injecting their personal views into the holding.<sup>169</sup> They also enhance the legitimacy of judicial decisions by ensuring that cases are decided through the neutral application of a rule instead of the judge's personal views.<sup>170</sup>

*Anderson-Burdick* offers none of these advantages.<sup>171</sup> Balancing tests such as *Anderson-Burdick* permit judges to manipulate the factors in a case to achieve their desired outcome.<sup>172</sup> *Anderson-Burdick* offers greater flexibility,<sup>173</sup> but judicial flexibility in picking winners and losers in sensitive political disputes like ballot access laws does not serve justice.<sup>174</sup> Instead, bright-line rules provide and limit judicial discretion, enabling a true sense of equal justice under the law.<sup>175</sup> *Anderson-Burdick* allows for

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Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 324 n.41 (2007).

167. See *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring) (noting the *Anderson-Burdick* test lacks sufficient detail as to the factors courts must balance); Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2066 n.65 (2018); Lindsay M. Sorin, *Precedent Misapplied: Crawford v. Marion County Election Board: A Compelling Case Study in the Importance of Both Identifying Appropriate and Relevant Case Law and Establishing a Uniform Methodology of Judicial Review*, 40 SETON HALL L. REV. 341, 357 (2010).

168. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010) (holding that bright line rules create reasonably predictable judicial results); see also Florrie Young Roberts, *Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line*, 2006 BYU L. REV. 957, 982-83 (2006).

169. *Harris v. City of Zion*, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting); Little V. West, *Awakening the Moral Consciousness: On the Numbing of the Conscience of a Nation*, 83 N.C. L. REV. 289, 318 (2004); Nicholas S. Zeppos, *People's Court*, 44 VAND. L. REV. 847, 856 (1991).

170. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014).

171. See Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1859 (2013) (noting *Anderson-Burdick's* imprecision undermines predictability and objectivity).

172. See generally, *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting); Eric Engle, *The Rights Orchestra: Proportionality, Balancing, and Viking*, 17 NEW ENG. J. INT'L & COMP. L. 87, 93-94 (2011); Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 576 (2001).

173. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 314 (7th Cir. 2018); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869, 901 (2016).

174. See generally, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (encouraging avoidance of balancing tests at the appellate level because it makes judges factfinders).

175. See Samuel Johnson, *Are You My Mother? A Critique of the Requirements for*

two judges to reach two very different conclusions based on the same facts.<sup>176</sup> It is deeply troubling that in the context of ballot access laws jurisprudence, litigants are afforded little predictability despite the issue implicating associational freedoms.<sup>177</sup>

*Anderson-Burdick's* downsides appeared recently during the 2020 election cycle. In *Buscemi v. Bell*,<sup>178</sup> the Fourth Circuit upheld North Carolina's ballot access law that mandated a petition deadline of March 3.<sup>179</sup> This runs counter to the holding in *Anderson*, where the Supreme Court struck down Ohio's March 20 petition deadline.<sup>180</sup> In addition, the Ohio petition only required five thousand signatures, but in *Buscemi* the North Carolina ballot access law required 70,666 signatures.<sup>181</sup> *Anderson-Burdick's* flexibility offers litigants little predictability, unlike Alaska's bright-line rule of strict scrutiny.

## B. Strict Scrutiny Review of Ballot Access Laws Protects First Amendment Freedoms

*Anderson-Burdick's* lack of predictability in assessing ballot access laws implicates vital First Amendment freedoms.<sup>182</sup> This Section begins by showing the various First Amendment interests ballot access laws implicate. Restrictive ballot access laws hinder First Amendment guarantees of freedom to associate with a political party and the right to hear new ideas. Finally, the Court's *Anderson-Burdick* balancing test approach to ballot access laws is particularly peculiar because laws that implicate First Amendment rights are typically reviewed under strict scrutiny.<sup>183</sup>

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*de Facto Parenthood in Maine Following the Law Court's Decision in Pitts v. Moore*, 67 ME. L. REV. 353, 370 (2015) (explaining such results are accomplished by clearly defined safeguards that create predictability).

176. Foley, *supra* note 171, at 1859.

177. See generally *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).

178. 964 F.3d 252 (4th Cir. 2020).

179. *Id.* at 263.

180. *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983).

181. 964 F.3d at 264. North Carolina's 2020 population was 10,439,388. *Quick Facts: North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NC/POP010220#POP010220> (last visited Nov. 30, 2021).

182. *Cook v. Gralike*, 531 U.S. 510, 530–31 (2001) (Rehnquist, J., concurring); *O'Connor v. Nevada*, 27 F.3d 357, 360 (9th Cir. 1994); Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 696 (2016).

183. Erika Stern, "The Only Thing We Have to Fear is Fear Itself": The Constitutional Infirmities with Felon Disenfranchisement and Citing Fear as the Rationale for Depriving Felons of Their Right to Vote, 48 LOY. L.A. L. REV. 703, 710 (2015) ("Because the First Amendment is a fundamental right, a First Amendment

### 1. Anderson-Burdick *Hinders Associational Rights*

Political parties and their “[members] enjoy a constitutionally protected right of political association.”<sup>184</sup> The Constitution grants parties and their members the “freedom to associate with others for the common advancement of political beliefs and ideas.”<sup>185</sup>

Ballot access laws force third-party candidates to compete on unequal terms with the Democratic and Republican parties.<sup>186</sup> Such laws burden the right to associate both publicly and privately.<sup>187</sup> Ballot access laws impact the right of individuals to publicly associate with a candidate of their choice. For example, signature requirements burden associational rights in other ways than general election exclusion. First, the cost and effort of signature gathering is incredibly expensive and time consuming.<sup>188</sup> Furthermore, a third-party candidate must meet filing deadlines.<sup>189</sup> States vary in their filing deadlines.<sup>190</sup> For example, in 2020, the filing deadlines for North Carolina, Texas, and New Mexico were March 3, May 11, and June 25, respectively.<sup>191</sup> These were the earliest state filing deadlines.<sup>192</sup> By contrast, the two major parties are often granted automatic ballot access and do not have to toil through the pains of mass signature gathering.<sup>193</sup>

Even after a third-party candidate meets the filing deadline, the candidate must then fend off legal challenges. Democratic and Republican candidates typically bring these legal challenges by questioning the validity of signatures.<sup>194</sup> Third-party candidates are

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intrusion can typically only be justified by a compelling state interest.”).

184. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

185. *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973)).

186. Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. LEGIS. 167, 195 (1991).

187. *Id.*

188. Hall, *supra* note 11, at 414; Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL’Y REV. 109, 139 (2014). Gathering restrictions imposed because of the COVID-19 pandemic forced some candidates to resort to remote signature gathering methods that are often more expensive and less fruitful. See *Garbett v. Herbert*, 458 F. Supp. 3d 1328, 1343 (2020).

189. *State and Federal Candidate Filing Deadlines for 2020*, BALLOTPEdia, [https://ballotpedia.org/State\\_and\\_federal\\_candidate\\_filing\\_deadlines\\_for\\_2020](https://ballotpedia.org/State_and_federal_candidate_filing_deadlines_for_2020) (last visited Nov. 30, 2021).

190. See *id.* (collecting all of the various deadlines for each state).

191. *Id.*

192. *Id.*

193. *E.g.*, *Const. Party v. Aichele*, 757 F.3d 347, 349 (3d Cir. 2014) (“[The Pennsylvania law requires] that candidates seeking to be included on the general election ballot—other than Republicans and Democrats—must submit nomination papers with a specified number of signatures.”).

194. *E.g.*, Mark R. Brown, *Policing Ballot Access: Lessons from Nader’s 2004 Run for President*, 35 CAP. U. L. REV. 163, 166–67 (2006); Randy Lobasso, *The Sneaky*

usually compelled to collect thirty percent more signatures than are required in order to make allowances for some signatures being declared invalid.<sup>195</sup>

To secure ballot access, almost every contemporary third-party presidential candidate has depleted his or her resources by September or October.<sup>196</sup> Because alternative candidates and third parties must spend so much of their time and money to simply appear on the ballot, they are less able to appeal to potential voters than the two major parties, which do not face this hurdle. As a result, alternative candidates and third parties are left without sufficient resources to rally and organize like-minded voters into winning coalitions. With this uncertainty, third parties are hindered in their associational rights and are left without “freedom for self-development and group interaction without undue impingement by the norms of the majority.”<sup>197</sup>

The freedom of association enables citizens and groups to participate meaningfully in public debate. When the major parties impose restrictive ballot access requirements, they impose their views on others that would rather express different political views.<sup>198</sup> For example, in 2014 in Ohio, Republican Secretary of State Jon Husted removed all of the Libertarian Party’s statewide candidates from the primary ballot after one of its ballot access petition circulators failed to disclose their employer on the circulator form—a requirement because they were a paid petitioner.<sup>199</sup>

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*Silencing of Third-Party Politicians*, PAC. STANDARD (May 3, 2017), <https://psmag.com/news/how-states-are-blocking-a-third-party-run>; see also Michael D. Moberly, *Old MacDonald Hid a Farm: Examining Arizona’s Prospects for Legalizing Industrial Hemp*, 20 DRAKE J. AGRIC. L. 361, 368 n.41 (2015) (describing challenges related to signature gathering for ballot initiatives).

195. E.g., Jonathan Lai, *Pa. Just Made It Easier to Run as a Third-Party or Independent. Will People Do It?*, PHILA. INQUIRER (Feb. 9, 2018), <https://www.inquirer.com/philly/news/pa-third-party-ballot-access-signature-requirements-20180209.html> (explaining some third-party candidates gather many extra signatures in case of technical challenges by the major parties).

196. George Frampton, Jr., *Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate*, 10 N.Y.U. REV. L. & SOC. CHANGE 131, 134 (1981).

197. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Against Disclosure*, 53 DUKE L.J. 967, 995 (2003).

198. See Cofsky, *supra* note 12, at 354–55 (explaining challenges to the existing two party duopoly and that the introduction of new political ideas is difficult because of restrictive ballot access laws).

199. Richard Winger, *Ohio Secretary of State Removes Libertarian Party Statewide Candidates from the Libertarian Primary Ballot*, BALLOT ACCESS NEWS (Mar. 7, 2014), <http://ballot-access.org/2014/03/07/ohio-secretary-of-state-removes-libertarian-party-statewide-candidates-from-the-libertarian-primary-ballot/> [hereinafter Winger, *Ohio Libertarian Primary*]; Jim Heath, *Husted Orders Libertarian Candidates Off Primary Ballot*, 10 WBNS (Mar. 7, 2014, 6:39 PM), <https://www.10tv.com/article/news/politics/husted-orders-libertarian-candidates-primary-ballot/530-0978ef63-5e46-40e5-9010-1e25a0aa23d7>.

Because the Libertarians' primary field was left vacant by this decision, they were unable to field general election candidates.<sup>200</sup> As such, they essentially forfeited any opportunity to earn "qualified party" status for future elections through winning at least two percent of the general election vote.<sup>201</sup> This important designation enables parties to hold primaries and makes it easier for their candidates to appear on general election ballots in the next election.<sup>202</sup>

As a result of this decision, 2016 Libertarian presidential nominee Gary Johnson was able to appear on the Ohio ballot only after a convoluted process in which Libertarian petitioners gathered enough signatures to get a placeholder candidate on the ballot as an independent (rather than as a Libertarian), and Johnson was substituted just before the necessary deadline.<sup>203</sup> Then, after Johnson seemingly surpassed the necessary vote total in Ohio in the 2016 election to again earn "qualified party" status for the Libertarian Party, Secretary of State Husted ruled that Johnson's votes did not count because he had been listed in Ohio as an independent.<sup>204</sup>

This direct attack by one partisan elected official on the largest third party in the country<sup>205</sup> began more specifically with a direct attack on the privacy and associational rights of one individual who was attempting to gather signatures for a minority party who merely forgot to list his employer. Actions like these, only made possible through state-imposed ballot access petition requirements, are certain to have a chilling effect on political speech and political participation,<sup>206</sup> thereby heavily burdening associational rights.

This is noteworthy because the Supreme Court has held that removing an organization's confidentiality can hinder the right to associate.<sup>207</sup> This right is particularly important when the group espouses

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200. Winger, *Ohio Libertarian Primary*, *supra* note 199.

201. *Id.*

202. *Id.*

203. Daniel Strauss, *Gary Johnson Qualifies for Ohio Ballot as an Independent*, POLITICO (Aug. 24, 2016, 3:41 PM), <https://www.politico.com/story/2016/08/gary-johnson-ohio-ballot-independent-227368>.

204. Jeff D. Gorman, *Libertarians Lose Battle Over Party Status in Ohio*, COURTHOUSE NEWS SERV. (Jan 26, 2017), <https://www.courthousenews.com/libertarians-lose-battle-over-party-status-in-ohio/>.

205. Richard Winger, *New Registration Data for the United States*, BALLOT ACCESS NEWS (July 27, 2017), <http://ballot-access.org/2017/07/27/new-registration-data-for-the-united-states/>.

206. See Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2188–89 (2001).

207. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958).

dissident beliefs.<sup>208</sup> Ballot access laws mandate that petitions include signers' names and addresses, violating the confidentiality that the Court has deemed so fundamental.<sup>209</sup> Harassment has occurred because of ballot access petitions.<sup>210</sup> In 1948, some American newspapers published the names, addresses, and occupations of people who signed ballot access petitions for Progressive presidential candidate Henry Wallace.<sup>211</sup> This action denied individuals the right to associate because it hindered their ability to form a political coalition without fear of reprisal.

Such harassment of ballot access signers is not exclusive to the twentieth century. In a more recent election, California Proposition 8 petition signers were subjected to death threats, threats of physical harm, vandalism, and economic reprisals.<sup>212</sup> The Supreme Court characterized these threats against Proposition 8 supporters as a "cause for concern."<sup>213</sup> In the modern era, preying on someone who signs a ballot access petition does not require searching through thousands of arcane paper documents in a government office.<sup>214</sup> Instead, data containing a petition signers' political leanings, home address, and employer are accessible from any computer, tablet, or smartphone.<sup>215</sup> Excessive ballot access signature requirements thereby threaten the associational privacy of people based on their political viewpoints.

## 2. Alaska's Strict Scrutiny Approach Protects First Amendment "Right to Hear"

Perhaps as central to the First Amendment's right to speak freely is

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208. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (quoting *Patterson*, 357 U.S. at 462); *Uphaus v. Wyman*, 364 U.S. 388, 406 (1960); Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 611 (2008); Michael Froomkin & Zak Colangelo, *Privacy as Safety*, 95 WASH. L. REV. 141, 187 (2020).

209. See, e.g., *Ballot Access Requirements for Political Candidates in New York*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_access\\_requirements\\_for\\_political\\_candidates\\_in\\_New\\_York](https://ballotpedia.org/Ballot_access_requirements_for_political_candidates_in_New_York) (last visited Nov. 30, 2021).

210. See generally, Jennifer Van Laar, *California Dems Want the Name, Address of Everyone Who Signs a Recall Petition*, REDSTATE (Apr. 13, 2021), <https://redstate.com/jenvanlaar/2021/04/13/california-dems-want-the-name-address-of-everyone-who-signs-a-recall-petition-n359874>.

211. KARL M. SCHMIDT, HENRY A. WALLACE: QUIXOTIC CRUSADE 133–34 (1948).

212. Proposition 8, or Prop 8, was the California ballot proposal to create a state constitutional amendment banning same-sex marriage. See Brief for the Institute for Justice as Amicus Curiae supporting Petitioners at 16–17, *Doe v. Reed*, 561 U.S. 186 (2010) (No. 09-559) (collecting news stories on aforementioned incidents) [hereinafter *Institute for Justice Amicus Brief*].

213. *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).

214. *Institute for Justice Amicus Brief*, *supra* note 212, at 18.

215. *Id.*

the right to hear new and different ideas.<sup>216</sup> Justice Douglas elaborated on this principle, noting that “[t]he First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know.”<sup>217</sup> Justice Marshall shared the same belief, stating that:

[T]he right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of [the democratic] process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the “means indispensable to the discovery and spread of political truth.”<sup>218</sup>

This right to learn, hear, and discover new ideas does not stop at the ballot box. As it currently stands, however, many Americans are not even aware of alternative candidates. For example, even though he was on his way to the best third-party vote total of any presidential candidate in twenty years, forty percent of those polled were “undecided” on Libertarian Gary Johnson in the days before Election Day 2016.<sup>219</sup> This is in sharp contrast to Hillary Clinton and Donald Trump, who each garnered “undecided” opinions from four to six percent of voters.<sup>220</sup>

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216. Isaac Smith, *Say It Again for the People in the Back: Freedom to Speak Includes the Freedom to Hear*, FIRE (July 19, 2017), <https://www.thefire.org/say-it-again-for-the-people-in-the-back-freedom-to-speak-includes-the-freedom-to-hear/?fbclid=IwAR0b4ixFf4TrzyTT6A06L1L4WzXWVvEt3CGtx8NZ1KuNTA9v0hvjtKv5b7>; Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2290 (1994); James Netter, Note, *Injunction Junction, What’s Your Function? Crafting Permanent Injunctions to Be Appropriate Remedies in Defamation Cases*, 54 GA. L. REV. 663, 691 (2020).

217. *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) (Douglas, J., dissenting).

218. *Id.* at 775 (Marshall, J., dissenting).

219. *Custom Chart: Gary Johnson Favorable Rating*, HUFFINGTON POST, <https://elections.huffingtonpost.com/pollster/gary-johnson-favorable-rating/edit#!minpct=0&maxpct=100&mindate=2000-01-01&maxdate=2021-01-29&smoothing=moderate&showpoints=yes&showsplines=yes&hiddenpollsters=&hiddensubpops=&partisanship=S,P,N&parties=D,R,I,N&selected=favorable,unfavorable,undecided&fudge=1> (last visited Nov. 30, 2021). A September 2016 poll showed sixty percent of Americans did not know enough about Johnson to form an opinion. Emily Swanson, *AP-GfK Poll: Candidates Disliked, Viewed as Dishonest*, AP NEWS (Sept. 23, 2016), <https://apnews.com/article/a70f1009aa99449287a534e237a27456>.

220. *Hillary Clinton Favorable Rating*, HUFFINGTON POST, <https://elections.huffingtonpost.com/pollster/hillary-clinton-favorable-rating> (last visited Nov. 30, 2021); *Donald Trump Favorable Rating*, HUFFINGTON POST, <https://elections.huffingtonpost.com/pollster/donald-trump-favorable-rating> (last visited Nov. 30, 2021).



When the most viable third-party candidate in two decades<sup>221</sup> is unknown by such a significant portion of voters, is the right to hear being treated with the reverence it deserves?

While other factors like limited media coverage often drag down alternative candidacies, the amount of time and money spent just to get on the ballot can be a war of attrition which ultimately runs campaigns thin. Johnson ultimately got on the ballot in every jurisdiction,<sup>222</sup> but not before incurring significant costs and exhausting limited campaign resources to do so.<sup>223</sup> This is similar to another of the most successful alternative presidential candidates in recent history, John B. Anderson:

“The biggest problem that I faced back in 1980,” says Anderson, “was simply the question of ballot access. How do you get a new party on the ballot? You can’t start a new party and expect it to take wing and soar if it can’t even get on the ballot. I at one time had lawsuits going in about nine different federal courts. We spent somewhere between \$2 million and \$3 million paying lawyers to knock down restrictive ballot-access laws.”<sup>224</sup>

For third-party candidates to get on every ballot, as Johnson and Anderson did, they need to get roughly one million signatures.<sup>225</sup> Twenty years after Ross Perot’s historic third-party run, Perot’s 1996 campaign manager Russell Verney estimated that these costs for ballot access, in addition to other essential campaign functions, meant that third-party campaigns must raise between seventy and one-hundred million dollars,<sup>226</sup> an amount that has surely increased in the last fifteen years due to inflation and growing costs of presidential campaigns generally.<sup>227</sup>

The reality of these ballot access requirements and how the Supreme

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221. See Harry Enten, *What Went Wrong For Gary Johnson*, FIVETHIRTYEIGHT (Oct. 24, 2016), <https://fivethirtyeight.com/features/what-went-wrong-for-gary-johnson/>.

222. Jordyn Phelps, *Gary Johnson on November Ballot in All 50 States*, ABC NEWS (Sept. 14, 2016, 11:23 AM), <https://abcnews.go.com/Politics/gary-johnson-november-ballot-50-states/story?id=42081756>.

223. See Brian Doherty & Matt Welch, *Did the Libertarian Party Blow It in 2016?*, REASON (Feb. 2017), <https://reason.com/2017/01/07/did-the-libertarian-party-blow/> (“Next election cycle, such money [spent on ballot access] can be plowed into actual campaigns instead of time-consuming and expensive petition drives.”).

224. Ryan Lizza, *But Is A Third Party Possible?*, N.Y. MAG. (Apr. 14, 2006), <https://nymag.com/news/politics/16743/>.

225. *Id.*

226. *Id.*

227. Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS (Feb. 11, 2021), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/>.

Court has treated them are fundamentally at odds with the Court's belief in the "right to hear." This is particularly surprising in light of Court precedent conducting strict-scrutiny analyses. For example, in *Forsyth County v. Nationalist Movement*,<sup>228</sup> the Court invoked strict scrutiny to strike down laws imposing differing fees for use of public fora based on political ideology.<sup>229</sup> There, a rural Georgia county enacted a statute permitting the county to charge varying filing fees for public demonstrations.<sup>230</sup> The Court struck down the statute after Forsyth County charged nationalist protesters \$100 without providing any explanation.<sup>231</sup> Specifically, the Court applied strict scrutiny because the law charged different fees on the basis of ideology.<sup>232</sup> Consequently, the law was found unconstitutional under the First Amendment because it lacked "narrowly drawn, reasonable, and definite standards" governing the amount of the fee.<sup>233</sup>

The parallels between the statute in *Forsyth* and modern ballot-access statutes are clear. In both cases, government administrators use arbitrary costs and other hurdles to determine which ideas "deserve" to be heard.<sup>234</sup> Just as with the statute in *Forsyth*, most modern ballot access laws should be struck down and retooled to provide definite, reasonable, and narrowly drawn standards that allow new and even unpopular ideas the ability to use the public forum of the ballot box.

Third-party candidates have been essential for the public to hear new political ideas throughout American history. For example, the Free Soil Party injected the issue of slavery into the public debate during the 1848 presidential election when the major parties failed to adequately grapple with the issue.<sup>235</sup> In the late 1800s and early 1900s populist, socialist, and farmer and labor-oriented parties campaigned on a variety of policy positions that became law.<sup>236</sup> Issues as diverse as progressive

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228. 505 U.S. 123 (1992).

229. See *id.* at 130 ("[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message [and] must be narrowly tailored to serve a significant governmental interest . . .").

230. *Id.* at 126.

231. *Id.* at 127, 137.

232. See *id.* at 124.

233. *Id.* at 132-33.

234. See, e.g., Winger, *Ohio Libertarian Primary*, *supra* note 199 (discussing how a Libertarian candidate for Governor of Ohio was removed from the ballot for a technical error).

235. Tim Cramm, *The Designated Nonpublic Forum: Remediating the Forbes Mistake*, 67 ALB. L.

REV. 89, 158 (2003).

236. Gregory P. Magarian, Note, *Fighting Exclusion From Televised Presidential Debates: Minor-Party Candidates' Standing To Challenge Sponsoring Organizations' Tax-Exempt Status*, 90 MICH. L. REV. 838, 879 (1992).

taxation, federal railroad regulation, federal corporate regulations, civil service reform, stricter child labor laws, social insurance, and women's suffrage originated from these third parties.<sup>237</sup>

This innovation persists in the modern era. For example, the Green Party's Howie Hawkins was the first person to campaign on a "Green New Deal," launching that ambitious platform in 2010.<sup>238</sup> By 2018, a number of Democratic candidates were campaigning on that same proposal.<sup>239</sup> Senator Ed Markey (D-MA) and Representative Alexandria Ocasio-Cortez (D-NY) ultimately released a resolution calling for a "Green New Deal,"<sup>240</sup> even bringing the resolution to a vote in the U.S. Senate.<sup>241</sup> President Joe Biden embraced elements of these initiatives in both his campaign<sup>242</sup> and presidential environmental proposals.<sup>243</sup>

Another relatively recent example is Ross Perot's independent presidential campaign's focus on the federal budget deficit.<sup>244</sup> Neither the

237. *Id.*

238. Robert Harding, *Syracuse's Howie Hawkins, a Lifelong Activist, is Green Party's Nominee for President*, AUBURNPUB.COM (Aug. 16, 2020), [https://auburnpub.com/news/local/govt-and-politics/syracuses-howie-hawkins-a-lifelong-activist-is-green-partys-nominee-for-president/article\\_d592c686-3440-51da-abcd-df569564e258.html](https://auburnpub.com/news/local/govt-and-politics/syracuses-howie-hawkins-a-lifelong-activist-is-green-partys-nominee-for-president/article_d592c686-3440-51da-abcd-df569564e258.html); Gabrielle Mannino, *Who Are the Third-Party Candidates Running for President?*, NEWS CTR. ME. (Oct. 3, 2020, 2:35 PM), <https://www.newscentermaine.com/article/news/politics/elections/who-are-the-third-party-candidates-running-for-president/97-0f9fe456-8bd2-4493-afd7-695bbba33196>.

239. Greg Carlock & Sean McElwee, *Why the Best New Deal Is a Green New Deal*, THE NATION (Sept. 18, 2018), <https://www.thenation.com/article/archive/why-the-best-new-deal-is-a-green-new-deal/>.

240. Joe Battenfeld, Opinion, *Ed Markey's Green Gaffe*, BOS. HERALD (Feb. 14, 2019, 3:10 AM), <https://www.bostonherald.com/2019/02/13/battenfeld-markeys-green-gaffe/>.

241. *Id.*

242. See Natalie Gontcharova, *Does Joe Biden Actually Support the Green New Deal? It's Complicated.*, REFINERY29 (Oct. 7, 2020, 10:00 PM), <https://www.refinery29.com/en-us/2020/09/10057568/does-joe-biden-support-green-new-deal-debate> ("Although Biden has not officially endorsed the Green New Deal, he has essentially embraced its goals . . .").

243. Steve Nelson & Mark Moore, *Biden Pitches Green New Deal-Like \$2 Trillion Environmental Plan*, N.Y. POST (Jan. 27, 2021, 3:47 PM), <https://nypost.com/2021/01/27/biden-pitches-green-new-deal-like-2t-environmental-plan/>; Dylan Matthews, *Joe Biden is Officially President. Here's What He Wants to Do in Office.*, VOX (Jan. 20, 2021, 11:56 AM), <https://www.vox.com/22237275/joe-biden-inauguration-policy-build-back-better>.

244. Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753, 805 (2012) ("By the end of the campaign, Perot had shed valuable light on the importance of deficit reduction . . ."); Matthew M. Mannix, Comment, *Opening Ballot Access to Political Outsiders: How Third Parties Could Use Cook v. Gralike to Challenge the Dominance of America's Two-Party System*, 11 ROGER WILLIAMS U. L. REV. 273, 282 (2005).

Republicans nor Democrats made an issue of the deficit despite its growth during both Democratic and Republican administrations.<sup>245</sup> Perot forced the issue into the public discourse,<sup>246</sup> and, subsequently, both President Bill Clinton and Republicans focused on deficit reduction during the 1990s.<sup>247</sup> Ironically, third parties may bring about their own downfall by proposing ideas later co-opted by larger political parties, but this is currently how third-party candidates have the largest impact on public policy.<sup>248</sup> Americans should have the right to hear new political ideas directly from the third-party candidates who devise them.

### 3. *Strict Scrutiny Typically Applies When an Issue Implicates the First Amendment*

The Supreme Court's use of a balancing test when reviewing ballot access laws is inconsistent with precedent on other issues implicating political speech and other First Amendment freedoms. The Supreme Court usually applies strict scrutiny when the regulation in question impinges on political speech,<sup>249</sup> whether it is statutory prohibitions against distribution of anonymous campaign literature,<sup>250</sup> judicial canon prohibiting judicial candidates from announcing legal or political

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245. See Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1969 (1999) (noting that before Perot's entry into the presidential race, the major party candidates appeared unlikely to address deficit reduction); Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 223-24 (1994).

246. David Boaz, *RIP Ross Perot, The Billionaire Who Ran for President*, CATO INSTITUTE (July 9, 2019, 12:20 PM), <https://www.cato.org/blog/rip-ross-perot-billionaire-who-ran-president> ("[Perot] made spending, deficits, and debt a real political issue . . .").

247. Raskin, *supra* note 245, at 1969; Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating A Federal Electoral System*, 141 U. PA. L. REV. 1991, 2007 (1993). Not all changes brought by third-party candidates are positive, however: Richard Nixon softened his support for civil rights to court supporters of the segregationist AIP candidate George Wallace. Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 334-36 (2012); Peter Baker, *Trump May Compare Himself to Nixon in 1968, but He Really Resembles Wallace*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/us/politics/trump-2020.html>.

248. STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 43-44 (2d. ed. 1996).

249. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) ("Because [the law in question] burdens political speech, it is subject to strict scrutiny . . ."); Dione Christopher Greene, Note, *The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule"*, 81 IND. L.J. 1503, 1514-15 (2006); González, *supra* note 172, at 530 n.198.

250. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-47 (1995).

views,<sup>251</sup> judicial campaign contributions,<sup>252</sup> regulations regarding corporate political speech,<sup>253</sup> a matching campaign funds provision,<sup>254</sup> and state campaign finance contribution limits.<sup>255</sup> This is because political speech is a core right,<sup>256</sup> and “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of [our] system of government.”<sup>257</sup> Consequently, the First Amendment has its fullest and most critical application to speech concerning a political election campaign.<sup>258</sup>

The Supreme Court’s balancing test for ballot access laws is inconsistent with other cases in which the Court applied strict scrutiny. The Court has stated that strict scrutiny applies to a panoply of legislation implicating other precious First Amendment rights, such as federal “signal bleed” regulations,<sup>259</sup> laws prohibiting the sale of violent video games to minors,<sup>260</sup> statutory bans on liquor price advertising,<sup>261</sup> ritual sacrifice ordinances,<sup>262</sup> statutes prohibiting false claims of receipt of military decorations or medals,<sup>263</sup> law schools’ race-conscious admissions programs,<sup>264</sup> statutes barring sale of pharmacy records that reveal prescribing practices of individual doctors,<sup>265</sup> “Son of Sam” laws preventing individuals from profiting from discussions or accounts of crimes for which they have been convicted,<sup>266</sup> and no-aid provisions

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251. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

252. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442–43 (2015).

253. *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010).

254. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734–36 (2011).

255. *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006).

256. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989); Seth N. K. Long, Note, *More Money, Less Problems: Why Strict Scrutiny Should Be Applied to Individual Contribution Limits*, 13 LIBERTY U. L. REV. 189, 217 (2018); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 906 (2001).

257. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 1 (1976) (per curiam)).

258. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971); see also *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

259. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813–14 (2000).

260. *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 799–800 (2011).

261. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 501–03 (1996).

262. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

263. *United States v. Alvarez*, 567 U.S. 709, 715–16 (2012).

264. *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

265. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

266. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

barring religious schools from state scholarship programs.<sup>267</sup> Ballot access laws deserve this same level of scrutiny. After all, they implicate the most integral of First Amendment freedoms relating to political participation and speech.<sup>268</sup> As Justice Black so eloquently stated in *Williams v. Rhodes*: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>269</sup>

Justice Black and the *Williams* Court recognized that the right to the ballot was a fundamental political right, leading the Court to subject additional governmental speech regulations to strict scrutiny.<sup>270</sup> Content-based speech is one such regulation subject to strict scrutiny. Government regulation of speech is content-based if a law applies to the actual message a speaker conveys.<sup>271</sup> Justice Scalia explained that strict review of content-based regulations should apply because “[t]he vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes.”<sup>272</sup>

For example, in *Reed v. Town of Gilbert*,<sup>273</sup> a local sign ordinance drew distinctions based on the content of the sign.<sup>274</sup> Signs were regulated differently depending on whether they were “ideological sign[s],” “political sign[s],” or “temporary directional signs relating to a qualifying event.”<sup>275</sup> “Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals.”<sup>276</sup> The regulations were a “paradigmatic example of content-based discrimination.”<sup>277</sup> The sign ordinance was deemed to have violated the First Amendment because it was a content-based regulation that did not satisfy strict scrutiny.<sup>278</sup> The Court held that even

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267. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2256–57 (2020).

268. *C.f. Gallivan v. Walker*, 54 P.3d 1069, 1081–82 (Utah 2002) (emphasizing the implications of ballot access laws in the initiative and referenda contexts.)

269. 393 U.S. 23, 31 (1968).

270. *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020); *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015); Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1428 (2017).

271. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011).

272. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part) (emphasis added).

273. 576 U.S. 155 (2015).

274. *Id.* at 159.

275. *Id.*

276. *Id.* at 169.

277. *Id.*

278. *Id.* at 171.

innocent motives do not eliminate the danger of censorship presented by content-based regulations because future governments may use such statutes as a tool to suppress disfavored speech.<sup>279</sup>

Often, ballot access laws are content-based regulations designed to suppress disfavored ideas.<sup>280</sup> Certain ballot access laws apply differently depending on a candidate's political party. For example, in North Dakota, a U.S. House candidate belonging to a "recognized party" must obtain only three hundred signatures for ballot access.<sup>281</sup> By contrast, an unaffiliated candidate must acquire one thousand signatures—an over three-fold increase.<sup>282</sup> Such a distinction is content-based because the number of required signatures hinges on the message conveyed.<sup>283</sup> Voters use political party affiliation to make inferences about a candidate's policy positions.<sup>284</sup> Consequently, candidates who wish to remain independent from political parties are penalized solely because of the content of their political beliefs.

Other examples of content-based ballot access regulation are readily apparent.<sup>285</sup> Such distinctions merit a strict scrutiny approach because

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279. *Id.* at 167; *see also* Hill v. Colorado, 530 U.S. 703, 744 (2000) (Scalia, J., dissenting) ("A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk [of being used for thought-control purposes].").

280. *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 166–67 (2008) (noting that a law requiring candidates to disaffiliate from a prior party for one year before the candidate could be on a ballot as an independent helped majority parties "because their candidates would face less opposition, as the law made it harder for factions to break off from entrenched parties").

281. *Ballot Access Requirements for Political Candidates in North Dakota*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_access\\_requirements\\_for\\_political\\_candidates\\_in\\_North\\_Dakota](https://ballotpedia.org/Ballot_access_requirements_for_political_candidates_in_North_Dakota). (last visited Nov. 30, 2021).

282. *Id.*

283. *See generally* Jennifer A. Heerwig & Jennifer Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1471 ("For voters, one well-known heuristic that routinely aids candidate choice is political party – voters frequently select candidates based purely on their partisan affiliation without a deep understanding of a candidate's particular issue stances, voting history, or relevant political experience.").

284. Michael Pfau et al., *Mediating the Vote: The Changing Media Landscape in U.S. Presidential Campaigns* 52 (2007).

285. *See, e.g., Ballot Access Requirements for Political Candidates in Iowa*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_access\\_requirements\\_for\\_political\\_candidates\\_in\\_Iowa](https://ballotpedia.org/Ballot_access_requirements_for_political_candidates_in_Iowa) (last visited Nov. 30, 2021) (lower signature requirement for unaffiliated candidates compared to major party candidates); *Ballot Access Requirements for Political Candidates in Kentucky*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_access\\_requirements\\_for\\_political\\_candidates\\_in\\_Kentucky](https://ballotpedia.org/Ballot_access_requirements_for_political_candidates_in_Kentucky) (last visited Nov. 30, 2021) (candidates from recognized political parties need only two signatures, compared to 400 for unaffiliated House

these laws discriminate based on the content of the speaker's message and accordingly express a government preference toward specific political speech. Ballot access laws should not serve as an exception to strict scrutiny in Supreme Court jurisprudence. Because ballot access laws implicate critical First Amendment freedom, it is necessary to review them under strict scrutiny. Liberty and justice demand it.

## V. CONCLUSION

It is time to rethink the *Anderson-Burdick* balancing test for ballot access laws.<sup>286</sup> Ballot access laws impinge on associational freedoms and hinder valuable policy benefits derived from third-party candidates. The existing standard does nothing to stop the tyranny of the majority in preventing new and different ideas, instead giving far too much leeway to questionable attempts from entrenched Democrats and Republicans to quell competition at the ballot box.

Instead, federal courts, including the Supreme Court, should look to Alaska and come to the imperative realization that ballot access laws must be reviewed under strict scrutiny because they attack some of the most important First Amendment protections. Contrary to any fears of more electoral options, Alaska's system has not led to an unprecedented increase in voter confusion or frivolous candidacies. In fact, doomsday scenarios of delegitimized elections stemming from such confusion seem to be quite unfounded, as Alaska currently has one of the highest voter participation rates in the U.S.<sup>287</sup> American courts should therefore adopt Alaska's approach to ballot access laws. Doing so would lead to an ironic outcome in that Joe Vogler, a peculiar man who vigorously advocated for Alaskan secession and cared little for the rest of the nation, helped develop Alaska's approach that should become the model for the very nation from which he wanted to separate. The *Anderson-Burdick* balancing test is not only outdated, but actively hostile to the political competition

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candidates and 5,000 for unaffiliated Senate candidates).

286. See Daniel Bruce, *Is It Time for SCOTUS to Revisit the Anderson-Burdick Test?: Insights from the Challenge to West Virginia's Ballot Order Statute*, WM. & MARY L. SCH.: ELECTION L. SOC'Y (Nov. 18, 2020), <http://electls.blogs.wm.edu/2020/11/18/time-scotus-revisit-anderson-burdick-test-insights-challenge-west-virginias-ballot-order-statute/> (arguing that the *Anderson-Burdick* test gives judges too much discretion).

287. Casey Leins, *10 States with the Most Voter Participation*, U.S. NEWS & WORLD REP. (Dec. 17, 2019), <https://www.usnews.com/news/best-states/slideshows/states-with-the-highest-voter-turnout-in-presidential-and-congressional-elections?slide=2>. 2020 was the highest voter turnout in Alaskan history. Suzanne Downing, *2020 Was Highest Voter Turnout in Alaska History*, MUST READ ALASKA (Nov. 17, 2020), <https://mustreadalaska.com/2020-was-highest-voter-turnout-in-alaska-history/>.



which is essential to a constitutional republic. Accordingly, it is time that courts instead employ Alaska's strict scrutiny review, thus expanding First Amendment protections for not only different candidates, but millions of voters as well.