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I. INTRODUCTION

State ballot access laws, which restrict when candidates and initiatives may be placed on the ballot, play a controversial role in the modern electoral process.[1] Many state election codes require candidates and initiative sponsors to obtain a certain number of signatures—based on a percentage of the state's registered or actual voters—to appear on the ballot.[2] These must be "wet" signatures, meaning "those made with pen and paper."[3] When confronting candidates' challenges to ballot access laws, courts agree that "there is no fundamental right to seek elected office."[4] Similarly, citizens do not have a federal constitutional right to place initiatives on the ballot.[5] However, the Supreme Court has consistently recognized that ballot access implicates both the First Amendment right to freedom of association and the Equal Protection Clause of the Fourteenth Amendment.[6]

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[1] *See, e.g.*, 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, 414 (2005) (describing modern ballot access laws as "probably the most obviously anticompetitive feature of the American electoral system").

[2] *Id.* at 418 (discussing candidate signature requirements); Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1019, 1023 (2014) (discussing signature requirements for ballot initiative sponsors).

[3] Amee LaTour, *Methods for Signing Candidate Nominating Petitions: Ink Versus Electronic*, BALLOTPEDIA NEWS (Apr. 22, 2020), https://news.ballotpedia.org/2020/04/22/methods-for-signing-candidate-nominating-petitions-ink-versus-electronic/ [https://perma.cc/ZMJ3-NZK9].

[4] Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 742 (N.D. Ill. 2020).

[5] Morgan v. White, No. 20 C 2189, 2020 WL 2526484, at *5 (N.D. Ill. May 18, 2020).

[6] Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986); Storer v. Brown, 415 U.S. 724, 729 (1974); Williams v. Rhodes, 393 U.S. 23, 30–31 (1968).

When states implemented emergency stay-at-home orders to combat the spread of COVID-19, it became much harder to collect the signatures needed for ballot eligibility.[7] Consequently, candidates and initiative proponents sued to enjoin state governments from strictly enforcing the requirement that they obtain a requisite number of in-person signatures.[8] These claims often alleged violations of the First and Fourteenth Amendments.

When determining whether election regulations unconstitutionally burden First and Fourteenth Amendment rights, courts most often apply the test articulated in *Anderson v. Celebrezze*[9] and *Burdick v. Takushi*.[10] The *Anderson-Burdick* balancing test instructs courts to weigh the "character and magnitude" of the state's burden on the plaintiffs' rights against interests put forward by the state.[11] Courts then determine whether the stated interests make such a burden necessary.[12] To assess the magnitude of the burdens that an election regulation creates, courts might consider whether a "reasonably diligent" candidate could be expected to meet the state's signature requirements.[13] Though many ballot access laws have been upheld as constitutional under *Anderson-Burdick*,[14] recent challenges contend that the pandemic changes the test's calculus, rendering these laws unconstitutional as-applied to the 2020 election.[15]

This Comment analyzes how courts have applied *Anderson-Burdick* to pandemic-related ballot access cases.[16] It focuses on one

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[7] Meg Cunningham, *As Coronavirus Upends Elections, Ballot Access Becomes Next Point of Concern*, ABC NEWS (Apr. 22, 2020), https://abcnews.go.com/Politics/coronavirus-upends-elections-ballot-access-point-concern/story?id=70288113 [https://perma.cc/2WS9-9Z8Y].

[8] *See infra* Part III.A.

[9] 460 U.S. 780 (1983).

[10] 504 U.S. 428 (1992).

[11] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434).

[12] *Id.*

[13] Storer v. Brown, 415 U.S. 724, 742 (1974).

[14] *See* Thompson v. DeWine, 959 F.3d 804, 808–09 (6th Cir. 2020) (stating that, in the context of a challenge to Ohio's signature requirement for ballot initiatives, the Sixth Circuit has "regularly upheld ballot access regulations like those at issue").

[15] *See, e.g.*, Garbett v. Herbert, 458 F. Supp. 3d 1328, 1336 (D. Utah 2020); Lyons v. City of Columbus, No. 2:20-cv-3070, 2020 WL 3396319, at *3 (S.D. Ohio June 19, 2020).

[16] Some courts have distinguished between cases involving candidates and initiatives. *See, e.g.*, Bambenek v. White, No. 3:20-cv-3107, 2020 WL 2123951, at *2 (C.D. Ill. May 1, 2020); Morgan v. White, No. 20 C 2189, 2020 WL 2526484, at *5 n.6 (N.D. Ill. May 18, 2020). Scholars have argued that this distinction is illusory. *See* Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, U. CHI. L. REV. ONLINE (2020) ("The courts' arguments seeking to distinguish *candidate* ballot access from *ballot measure* ballot access are unsupported by any reasoning. Both involve voting rights and both involve severe burdens caused by the pandemic. If the external shock of COVID-19 is enough to justify judicial changes in candidate signature requirements, it should for ballot measures as well."). Accordingly, this Comment will discuss both types of cases.

troubling pattern in COVID-19 ballot access litigation: cases in which courts applying *Anderson-Burdick* fault plaintiffs for not being reasonably diligent in collecting signatures prior to or during a shelter-in-place order. Because considering the specific plaintiff's diligence conflicts with the Supreme Court's ballot access jurisprudence, this Comment argues that, when applying *Anderson-Burdick* in the future, courts should either look to factors other than diligence or contemplate diligence only in an objective sense.

To explain the context in which this problem arose, Part II provides a brief history of ballot access laws, tracing the development of the "reasonably diligent" language and its interaction with the *Anderson-Burdick* test. This will clarify the proper role for diligence to play in ballot access cases in order to better understand how courts went astray. Part III introduces pandemic-related challenges to ballot access laws, highlighting cases in which the plaintiff's diligence has improperly played a significant role. In light of this break from precedent, Part IV argues for an objective assessment of reasonable diligence. Rather than determine whether the *specific* plaintiff was diligent enough to meet the relevant signature requirement, courts should ask whether a reasonably diligent plaintiff *generally* would be able to do so. To show how courts can better comport with this standard, Part V looks to examples from COVID-19 ballot access litigation. Part VI concludes.

II. HISTORY: BALLOT ACCESS REQUIREMENTS AND REASONABLE DILIGENCE

A. Early Ballot Access Jurisprudence and *Storer v. Brown*

Election ballots were first introduced in the late 1800s as a more private alternative to voting for government officials by a showing of hands.[17] Though certainly less public, this development did not fully eliminate privacy concerns. Initially, each party produced its own ballot, and because these ballots were printed in distinctive colors and designs, they were easily recognizable from a distance.[18] Over time, however, the ballot system grew more protective of voter privacy, especially as states adopted features of Australian voting reform.[19] Two particularly important features of this reform were the general ballot (a single ballot listing candidates from all parties) and polling booths.[20]

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[17] Burson v. Freeman, 504 U.S. 191, 200–04 (1992).

[18] *Id.* at 200.

[19] *Id.* at 202.

[20] *Id.*

In 1898, South Dakota became the first state to allow citizens to submit petitions in order to place initiatives on the ballot.[21] As of 2021, twenty-four states have adopted a ballot initiative process.[22] Such processes often require that proponents collect a statutorily determined number of signatures.[23] Though the federal Constitution does not guarantee citizens the ability to place initiatives on the ballot,[24] the Supreme Court has determined that once states open up the ballot to citizen initiatives, they cannot impose unconstitutional restrictions on that right.[25]

Candidates' paths to ballot access initially varied by state: while some states placed candidates on the ballot by request, others required them to collect a modest number of signatures.[26] The number of signatures needed has grown drastically over time, though, and many states have narrowed the permissible timeframe and method of signature collection.[27] Courts have reasoned that such restrictions and procedures are beneficial because they help "avoid ballot clutter"[28] and "ensure an organized election cycle."[29]

Three Supreme Court cases, decided over six years, laid the framework for early ballot access jurisprudence. This series began in 1968 with *Williams v. Rhodes*,[30] in which the Court recognized that restrictions on ballot access "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[31] The Court determined that the contested Ohio statute imposed a signature requirement that made it "virtually impossible" for minor party candidates, those not affiliated with either of the two major parties, to

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[21] Levinson, *supra* note 2, at 1023.

[22] *Initiative Process 101*, NAT'L CONF. OF ST. LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/initiative-process-101.aspx [https://perma.cc/3XBS-DA8E].

[23] *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 417 (1988) (describing how, in order to place an amendment to Colorado's Constitution on the ballot in November 1984, petitioners had to collect 46,737 signatures).

[24] *See* Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 937 (7th Cir. 2018).

[25] *Meyer*, 486 U.S. at 424–25. For a more in-depth discussion of *Meyer* and subsequent ballot initiative cases, see Jennifer S. Senior, *Expanding the Court's First Amendment Accessibility Framework for Analyzing Ballot Initiative Circulator Regulations*, 2009 U. CHI. LEGAL F. 529.

[26] Hall, *supra* note 1, at 417 ("500 signatures was the most common requirement, and 1000 signatures the second most common.").

[27] *Id.* at 417–18.

[28] Libertarian Party of N.H. v. Sununu, No. 20-cv-688-JL, 2020 WL 4340308, at *10 (D.N.H. July 28, 2020).

[29] Eason v. Whitmer, No. 20-12252, 2020 WL 5405878, at *7 (E.D. Mich. Sept. 9, 2020).

[30] 393 U.S. 23 (1968).

[31] *Id.* at 30.

qualify for the ballot.[32] Because the state failed to justify such burdensome procedures with any compelling interest,[33] the Court found Ohio's ballot access requirements to be unconstitutional.[34]

Three years later came *Jenness v. Fortson*,[35] in which a prospective candidate challenged Georgia's ballot access signature requirement.[36] In *Jenness*, the Court considered Georgia's statutory scheme "vastly different" from that in *Williams*.[37] Georgia allowed for write-in votes, recognized independent candidacies, and did not set an unreasonably early filing deadline.[38] In sum, Georgia's election laws, "unlike Ohio's, d[id] not operate to freeze the political status quo."[39] For this reason—and because each state has an interest in requiring candidates to show a "significant modicum of support" before printing their names on the ballot[40]—the Court upheld Georgia's signature requirement as constitutional.[41]

The concept of a "reasonably diligent" candidate first appeared in the final case to shape early ballot access jurisprudence, *Storer v. Brown*.[42] The plaintiffs challenged California's ballot access restrictions, which required independent candidates (those unaffiliated with any political party) to collect signatures from at least five percent of all eligible voters, within a twenty-four-day window.[43] The Court acknowledged that there is no "litmus-paper test" for separating valid

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[32] *Id.* at 25.

[33] *Id.* at 31.

[34] *Id.* at 34.

[35] 403 U.S. 431 (1971).

[36] *Id.* at 432 (describing how Georgia's election code requires "nonparty" candidates to obtain signatures from five percent of registered voters for ballot eligibility).

[37] *Id.* at 438.

[38] *Id.*

[39] *Id. But see* Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 181–84 (1991) (explaining how "the differences between the Ohio and Georgia systems, in 'totality,' were not nearly so great as the Court's opinion in *Jenness* would make it seem").

[40] *Jenness*, 403 U.S. at 442 ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.").

[41] *Id.* Scholars have argued that this result is inconsistent with *Williams* and that it led to greater restrictions on ballot access. *See, e.g.*, Smith, *supra* note 39, at 186–87 ("Whereas *Williams* had applied a rigorous strict scrutiny standard, *Jenness* applied minimal scrutiny. *Jenness* appears to have been a catalyst, if not a cause, of renewed state efforts to restrict ballot access.").

[42] 415 U.S. 724 (1974).

[43] *Id.* at 726–27.

from invalid restrictions,[44] but it never opined on the validity of the signature requirement at issue.[45] Instead, it remanded the case to the district court to determine the extent of the burden that California law imposed on independent candidates.[46]

In *Storer*, the Court warned that an "inevitable question" would arise on remand: "[I]n the context of California politics, could a *reasonably diligent* independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?"[47] This wording was intentional; the Court was not asking the lower court to assess either of the plaintiffs' diligence specifically or compare them to other, reasonably diligent candidates. Rather, the Court's language suggests that the burden inquiry was an objective one: could a reasonably diligent candidate *generally* be able to obtain the required number of signatures within twenty-four days?[48]

B. The *Anderson-Burdick* Framework as a Continuation of *Storer*'s Objective Approach to Assessing Burdens

After *Storer* introduced the objective "reasonably diligent" language to ballot access jurisprudence, the Supreme Court decided *Anderson* and *Burdick*. These cases are significant for two reasons—in addition to establishing the current framework courts use to assess the constitutionality of ballot access laws,[49] they exemplify the Court's steady commitment to *Storer*'s objective assessment of burden.

Anderson presented an easy case to fault the plaintiff for his lack of diligence. John Anderson—an independent candidate for president—submitted filing fees, a statement of candidacy, and a petition with

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[44] *Id.* at 730.

[45] The Court did, however, reach a decision on the merits in a separate issue in the case. *See id.* at 738 (upholding California's ban on placing independent candidates on the ballot unless they have been disaffiliated from any registered party for one year).

[46] *Id.* at 740. More specifically, the Court instructed the district court to ascertain the number of signatures independent candidates were required to collect within the allotted twenty-four-day window as well as the "total pool" from which these signatures may be drawn. *Id.* at 742.

[47] *Id.* at 742 (emphasis added).

[48] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring) (explaining how, in *Storer*, the Court "did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures. What mattered was the *general* assessment of the burden" (emphasis added)); Erum v. Cayetano, 881 F.2d 689, 691 n.5 (9th Cir. 1989) ("Indeed, the phrase '*a* reasonably diligent candidate' by its very wording suggests that the inquiry does not necessarily pertain to the specific candidate bringing the challenge."), *overruled on other grounds as recognized in* Kelly v. McCulloch, 405 F. App'x 218 (9th Cir. 2010).

[49] *See, e.g.*, Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 743–44 (N.D. Ill. 2020) ("In determining whether a ballot access restriction survives constitutional scrutiny, courts apply the framework articulated in [*Anderson-Burdick*].").

14,500 signatures to the Ohio Secretary of State in order to place his name on Ohio's general election ballot.[50] The only problem was his timing: Ohio's election code required that these items be submitted on or before March 20, 1980, and Anderson was almost two months late.[51] In fact, he did not even begin collecting signatures until this deadline *had already passed*.[52] When the Secretary of State refused to accept Anderson's materials, he and three voters brought First and Fourteenth Amendment challenges against Ohio's early filing deadline for independent candidates.[53]

The *Anderson* Court clarified that not all ballot access restrictions are subject to strict scrutiny.[54] Rather, for ballot access cases, it instructed courts to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule."[55] When balancing these considerations, the court should determine "the extent to which those interests make it necessary to burden the plaintiff's rights."[56] If the burden is minimal and the regulation in question is "reasonable" and "nondiscriminatory," then the state's interests are generally sufficient to justify the regulation.[57] In *Anderson*, the relevant statute was discriminatory because the early filing deadline for independent candidates placed a heavy burden on Ohio's independent voters.[58] The Court ultimately concluded that this burden could not be justified by Ohio's asserted interest in political stability; accordingly, the early filing deadline was unconstitutional.[59]

Notably, in reaching this conclusion, the Court never faulted Anderson for his lack of diligence. It certainly had the opportunity to do

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[50] Anderson v. Celebrezze, 460 U.S. 780, 782 (1983).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 783.

[54] *Id.* at 788 ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates."); *see also* Andrew C. Maxfield, Comment, *Litigating the Line Drawers: Why Courts Should Apply* Anderson-Burdick *to Redistricting Commissions*, 87 U. CHI. L. REV. 1845, 1864 (2020) (describing how, in *Anderson*, "the Court eschewed the strict scrutiny/rational basis review dichotomy that normally characterizes First Amendment evaluations").

[55] *Anderson*, 460 U.S. at 789.

[56] *Id.*

[57] *Id.* at 788.

[58] *Id.* at 792–93.

[59] *Id.* at 805.

so, as Anderson failed to announce his candidacy or even begin collecting signatures until after the proper timeframe had already ended.[60] The Court also could have compared Anderson to more diligent independent candidates—as Justice Rehnquist noted in his dissent, five independent candidates had successfully petitioned onto the ballot that year.[61] But the Court refused to give this fact significant weight in its burden analysis, reasoning that "[these candidates'] inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters."[62]

The Supreme Court also applied an objective approach to assessing burdens in *Norman v. Reed*,[63] a ballot access case decided in 1992. In *Norman*, the plaintiff candidates were barred from placement on the Illinois statewide ballot for failure to collect enough signatures within the allotted timeframe.[64] The Court held that the relevant ballot access requirement was unconstitutional[65] "without inquiring whether petitioners had shown due diligence in trying to satisfy the challenged requirement."[66]

Seven months after *Norman*, the Court decided *Burdick*, which refined the test articulated in *Anderson* and continued to use an objective approach to assessing an election regulation's burdens. The plaintiff, a registered Hawaii voter hoping to vote for a person not listed on the primary or general election ballot, challenged Hawaii's ban on write-in voting.[67] The Court applied *Anderson*'s "flexible standard"[68] and determined that it only needed to apply strict scrutiny if First and Fourteenth Amendment rights were subjected to a "severe" burden.[69] In accordance with *Anderson*, the Court first looked to the statute's restriction on First and Fourteenth Amendment rights. Instead of considering the burden on the plaintiff, the Court took a broad approach,

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[60] *Id.* at 782.

[61] *Id.* at 809 (Rehnquist, J., dissenting).

[62] *Id.* at 791 n.12 (majority opinion).

[63] 502 U.S. 279 (1992).

[64] *Id.* at 286.

[65] *Id.* at 293.

[66] Perez-Guzman v. Gracia, 346 F.3d 229, 243 (1st Cir. 2003) (citing *Norman*, 502 U.S. at 293).

[67] Burdick v. Takushi, 504 U.S. 428, 430 (1992).

[68] *Id.* at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)).

[69] *Id.* (quoting *Norman*, 502 U.S. at 289). It remains unclear, though, when a burden becomes "severe," as "the Court has failed to define that term with any clarity." Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC. EXPERT F. (Sept. 24, 2019), https://www.acslaw.org/expertforum/a-tale-of-two-election-law-standards/ [https://perma.cc/ERR5-JU78]. In the ballot access context, some lower courts have asserted that "the hallmark of a severe burden is exclusion or virtual exclusion from the ballot." Cooper v. Raffensperger, 472 F. Supp. 3d 1282, 1293 (N.D. Ga. 2020) (quoting Libertarian Party of Ky. v. Grimes, 835 F.3d 570, 574 (6th Cir. 2016)); *see also* Bond v. Dunlap, No. 1:20-cv-00216-NT, 2020 WL 4275035, at *8 (D. Me. July 24, 2020).

finding that Hawaii's ballot access system generally provided candidates with "easy access to the ballot"[70] and that "any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary."[71] Under this general assessment,[72] the write-in voting ban "impose[d] only a limited burden on voters' rights,"[73] meaning it was not subject to strict scrutiny.[74] The Court then turned to the second consideration from *Anderson*—the state's justifications for the rule—noting that a ban on write-in voting helps prevent issues such as "unrestrained factionalism."[75] Balancing these two considerations, the Court concluded that the state's justification for the ban on write-in voting outweighed the statute's burden on Hawaii voters.[76]

The Court continued its approach to assessing burden in *Crawford v. Marion County Election Board*,[77] decided sixteen years after *Burdick*. At issue in *Crawford* was the constitutionality of an Indiana statute that required citizens to present government-issued photo identification for early and in-person voting.[78] Though Justice Stevens purported to apply *Anderson-Burdick* in his plurality opinion,[79] scholars have pointed to *Crawford* as a misapplication of this test.[80] Nonetheless, this case does provide a clear articulation of the Court's commitment to an objective assessment of burden. The plaintiffs in *Crawford* urged the Court to consider the statute's "special burden" on certain voters, namely those who were indigent or had religious objections to having their photo taken.[81] But Justice Stevens applied a general approach instead. Considering "only the statute's *broad* application to *all* Indiana

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[70] *Burdick*, 504 U.S. at 436.

[71] *Id.* at 436–37.

[72] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring) (explaining how, in *Burdick*, the Court "considered the laws and their reasonably foreseeable effect on *voters generally*," instead of asking "whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances").

[73] *Burdick*, 504 U.S. at 438–39.

[74] *See id.* at 429 (stating that only "severe" restrictions are subject to strict scrutiny).

[75] *Id.* at 439; *see also id.* at 440 (describing how a ban on write-in voting also helps prevent "party raiding," or "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983))).

[76] *Id.* at 441.

[77] 553 U.S. 181 (2008) (plurality opinion).

[78] *Id.* at 185.

[79] *Id.* at 190 n.8.

[80] *See, e.g.*, Bryan P. Jensen, Crawford v. Marion County Election Board*: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of* Burdick, 86 DENV. U. L. REV. 535, 547 (2009) (describing how *Anderson-Burdick* instructs courts to first consider burden and then analyze state interests, but Justice Stevens mistakenly reversed this order).

[81] *Crawford*, 553 U.S. at 200–01.

voters,"[82] he reasoned that the photo identification requirement did not excessively burden "any class of voters."[83]

Justice Breyer's dissent criticized this broad approach for ignoring how the Indiana law disproportionately burdened voters who were "likely to be poor, elderly, or disabled."[84] However, Justice Scalia's concurrence explained that the Court's "precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes."[85] Justice Scalia further insisted that, when the Court has calculated the magnitude of burden for purposes of *Anderson-Burdick*, it has done so "categorically," not considering the "peculiar circumstances of voters or candidates."[86] In prior cases that have reached the Court, "[w]hat mattered was the *general* assessment of the burden."[87]

III. PANDEMIC-RELATED CHALLENGES TO BALLOT ACCESS LAWS

As illustrated above, challenges to ballot access laws are a regular part of election litigation. And as *Storer* and *Anderson* make clear, when courts resolve these claims, they must consider diligence only in a broad, objective sense, rather than as it pertains to the unique circumstances of the plaintiff.

However, in the context of COVID-19, courts began to break from this precedent. This Part explains the rise in ballot access litigation during the pandemic and highlights instances in which courts contravened *Storer*'s objective assessment of diligence. Section A provides an overview of ballot access litigation during the 2020 election. Section B then explores pandemic-related ballot access cases in which lower courts applying the *Anderson-Burdick* test have improperly placed significant weight on the plaintiff's diligence.

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[82] *Id.* at 202–203 (emphasis added).

[83] *Id.* at 202 (citing Storer v. Brown, 415 U.S. 724, 738 (1974)).

[84] *Id.* at 238–39 (Breyer, J., dissenting) ("For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system . . . . For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome.").

[85] *Id.* at 205 (Scalia, J., concurring).

[86] *Id.* (citing Jenness v. Fortson, 403 U.S. 431, 438–441 (1971)).

[87] *Id.* at 206–07 (emphasis added). Many lower courts have agreed with Justice Scalia's view of *Storer* and the proper way to assess burden under *Anderson-Burdick*. *See, e.g.*, Perez-Guzman v. Gracia, 346 F.3d 229, 230–31, 242–43 (1st Cir. 2003) (stating that imputing a due diligence requirement is "a misreading of *Storer*" and that the Court's language "did not portend that only those who demonstrate due diligence can mount a First Amendment challenge to a ballot access requirement"); Fishbeck v. Hechler, 85 F.3d 162, 170 (4th Cir. 1996) (Payne, J., dissenting) (reaffirming that *Storer* endorses an objective diligence standard).

A. Ballot Access Litigation and the 2020 Election

In response to the COVID-19 pandemic, state governors issued executive orders that closed businesses, limited the number of people that can attend public gatherings, and required citizens to shelter in place.[88] While personal safety concerns persuaded many people to stay at home,[89] state executive orders added the threat of civil or criminal penalties for those who failed to comply.[90] These orders have prompted novel questions—and subsequent lawsuits—concerning how the pandemic affects state election administration.[91] Prior to the election on November 3, 2020,[92] courts had seen nearly 500 cases arising out of the COVID-19 pandemic,[93] causing journalists to label the 2020 election as the "most litigated election ever."[94]

Ballot access laws prompted a subset of these cases. Faced with stay-at-home orders in place nationwide, candidates and initiative proponents alike struggled to obtain the written signatures required to qualify for 2020 election ballots.[95] A handful of states recognized this obstacle and attempted to ease the burden by allowing for electronic

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[88] *See, e.g.*, Ill. Exec. Order 2020-10 (Mar. 20, 2020) (implementing stay-at-home policy and closing nonessential businesses); Mass. COVID-19 Order No. 63 (Feb. 4, 2020) (limiting indoor gatherings to ten people and outdoor gatherings to twenty-five people). For a detailed record of each state's executive orders in response to COVID-19, see *Executive Orders*, THE COUNCIL OF ST. GOV'TS, https://web.csg.org/covid19/executive-orders/ [https://perma.cc/BNW5-6HR4] (last visited Aug. 7, 2021).

[89] These personal safety concerns apply to both signature collectors and voters. Candidates or initiative sponsors might not be comfortable collecting signatures in-person, and, even if they try to do so, there will be fewer people from whom signatures can be collected.

[90] *See* Betsy Pearl et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. FOR AM. PROGRESS (Apr. 2, 2020), https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders/ [https://perma.cc/6JF2-MU7Z].

[91] For more information about how COVID-19 affected American elections and voting rights, see Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263 (2020).

[92] There were many post-election cases as well. *See* Jacob Kovacs-Goodman, *Post-Election Litigation in Battleground States: A Summary*, HEALTHYELECTIONS.ORG (Feb. 1, 2021), https://healthyelections.org/sites/default/files/2021-02/Post-Election%E2%80%93Litigation_Summary.pdf [https://perma.cc/K24E-UGEG]. But these cases are often of a different character than pre-election litigation. *See* Wendy R. Weiser, *Talking Election Law with the Brennan Center*, BRENNAN CTR. FOR JUST. (Oct. 30, 2020), https://www.brennancenter.org/our-work/research-reports/talking-election-law-brennan-center [https://perma.cc/V446-UZ5M] ("Typically, post-election litigation centers around recounts, which focus on determining voter intent on individual ballots.").

[93] *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ [https://perma.cc/FU8J-LQ8U] (last visited Aug. 7, 2021) (choose "Case Search" from menu bar; then select "Case Filed" next to "Date Range"; then choose "Custom Range" from the dropdown menu; then, under "To," input "11/02/2020"; then select "OK"; then press "Search").

[94] Michael Wines & Nick Corasaniti, *In the Most Litigated Election Ever, Early Democratic Wins but Few Clear Signals*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/us/2020-voting-litigation-election.html [https://perma.cc/3FDF-GLEK].

[95] *See* Cunningham, *supra* note 7.

signatures,[96] reducing the number of signatures required,[97] or suspending the signature requirement entirely.[98] But when states continued to strictly enforce their regular ballot access regimes—or when the reduced requirements were still too burdensome—candidates and initiative sponsors turned to the courts for relief.

Though each pandemic-related ballot access case presents unique facts, these lawsuits are united by common themes. Plaintiffs typically claimed that the state's enforcement of its ballot access scheme, in the context of a shelter-in-place order, violated the First Amendment right to freedom of association and the Fourteenth Amendment's Equal Protection Clause.[99] They often asked for injunctive relief to prohibit states from enforcing some or all of the requirements for ballot access.[100] In assessing the merits of these plaintiffs' First and Fourteenth Amendment claims (often in the preliminary injunction context), courts almost always applied the *Anderson-Burdick* balancing test.[101]

B. An Unwarranted Break with Precedent: 2020 Election Cases in Which Courts Assessed the Plaintiffs' Diligence

A handful of courts, applying the *Anderson-Burdick* framework, gave weight in their burden analyses to whether the plaintiff had been reasonably diligent in collecting signatures. One such case is *Kishore v. Whitmer*,[102] in which two independent candidates mounted an as applied challenge to Michigan's ballot access requirements.[103] The Eastern District of Michigan denied their request for a preliminary injunction, citing *Anderson-Burdick* and the plaintiffs' failure to show that the

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[96] N.J. Exec. Order No. 105 (Mar. 19, 2020); Utah Exec. Order No. 2020-8 (Mar. 26, 2020).

[97] N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing signature requirements by thirty percent).

[98] 2020 Vt. Acts & Resolves 92.

[99] *E.g.*, Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 742 (N.D. Ill. 2020); Garbett v. Herbert, 458 F. Supp. 3d 1328, 1336 (D. Utah 2020); Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910, 914 (D. Ariz. 2020).

[100] *E.g.*, *Garbett*, 458 F. Supp. 3d at 1334; Garcia v. Griswold, No. 20-cv-1268-WJM, 2020 WL 4926051, at *1 (D. Colo. Aug. 21, 2020); Cooper v. Raffensperger, 472 F. Supp. 3d 1282, 1291 (N.D. Ga. 2020).

[101] *E.g.*, *Libertarian Party of Ill.*, 455 F. Supp. 3d at 742; Eason v. Whitmer, No. 20-12252, 2020 WL 5405878, at *5 (E.D. Mich. Sept. 9, 2020). *But see* Thompson v. DeWine, 959 F.3d 804, 808 n.2 (6th Cir. 2020) (doubting "whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote," but determining that the Sixth Circuit will apply the test to ballot access cases until it determines *Anderson-Burdick*'s reach *en banc*); Fair Maps Nev. v. Cegavske, 463 F. Supp. 3d 1123, 1141 (D. Nev. 2020) (determining that Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012), provides the proper framework under which to analyze ballot initiative cases).

[102] No. 20-11605, 2020 WL 3819125 (E.D. Mich. July 8, 2020), *aff'd*, 972 F.3d 745 (6th Cir. 2020).

[103] *Id.* at *1.

statutory scheme imposed a severe burden on their rights.[104] In reaching this conclusion, the court provided a detailed account of the plaintiffs' "complete lack of effort" to gather signatures.[105] Ultimately, this factor played a significant role in the court's *Anderson-Burdick* analysis. The court found that lack of diligence lessened the plaintiffs' burden, concluding that the "[p]laintiffs' lack of diligence also weighs strongly in favor of applying intermediate scrutiny in this particular case."[106] Moreover, the court concluded that any burden on the plaintiffs was self-imposed: Because the plaintiffs' lack of diligence was a "voluntary decision[ ]," the "root cause" of the burden was not state action.[107] Without commenting on whether the plaintiffs were reasonably diligent or whether a plaintiff's diligence is a relevant factor under *Anderson-Burdick*, the Sixth Circuit affirmed this outcome in its entirety.[108]

In *Arizonans for Second Chances, Rehabilitation, & Public Safety v. Hobbs*,[109] the Supreme Court of Arizona made a similar inquiry into the plaintiff initiative sponsors' diligence while applying *Anderson-Burdick* to uphold Arizona's ballot access scheme.[110] The challenged restriction required initiative proponents to collect 237,145 signatures by July 2, 2020, to qualify for the ballot.[111] Faced with the state's stay-at-home order, which lasted from March 30 until May 12, 2020, the plaintiffs, four political action committees, sought relief allowing them to collect signatures electronically.[112] The court denied this request, as "[a] proponent bears the burden of showing that he exercised reasonable diligence in seeking ballot access" and three of four plaintiffs "made no effort to collect signatures for sixteen months."[113] Because the court found that the plaintiffs failed to exercise their rights in a reasonably diligent manner, it concluded in turn that "the circumstances created by COVID-19 did not severely burden their constitutional rights," and that, consequently, strict scrutiny was not appropriate.[114]

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[104] *Id.*

[105] *Id.* at *5; *see also id.* at *10–11 (explaining how plaintiffs failed to prepare a qualifying petition and did not collect any signatures before, during, or after Michigan's stay-at-home order).

[106] *Id.* at *7; *see also id.* at *9 (finding that, in "sharp contrast" to the plaintiffs in two other ballot access cases, "[p]laintiffs have not been diligent in the exercise of their rights").

[107] *Id.* at *12.

[108] Kishore v. Whitmer, 972 F.3d 745, 751 (6th Cir. 2020).

[109] 471 P.3d 607 (Ariz. 2020).

[110] *Id.* at 621–23.

[111] *Id.* at 614.

[112] *Id.*

[113] *Id.* at 621 (citations omitted).

[114] *Id.* at 623.

Another case to weigh the plaintiffs' diligence was *Morgan v. White*.[115] The plaintiffs in that case were registered voters who sought to place referenda on the Illinois ballot in November 2020.[116] The Northern District of Illinois noted that, though the plaintiffs had eighteen months to collect 363,813 signatures on their petition, they waited until the final two months of this window to take action.[117] Citing to the same "reasonably diligent" language from *Storer v. Brown*, the court concluded that the plaintiffs "ha[d] not established that it is state law, rather than their own 16-month delay, that imposes a severe burden on their First Amendment rights, even in the context of the COVID-19 pandemic."[118] On appeal, the Seventh Circuit emphasized the discretion afforded to district court judges when determining whether to grant preliminary relief.[119] Noting the importance of the emergency relief context, the court stated that "one important question . . . is whether the plaintiff has brought the emergency on himself."[120] Because the plaintiffs "had plenty of time to gather signatures before the pandemic began," the Seventh Circuit determined that the district court had "good reason to conclude that they are not entitled to emergency relief."[121]

A number of district courts within the Ninth Circuit have cited to *Angle v. Miller*[122] for the proposition that a court should consider whether an initiative sponsor is reasonably diligent when collecting signatures. This case dealt with Nevada's constitutional scheme for placing initiatives on the state ballot.[123] The Ninth Circuit reiterated that the standard for ballot initiative cases should be the same as that in candidate cases. Accordingly, courts should consider "whether . . . 'reasonably diligent' [initiative proponents] can normally gain a place on the ballot."[124] However, because the plaintiffs in *Angle* did not present evidence that "despite reasonably diligent efforts, they and other initiative proponents had been unable to qualify initiatives for the ballot as

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[115] No. 20 C 2189, 2020 WL 2526484 (N.D. Ill. May 18, 2020).

[116] *Id.* at *1.

[117] *See id.* at *2–3.

[118] *Id.* at *6. Though beyond the scope of this Comment, it is worth nothing that the courts in both *Arizonans for Second Chances* and *Morgan* concluded that the burden on the plaintiffs' rights was caused by the pandemic, rather than state action. One election law scholar, Richard L. Hasen, has described this reasoning as "nonsensical." *See* Hasen, *supra* note 16.

[119] Morgan v. White, 964 F.3d 649, 651 (7th Cir. 2020).

[120] *Id.*

[121] *Id.* at 652–53.

[122] 673 F.3d 1122 (9th Cir. 2012).

[123] *Id.* at 1126–27.

[124] *Id.* at 1133 (quoting Nader v. Brewer, 531 F.3d 1028, 1035 (9th Cir. 2008)).

a result of [the challenged] requirement," the court refused to apply strict scrutiny.[125]

Fair Maps Nevada v. Cegavske,[126] a pandemic-related ballot initiative case in which the plaintiffs mounted an as-applied challenge to Nevada's ballot access scheme,[127] described *Angle* as the Ninth Circuit's application of *Anderson-Burdick* to "the specific context of Nevada's initiative process for amending the Nevada Constitution."[128] Because the plaintiffs' claim in *Fair Maps Nevada* was not related to voting rights, but rather the ballot initiative qualification process, the District of Nevada determined that *Angle* was applicable.[129] The court then stated that *Angle* requires strict scrutiny *only* when "the proponents of the initiative have been 'reasonably diligent' as compared to other initiative proponents."[130] This language misstated the holding in *Angle*. Yet, four district courts—citing to *Fair Maps Nevada*'s reformulation of *Angle*—assessed plaintiffs' relative diligence in pandemic-related ballot access cases, reaching a variety of results.[131]

IV. THE CASE FOR AN OBJECTIVE "REASONABLY DILIGENT" ASSESSMENT

A. An Objective Assessment Is Consistent with *Storer* and the Supreme Court's Subsequent Cases

Courts that consider a plaintiff's diligence when applying *Anderson-Burdick*[132] misunderstand *Storer v. Brown*'s "reasonably diligent" language.[133] By instructing the district court to consider the signature

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[125] *Id.* at 1134.

[126] 463 F. Supp. 3d 1123 (D. Nev. 2020).

[127] *Id.* at 1130–33 (explaining Nevada's ballot initiative scheme and the nature of plaintiffs' claim).

[128] *Id.* at 1141.

[129] *Id.*

[130] *Id.* at 1142.

[131] *See* People Not Politicians Or. v. Clarno, 472 F. Supp. 3d 890, 897–98 (D. Or. 2020) (finding that plaintiffs were reasonably diligent); Reclaim Idaho v. Little, 469 F. Supp. 3d 988, 998 (D. Idaho 2020) (same); Eilenberg v. City of Colton, No. CV-20-00767, 2020 WL 5802377, at *4–5 (C.D. Cal. July 9, 2020) (finding that plaintiffs had not been reasonably diligent, so strict scrutiny does not apply), *report and recommendation adopted*, No. CV-20-00767, 2020 WL 5802379 (C.D. Cal. July 29, 2020); McCarter v. Brown, No. 6:20-cv-1048-MC, 2020 WL 4059698, at *2–3 (D. Or. July 20, 2020) (same). Though two of these cases were appealed, the Ninth Circuit never corrected the district courts' understanding of *Angle* because the issues had become moot. *See* Reclaim Idaho v. Little, 826 F. App'x 592, 595 (9th Cir. 2020); People Not Politicians Or. v. Clarno, 826 F. App'x 581, 583 (9th Cir. 2020).

[132] *See, e.g.*, Morgan v. White, No. 20 C 2189, 2020 WL 2526484, at *6 (N.D. Ill. May 18, 2020).

[133] *See* Perez-Guzman v. Gracia, 346 F.3d 229, 242–43 (1st Cir. 2003) ("The *Storer* remand went to the burdensomeness of the challenged regulation (i.e., its severity), not to causation. While a particular plaintiff's '[p]ast experience' can have evidentiary significance in an assessment of severity, a showing of personal due diligence is not an element of a ballot access claim." (internal

requirement's burden on "*a* reasonably diligent candidate"—*not* specifically the plaintiff—the *Storer* Court clarified that "[w]hat mattered was the general assessment of the burden."[134]

The Supreme Court has reinforced this objective reading of *Storer*'s "reasonably diligent" language in subsequent ballot access cases, which omit any discussion of an individual plaintiff's diligence.[135] *Anderson v. Celebrezze* presented a case where the plaintiff's lack of diligence was egregious—he did not collect a single signature before the deadline had passed.[136] Yet the Court still determined that it was appropriate to apply strict scrutiny, and it consequently found the deadline unconstitutional,[137] without assessing whether the plaintiff had been diligent[138] or comparing the plaintiff to a more diligent candidate.[139] The same is true of *Norman v. Reed*, when the plaintiffs' claim was spurred by their failure to collect enough signatures, which "doomed the entire slate."[140] The Court still found the relevant ballot access requirements unconstitutional, and it did so without faulting the plaintiffs for their oversight.[141]

Despite being somewhat distinct from the ballot access context, the Court's jurisprudence on challenges to voting restrictions reflects the same commitment to an objective assessment of burden. In *Burdick v. Takushi*, the Court ignored "whether the laws had a severe effect on [the plaintiff]'s own right to vote, given his particular circumstances."[142] Instead, the Court's analysis "considered the laws and their reasonably foreseeable effect on *voters generally*."[143] Even when the costs of a general approach were high—such as in *Crawford v. Marion County Election Board*—the Court chose to focus on the "broad application" of the

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citation omitted)).

[134] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring) (emphasis added); *see also id.* ("[W]hen we began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or candidates . . . . [In *Storer*], we did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures.").

[135] As the Ninth Circuit has pointed out, the Court "surely could have" made this assessment at some point. Erum v. Cayetano, 881 F.2d 689, 691 n.5 (9th Cir. 1989) (citing Munro v. Socialist Workers Party, 479 U.S. 189, 192 (1986)).

[136] Anderson v. Celebrezze, 460 U.S. 780, 782 (1983).

[137] *Id.* at 805.

[138] *See Perez-Guzman*, 346 F.3d at 243.

[139] *See* Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (2020) (conceding that, though "[i]t makes sense that the punctuality or tardiness of a litigant's activity would be relevant to a court's evaluation of the burden imposed on the litigant . . . . plaintiff diligence isn't assessed relative to more punctual nonparties").

[140] Norman v. Reed, 502 U.S. 279, 286 (1992).

[141] *Id.* at 293.

[142] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring).

[143] *Id.*

relevant statute to all voters rather than its impact on the specific plaintiffs or the individuals it burdened the most.[144]

B. *Angle v. Miller* Did Not Create a Specific Diligence Requirement—It Applied *Storer*'s Objective Assessment

When district courts within the Ninth Circuit cite to *Angle v. Miller* in order to justify assessing the specific plaintiff's diligence,[145] they misconstrue this case's context, reasoning, and holding. Though the court in *Fair Maps Nevada v. Cegavske* claimed that "*Angle* requires application of strict scrutiny when . . . the proponents of the initiative have been 'reasonably diligent' as compared to other initiative proponents,"[146] *Angle* never actually imposed such a requirement. In *Angle*, the court stated that "the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can *normally* gain a place on the ballot, or whether they will rarely succeed in doing so."[147] This language came directly from the objective assessment of diligence articulated in *Storer*.[148] *Angle* only mentions diligence one other time, yet again in a general context: the court concluded that there was not enough evidence to show that "despite reasonably diligent efforts, [the plaintiffs] *and other initiative proponents* have been unable to qualify initiatives for the ballot."[149] Nowhere in *Angle* did the Ninth Circuit compare the plaintiffs to a hypothetical reasonably diligent initiative proponent or instruct lower courts to do so. Rather, the Ninth Circuit's analysis in *Angle* was entirely consistent with the objective approach in *Storer*.

Though a handful of district courts have latched onto *Fair Maps Nevada*'s misguided interpretation of *Angle*, this error has not gone unnoticed by the Ninth Circuit. It caught the attention of Judge Nelson, who wrote separately in two ballot initiative cases, *Reclaim Idaho v. Little*[150] and *People Not Politicians Oregon v. Clarno*,[151] to highlight how *Angle* should be reviewed *en banc* in a future case.[152] Judge Nelson was

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[144] *Id.* at 202–03.

[145] *See supra* Part III.B.

[146] Fair Maps Nev. v. Cegavske, 463 F. Supp. 3d 1123, 1142 (D. Nev. 2020).

[147] Angle v. Miller, 673 F.3d 1133 (9th Cir. 2012) (quoting Nader v. Brewer, 531 F.3d 1028, 1035 (9th Cir. 2008)) (emphasis added).

[148] *See Nader*, 531 F.3d at 1035 (quoting Storer v. Brown, 415 U.S. 724, 742 (1974)).

[149] *Angle*, 673 F.3d at 1134 (emphasis added).

[150] 826 F. App'x 592 (9th Cir. 2020).

[151] 826 F. App'x 581 (9th Cir. 2020).

[152] *Id.* at 584 (Nelson, J., dissenting); *Reclaim Idaho*, 826 F. App'x at 595–96 (Nelson, J., dissenting).

specifically worried that district courts were improperly applying *Angle* in pandemic-related ballot initiative cases.[153] He insisted that the "plainest reading of *Angle* suggests an objective, not subjective test" for reasonable diligence.[154] Urging that he could not find any case "in which First Amendment protections turn on whether the speaker was sufficiently diligent while engaged in expression,"[155] he proposed that the court revisit *Angle* if it truly stands for the proposition lower courts have ascribed to it.[156] The majority in both cases did not ignore or reject Judge Nelson's concerns. The Ninth Circuit stated that it only declined to revisit its jurisprudence on ballot initiatives because it was unnecessary to resolve either case on its merits.[157]

C. An Objective Diligence Assessment Properly Maintains Ballot Access Jurisprudence's Focus on the Rights of Voters

While some might argue that *stare decisis* alone cannot be dispositive,[158] normative considerations warrant an objective assessment of reasonable diligence as well. From the beginning of its ballot access jurisprudence, the Supreme Court has emphasized that the First and Fourteenth Amendment rights at issue are those of the voters rather than those of candidates or initiative proponents.[159] Because the rights of voters are "fundamental" in ballot access cases,[160] it would be inconsistent for the *Anderson-Burdick* analysis to turn on the specific circumstances or relative diligence of the candidate or initiative proponent plaintiff. These questions bear no relation to the voters' rights.

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[153] *Reclaim Idaho*, 826 F. App'x at 602–03 (citing People Not Politicians Or. v. Clarno, 472 F. Supp. 3d 890, 896 (D. Or. 2020)).

[154] *Id.* at 602 n.7.

[155] *Id.* at 602.

[156] *Id.* ("If *Angle* truly stands for how it is being applied—conditioning constitutional protections on the diligence of the speaker . . . *Angle* must be revisited en banc in a future case and brought in line with fundamental First Amendment principles.").

[157] *Id.* at 595 n.2; *People Not Politicians Or.*, 826 F. App'x at 583.

[158] *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

[159] *See, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 198 (1986) (explaining how, in cases where ballot access restrictions have been deemed unconstitutional, "the State's *voters* had no opportunity to cast a ballot for that candidate and the candidate had no ballot-connected campaign platform from which to espouse his or her views" (emphasis added)); Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983) ("As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both . . . . The exclusion of candidates [ ] burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." (internal citations omitted)); Lubin v. Panish, 415 U.S. 709, 716 (1974) ("[V]oters can assert their preferences only through candidates or parties or both . . . ."); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (stating that ballot access laws burden "the right of qualified *voters* . . . to cast their votes effectively" (emphasis added)).

[160] *Anderson*, 460 U.S. at 788.

Judge Payne, dissenting in the Fourth Circuit case *Fishbeck v. Hechler*,[161] advanced this same position. The plaintiffs in *Fishbeck* challenged West Virginia's filing deadline for candidate petitions.[162] The court affirmed the district court's finding that, under *Anderson-Burdick*, the deadline did not impose a "severe" restriction on the plaintiffs.[163] Though the district court's analysis weighted the plaintiffs' "lack of diligence,"[164] the Fourth Circuit did not address this issue specifically on appeal. Judge Payne explained this oversight, reaffirming that *Storer* does not endorse such a consideration.[165] He reasoned that assessing the filing deadline's burdens by looking to the specific candidate's diligence is not consistent with the idea that "the primary concern in ballot access cases is the rights of the voter."[166] This is because "a heavy focus on a specific candidate's actual diligence precludes or, at least distorts, the inquiry on the primary concern that permits consideration of a candidate's diligence only in an objective sense."[167]

One can easily imagine the undesirable consequences if courts were to heavily focus on the plaintiff's diligence in their burden analyses. As Judge Payne noted, faulting the plaintiff for lack of diligence "would permit even the most egregious restrictions to survive," which is not what the Court in *Storer* intended.[168] The First Circuit has expressed similar sentiments, explaining that such a rule "would tend to inoculate even the most blatantly unconstitutional electoral requirements from legitimate attack."[169] The facts of *Anderson* clearly demonstrate this issue. If the Supreme Court had considered Anderson's failure to exercise reasonable diligence, it might have concluded that Ohio's ballot access restrictions did not impose a severe burden on First and Fourteenth Amendment rights. It follows that strict scrutiny would have been inappropriate. Accordingly, the Court would have been more likely to uphold the relevant ballot access scheme, even though the restrictions clearly impinged on independent voters' rights.[170]

Anderson illustrates how voters pay the price when courts focus on the plaintiff's lack of diligence in order to uphold anti-democratic laws. This notion is especially true in the context of ballot access, where independent and third-party voters do not get a voice if their candidate

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[161] 85 F.3d 162 (4th Cir. 1996).

[162] *Id.* at 163.

[163] *Id.* at 165.

[164] Hess v. Hechler, 925 F. Supp. 1140 (S.D. W. Va. 1995).

[165] *Fishbeck*, 85 F.3d at 170 (Payne, J., dissenting).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Perez-Guzman v. Gracia, 346 F.3d 229, 243 (1st Cir. 2003).

[170] *See* Anderson v. Celebrezze, 460 U.S. 780, 792–95 (1983).

does not secure a spot on the ballot. But there is also a broader lesson here, as diligence considerations are not solely a feature of ballot access challenges—they permeate other areas of election law as well. The common misconception that nonvoters are "lazy" perpetuates restrictive voting laws,[171] and lawmakers have used diligence as an argument against implementing pro-democratic processes and rules.[172] When participation in the electoral process hinges on diligence judgments, our political system becomes a less democratic one.

V. A BETTER WAY TO ASSESS BURDEN: EXAMPLES FROM 2020 BALLOT ACCESS CASES

Courts faced with resolving challenges to ballot access restrictions can—and have—applied *Anderson-Burdick* in a way that comports with *Storer v. Brown* and the Supreme Court's history of an objective burden assessment. While some courts confronted with pandemic-related ballot access challenges have erroneously conducted a specific burden analysis, others have kept their analyses general or looked to factors besides diligence.

Even when courts give significant weight to diligence in their application of *Anderson-Burdick*, they can still apply an objective approach by refusing to analyze whether the specific plaintiff has acted in a reasonably diligent manner. The Second Circuit implemented this general assessment one month prior to the 2020 election in *Libertarian Party of Connecticut v. Lamont*.[173] This case was similar to other pandemic-related ballot access cases: Two candidates brought First and Fourteenth Amendment challenges to Connecticut's signature requirement, asking the court to enjoin the state from strictly enforcing its ballot access laws.[174] After determining that *Anderson-Burdick* was the proper test under which to analyze this challenge,[175] the court clarified that what is "ultimately important is . . . whether a 'reasonably diligent

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[171] *See* Sarah Jackel & Stuart A. Thompson, *The Myth of the Lazy Nonvoter*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/interactive/2018/10/05/opinion/midterm-election-voter-turnout-photo-id.html [https://perma.cc/3ZYW-VUSC].

[172] One telling example is the language surrounding a piece of 1992 legislation that sought to allow people to register to vote when applying for a driver's license or government benefits. President George H.W. Bush vetoed this bill, and the Senate failed to override the veto, preventing the legislation from being passed. In justifying his decision to not vote to override the veto, Senator Mitch McConnell reasoned that even if voter registration laws were tailored to "political couch potatoes," voter turnout would still not increase. *See* Helen Dewar, *Veto of 'Motor Voter' Bill Sustained*, WASH. POST (Sept. 23, 1992), https://www.washingtonpost.com/archive/politics/1992/09/23/veto-of-motor-voter-bill-sustained/94a25acc-1090-43f9-9460-a94d106c81d8 [https://perma.cc/4CA9-AWHP].

[173] 977 F.3d 173 (2d Cir. 2020).

[174] *Id.* at 175.

[175] *Id.* at 177.

candidate could be expected to be able to meet the requirements and gain a place on the ballot.'"[176] Though the Second Circuit explicitly stated that diligence was the primary consideration in its *Anderson-Burdick* analysis, the court never commented on whether the plaintiff candidates had been reasonably diligent or not. Rather, it conducted an objective assessment of diligence, concluding that a reasonably diligent candidate would still have been able to qualify for the ballot despite such challenging conditions.[177]

Courts can also avoid conflict with *Storer* by looking to factors other than a candidate's or initiative sponsor's diligence. In *Bond v. Dunlap*[178]—a case regarding an as-applied challenge to candidate signature requirements[179]—the state attempted to argue that the plaintiff had not been diligent in collecting signatures.[180] The District of Maine explicitly rejected this argument, reasoning that "the issue is not whether the Plaintiff herself lacked diligence. . . . Rather, the question is whether the State's ballot restrictions are severely burdensome to a reasonably diligent candidate."[181] Putting aside whether the plaintiff had been diligent, then, the court focused on other factors, such as the timeframe in which candidates were able to collect signatures and the duration of the stay-at-home order.[182] Because the Governor of Maine had extended the window for signature collection—and because this extension coincided with the end of Maine's stay-at-home order—the court found that a reasonably diligent candidate would not be "virtually excluded" from the ballot.[183] Similarly, in *Cooper v. Raffensperger*,[184] another candidate ballot access case,[185] the Northern District of Georgia did not comment on the individual plaintiff's diligence. In upholding Georgia's ballot access requirements for third-party candidates, its application of *Anderson-Burdick* generally considered "the hardships of the COVID-19 pandemic, the Governor's responses thereto, Georgia's current ballot access

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[176] *Id.* at 177–78 (quoting Stone v. Bd. of Election Comm'rs, 750 F.3d 678, 682 (7th Cir. 2014)).

[177] *See id.* at 178–80 (situating the reasonable diligence requirement within the context of prior cases and explaining how, despite challenging conditions, candidates had generally been able to petition onto the ballot).

[178] No. 1:20-cv-00216-NT, 2020 WL 4275035 (D. Me. July 24, 2020).

[179] *Id.* at *1.

[180] *See id.* at *9 n.10.

[181] *Id.* (citing Perez-Guzman v. Gracia, 346 F.3d 229, 242–43 (1st Cir. 2003)).

[182] *Id.* at *8.

[183] *Id.* at *9 (concluding that extending the signature collection window "certainly lessened the burden imposed by Maine's ballot access scheme," as candidates were given time after the stay-at-home order to collect additional signatures).

[184] 472 F. Supp. 3d 1282 (N.D. Ga. 2020).

[185] *Id.* at 1286.

laws, the Secretary's responsive measures thus far, and recent conditions in Georgia."[186] These cases illustrate that courts are not forced to ask whether plaintiffs have acted reasonably diligently. There are plenty of other factors to consider when assessing election regulations' burdens under *Anderson-Burdick*.

VI. CONCLUSION

Prior to the COVID-19 pandemic, a specific plaintiff's diligence had not been recognized as a relevant consideration when courts applied the *Anderson-Burdick* balancing test in ballot access cases. In fact, the Supreme Court's ballot access jurisprudence indicated that courts should not assess the plaintiff's diligence at all. Burden was always considered as a broad, objective question—not unique to the specific candidate. When the Court contemplated diligence, it was in relation to all candidates rather than just the plaintiff.

When the COVID-19 pandemic began and states put stay-at-home orders in place, ballot access became much more difficult to achieve. Candidates and initiative sponsors faced new, nontrivial obstacles that prevented them from collecting the requisite number of in-person signatures to secure a place on the ballot. In light of this increased difficulty, they brought First and Fourteenth Amendment challenges contending that these requirements were unconstitutional as applied to the 2020 election. When resolving these cases, some lower courts erroneously departed from the Court's precedent of assessing burden in a general manner and instead gave weight to the specific plaintiff's diligence. This change made it significantly more difficult for plaintiffs to prevail in the *Anderson-Burdick* analysis.

This Comment has argued that considering the plaintiff's diligence is improper for two reasons. The first is *stare decisis*. Contrary to some lower courts' determinations, *Storer* and *Angle v. Miller* do not support a plaintiff-specific diligence analysis. As discussed at length above, each of these cases only considered diligence in an objective sense, asking whether a reasonably diligent candidate could *generally* meet the challenged requirements. Second, an objective diligence standard is consistent with the voter-focused logic behind the Supreme Court's prior ballot access cases. When courts ask whether a specific candidate or initiative proponent has been reasonably diligent, they forget that the primary concern in these cases is voters. Placing weight on a specific plaintiff's diligence might lead courts to unjustly uphold even the most

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[186] *Id.* at 1293; *see also id.* at 1292–93 (explaining how the timeframe to collect signatures began prior to Georgia's stay-at-home order, how the order had been lifted already, and how the State extended its petitioning period "to ameliorate the increased burden he concedes the public health emergency has imposed on Plaintiffs").

burdensome and egregious ballot access laws. This mistake ultimately harms voters' rights the most.

The COVID-19 pandemic has cast a spotlight on the role of diligence in election law litigation, but ballot access is not the only context in which this language is prevalent. Lack of diligence is often an argument used to justify anti-democratic processes and rules. Though this Comment has only explored why a specific plaintiff's diligence is an improper consideration in the ballot access context, it would be worthwhile to consider the negative consequences of this rhetoric in other areas of election law as well. If courts looked to how restrictions can be burdensome in the first place—rather than to whether an individual acted in a reasonably diligent manner when exercising his or her rights—perhaps our electoral system could become a more democratic one.