No. 14-15976

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Arizona Green Party; Claudia Ellquist, Plaintiffs-Appellants, v. Ken Bennett, in his official capacity as Secretary of the State of Arizona, Defendant-Appellee.	On appeal from the United States District Court for the District of Arizona D.C. No. 2:14-cv-00375-NVW U.S. District Court for Arizona, Phoenix

ARIZONA SECRETARY OF STATE'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Appellee agrees with Appellants' Statement of Jurisdiction. (Opening Brief ("Op. Br." at 1.)

ISSUE PRESENTED FOR REVIEW

Appellants presented no evidence that they were severely burdened by the deadline to file a petition for new party recognition 180 days prior to the primary election and Appellee Secretary of State Bennett presented unrefuted evidence of the important state interest that supports that deadline. Under these circumstances, did the district court correctly uphold the statutory deadline and grant summary judgment in favor of the Secretary?

STATEMENT OF THE CASE

On February 25, 2014, Plaintiffs-Appellants Arizona Green Party and Claudia Ellquist (hereinafter collectively referred to as "the Party") filed a Complaint seeking declaratory and injunctive relief against Defendant Ken Bennett, the Arizona Secretary of State ("the Secretary"), alleging that Ariz. Rev. Stat. ("A.R.S.") § 16-803 is unconstitutional to the extent that it requires a petition for new party recognition be filed 180 days prior to a primary election. (Appellants' Excerpts of Record ("ER") 260–266.) Because this was an expedited election case, the parties stipulated and the district court ordered a briefing schedule for cross-motions for summary judgment. (Dkt. 8–9; ER 269.) After

hearing oral argument, the district court granted summary judgment in favor of Secretary Bennett. (Supplemental Excerpts of Record ("SER") 4.) The district court entered judgment in favor of Defendant on May 16, 2014. (ER 3.) The Party filed a timely notice of appeal on the same day. (ER 1.)

STATEMENT OF FACTS

The Party alleged that the statutory deadline for filing a petition for recognition as a new political party is facially unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. (ER 265 at ¶ 24.) For the 2014 election cycle, the deadline to submit new party petitions was February 27, 2014. (ER 46 at ¶ 30.) The Party did not submit any petitions by the deadline, and instead filed this action. (ER 21 at ¶ 5; ER 260; SER 5.)

I. Arizona's Statutory Scheme for New Party Recognition

Arizona law provides that a new political party may become eligible for recognition at the next primary election and be given representation on the next general election ballot, if the party files a petition with the Secretary that meets statutory requirements. A.R.S. § 16-801. Once a political party has met those statutory requirements, it is entitled to representation through the next two regularly scheduled general elections for federal office immediately following recognition of the party and may qualify for continued representation in successive election cycles if other qualifications are met.

Party recognition means that a given political party will have a separate ballot at the primary election. *See, e.g.,* A.R.S. § 16-461 (providing for the preparation of sample primary election ballots with submission of "the sample ballot proof of each party to the county chairman"); A.R.S. § 16-462 (providing the form of paper primary election ballots which must state "official ballot of the _____ party" and that each political party's ballot must be designated by a different color ink; A.R.S. § 16-463 (requiring each party's ballot to be designated by a different color; A.R.S. § 16-467 (providing that there shall be a separate ballot for each party entitled to participate in the primary and that independent voters or registered voters with no party preference may designate the ballot of one of the recognized parties for that primary election). The State and its fifteen counties are responsible for the costs associated with preparation of the ballots and conducting the primary elections. A.R.S. §§ 16-404, -461(D).

Petitioners for recognized-party status must collect signatures equal to not fewer than one and one-third percent of the total votes cast for governor at the last preceding general election at which a governor was elected. *See* A.R.S. § 16-801. Thus, for new party recognition at any time since the November 2010 general election (the last gubernatorial election), petitioners were required to collect a minimum of 23,041 signatures. (ER 40 at ¶ 4.) That number represents one and

one-third percent of the total votes cast for governor (1,728,081) in the 2010 general election. (*Id*.)

A. Legislative Changes to A.R.S. § 16-803

The procedure for a party seeking new party recognition underwent a small change after the 2010 election. (ER 40 at ¶ 5.) While the formula for determining whether a party qualifies for recognition stayed the same, the procedure for verifying the petition signatures has changed to be more akin to the processing of petitions for initiatives, referenda, and recalls. (*Id*.) Consequently, the burden on parties seeking recognition has not changed, but the burden on the Secretary has increased, and the burden on the counties has lessened. (*Id*.)

Before the 2011 and 2012 legislation, a party seeking statewide recognition ("the applicant") was required to file individual petitions with each county for signature verification. See A.R.S. § 16-803(B) (2000).[1] (ER 40–41 at ¶ 6.) The petitions had to be submitted to the Secretary no later than 140 days before the primary election for certification. (*Id*.) Under A.R.S. § 16-803(C) (2000), each county recorder had to verify and count one hundred percent of the signatures submitted and prepare a certification summarizing the results of the signature-verification process within thirty days after submission. (ER 41 at ¶ 8.) After receipt of the petition from the applicant along with the counties' certifications, the

[1] The relevant statutes are provided in ER 139–48.

Secretary's Office tallied up the number of sheets and the number of verified signatures for each county to determine whether the petitioning organization had submitted the minimum number of required signatures. (ER 41–42 at ¶¶ 9–13.) Staff hours for the Secretary's Office to complete this process totaled no more than a few hours. (ER 42 at ¶ 14.)

In 2011 and 2012, respectively, the Legislature enacted S.B. 1471 and H.B. 2033, which together created a process for the verification of new party petitions that is very similar to the processes used for verifying petitions for initiatives, referenda, and recall. (ER 42 at ¶¶ 15–17.) Under this revised procedure, the Secretary's Office is required to take various steps to eliminate certain signatures from eligibility for verification, group and organize the petition sheets, count the number of eligible signatures remaining after review, and select a random twenty percent sample to be sent to the counties for verification. (ER 43 at ¶ 18.) The Secretary's Office has seven business days to complete these steps, and when such a petition is filed, expects to use much, if not all of that statutorily allotted time. (ER 43 at ¶¶ 18–19.)

After the counties complete the verification of the randomly selected signatures from their counties, the Secretary's Office must then tally the total number of valid signatures to determine the percentage of valid signatures in the sample, and then calculate the projected number of valid signatures submitted by

the applicant. (ER 44 at ¶ 20.) If that number is at least one hundred percent of the minimum required, the Secretary must certify that the party shall be recognized. (*Id*.)

B. The State's Rationale for the New Party Petition Deadline

The deadline for filing new party petitions—as with many other election-related deadlines—is linked by statute to the date of the primary election. (ER 46 at ¶ 29.) In 2007 and 2009, the Legislature successively amended A.R.S. § 16-201 to provide that the primary election shall be held on the tenth Tuesday prior to the general election. (*Id*.) There are many tasks that must be completed before the primary election, and many of those depend to some extent on the status of the various political parties. (ER 46 at ¶ 30.) It is necessary that the recognized political parties be set long before the primary election itself. (*Id*.) These tasks include:

- Calculation of the candidate signature requirements by March 1, 2014 (A.R.S. §§ 16-168(G), -322(B));
- Candidate filings between April 28, 2014 and May 28, 2014 (A.R.S. §§ 16-311, -341);
- Mailing notices to voters on the permanent early voting list by May 28, 2014 (A.R.S. § 16-544(D));
- Resolution of nomination petition challenges—the filing deadline was June 11, 2014 (A.R.S. § 16-351);
- Finalizing the primary ballots with the printers by June 27, 2014;

- Mailing the primary ballots to the uniformed and overseas voters by July 12, 2014 (A.R.S. § 16-544(F));
- Program and test electronic ballot tabulating systems and accessible voting system units—testing begins on July 24, 2014 (A.R.S. § 16-449); and
- Early voting for the 2014 primary election begins on July 31, 2014 (A.R.S. § 16-542(C)).

(ER 46–49 at ¶¶ 31–40.)

In addition to the numerous tasks that must be completed before the primary election, the following tasks, among others, must be completed after the primary election and before the general election:

- Processing thousands of provisional ballots and early ballots dropped off at the polling places (A.R.S. § 16-584(E))
- Conducting hand counts and audits (A.R.S. § 16-602);
- Conducting recounts or contests, if necessary (A.R.S. §§ 16-661 through -676);
- Canvassing the election results (A.R.S. §§ 16-642, -645);
- Issuing certificates of nomination (A.R.S. § 16-645);
- Creating the general election database;
- Preparing and proofing general election ballots for printing, including translation of ballots into Spanish and Native American languages, as required by federal law (A.R.S. § 16-510);
- Programming and testing voting equipment and accessible voting devices (A.R.S. § 16-449); and
- Issuing early ballots, including to military and overseas voters, which must be issued at least forty-five days prior to the general election day (A.R.S. §§ 16-542, -543(A), -544).

(ER 49–50 at ¶¶ 41-42.) Pushing the primary election date to ten weeks before the general election relieved some of the burden on the counties to complete these tasks in time. (ER 49 at ¶ 41.)

In 2011, several years after the primary election was moved to ten weeks before the general election, the Americans Elect Party successfully obtained new party representation. (ER 50 at ¶ 44.) The Americans Elect Party submitted a total of 2,918 sheets containing 27,288 verified signatures, exceeding the required minimum number by over four thousand signatures. (ER 50 at ¶ 45.) In addition, the Americans Elect Party filed over six months before the deadline. (ER 50 at ¶ 46.)

II. Ballot Access for Candidates in Arizona

At oral argument, counsel for the Party raised for the first time an argument that the 180-day petition-filing deadline was too early because it was tied to the primary election date and there was no requirement for the Party to participate in a primary. (SER 19–20.) The Party asserted that it could hold a convention to nominate its candidates. (*Id*. at 22–23, 25–28, 32–33, 42–43.) This issue was not briefed below by the parties. However, to the extent that the Court wishes to consider it, the Secretary provides the following additional information.

Arizona law provides multiple methods for obtaining ballot status as a candidate for the general election. First, there is the nomination by primary

election process. A.R.S. § 16-311. Under this method, a candidate must file his nomination paperwork by the end of the filing period, which is generally late May, survive the nomination challenge period in June, and then be his party's victor in the primary election, held in late August.

A second method, nomination other than by primary, also requires the candidate to file his nomination papers by the end of the filing period in May, survive the challenge period, and then be printed on the general election ballot. A.R.S. § 16-341. Under this method, a candidate may include a ballot designation of up to three words to identify himself or herself as a member of a particular party. (Addendum ("Add.") 1.)[2] For the 2014 general election ballot, several independent candidates filed under A.R.S. § 16-341. *See* http://azsos.gov/election/2014/general/IndependentCandidates.htm (last visited Oct. 29, 2014). Fred Botha, for example, is a candidate for representative of state legislative district no. 22 and identifies himself with the "Independent New Dude" party. *Id*.

[2] Addendum 1 is a true and accurate copy of the sample form for a candidate seeking nomination under A.R.S. § 16-341. This form is published by the Secretary of State's Office and is available online in the Election Procedures Manual, which the Secretary is obligated to issue under A.R.S. § 16-452. The Election Procedures Manual provides rules that have the force and effect of law, such that violations are punishable as class 2 misdemeanors. A.R.S. § 16-452(C). This form is available at http://azsos.gov/election/Electronic_Voting_System/manual.pdf (page last visited on October 29, 2014) at 336. The Secretary asks the Court to take judicial notice of this form under Fed. R. Evid. 201.

Finally, a person may file as a write-in candidate. A.R.S. § 16-312. The deadline for filing as a write-in candidate is forty days before the election, which for the 2014 general election, was September 25, 2014. Being a write-in candidate means that the name is not printed on the ballot and instead voters must write in the candidate's name. However, the names of the write-in candidates for whom the Secretary is the filing officer are publicized on the Secretary's website and posted at all polling places. A.R.S. § 16-312(E). Like section 341 candidates above, write-in candidates may also designate a political party to be posted along with their names. (Add. 2.[3])

III. Arizona's Presidential Preference Election

Under Arizona law, the presidential preference election is not a traditional election where someone is definitively elected to office, rather this is Arizona's chosen method for indicating to the national political parties whom the state electors support for candidacy for the office of United States President. *See* A.R.S. § 16-241. In 2012, Arizona's presidential preference election was held on February 28th. At that time, the Republican Party and the Green Party participated. *See* http://azsos.gov/election/2012/PPE/canvass2012ppe.pdf (last

[3] Addendum 2 is a true and accurate copy of the sample form for write-in candidates seeking to be placed on the ballot pursuant to A.R.S. § 16-312. This form is available at http://azsos.gov/election/Electronic_Voting_System/manual.pdf (page last visited on October 29, 2014) at 337. The Secretary asks the Court to take judicial notice of this form under Fed. R. Evid. 201.

visited October 29, 2014.) Only registered members of the parties participating in a presidential preference election are eligible to cast votes on the respective official ballots. A.R.S. § 16-241.

In the late summer of 2012, the national political parties held their national conventions at which time the candidates for president were officially nominated. (Add. 3.[4]) The Democratic, Green, Libertarian, and Republican Parties each submitted official certifications of presidential nomination for their respective candidates in September of that year. Each of those candidates was placed on the ballot for the general election. *See* http://azsos.gov/election/2012/General/Canvass2012GE.pdf (last visited October 29, 2014).

SUMMARY OF THE ARGUMENT

The Party has conflated its right to place candidates on the ballot with the right to have continued statewide recognition that includes a primary election run at the State's and the counties' expense. In analyzing ballot access cases, the court must first determine whether the burden on the party seeking ballot access is severely burdened. If the burden is severe, then the government must demonstrate

[4] Addendum 3 is a true and accurate copy of the official certifications of presidential nominations from recognized parties in Arizona. These certifications are available online at http://azsos.gov/election/2012/General/Presidential/ (last visited on October 29, 2014) and then clicking on the individual links for each of the four recognized parties. Appellee asks the Court to take judicial notice of these official public records under Fed. R. Evid. 201.

that the regulation is narrowly tailored to serve a compelling interest. If, however, the burden is not significant, the regulation will be upheld if it is rational.

Here, the district court correctly concluded that the Party provided no evidence that it was significantly burdened by the 180-day deadline before the primary election to file petitions for new party recognition. On the other hand, the district court correctly noted the significant and important interests that this deadline serves in the administration of Arizona's elections.

The Party has not identified any errors that the district court made below but raised the same arguments they made below. This Court should therefore affirm the district court's judgment.

ARGUMENT

I. The District Court Correctly Upheld A.R.S. § 16-803 as Constitutional.

A. Standard of Review.

This Court reviews a district court's grant of summary judgment *de novo*. *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055 (9th Cir. 2002). Summary judgment is appropriate if, drawing all inferences in favor of the nonmoving party, there are no genuine issues of material fact. *Id*. When parties file cross-motions for summary judgment, the court must consider each motion on its own merits. *Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court may affirm for any reason supported by the

record. *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008).

B. The District Court Applied the Correct Framework for Analyzing First Amendment Ballot Access Issues.

In its Opening Brief, the Party appears to argue that the district court should have used a heightened level of scrutiny to determine whether Arizona's 180-day deadline for filing new party recognition petitions was constitutional. (Op. Br. at 17, *citing Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690, 695–96 (E.D. Ark. 1996). However, the federal courts have recognized that not all election statutes that burden associational rights are subject to heightened scrutiny.

The Supreme Court has recognized that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.")

"[I]n considering a constitutional challenge to an election law, a court must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against the 'precise interest put forward by the State as justification for the burden imposed by its rule.'" *Nader v. Brewer*,

531 F.3d 1028, 1034 (9th Cir. 2008) (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In *Burdick*, the Supreme Court clarified that the rigorousness of the inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. (*quoting Norman v. Reed*, 502 U.S. 279, 289 (1992)). "But when a state election provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (*quoting Anderson*, 460 U.S. at 788); *see also Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 761 (9th Cir. 1994) (*citing Burdick* and stating that if the challenged election regulation causes a severe burden, it must be narrowly tailored to achieve a compelling interest, while if the burden is slight, the regulation will survive review as long as it has a rational basis.)

Since *Burdick*, the Supreme Court noted that it had not identified a litmus test for measuring the severity of a burden that a state law imposes on a political party. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). More recently, the Eighth Circuit, facing a challenge similar to the present case,

explained that the level of scrutiny varies with the burden on the political party seeking ballot access:

> To determine whether a State overstepped the limitations of its broad regulatory powers by enacting a ballot access scheme that impermissibly infringes upon the rights of citizens to associate, we must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, non-discriminatory restrictions. Thus, we observe that not every electoral law that burdens associational rights is subject to strict scrutiny.

Green Party of Ark. v. Martin, 649 F.3d 675, 680 (8th Cir. 2011). There, the court examined Arkansas's ballot access scheme and found that the process was "far from an impossible task" and that "achieving ballot access is a task that can be, and has been, accomplished with regularity," including by the Green Party itself on multiple occasions. *Id*. at 684. The court then held that the burdens Arkansas's statutes imposed on the Green Party were not severe, and refused to apply heightened scrutiny. *Id*. at 685. As discussed below, the district court correctly concluded that the Party had not demonstrated that A.R.S. § 16-803 imposed a severe burden on it.

C. The District Court Correctly Concluded that the Party Did Not Demonstrate a Severe Burden and Therefore a Rational Basis Standard Applied.

The Party discusses the historical importance of minority parties at length in their Opening Brief, without providing the Court with some vital context. (Op. Br. at 4–14.) Although minority parties serve a valuable role in the democratic process, they are still subject to rules that serve the election administrative process. What the Party left out is that the idea of publicly financed primary elections to determine party candidates for the general election is a relatively recent development:

> For almost half of this nation's existence, states did not regulate ballot access for the simple reason that the government did not provide printed ballots. Instead, each political party was eager to supply voters with ballots listing their own candidates for each office. Voters simply chose the ballot of the party that most appealed to them, and could mark changes on it if they did not want to vote a straight-party ticket. In the late 1880s, however, as part of Progressive-era reforms designed to combat vote-buying and the influence of party political machines, states adopted the so-called Australian, or government-printed, ballot.

Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. Rev. 1277, 1283 (2005); *see also* Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy* 348–52 (2d ed. 2002).

The relevant inquiry is therefore whether A.R.S. § 16-803 causes a severe burden to a minor party's efforts to obtain ballot recognition, and the relevant case law precedent then is limited to those cases that address a minor party's attempt to obtain ballot recognition, or in other words, access to the publicly financed primary election processes. Here, the Party provides this Court with numerous cases about ballot access, but they are irrelevant because (1) they are concerned with individual candidates seeking to be placed on the ballot; (2) they are concerned with presidential elections, which have different concerns; or (3) they are otherwise distinguishable. And there is no case that holds that a particular deadline is unconstitutional on its face without taking into account the State's election process as a whole and where that deadline fits into the process.

The Party's only claim is that the deadline for filing petitions for new party recognition, which falls 180 days before the primary election is too soon. The Party asserts that this deadline is facially unconstitutional and asks this Court to declare that 180 days is too early as a matter of law. The Party did not allege that Arizona's primary election process, that the deadline for candidates to file nomination papers, or that any other election statutes are unconstitutional. (SER 13 (noting that "Plaintiffs expressly disclaimed any challenge to the other statutory requirements and time frames at oral argument"); (Op. Br. at 14). The district court, in its Order, outlined the Party's allegations:

> - They [the Party] would not be able to collect sufficient signatures by February 27, 2014.
> - The petition requirements "are so onerous for third parties such as the Arizona Green Party that they must begin each campaign to regain ballot status immediately following the conclusion of the previous election cycle."
> - The February deadline "can greatly increase the costs minor parties incur collecting the required number of signatures for their qualifying petitions."
> - The February deadline is "not designed to allow a reasonabl[y] diligent minor party organization to qualify for ballot access."
> - "Requiring minority political parties to gather signatures on their petitions so early, when the mind of the general public and the attention of the media is not focused on the general elections, i[s] unduly burdensome."

(SER 10–11.) The district court then noted that the Party offered no evidence to support those assertions. (SER 11.) Instead, the district court noted that the Party's argument could be distilled to a claim that other courts had struck down various deadlines, and therefore Arizona's deadline must also be unconstitutional. (SER 12.)

The Party does not claim that the district court erred by failing to consider some evidence of the burden that it has allegedly been subjected to. Instead, the Party discusses the important role that minor parties play in the democratic process

and the overall burden to voters if minor parties are not able to participate in the process. (Op. Br. at 16–22.) The Party, however, fails to demonstrate that this particular regulation—the 180-day deadline set forth in A.R.S. § 16-803—forecloses its opportunity to participate and therefore constitutes a severe burden.

The Party also does not claim that the district court erred in failing to consider the cases that it cited in its summary-judgment motion. Instead, the Party just recites those same cases without any discussion of the regulations involved, the context of the regulations in the respective States' election regimes, or the evidence of burdens on the political parties or candidates. But the district court correctly noted that challenges to election laws are context dependent. (SER 9, *citing Burdick*, 504 U.S. at 434.) The authorities the Party cites provide no persuasive or precedential authority showing that the district court erred.

For example, the Party relies on *Citizens to Establish a Reform Party in Arkansas v. Priest* ("*Priest*"), 970 F. Supp. 690 (E.D. Ark. 1996). In that case, the party challenged a January 2nd deadline for filing petitions for new party recognition. In contrast to this case where the Party provided no evidence, the party in *Priest* presented expert testimony that the deadline was too early, served no state interests in regulating ballot access, and constituted an unreasonable burden. *Id*. at 694–95. There was further evidence that no minor parties had been able to qualify for ballot status in the preceding twenty-five years. *Id*. at 696.

Furthermore, unlike under Arizona law, Arkansas election statutes required established political parties to hold their own primary elections. *Id*. at 694. Based on this evidence, the court concluded that the burden on the party was sufficiently severe to warrant strict scrutiny because the statutes "serve[d] to bar altogether the recognition of a new political party in Arkansas." *Id*. at 697.

In the case at bar, the Party had previously qualified for party recognition in 2010 albeit with a two-week, court-ordered extension due to a mid-election cycle change in the primary date. And another minor party, the Americans Elect Party, qualified in 2011 under the February deadline.[5] (ER 44, ¶ 23; ER 50, ¶¶ 44–46; SER 7.) While the fact that other minor parties have been able to qualify under Arizona's statutory scheme is not dispositive of the deadline's constitutionality, it does demonstrate that Arizona's statutory scheme does not completely bar minor parties from obtaining ballot status.

The Party cites several other cases for the proposition that the deadlines are too early and therefore unconstitutional. (Op. Br. at 23.) However, an examination of those cases shows that they are distinguishable. For example, in *MacBride v. Exon*, 558 F.2d 443 (8th Cir. 1977), the court considered a February deadline for recognition of minor parties in the context of the 1976 presidential

[5] The 2011 and 2012 amendments to A.R.S. § 16-803 did not change the deadline, which has remained 180 days before the primary election, but instead required the petitioning party to submit its petition signatures to the Secretary, rather than the county election officers. (ER 56, ¶ 8; ER 139–44.)

election. *Id*. at 446. The Nebraska statute required the Libertarian Party to submit petitions for new party recognition nine months before the general election. *Id*. As this case was decided before *Burdick*, it did not follow the analysis outlined above, but instead held that in the circumstances of that case, the deadline was unconstitutional. *Id*. at 449. The court stated that while some regulation may be appropriate, "a state may not constitutionally impose requirements or restrictions based on time or organizational structure which effectively prevent a third party presidential candidate from ever gaining a position on the state's general election ballot." *Id*.

The *MacBride* court noted that presidential elections are distinct from statewide or local elections:

> While the organized support that may rally around an independent candidate after the national conventions of the major parties may give itself a party label, it is not ordinarily a political party in the sense that it is an organization having a continuity of existence from year to year and election after election. It is more of an ad hoc committee set up on a more or less national basis to support an independent candidate.

Id. With respect to the 1976 presidential election, several other courts ruled the same way in similar circumstances to require States to place minor party presidential candidates on the general election ballots. *McCarthy v. Briscoe*, 429 U.S. 1317 (1976); *McCarthy v. Hardy*, 420 F. Supp. 410 (E.D. La. 1976);

McCarthy v. Kirkpatrick, 420 F. Supp. 366 (W.D. Mo. 1976); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976).[6]

As previously noted, the Party did not argue that any other Arizona election statutes besides A.R.S. § 16-803's deadline were unconstitutional. The Party did not allege that this deadline will hamper the Party's ability to nominate a candidate for the next presidential election in 2016. Nevertheless, Arizona's statutory scheme does not preclude minor parties from nominating presidential candidates. Under A.R.S. § 16-341(G), "a nomination petition for the office of presidential elector shall be filed not less than sixty nor more than ninety days before the general election." Thus, the effective final date for a party to hold its national convention, to nominate its presidential candidate, and to communicate that information to the secretary of state is late September of an election year. For those parties that are recognized in Arizona, the candidate's name is printed on the ballot along with the party name. *See, e.g.*, http://azsos.gov/election/2012/General/Presidential/ and then click on the individual party names for the certifications for the candidates for the 2012 presidential election.

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[6] The Party also cited two unreported district court cases (*California Justice Comm. v. Bowen*, No. CV12-3956 (C.D. Cal. October 18, 2012); *The Constitution Party of New Mexico v. Duran*, No. 1:12-325 (D.N.M. December 19, 2013), but did not provide slip copies as required by Fed. R. App. P. 32.1(b). These cases also involved new party filing deadlines in connection with presidential nominations and are for that reason irrelevant to this Court's analysis. The summary-judgment orders for both cases are attached as Addendum 4 and 5, respectively.

And for those parties that are not recognized in Arizona, the candidate's chosen party designation is identified on the ballot as well. *See*, *e.g.*, http://azsos.gov/election/2012/General/Canvass2012GE.pdf. For example, in 2012, Virgil Goode was a write-in candidate for president representing the Constitution Party.[7] Although the Constitution Party was not a recognized political party under Arizona law, the party name was still identified along with the candidate's name, vice presidential candidate's name, and presidential electors on the official canvass.

The Party next relies on *Libertarian Party of Kentucky v. Ehrler*, 776 F. Supp. 1200 (E.D. Ky. 1991), in which the Court struck a deadline that required minor party candidates that would not be nominated at primary elections to submit their petitions at least 119 days before the primary and 280 days before the general election. *Id*. at 1203–04, -06. While the opinion is not clear, it appears that minor party candidates had to file before major party candidates, even though they would not be participating in the primary election and would be placed directly on the general election ballot. And it appears that the State's sole justification was that a prior Seventh Circuit case had upheld a filing deadline of 323 days prior to the general election. *Id*. at 1205–06. This case is not relevant because it addresses candidate-filing deadlines rather than the deadline for filing petitions for political

[7] The procedure for filing as a write-in candidate for president is set forth in A.R.S. § 16-312(G).

party recognition. Furthermore, the Party did not allege that the deadlines for candidates to submit their nomination papers—whether under A.R.S. § 16-311 for nomination by primary, under A.R.S. § 16-312 for inclusion as write in candidates, or under A.R.S. § 16-341 for nomination other than by primary—were unconstitutional.

The Party cited numerous other cases involving candidate filing deadlines rather than the deadline for filing petitions for new party recognition and they are similarly irrelevant to this Court's analysis: *Anderson*, 460 U.S. 780 (1983); *Nader 2000 Primary Comm., Inc. v. Hazeltine*, 110 F. Supp. 2d 1201 (D.S.D. 2000); *Cripps v. Seneca Cnty. Bd. of Elections*, 629 F. Supp. 1335 (N.D. Ohio 1985).

The Party cited *McLain v. Meier*, 637 F.3d 1159 (8th Cir. 1980), noting that there the court struck a June deadline for new political parties in North Dakota even though the deadline was tied to the primary election that would be held ninety days later. There, the plaintiff raised constitutional concerns about the early deadline coupled with the high signature requirement, as well as other regulations that favored incumbents. *Id*. at 1161. The opinion did not indicate whether there was evidence in the record concerning the State's rationale for the deadline. Instead, the court held that the challenged regulations were unconstitutional because they were the only method of ballot access for a new political party. *Id*. at 1162. The court was not persuaded by the State's argument that the candidate had

another opportunity for ballot access by filing later with much fewer signatures as an independent candidate, because that method would not afford him the opportunity to identify himself as a member of his particular party. *Id*. at 1165. *McLain* is not dispositive here because (1) it predated the *Burdick* analysis and (2) unlike the statutory provisions in North Dakota, Arizona law provides numerous methods for candidates to obtain access to the ballot and identify themselves as members of the Party.

While there appears to be no Ninth Circuit case addressing the precise issue raised here, the district court correctly analyzed the 180-day deadline under the *Burdick* structure and held that the Party had failed to demonstrate that it was significantly burdened by the deadline. Since the Party did not identify how the district court erred in reaching that conclusion, the Court should affirm.

D. The District Court Correctly Upheld Arizona's Statutory Scheme Under the Rational Basis Standard.

The district court stated that the Secretary "provided ample evidence that its deadline serves a self-evidently important regulatory interest: the 'orderly administration of the election processes.'" (SER 14, *quoting* ER 18.) The Secretary explained the rationale supporting the 180-day deadline and the Party did not refute the evidence that the Secretary provided. (ER 46–50; SER 14.) In its Opening Brief, the Party does not argue that the district court erred in finding that the deadline "rationally accommodates the state's administrative needs." *Id*. The

Party argued that no harm would result if Arizona's deadline was later, for instance in June of the election year. (Op. Br. at 32.) But suggesting that a different regulation would be preferable is not the same as arguing that the district erred in upholding the challenged regulation.

Furthermore, the Secretary noted a number of ways in which the election officials, candidates, and the general electorate would be harmed if the deadline were changed. (ER 246–47.) First, the county election officials and the Secretary need to know which parties are participating in the primary election. Arizona's primary election for the 2014 election year was on August 26, 2014. The Secretary detailed numerous tasks that must be completed by the election officials before the primary, including ordering enough ballot paper stock, calculating the signature requirements for candidates, communicating with independent voters to determine which ballot they want to designate for the primary election, and many other tasks. (ER 46–49.) Those tasks could not be completed in time for the August primary if a new party was permitted to file its petitions later in the year.

Second, as noted above, the county election officials send a mailer to the independent voters and voters not affiliated with a particular party that are on the permanent early voting list ("PEVL") to advise them which parties are participating in the primary election and inviting each such voter to designate which ballot they wish to receive. (ER 47, ¶ 35.) There are over 1.9 million voters

on PEVL, and approximately one-third of them are independent or party-not-designated voters. If the counties had to send a second mailer to those voters later in the election process, it would cause voter confusion and represent an unexpected and burdensome cost to already tight budgets. (ER 48, ¶ 36.)

In addition, there is yet another problem. There are approximately 5,600 voters in Arizona that have registered as members of the Party. (ER 45, ¶ 27.) When the Party lost its status as a recognized party, those voters became part of the pool of voters who are "non-recognized political party," or in other words party-not-designated. (ER 47, ¶ 32.) As party-not-designated voters, these former members of the Party are eligible to sign candidate nominating petitions for any party. Under A.R.S. § 16-314, partisan nomination petitions may be signed by qualified electors who are registered in the same party as the candidate, who are registered as independents, or who are registered with a political party not qualified for representation on the ballot. The candidate filing period runs from late April to late May in an election year. (ER 47, ¶ 33.) If the Party were permitted to file its petitions to seek recognition after that period, then Party members who previously signed petitions for candidates of other parties could potentially have their signatures invalidated, they would not then be able to sign petitions for candidates affiliated with the Party because A.R.S. § 16-314 prohibits electors from signing more than one nominating petition for the same elective office. And the candidates

for whom they signed petitions might be subject to challenge under A.R.S. § 16-351. In addition, the signature requirements themselves would have to be recalculated. (ER 46–47, ¶¶ 31–32.)

The principal benefit of political party recognition is the publicly funded primary election with a separate official ballot for each party. Because of that benefit, Arizona law require political parties that are seeking recognition to file in sufficient time to process the petitions and take care of all of those necessary tasks that ensure the primary election to occur. Since the district court correctly concluded that the Party was not significantly burdened and the 180-day deadline served a rational and important interest. (SER 14.) This Court should affirm the district court's ruling.

This Court should not consider any argument that disturbs the district court's findings as the Party did not assert that the district court erred. *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (court of appeals ordinarily will not consider an issue that was not specifically and distinctly argued in appellant's opening brief). As demonstrated above, the district court correctly determined that the 180-day deadline serves an important interest in preventing chaos in the election administration procedures.

Rather than pointing out errors that the district court made, the Party attempts to revive an argument that it raised for the first time in oral argument on

the cross-motions for summary judgment and that it did not allege in its Complaint—that is, the deadline should not be tied to the primary election process because the Party should be permitted to nominate its candidates through a convention process instead. (Op. Br. at 33–36.) The district court correctly disregarded the Party's assertion during oral argument because it had not been alleged or briefed. (SER 19–20, 22–23, 25–29.) The district court specifically asked the Party whether it was challenging Arizona's primary election process, and that Party confirmed that it was not:

> THE COURT: I'm talking about primary candidates.
>
> MR. BARNES: Yes, Your Honor. That's my understanding.
>
> THE COURT: Is there anything unconstitutional about that schedule.
>
> MR. BARNES: That's not part of this lawsuit.
>
> THE COURT: I know. Is there anything unconstitutional about that schedule?
>
> MR. BARNES: I believe that deadline is probably also an early deadline and I would say it probably is unconstitutional, but I'm not challenging it at this juncture.
>
> THE COURT: You're not challenging the schedule for candidate nominations in the entire process leading up to the primary election, correct?
>
> MR. BARNES: Yes, Your Honor, that is correct.

(SER 21.) In its Order, the district court stated that even though it was insufficient for the Party to raise the nominating-convention argument at oral argument without briefing it, "Arizona's interest in utilizing a primary outweighs Plaintiffs' desire for an alternative procedure." (SER 13–14 *citing Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1178 (9th Cir. 2008) and *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).)

As noted above in the oral argument transcript, the Party specifically limited its claim in this case to the 180-day deadline only. The Party did not allege or claim that the primary process was unconstitutional as the method in which recognized political parties in Arizona nominate their candidates. For this reason, this Court should also reject the Party's argument here.

In the event that the Court chooses to consider the Party's argument, the district court correctly concluded that "Arizona's interest in utilizing a primary outweighs Plaintiffs' desire for an alternative procedure." Further, as discussed above, the Party has other alternative methods for ballot access and identification of its candidates as members of the Party.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted this 3rd day of November, 2014.

Thomas C. Horne
Attorney General

s/ Michele L. Forney
Michele L. Forney
Assistant Attorney General

Attorney for Defendant-Appellee
Secretary Bennett

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee states that it is not aware of any related cases pending in the Ninth Circuit.

s/ Michele L. Forney
Michele L. Forney
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,138 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 3rd day of November, 2014.

s/ Michele L. Forney
Michele L. Forney
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on November 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

United States Court of Appeals
Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: s/ Maureen Riordan
#4206998

ADDENDUM

1 Candidate Nomination Paper for Nomination Other Than by Primary (A.R.S. § 16-341)

2 Candidate Nomination Paper for Write-In Candidates (A.R.S. § 16-311)

3 2012 General Election Official Party Presidential Nomination Certifications

4 Slip Copy of *California Justice Committee v. Bowen*, CV 12-3956 (C.D. Cal. October 18, 2012)

5 Slip Copy of *The Constitution Party of New Mexico v. Duran*, Civ. No. 1:12-325 (D.N.M. December 9, 2013)

ADDENDUM 1

Triplicate Form (Nomination Other Than By Primary, ARS § 16-341)

STATE OF ARIZONA
ARS § 16-341
Nomination Other Than By Primary
NOMINATION PAPER
AFFIDAVIT OF QUALIFICATION
CAMPAIGN FINANCE LAWS STATEMENT
[ARS §§ 16-311, 16-341, 16-905(I)(5)]

You are hereby notified that I, the undersigned, a qualified elector, am a candidate for the office of _____ subject to the Arizona General Election to be held on _____.

I will have been a citizen of the United States for _____ years next preceding my election and will have been a citizen of Arizona for _____ years next preceding my election and will meet the age requirement for the office I seek and have resided in _____ County for _____ years and in precinct _____for _____ years before my election.

I do solemnly swear (or affirm) that at the time of filing, I am a resident of the county, district or precinct which I propose to represent, I have no final, outstanding judgments against me of more than an aggregate of $1,000 that arose from failure to comply with or enforcement of ARS Title 16, Chapter 6,and as to all other qualifications, I will be qualified at the time of election to hold the office that I seek, having fulfilled the constitutional and statutory requirements for holding said office.

_____
Actual residence address or description of place of residence (city or town) (zip)

_____
Post office address (city or town) (zip)

Print or type your name on the following line in the exact manner you wish it to appear on the ballot. A.R.S. § 16-311(G).

_____, _____
LAST NAME FIRST NAME

_____ _____
BALLOT DESIGNATION (up to 3 words) CANDIDATE SIGNATURE

State of _____)
County of _____)

Subscribed and sworn to (or affirmed) before me this _____ day of _____, 20_____.

_____
Notary Public

(Seal)

I have read all applicable laws relating to campaign financing and reporting.

_____
CANDIDATE SIGNATURE

ADDENDUM 2

Triplicate Form (Write-In)

STATE OF ARIZONA

Write-in Candidate
NOMINATION PAPER
AFFIDAVIT OF QUALIFICATION
CAMPAIGN FINANCE LAWS STATEMENT
[ARS §§ 16-311, 16-312, 16-905(I)(5)]

You are hereby notified that I, the undersigned, a qualified elector, am a candidate for the office of _____ for the _____ Party (if applicable) to be voted on at the PRIMARY or GENERAL (circle one) election to be held on _____.

I will have been a citizen of the United States for _____ year(s) next preceding my election and will have been a citizen of Arizona for _____ year(s) next preceding my election and that my age is _____, and my date of birth is the _____ day of _____, 19_____, and have resided in _____ County for _____ year(s) and in precinct _____ for _____ year(s) before my election.

I do solemnly swear (or affirm) that at the time of filing, I am a resident of the county, district or precinct which I propose to represent, I have no final, outstanding judgments against me of more than an aggregate of $1,000 that arose from failure to comply with or enforcement of ARS Title 16, Chapter 6, and as to all other qualifications, I will be qualified at the time of election to hold the office that I seek, having fulfilled the constitutional and statutory requirements for holding said office.

_____
Actual residence address or description of place of residence (city or town) (zip)

_____
Post office address (city or town) (zip)

Print or type your name on the following line as you wish it to be listed on the Notice of Official Write-In Candidates.

_____, _____
LAST NAME FIRST NAME

_____
CANDIDATE SIGNATURE

State of _____)
County of _____)

Subscribed and sworn to (or affirmed) before me this _____ day of _____, 20_____.

_____
Notary Public

(Seal)

I have read all applicable laws relating to campaign financing and reporting.

_____
CANDIDATE SIGNATURE

ADDENDUM 3

Arizona Secretary of State - Ken Bennett

2012 General Election Official Party Presidential Nominations

These are offical certifications of presidential nominations from recognized parties in Arizona.

Democratic Party
Green Party
Libertarian Party
Republican Party

Files require free Adobe Acrobat Reader

State of Arizona
Official Certification of Presidential Nomination

SECRETARY OF STATE
2012 SEP 10 AM 10:47
FOR OFFICE USE ONLY

We do hereby certify that at a National Convention of Delegates representing the Democratic Party of the United States, held in Charlotte, North Carolina, on September 4-6, 2012, the following person, meeting the constitutional requirements for the Office of President of the United States, and the following person, meeting the constitutional requirements for the Office of Vice President of the United States, were nominated to be candidates at the General Election to be held on **November 6, 2012** for the offices of President and Vice President of the United States respectively:

Candidate for President of the United States

Name of Candidate	Address of Candidate
Barack Obama	5046 South Greenwood Avenue Chicago, Illinois 60615

Candidate for Vice President of the United States

Name of Candidate	Address of Candidate
Joe Biden	1209 Barley Mill Road Wilmington, Delaware 19807

Chair of the National Convention

As the Chair of the Democratic Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Chairman	Signature of Chairman
Antonio Villaraigosa	

State of North Carolina
County of Mecklenburg

Subscribed AND Sworn to (or affirmed) before me this 5th day of September 20 12.

MONICA C COLE NOTARY My Comm. Exp. July 4, 2015 PUBLIC MECKLENBURG COUNTY, N. C.

7-4-2015
My Commission Expires

Monica C. Cole
Notary Public Signature

(Seal)

Secretary of the National Convention

As the Secretary of the Democratic Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Secretary	Signature of Secretary
Alice Travis Germond	

State of North Carolina
County of Mecklenburg

Subscribed AND Sworn to (or affirmed) before me this 5th day of September 20 12.

MONICA C COLE NOTARY My Comm. Exp. July 4, 2015 PUBLIC MECKLENBURG COUNTY, N. C.

7-4-2015
My Commission Expires

Monica C. Cole
Notary Public Signature

(Seal)

3/14/2012

Presidential Candidate

I, the undersigned, consent to my nomination by the Democratic Party to be a candidate for the office of President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012**.

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Obama	Barack
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of North Carolina
County of Mecklenburg

Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 6th day of September 2012.

7-4-2015
My Commission Expires

MONICA C COLE NOTARY My Comm. Exp. July 4, 2015 PUBLIC MECKLENBURG COUNTY, N. C.

(Seal)

Notary Public Signature

Vice Presidential Candidate

I, the undersigned, consent to my nomination by the Democratic Party to be a candidate for the office of Vice President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012**.

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of Vice President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Biden	Joe
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of North Carolina
County of Mecklenburg

Vice Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 6th day of September 2012.

7-4-2015
My Commission Expires

MONICA C COLE NOTARY My Comm. Exp. July 4, 2015 PUBLIC MECKLENBURG COUNTY, N. C.

(Seal)

Notary Public Signature

RECEIVED
SECRETARY OF STATE

2012 AUG 10 PM 3:03

Arizona Green Party (AZGP); P.O. Box 60173, Phoenix AZ 85082; (602)417-0213; info@azgp.org;
http://azgp.org

August 10, 2012

The Honorable Ken Bennett
Arizona Secretary of State
1700 W. Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Bennett,

The Green Party of the United States (GP-US) held its Presidential Nominating Convention in Baltimore, Maryland on Saturday, July 14th, 2012. It is my pleasure to inform you that the Green Party delegates to the convention have selected as our nominee for President of the United States, Dr. Jill Stein; and our nominee for Vice President of the United States, Ms. Cheri Honkala. Please find enclosed the State of Arizona Official Certification of Presidential Nomination form with the required notarized signatures. Thank you.

Respectfully,

Angel A. Torres

Angel A. Torres
Arizona Green Party (AZGP) state co-chair
(602)305-7496 (home)
(623)202-3747 (cell)
Aatorres29@hotmail.com

State of Arizona
Official Certification of Presidential Nomination

RECEIVED
SECRETARY OF STATE
2012 AUG 10 P 3:03
FOR OFFICE USE ONLY

We do hereby certify that at a National Convention of Delegates representing the Green Party of the United States, held in Baltimore, Maryland, on July 14, 2012, the following person, meeting the constitutional requirements for the Office of President of the United States, and the following person, meeting the constitutional requirements for the Office of Vice President of the United States, were nominated to be candidates at the General Election to be held on **November 6, 2012** for the offices of President and Vice President of the United States respectively:

Candidate for President of the United States

Name of Candidate	Address of Candidate
Jill Stein	17 Trotting Horse Drive Lexington, MA 02421

Candidate for Vice President of the United States

Name of Candidate	Address of Candidate
CHERI HONKALA	1928 Mutter St. Phila. PA. 19122

Chair of the National Convention

As the Chair of the Green Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Chairman	Signature of Chairman
Hillary Kane	

State of Virginia
County of Fairfax

Subscribed AND Sworn to (or affirmed) before me this 14th day of July 20 12.

June 30, 2016
My Commission Expires

(Seal)

TAMAR BYCZEK YAGER
NOTARY PUBLIC
REGISTRATION # 7516570
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2016

Tamar Byczek Yager
Notary Public Signature

Secretary of the National Convention

As the Secretary of the Green Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Secretary	Signature of Secretary
William B. Dickinson	William B. Dickinson

State of Virginia
County of Fairfax

Subscribed AND Sworn to (or affirmed) before me this 14th day of July 20 12

June 30, 2016
My Commission Expires

(Seal)

TAMAR BYCZEK YAGER
NOTARY PUBLIC
REGISTRATION # 7516570
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2016

Tamar Byczek Yager
Notary Public Signature

3/14/2012

Presidential Candidate

I, the undersigned, consent to my nomination by the Green Party to be a candidate for the office of President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012.**

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Stein	Jill
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of Virginia
County of Fairfax

Jill Stein
Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 14th day of July 2012.

June 30, 2016
My Commission Expires

(Seal)

TAMAR BYCZEK YAGER
NOTARY PUBLIC
REGISTRATION # 7516570
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2016

Tamar Byczek Yager
Notary Public Signature

Vice Presidential Candidate

I, the undersigned, consent to my nomination by the Green Party to be a candidate for the office of Vice President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012.**

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of Vice President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
HONKALA	CHERI
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of Virginia
County of Fairfax

Cheri Honkala
Vice Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 14th day of July 2012.

June 30, 2016
My Commission Expires

(Seal)

TAMAR BYCZEK YAGER
NOTARY PUBLIC
REGISTRATION # 7516570
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2016

Tamar Byczek Yager
Notary Public Signature

3/14/2012

RECEIVED
SECRETARY OF STATE
2012 SEP 6 AM 11:58
AUDIT DEPT USE ONLY

State of Arizona
Official Certification of Presidential Nomination

We do hereby certify that at a National Convention of Delegates representing the Libertarian Party of the United States, held in Las Vegas, NV, on May 3-6, 2012, the following person, meeting the constitutional requirements for the Office of President of the United States, and the following person, meeting the constitutional requirements for the Office of Vice President of the United States, were nominated to be candidates at the General Election to be held on **November 6, 2012** for the offices of President and Vice President of the United States respectively:

Candidate for President of the United States

Name of Candidate	Address of Candidate
GARY JOHNSON	850 C CAMINO CHAMISA SANTA FE, NM 87501

Candidate for Vice President of the United States

Name of Candidate	Address of Candidate
JAMES P. GRAY	2531 CRESTVIEW DR. NEWPORT BEACH, CA 92663

Chair of the National Convention

As the Chair of the Libertarian Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Chairman	Signature of Chairman
Mark W. A. Hinkle	Mark W A Hinkle 8/30/12

State of CA
County of Santa Clara

Subscribed AND Sworn to (or affirmed) before me this 30 day of August 20 12.

12/08/2012
My Commission Expires

(Seal)

JOSEPH B. AVILA
COMM. #1826078
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My Comm. Expires Dec. 8, 2012

Joseph B. Avila
Notary Public Signature

Secretary of the National Convention

As the Secretary of the Libertarian Party National Convention for the year 20 12, I swear (or affirm) that the information in this Certificate of Nomination is true and correct to the best of my knowledge and belief.

Printed Name of Secretary	Signature of Secretary
Alicia G. Mattson	Alicia G Mattson

State of NEVADA
County of CLARK

Subscribed AND Sworn to (or affirmed) before me this 29TH day of August 20 12.

Oct 27, 2013
My Commission Expires

(Seal)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
EARL JAMES GRAHAM
No:05-100768-1
My Appointment Expires Oct. 27, 2013

Earl James Graham
Notary Public Signature

3/14/2012

Presidential Candidate

I, the undersigned, consent to my nomination by the LIBERTARIAN Party to be a candidate for the office of President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012.**

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Johnson	GARY
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of New Mexico
County of Santa Fe

Gary Johnson
Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 31st day of August 2012.

OFFICIAL SEAL
Sherry L. Mascarenas
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 3-14-2016

3-14-2016
My Commission Expires

Notary Public Signature

(Seal)

Vice Presidential Candidate

I, the undersigned, consent to my nomination by the LIBERTARIAN Party to be a candidate for the office of Vice President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on **November 6, 2012.**

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of Vice President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
GRAY	JAMES P.
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of California
County of Orange

James P. Gray
Vice Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 5 day of Sept. 2012.

8/30/2014
My Commission Expires

Notary Public Signature

(Seal)

MIKE SOLIMAN
COMM. #1902238
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ORANGE
My Comm. Expires August 30, 2014

3/14/2012

CERTIFICATE OF NOMINATIONS

State of Arizona:

We do hereby certify that at a National Convention of Delegates representing the Republican Party of the United States, duly held and convened in the City of Tampa, State of Florida, on August 30th 2012, the following person, meeting the constitutional requirements for the Office of President of the United States, and the following person, meeting the constitutional requirements for the Office of Vice President of the United States, were nominated for such offices to be filled at the ensuing general election, November 6, 2012, viz.:

TITLE OF OFFICE TO BE FILLED	NAME OF CANDIDATE	NAME OF PARTY	PLACE OF RESIDENCE OF CANDIDATE
President of the United States	MITT ROMNEY	Republican	3 South Cottage Road Belmont, Massachusetts 02478
Vice President of the United States	PAUL RYAN	Republican	700 Saint Lawrence Avenue Janesville, Wisconsin 53545

IN TESTIMONY WHEREOF, we have hereunto set our hand this 30th day of August, 2012

Permanent Address of Chairman of Convention: JOHN A. BOEHNER, 7371 CHARTER CUP LANE, WEST CHESTER, OH 45069

Chairman of the 2012 Republican National Convention

Permanent Address of Secretary of Convention: KIM REYNOLDS, 1010A PARK LANE, OSCEOLA, IA 50213

Secretary of the 2012 Republican National Convention

Permanent Address of Chairman of State Party: TOM MORRISSEY, 11234 S TOMI DRIVE, PHOENIX, AZ 85044

Chairman of the Arizona Republican Party

John A. Boehner, being duly sworn, says that he was the presiding officer of the Convention of Delegates mentioned and described in the foregoing certificate, and that the said Kim Reynolds was the secretary of such convention, and that the said Tom Morrissey is the chairman of the Arizona Republican Party, which constitutes the Republican party of the State of Arizona, and that said certificate and the statements therein contained are true to the best of his information and belief.

Subscribed and sworn to before me this 30th day of August, 2012

GWENDOLYN D. FINN MY COMMISSION #EE144050 EXPIRES: NOV 06, 2015 Bonded through 1st State Insurance

Notary Public

My Commission expires on the 6 day of Nov 15

Kim Reynolds, being duly sworn, says that she was the secretary of the Convention of Delegates mentioned and described in the foregoing certificate, and that the said John A. Boehner was the presiding officer of such convention, and that the said Tom Morrissey is the chairman of the Arizona Republican Party, which constitutes the Republican party of the State of Arizona, and that said certificate and the statements therein contained are true to the best of her information and belief.

Subscribed and sworn to before me this 30th day of August, 2012

GWENDOLYN D. FINN MY COMMISSION #EE144050 EXPIRES: NOV 06, 2015 Bonded through 1st State Insurance

Notary Public

My Commission expires on the 6 day of Nov 20 15

Tom Morrissey, being duly sworn, says that he is the chairman of the Arizona Republican Party, which constitutes the Republican party of the State of Arizona, and that the said John A. Boehner was the presiding officer of the Convention of Delegates mentioned and described in the foregoing certificate, and that the said Kim Reynolds was the secretary of such convention, and that said certificate and the statements therein contained are true to the best of his information and belief.

Subscribed and sworn to before me this 30th day of August, 2012

GWENDOLYN D. FINN MY COMMISSION #EE144050 EXPIRES: NOV 06, 2015 Bonded through 1st State Insurance

Notary Public

My Commission expires on the 6 day of Nov 20 15

Presidential Candidate

I, the undersigned, consent to my nomination by the Republican Party to be a candidate for the office of President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on November 6, 2012.

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Romney	Mitt
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of Florida
County of Hillsborough

Mitt Romney
Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 30th day of August 2012.

Aug. 9, 2016
My Commission Expires

ANDREW M. BONDERUD
MY COMMISSION # EE223917
EXPIRES: August 09, 2016

(Seal)

AMBld
Notary Public Signature

Vice Presidential Candidate

I, the undersigned, consent to my nomination by the Republican Party to be a candidate for the office of Vice President of the United States. I further consent to have my name placed on Arizona's General Election ballot and will submit myself to the vote of the Presidential Electors in Arizona receiving the most votes at the General Election to be held on November 6, 2012.

I am a natural born citizen of the United States, am at least thirty-five years of age, have been a resident within the United States for at least fourteen years, and meet all other constitutional requirements to hold the office of Vice President of the United States.

Print or type your name on the following line in the exact manner you wish it to appear on the ballot, last name first.	
Ryan	Paul
Last Name	First Name

I do solemnly swear (or affirm) that all the information in this Nomination Paper is true.

State of Florida
County of Hillsborough

Vice Presidential Candidate Signature

Subscribed AND Sworn to (or affirmed) before me this 30th day of August 2012.

Aug. 9, 2016
My Commission Expires

ANDREW M. BONDERUD
MY COMMISSION # EE223917
EXPIRES: August 09, 2016

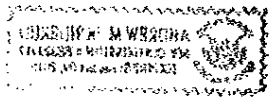
(Seal)

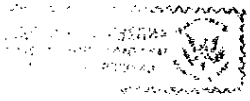
AMBld
Notary Public Signature

3/14/2012

SECRETARY OF STATE

2012 SEP -4 PM 5:01





ADDENDUM 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA JUSTICE COMMITTEE, THE CONSTITUTION PARTY OF CALIFORNIA, JEFF NORMAN, CHARLES MICHEL DEEMER, and JOHN GABREE, Plaintiffs, v. DEBRA BOWEN, California Secretary of State, in her official capacity, Defendant.	CV 12-3956 PA (AGRx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs California Justice Committee, the Constitution Party of California, Jeff Norman, Charles Michel Deemer, and John Gabree (collectively "Plaintiffs") commenced this action against Debra Bowen, California's Secretary of State ("Defendant" or "Secretary of State") on May 7, 2012 for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of California Elections Code section 5100. Specifically, Plaintiffs challenge section 5100's provision requiring that a political body seeking to qualify as a political party to have its nominee for President appear as the party's nominee for President on the November general election must satisfy the requirements for

qualification at least 135 days prior to the primary election even if the party does not use the primary election in the process to choose its nominee.

In their Federal Rule of Civil Procedure 26(f) Joint Report, the parties agreed to try the case to the Court, that no discovery was needed, and that the Court Trial would be "decided based on record presented in support and in opposition to the preliminary injunction, supplemented by a joint stipulations as to additional facts." The Court issued a Scheduling Order consistent with the representations contained in the parties' Joint 26(f) Report. The Parties filed Trial Briefs and exchanged proposed Findings of Fact and Conclusions of Law.[1/]

The Secretary of State did not object to any of the evidence submitted by Plaintiffs in support of their Motion for Preliminary Injunction. However, in advance of the Court Trial, the Secretary of State filed evidentiary objections to the Declaration of Richard Winger that Plaintiffs first filed in support of their Motion for Preliminary Injunction and upon which they also rely to support their proposed Findings of Fact and Conclusions of Law. The Court overrules the Secretary of State's evidentiary objections.[2/]

On October 16, 2012, the Court, sitting without a jury, conducted a bench trial. Having considered the materials submitted by the parties and reviewing the evidence, the

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[1/] The Court ordered the parties to review the other side's proposed Findings of Fact and Conclusions of Law and to mark them to indicate the particular factual assertions and legal conclusions they disputed. Few of the facts submitted by the parties are in dispute, and those that are in dispute, and which the Court relies upon in reaching its conclusion, are supported by the record. (See Dkt. No. 42.)

[2/] The Court overrules the Secretary of State's objections to the Winger Declaration because those objections were not timely raised when the evidence was first submitted to the Court and the Secretary of State later agreed that the evidence would be included in the record at trial. Additionally, the evidentiary objections are not well-taken. Mr. Winger has been accepted as an expert witness on numerous occasions and the Secretary of State has not challenged his qualifications to testify as an expert in this matter. While the Court has not relied on any legal analysis that Mr. Winger may have provided in reaching its conclusions, the facts from Mr. Winger's declaration that are included in the Court's findings of fact are within the realm of knowledge of someone of Mr. Winger's expertise.

Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a):

I. **Findings of Fact**

A. Plaintiffs' Background

1. The California Justice Party and Plaintiff Constitution Party of California are political bodies attempting to qualify for the 2012 general election and desire to list their nominees for President and Vice President with their party affiliations on the November Presidential Election ballot. [Decl. of Jeff Norman ("Norman Decl.") 2, 11, 15 (Dkt. No. 6); Decl. of Charles Michel Deemer ("Deemer Decl.") 11-12, 17 (Dkt. No. 8).]

2. Plaintiff California Justice Committee is a general purpose committee under California law formed to support the efforts of the California Justice Party to qualify as a recognized political party in California. [Norman Decl. 2.]

3. Plaintiffs Jeff Norman and John Gabree are registered voters who have submitted affidavits declaring their intention to affiliate with the California Justice Party and who wish to vote for their party's candidates and the party with which they align. [Norman Decl. 6, 11; Decl. of John Gabree 3, 6 (Dkt. No. 4).]

4. Plaintiff Charles Michel Deemer is a registered voter who has submitted an affidavit declaring his intention to affiliate with the Constitution Party of California and who wishes to vote for his party's candidates and the party with which he aligns. [Deemer Decl. 12, 15.]

B. California's Party-Qualification Scheme

5. The California Elections Code defines a political "party" as a "political party or organization that has qualified for participation in any primary election." [Cal. Elec. Code § 338.]

6. Elections Code § 5100 provides three avenues by which political parties can receive formal recognition in California: (1) by receiving 2 percent of the statewide vote in the preceding gubernatorial election; (2) by having 1 percent of the vote from the last gubernatorial election declare their intent to affiliate with the party by registering with the

party; or (3) by collecting signatures of voters equal to 10 percent of the vote from the last gubernatorial election declaring that they represent a proposed party and that they desire to have that party participate in elections. [Cal. Elec. Code § 5100.]

7. For the current election cycle, if a political body sought to qualify as a political party through the voter registration method in Elections Code § 5100(b), a minimum of 103,004 voters needed to have declared their intention to affiliate with that party by the deadline specified by statute. [Joint Stipulated Facts ("Stip.") 3 (Dkt. No. 29).]

8. For the current election cycle, if a political body sought to qualify as a political party through the petition method in Elections Code § 5100(c), a minimum of 1,030,040 voters needed to have signed a petition supporting recognition of that political body as a political party by the deadline specified by statute. [Request for Judicial Notice ("RJN") at 7 (Dkt. No. 3).]

9. Elections Code § 5100 provides that the Secretary of State shall determine the parties eligible to participate in the primary election 135 days prior to the primary election, which this year was held on June 5, 2012. [Cal. Elec. Code § 5100; RJN at 6.]

10. The deadline for the Secretary of State's determination of parties eligible to participate in this year's primary therefore fell on January 23, 2012. [Cal. Elec. Code § 5100; RJN at 6-7, 10 &16.]

11. For political bodies seeking to qualify under Elections Code § 5100(b) (voter registration), the Secretary of State's determination is based on voter registration affidavits submitted to each county's registrar of voters by 154 days before the primary. [Cal. Elec. Code §2187(d)(2); RJN at 10.]

12. The deadline for voters to submit voter registration affidavits that would count toward the Secretary of State's determination of parties eligible to participate in this year's primary therefore fell on January 3, 2012. [RJN at 6, 10 & 16.]

13. For political bodies seeking to qualify under Elections Code § 5100(c) (petition) during this election cycle, the petition packet had to be submitted no later no later

than November 10, 2011 to ensure verification of signatures by January 23, 2012. [Cal. Elec. Code §§ 5100(c), 9030, 9031; RJN at 7.]

14. Under California law, only political bodies that fulfill California's party-qualification requirements are entitled to place their nominees for President and Vice President on the November Presidential ballot with their party affiliations listed. [Cal. Elec. Code §§ 6901, 13105; Field v. Bowen, 199 Cal. App. 4th 346, 350, 131 Cal. Rptr. 3d 721 (2011).]

15. Under California law, candidates for President and Vice President do not need to participate in the primary election to participate in the general election. [Cal. Const., art. 2, § 5(a-b); Cal. Elec. Code § 359.5; RJN at 52.]

16. California's January 3, 2012 deadline for party qualification through the voter registration option is earlier than almost every early qualification deadline that has been struck down by courts, and only two deadlines were earlier in the calendar year: the Arkansas deadline struck down in 1996 (January 2) and the Ohio deadline struck down in 2006 (November 3 of the year preceding the election). [Decl. of Richard Winger ("Winger Decl.") 28 & Exh. B (Dkt. No. 5).]

C. California's Requirements for Independent Presidential Candidates

17. Under California law, independent candidates for President may qualify for the November ballot in California by submitting a petition with a sufficient number of signatures by 88 days before the November Presidential election. [Winger Decl. 32; RJN at 35 & 39.]

18. For the November 2012 election, the number of signatures required for an independent Presidential candidate was 172,859, and the deadline for submitting the petition for verification of signatures was August 10, 2012. [Winger Decl. 32; RJN at 39.]

D. Plaintiffs' Efforts to Satisfy California's Party-Qualification Scheme

19. On or about November 30, 2011, Rocky Anderson announced the formation of the Justice Party and his intention to seek its nomination for President in 2012, and, on or about December 15, 2011, a group of California voters submitted to the California Secretary

of State's office a notice of intent to qualify the Justice Party as an official political party in California. [Norman Decl. 4-5.]

20. Because the Justice Party has limited funds, its supporters elected to pursue the voter registration option for qualifying as a political party in California. [Norman Decl. 10.]

21. The Constitution Party was founded by Howard Phillips as a national political party in 1992. [Deemer Decl. 5.]

22. Since its first Presidential campaign in 1992, the Constitution Party has placed its candidates for President and Vice President on the November ballot in no less than 35 states, such that its Presidential candidates have been theoretically capable of winning a majority of the electoral college in each election. [Deemer Decl. 6.]

23. In 1992, the American Independent Party (AIP), which has been continuously recognized as a political party by California since 1968, formally affiliated with the Constitution Party, so the Constitution Party's nominees for President and Vice President appeared on California's November Presidential ballot as AIP's candidate between 1992 and 2004. [Deemer Decl. 3, 8.]

24. When the AIP declined to affiliate with the Constitution Party in 2008 and again in 2010, supporters of the Constitution Party who resided in California filed, on or about August 9, 2010, a notice of intent to qualify the Constitution Party of California as a political party. [Deemer Decl. 9-11.]

25. Because the Constitution Party of California has limited funds, its supporters elected to pursue the voter registration option for qualifying as a political party in California. [Deemer Decl. 14.]

26. As of January 23, 2012, insufficient voters had affiliated with the California Justice Party or the Constitution Party of California to enable them to qualify as a political party under Elections Code § 5100(b). [Stip. 2.]

27. On or about January 31, 2012, Defendant Debra Bowen announced that the California Justice Party and Constitution Party of California had failed to qualify as recognized political parties. [RJN at 4.]

28. After the announcement that the groups had not qualified as recognized political parties, supporters of the California Justice Party and Constitution Party of California continued their efforts to fundraise, educate voters, and register supporters through the internet, conferences, and grassroots campaigning. [Norman Decl. 12; Deemer Decl. 17.]

29. The Secretary of State's determination in January 2012 that the California Justice Party and Constitution Party of California failed to qualify by the 135-day deadline undermined campaign activity because the parties' supporters could not promote the goal as part of their organizing efforts of qualifying as a recognized political party to place their candidates on California's 2012 Presidential ballot. [Norman Decl. 12; Deemer Decl. 17, 18.]

E. The Impact of Early Qualification Deadlines

30. Early qualification deadlines, when coupled with high voter registration or signature requirements, can act as barriers to the ability of minor parties and independent candidates to gain access to the ballot. [Winger Decl. 12-14.]

31. Events that occur during the spring of election years are sometimes completely unexpected, and of great importance, but early deadlines prevent minor parties from responding to and capitalizing on these developments. Two historical examples underscore the importance of flexibility: both the Republican Party in 1854 and the Progressive Party in 1912 formed late in the election cycle in response to political developments and ultimately garnered substantial support and won several important races, but an early qualification deadline like California's would have prevented either party from achieving that level of support. [Winger Decl. 13.]

32. Additionally, early qualification deadlines that require political bodies to organize in the year preceding the election hamper organizing efforts because new parties seldom have enough public support that early in the election season to comply with the requirement and there is seldom as much interest in politics that far before the heart of the election cycle in the summer and fall. This is particularly true of new parties, like the

Justice Party (which formed in December 2011), which not only have to organize but also make the public familiar with their platform. [Winger Decl. 14.]

F. California's History of Ballot Access for New Political Parties

33. Since 1953, when California set the party-qualification deadline 135 days before the primary election, seven new political parties have attained formal recognition under California's party-qualification scheme. [Stip. 6; Winger Decl. 16-22.]

34. Since 1995, one new political body, the Americans Elect Party in 2011, has qualified as a recognized political party. [Stip. 7; Winger Decl. 21-22.]

35. Since 2000, 61 groups that have registered with the Secretary of State as political bodies have failed to qualify as recognized political parties in California, with 11 of these having registered and failed to qualify more than once. [Stip. 8.]

36. In the 2012 election cycle, 21 groups that registered with the Secretary of State as political bodies failed to qualify as recognized political parties, and one political body succeeded. [Stip. 9.]

G. The Administrative Requirements for Preparing California's General Election Ballot

37. To have sufficient time to prepare the ballots for an election, California counties require notification by the Secretary of State that a political party has qualified for the ballot at least 98 days before the election. [Stip. 10.]

38. For the current election cycle, 98 days before the general election is July 31, 2012. [Stip. 10; RJN at 38.]

39. California counties therefore would have sufficient time to prepare ballots for the general election if they knew the identities of the political parties that have qualified for the November 6, 2012 Presidential election by July 31, 2012. [Stip. 10; RJN at 38.]

40. For the Secretary of State to determine to whether a political party has qualified 98 days prior to a Presidential election, each county would need to report the registration totals for each political body no more than 110 days before the election, which fell on July 19, 2012 in the current election cycle. [Stip. 11; RJN at 38.]

41. To enable the Secretary of State to have made the determination as to whether a political party had qualified prior to this year's presidential election, each county would have needed to report the registration totals for each political body by no later than July 19, 2012, and the counties in turn would have required additional time to collect and verify information provided to them. [Stip. 11.]

42. California counties require no more than 19 days to collect and verify voter affidavits before them submitting them to the Secretary of State. [Stip. 12; see also Elec. Code § 2187(d) (requiring that counties collect and verify voter affidavits for submission to the Secretary of State at different points in the election cycle in 7, 10 and 19 days).]

43. For the current election cycle, a deadline of June 30, 2012, for political parties seeking to qualify for the November general election would have allowed sufficient time for the counties to collect and verify voter affidavits, submit them to the Secretary of State, have the Secretary of State determine if the parties were eligible to participate in the election, and for the ballots to be prepared in time for the November general election. [Stip. 12.]

II. Conclusions of Law

A. Venue and Jurisdiction

1. Plaintiffs challenge the application of the timing requirements in California Elections Code section 5100 to political bodies seeking recognition as political parties so that their candidates for President and Vice President can appear on California's November general election ballot.

2. Plaintiffs' claims for declaratory and permanent injunctive relief are brought pursuant to the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

3. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331, 1343, and 2201. Declaratory relief is authorized under 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper in this Court under 28 U.S.C. § 1391(b).

5. Plaintiffs seeking a permanent injunction must demonstrate: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages,

are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiffs and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1184 (9th Cir. 2011) (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)).

B. Plaintiffs Have Demonstrated that California's Early Qualification Deadline Causes Irreparable Injury

6. Plaintiffs have established that California's early party-qualification deadline has caused, and will continue to cause, irreparable harm to political bodies and to voters seeking to cast their votes and to engage in the electoral process effectively in this and future Presidential elections.

7. Courts have consistently recognized that state ballot-access restrictions implicate two First Amendment guarantees, "'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,'" both of which "'rank among our most precious freedoms.'" Anderson v. Celebrezze, 460 U.S. 780, 787-88, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (quoting Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S. Ct. 5, 10, 21 L. Ed. 2d 24 (1968)).

8. Under the balancing test laid out in Anderson and clarified in Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992), courts weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the extent to which those interests make it necessary to burden the plaintiff's rights." Anderson, 460 U.S. at 789. If a State's laws place "severe" restrictions upon these rights, then courts apply strict scrutiny, but if the laws impose only "reasonable, nondiscriminatory restrictions," then courts apply rational basis review. Burdick, 504 U.S. at 434 (internal quotation marks omitted).

9. Plaintiffs have established that California's early party-qualification deadline severely burdens their First and Fourteenth Amendment rights and is therefore subject to strict scrutiny.

10. "[T]he great weight of authority that has distinguished between filing deadlines well in advance of the primary and general election and deadlines falling closer to the dates of those elections," Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 590 (6th Cir. 2006), and courts have consistently struck down deadlines that fall far in advance of the relevant election because of the severe burden they impose on voters' rights, see id. at 586 ("Many courts have documented the burden imposed by statutes requiring political parties to file registration petitions far in advance of the primary and general elections."); id. at 590-91 ("A number of other courts have noted the problems associated with filing deadlines far in advance of the election.").

11. For example, in Nader v. Brewer, 531 F.3d 1028 (9th. Cir. 2008), the Ninth Circuit applied strict scrutiny and struck down Arizona's early filing deadline for independent Presidential candidates, which fell 90 days before the primary and 146 days before the general election, see id. at 1031.

12. California's party-qualification deadline is earlier than all but two of the early deadlines that courts have struck down, including the early deadline to which the Ninth Circuit applied strict scrutiny in Nader, further supporting the conclusion that California's party-qualification deadline imposes a severe burden on Plaintiffs rights. See Nader, 531 F.3d at 1039 (noting that challenged "signature requirement is greater and the deadline [earlier]" than in a case where a registration deadline was upheld); Blackwell, 462 F.3d at 591 (noting that "Ohio's deadline in the November preceding the election is the earliest of any deadline reviewed by a federal court").

13. The limited success of new political parties in satisfying California's qualification requirements – only seven new political parties have satisfied California's party-qualification scheme since the current deadline was adopted 60 years ago and only one, the Americans Elect Party, has done so since 1995 – also supports the conclusion that

the early deadline is a severe barrier for political bodies seeking to qualify as recognized political parties. See Libertarian Party of Wash. v. Munro, 31 F.3d 759, 762 (9th Cir. 1994) (holding that the controlling inquiry is "whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed" (quoting Storer v. Brown, 415 U.S. 724, 742, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974); see also Blackwell, 462 F.3d at 592 ("[T]he fact that an election procedure can be met does not mean the burden imposed is not severe.").

14. The Secretary of State's argument that Plaintiffs have suffered no real injury because they have not made meaningful progress toward satisfying the 103,004 voter registration threshold erroneously shifts the focus from whether Plaintiffs have established the unconstitutionality of § 5100, the legal issue before the Court, to the likelihood that Plaintiffs will ever meet the qualification requirements that the Court might conclude are constitutional. Whether Plaintiffs have met, or ever would meet, the numeric threshold has no bearing on determining whether setting the deadline for doing so ten months before the relevant election impermissibly burdens Plaintiffs fundamental rights, which involves assessing the severity of that restriction against the justifications for it proffered by the Secretary of State.

15. The Secretary of State has not proffered a sufficient or credible justification for the party-qualification deadline in California Elections Code § 5100, let alone evidence that the timing requirement is "narrowly drawn" to justify the severe restriction it places on Plaintiffs and other voters and political bodies. See Burdick, 504 U.S. at 434.

16. Although California elections officials undoubtedly require a reasonable amount of time in advance of an election to certify that a candidate or party have satisfied the eligibility requirements for inclusion on the ballot and to prepare election materials, the evidence demonstrates that a June 30, 2012 deadline would have adequately served that legitimate interest during the current election cycle.

17. The State of California's ability to ensure that eligible independent candidates for President are included on the November ballot based on a petition deadline that is 98

days before the November election further confirms that California election officials do not need 10 months to tabulate whether a political body has satisfied the voter registration threshold in order to place its candidates for President and Vice President on the November ballot with the party label.

18. Although California has a legitimate interest in limiting ballot access to bona fide parties to avoid voter confusion and to protect the integrity of the electoral process, those concerns are far more relevant to support § 5100's numerosity requirement than the timing requirement. A party-qualification deadline closer to the relevant election would amply serve those interests.

19. Although California has legitimate interests in avoiding voter confusion and preventing fraud, the Secretary of State has presented no evidence and offered no plausible explanation why establishing a later party-qualification deadline would cause voter confusion or increase the likelihood of voter fraud, nor has she explained how the early qualification deadline is narrowly tailored to advance those interests.

20. California does not have a legitimate interest in withholding formal recognition from political parties who satisfy the numeric threshold based primarily on voter support for the party's presidential nominee. A state's interest in restricting ballot access is at its lowest when it comes to regulating Presidential elections, see Anderson, 460 U.S. at 794-95, and limiting ballot access for political parties that form primarily to support a candidate in the national Presidential election is not a legitimate state interest, see Burdick, 504 U.S. at 434 (holding that the constitution may permit "reasonable, nondiscriminatory restrictions" on ballot access (emphasis added and internal quotation marks omitted)).

21. Even if this were a legitimate interest, the early party-qualification deadline is not narrowly tailored to advance that interest. Under the current deadline, there is nothing that prevents a new party from meeting the numeric threshold based solely on voter support for that new party's putative Presidential nominee. Additionally, even with a later deadline for parties seeking recognition so their Presidential candidates may appear on the general election ballot, there is no reason to believe that voters who affirm their support for a party

that is focused primarily on trying to place its Presidential candidate on the general election ballot would not also support a broader slate of candidates from that party in future elections.

22. To the extent that California has a legitimate interest in assuring equal political opportunities for all unqualified parties, refusing to establish a later party-qualification deadline, which would be open to all political bodies seeking formal recognition, does not advance that interest.

23. Although California elections officials need sufficient time to resolve judicial and administrative challenges to the qualification of a party, they are able to resolve challenges involving independent Presidential candidates, who must submit their nomination petitions 98 days before the general election, before the general election, and the Secretary of State has presented no evidence establishing that a deadline 10 months before the election is necessary to accommodate this interest.

24. The loss of First Amendment freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury" because "[t]he timeliness of political speech is particularly important." Elrod v. Burns, 427 U.S. 347, 373, 374 n.29, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

C. Plaintiffs Have Demonstrated that Remedies at Law Are Inadequate

25. Monetary damages or other legal remedies are inadequate to resolve Plaintiffs' claims because "[t]here is no way to calculate the value of such a constitutional deprivation." Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998); see also Allee v. Medrano, 416 U.S. 802, 814-15 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974) (holding "[n]o remedy at law would be adequate to provide [adequate] protection" where plaintiffs challenged conduct that infringed "constitutionally protected rights of free expression, assembly, and association").

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. . . .

D. Plaintiffs Have Demonstrated the Balance of Hardships Tips Sharply in Favor of Granting a Permanent Injunction

26. The substantial infringement on fundamental personal liberties caused by California's early party-qualification deadline greatly outweighs whatever minimal burden the State of California must undertake to establish a constitutionally compliant deadline for political bodies seeking recognition so their candidates for President and Vice President may appear on the November Presidential Election ballot. See Anderson, 460 U.S. at 806 ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (internal quotation marks omitted)).

E. Plaintiffs Have Demonstrated that Permanent Injunctive Relief Serves the Public Interest

27. An order prohibiting the State of California from denying political bodies the opportunity to participate meaningfully in the current and future Presidential Election cycles greatly benefits the public, because "[t]he ability of a political party to appear on the general election ballot affects not only the party's rights, but also the First Amendment right of voters." Blackwell, 462 F.3d at 588; see also Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002) (recognizing "the significant public interest in upholding First Amendment principles").

F. Plaintiffs Have Established Their Entitlement to Declaratory and Permanent Injunctive Relief

28. Plaintiffs are entitled to a declaration that California Elections Code section 5100's timing requirement violates their rights under the First and Fourteenth Amendments of the United States Constitution.

29. Plaintiffs are entitled to a permanent injunction that enjoins the Secretary of State from enforcing or otherwise applying California Elections Code section 5100's requirement that proposed political parties must satisfy the party qualification requirements at least 135 days prior to the primary election.

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have established entitlement to declaratory and injunctive relief. Accordingly, the Court will enter a Judgment in favor of the Plaintiffs.

IT IS SO ORDERED.

DATED: October 18, 2012

Percy Anderson
UNITED STATES DISTRICT JUDGE

ADDENDUM 5

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE CONSTITUTION PARTY OF
NEW MEXICO,

Plaintiff,

vs. Civ. No. 1:12-325 KG/LFG

DIANNA J. DURAN, in her official capacity
as New Mexico Secretary of State,

Defendant.

MEMORANDUM OPINION AND ORDER

On November 30, 2012, Plaintiff filed Plaintiff's Motion for Summary Judgment arguing that it should prevail in this lawsuit.[1] (Doc. 26). Defendant opposes the Motion for Summary Judgment. (Doc. 32). Plaintiff filed a reply to Defendant's opposition to the Motion for Summary Judgment as well as a notice of additional authority. (Docs. 38 and 47). Defendant also filed a response to the notice of additional authority. (Doc. 48). Having reviewed the Motion for Summary Judgment, the accompanying briefs, the notice of additional authority, and the response to the notice of additional authority, the Court grants, in part, the Motion for Summary Judgment. Accordingly, the Court will enter summary judgment in Plaintiff's favor on its 42 U.S.C. Section 1983 claims and will enter a judgment declaring that NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) (1969) violate the First and Fourteenth Amendments of the United States Constitution to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is

[1] Former Plaintiffs Green Party of New Mexico and Estevan Trujillo had joined in Plaintiff's Motion for Summary, but they later withdrew from the case. *See* (Doc. 31).

authorized to participate." The Court will also enter a permanent injunction enjoining Defendant from enforcing Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate." The Court, however, will not, at this time, grant Plaintiff's request to order Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year.[2]

A. Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[3] When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996) (citation omitted). The non-moving party may not avoid summary judgment by

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[2] Although Plaintiff requests in the Verified Complaint for Injunctive and Declaratory Relief (Verified Complaint) that the Court order Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year, Plaintiff asks in the memorandum supporting Plaintiff's Motion for Summary Judgment that the Court order Defendant to accept minor party qualifying petitions until the first Tuesday in August of a general election year. *See* (Doc. 1) at 7; (Doc. 27) at 18. The Court will defer to the request for relief which Plaintiff makes in the Verified Complaint.

[3] Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

B. Background

Plaintiff brings this election law case under Section 1983 for violations of the First and Fourteenth Amendments. This lawsuit arises from the application of New Mexico election laws during the 2012 presidential election. Plaintiff, a minor political party, must be qualified as a political party before Defendant will place Plaintiff's candidates on a New Mexico ballot. To qualify as a political party, a minor party must file with Defendant a petition with signatures "of a least one-half of one percent of the total votes cast for the office of governor at the preceding general election who declare by their signatures on the petition that they are voters of New Mexico and that they desire the party to be a qualified political party in New Mexico." NMSA 1978, § 1-7-2(A). Section 1-7-2(A) refers to Section 1-7-4(A) for the time to file qualifying petitions. Section 1-7-4(A) requires that filings be made "no later than the first Tuesday in April before any election in which it is authorized to participate." Prior to 1995, the deadline for filing qualifying petitions was the second Tuesday in July of a general election year. *See* 1995 N.M. Laws Ch. 124, § 9.

The Court takes judicial notice that the primary elections in New Mexico take place "on the first Tuesday after the first Monday in June of each even-numbered year." NMSA 1978, § 1-8-11 (1969). In addition, the general election takes place "on the Tuesday after the first Monday in November of each even-numbered year." N.M. Const. art. XX, § 6.

Plaintiff alleges in the Verified Complaint that the April deadline "unconstitutionally impinge[s] on the associational rights of a minor politically [sic] party, its candidates, supporters and voters and freeze[s] the status quo in favor of the two dominant political parties in the state."

(Doc. 1) at ¶ 26. Plaintiff also maintains that the April deadline is unduly burdensome and discriminatory to minor parties because it restricts Plaintiff's right "to place candidates on the ballot" and restricts Plaintiff's members from voting for the candidate of their choice. *Id.* at ¶ 28. Plaintiff specifically alleges that "[r]equiring minor political parties to gather signatures on their petitions so early, when the mind of the general public and the attention of the media is not focused on the general elections, is unduly burdensome." *Id.* at ¶ 21. In addition, Plaintiff alleges that "[i]t is more difficult to recruit volunteers to collect petition signatures in the sometimes adverse weather of the early months of the year...." *Id.* at ¶ 22. Plaintiff further contends that it has paid consultants "to come to New Mexico to consult with local organizers and assist the parties in collecting the requisite number of signatures by the early deadline." *Id.* at ¶ 23. Even with the assistance of consultants, Plaintiff maintains that it "may not be able to muster the required number of signatures on petitions by the early April deadline." *Id.* at ¶ 24. Finally, Plaintiff alleges that Defendant lacks a compelling state interest in having an April deadline for minor parties seeking qualification as a political party. *Id.* at ¶ 29.

Plaintiffs seeks a declaratory judgment that Sections 1-7-2(A) and 1-7-4(A) are unconstitutional, and asks the Court to temporarily and permanently enjoin Defendant from enforcing the April deadline. *Id.* at 7. Moreover, Plaintiff requests that the Court order Defendant to accept minor party qualification petitions until the first Tuesday in July of a general election year. *Id.*

C. Plaintiff's Statement of Undisputed Material Facts

Plaintiff filed a Statement of Undisputed Material Facts comprised of summaries from various affidavits. The Statement of Undisputed Material Facts concerns Plaintiff as well as former Plaintiffs, the Green Party of New Mexico and Estevan Trujillo. (Doc. 28). Because the

Green Party of New Mexico and Trujillo are no longer parties to this lawsuit, the Court will consider only the statements regarding Plaintiff. The Court notes that Defendant did not submit any of her own facts to counter Plaintiff's Statement of Undisputed Material Facts, but she contests several paragraphs in the Statement of Undisputed Material Facts.

First, Defendant contests Paragraphs 21, 22, 23, and 26 of the Statement of Undisputed Material Facts. In Paragraph 21, Plaintiff contends that "[i]n the early part of a year of a presidential election, the mind of the general public and the attention of the media is not focused on the election, so it is more difficult for a minor party to recruit volunteers to gather signatures for minor party qualifying petitions by the early April deadline in New Mexico." In Paragraph 22, Plaintiff states that "[o]ften minor parties attract additional supporters who supported major party candidates who lose in the June primaries and supporters who are disappointed with winning major party candidates." In Paragraph 23, Plaintiff asserts that "[i]t is more difficult to recruit volunteers to collect qualifying petition signatures in the sometimes adverse weather of the early months of the year." Finally, Plaintiff maintains in Paragraph 26 that "[a]fter a minor party has a nominated candidate, there is often a groundswell of support and an increase of party membership and volunteers."

Defendant argues that the Court should reject these paragraphs because they are broad, conclusory, and mere opinions without specific factual support. Defendant also argues that Paragraphs 22 and 23 are immaterial. Plaintiff contends that Paragraphs 21, 22, 23, and 26 are supported by affidavits sworn to by witnesses experienced in these matters. Plaintiff further contends that other courts have recognized the general observation made in Paragraph 21 and that other courts have found the statement in Paragraph 23 to be material.

The Tenth Circuit Court of Appeals has "long held that 'conclusory allegations without specific supporting facts have no probative value'" and cannot support summary judgment. *See, e.g., Ftizgerald v. Corrections Corp. of America*, 403 F.3d 1134, 1143 (10th Cir. 2005) (citation omitted). Even if Paragraphs 21, 22, 23, and 26 are material to the Motion for Summary Judgment and based on the opinions of experienced witnesses, the Court is troubled by the conclusory and even speculative nature of those paragraphs. Plaintiff's use of "often" or "more difficult" fail to convey the extent and severity of the situations presented in Paragraphs 21, 22, 23, and 26. Plaintiff simply does not present any specific facts to support the opinions reflected in those paragraphs. Moreover, the Court is reluctant to rely on general facts which other courts have found to be material. As a federal district court recently observed in a minor party ballot access case, "[r]eferences to previous cases, which conducted their own factual findings to unique election cycles and localities, are distinguishable at best and are most likely inapt to the current situation." *Stein v. Chapman*, 2012 WL 2935637 *8 (M.D. Ala. 2012). The Court will, therefore, disregard Paragraphs 21, 22, 23, and 26 in its analysis of the Motion for Summary Judgment. *See City of Shawnee, Kan. v. Argonaut Ins. Co.*, 546 F.Supp.2d 1163, 1178 (D. Kan. 2008) (court gave no weight to defendant's "conclusory and self-serving" affidavit when deciding motion for summary judgment).

Next, Defendant argues that Paragraphs 29, 32-33, and 35 are immaterial. In Paragraph 29, Plaintiff states that it paid approximately $15,459 for the costs and services of two consultants to collect signatures prior to the April 2012 deadline. In Paragraphs 32-33, Plaintiff contends that it would have spent the money it paid to the consultants on various activities like media coverage and public relations. In Paragraph 35, Plaintiff concludes that the money paid to

the consultants and canvassers to collect signatures "severely" burdened Plaintiff's resources and Plaintiff's attempt to be a viable party in New Mexico.

Defendant contends that she did not require Plaintiff to spend any money on consultants and that Plaintiff exercised its discretion in spending over $15,000 on consultants. Plaintiff argues that these Paragraphs are material because the April 2012 deadline caused it to spend money on consultants which would have otherwise been spent on other activities. The Court agrees with Plaintiff that it is material that Plaintiff spent over $15,000 on consultants in order to meet the April 2012 deadline. However, it is immaterial what Plaintiff would have spent that money on. In addition, Paragraph 35 is an unsupported conclusory statement which does not deserve any weight. Consequently, the Court will consider Paragraph 29, but not Paragraphs 32-33 and 35.

Defendant also asserts that Paragraph 28 is immaterial because it refers to the June deadline for independent candidates to submit qualifying petitions which require more signatures than minor party qualifying petitions. Plaintiff notes that Paragraph 28 "demonstrates that Defendant can handle the administration of qualifying petitions much later within the election cycle without disrupting the election cycle and undercuts any claim that the deadline set by [the] NMSA 1978, § 1-7-4(A) deadline is narrowly tailored or even legitimate." (Doc. 38) at 7. The Court agrees with Plaintiff and will consider Paragraph 28.

Furthermore, Defendant contends that Paragraph 34 is not a fact. Plaintiff indicates in Paragraph 34 that it "had to neglect other states in which it wanted to develop a presence because it had to concentrate its efforts in New Mexico." Defendant argues that she did not require Plaintiff to concentrate its efforts in New Mexico, but rather Plaintiff chose to do so. Plaintiff contends that Paragraph 34 is based on a sworn statement made by Plaintiff's national chairman.

The issue in this case is what the effect of the April deadline has on Plaintiff's ability to access ballots in this state. Whether efforts in New Mexico adversely affected Plaintiff's presence on ballots in other states is simply not material. Hence, the Court will disregard Paragraph 34.

Finally, Defendant observes that Paragraph 19 is an incorrect statement of the law. Plaintiff states in Paragraph 19 that "[m]inor parties do not nominate their candidates in June primary elections in New Mexico. They select their candidates at nominating conventions, which can be held as late as the month of July of the year of the general elections. NMSA 1978 § 1-8-2." Plaintiff does not object to Defendant's observation that Paragraph 19 is incorrectly stated. Accordingly, the Court will disregard Paragraph 19 and directly refer to Section 1-8-2 when necessary.

Defendant does not object to Paragraphs 1-6, 12-18, and 20 which provide background information on Plaintiff and on New Mexico law regarding minor party qualifying petitions. Defendant also does not object to Paragraph 24 wherein Plaintiff states that it nominated its presidential and vice-presidential candidates at a convention in late April 2012. Lastly, Defendant does not dispute Paragraph 31 which states: "With a later deadline, it would have been easier for Plaintiff[] to collect the required amount of signatures on qualifying petitions using minor party volunteers."

D. Discussion

1. Plaintiff's First and Fourteenth Amendment Claims

Plaintiff argues that it is entitled to summary judgment on its First and Fourteenth Amendment claims based on the balancing test articulated by the United States Supreme Court in *Anderson v. Celebreeze*, 460 U.S. 780 (1983). Although *Anderson* involved an early qualifying petition deadline for independent candidates, courts have applied *Anderson* to cases addressing

the constitutionality of early qualifying petition deadlines for minor parties. *See, e.g., Chapman*, 2012 WL 2935637 *2; *American Ass'n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1195 (D.N.M. 2010) (use *Anderson* test for inquiries "into the propriety of a state election law...."). The Court in *Anderson* noted that when a state election law imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788. The Court went on to hold that for a court to resolve a constitutional challenge to a state's election law, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

Id. at 789-90 (internal citations omitted).

In 1992, the United States Supreme Court discussed *Anderson* in *Burdick v. Takushi*, a state election law case involving a ban on write-in voting in Hawaii. 504 U.S. 428 (1992). The Court explained that when First and Fourteenth Amendment "rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" 504 U.S. 428, 433 (1992) (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The Court then applied the principles in *Anderson* and determined that the "ban on write-in voting imposed[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote." *Id.* at 438-39. The Court stated that because they "concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional

scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate." *Id.* at 439. The Court concluded that "when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights—as do Hawaii's election laws—a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Id.* at 441.

In 2008, the United States Supreme Court in *Crawford v. Marion County Election Bd.* confirmed that *Burdick* did not "identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288-89). Moreover, the Court emphasized that "[t]he *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*" and "did not create a novel 'differential important regulatory interests standard.'" *Id.* at 190 n.8 (citations and internal quotation marks omitted).

The first step in applying the *Anderson* test is to determine the character and magnitude of Plaintiff's asserted injury. Plaintiff notes that other courts have determined that early deadlines, similar to the one in this case, for filing minor party qualifying petitions impose severe burdens on minor parties. While that may be true, courts must apply the *Anderson* test on a case-by-case basis. *See Constitution Party of Kansas v. Kobach*, 695 F.3d 1140, 1144 (10th Cir. 2012). *See also Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) ("a particularized assessment of the restriction and the burden it imposes is required."); *Chapman*, 2012 WL

2935637 *7 (*Anderson* test requires examination of "present conditions" which "particular parties" face in the jurisdiction at issue). Consequently, the Court will not rely on the cases cited by Plaintiff to decide Plaintiff's Motion for Summary Judgment.

Defendant contends that to determine the extent of the injury caused by the April deadline the Court must look at the number of signatures required to be on the qualifying petition as well as the time period to collect those signatures. Defendant cites five cases which discuss whether the number of required signatures injures or burdens a minor party: *Williams v. Rhodes*, 393 U.S. 23 (1968); *Green Party of Tennessee v. Hargett*, 882 F.Supp.2d 959 (M.D. Tenn.), *reversed on other grounds*, 700 F.3d 816 (6th Cir. 2012); *Kelly v. McCulloch*, 2012 WL 1945423; *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991); and *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980). These cases, however, do not mandate that the number of signatures be considered in determining the constitutionality of an early filing deadline for minor party qualifying petitions. Moreover, in *Williams*, *Hargett*, *Kelly*, and *McLain*, the plaintiffs, unlike Plaintiff here, specifically challenged the signature numerosity requirement of their state election laws. Additionally, the court in *New Alliance Party* did not even consider the state's signature numerosity requirement in deciding that an early deadline for filing minor party qualifying petitions and candidate nomination certifications was unconstiututional. In fact, the court in *Hargett* decided that the deadline challenge alone unduly burdened the plaintiffs' First Amendment rights. 882 F.Supp.2d at 1013. Also, as Plaintiff correctly indicates, the Court in *Anderson* decided a challenge to an early qualifying petition deadline for independent candidates without considering the numerosity of signatures. No legal authority mandates that the Court consider the numerosity of signatures in deciding the character and magnitude of any injury caused by the April deadline.

Next, Defendant distinguishes cases Plaintiff cites, including *Anderson*, which concern qualifying petition deadlines for independent candidates. Defendant argues that "the burden imposed on an independent candidate is different in kind from that imposed on a party merely seeking qualification." (Doc. 32) at 8. Courts, however, have not made that distinction. As noted previously, courts have applied the *Anderson* test to cases involving qualifying petition deadlines for minor parties. *See, e.g., California Justice Committee v. Bowen*, 2012 WL 5057625 (C.D. Cal.).

Defendant also argues that since there is no restriction on when Plaintiff can begin collecting signatures, the April deadline does not impose a "time pressure" on Plaintiff. *See* (Doc. 32) at 9. Defendant cites two cases in which courts considered the lack of a beginning date for collecting signatures as factors in concluding that early qualifying petition deadlines for minor parties are constitutional. In *North Carolina Constitution Party v. Bartlett*, the plaintiffs argued that both the signature numerosity requirement and the early deadline for filing minor party qualifying petitions were unconstitutional. 2013 WL 785353 (W.D.N.C.) (slip copy). The court, however, found that the early deadline was immaterial and that the analysis should be directed to the burden associated with collecting signatures. *Id.* at *6. Consequently, the court found that the burden of collecting signatures was lessened significantly by six different factors including that there was "no time limit on the time period in which signatures could be gathered...." *Id. Bartlett*, however, is not particularly helpful here because (1) the *Bartlett* court did not directly address the deadline issue presented in this case; and (2) the lack of a beginning date to collect signatures was only one of six determining factors.

In *Stein v. Bennett*, the second case cited by Defendant, the court discussed, among other facts, how the plaintiffs could have collected signatures earlier in order to meet the Alabama

deadline for minor party qualifying petitions. 2013 U.S. Dist. Lexis 126667 *22-23 (M.D. Ala.). The court, however, stated that it could not "affirmatively conclude that Alabama's election law imposes minor burdens on Plaintiffs' rights; it finds only that Plaintiffs (who would bear the burden of proof at trial) have failed to prove otherwise." *Id.* at *27. Moreover, the court noted that because the Alabama deadline for minor party qualifying petitions is the date of the primary election, the Alabama election law does not discriminate against minor parties, unlike cases, similar to this one, where ballot access deadlines are well before the primaries and subject to constitutional scrutiny. *Id.* at *14-15. Although *Bennett* appears persuasive at first glance, the court did not actually conclude that the Alabama election law does not burden minor parties. Additionally, *Bennett* is distinguishable from this case on the facts. Accordingly, *Bennett*, an unpublished district court case from another district, simply carries little weight.

Even assuming Plaintiff could meet the April deadline if it starts collecting signatures earlier in the year, that fact alone does not necessarily mean that the April deadline does not burden Plaintiff. "The fact that an election procedure can be met does not mean the burden imposed is not severe." *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006)). The Court, therefore, rejects Defendant's argument that if Plaintiff starts collecting signatures earlier in the year, the April deadline must not be burdensome to minor parties like Plaintiff.

Finally, Defendant cites *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.* to support its assertion that the April deadline imposes at most a *de minimus* burden on Plaintiff. 844 F.2d 740 (10th Cir. 1988). Plaintiffs in *Rainbow Coalition* argued that an early deadline for filing minor party qualifying petitions combined with a high signature requirement made Oklahoma's ballot access law "one of the most restrictive in the country." *Id.* at 744. The Tenth

Circuit held that the early deadline was constitutional, "even in conjunction with the relatively high signature requirement." *Id.* at 747.

Rainbow Coalition, however, is easily distinguished from this case. First, the Tenth Circuit in *Rainbow Coalition* differentiated *Anderson* on the deadline issue by noting that the United States Supreme Court in *Anderson* decided that case with respect to a qualifying petition deadline for independent candidates in the context of a presidential election year while *Rainbow Coalition* did not involve Oklahoma's much more lenient ballot access law for presidential minority candidates. *Id.* at 746 n.9. This case, on the other hand, arose from the 2012 presidential election. As the Court stated in *Anderson*, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." 460 U.S. at 795. Moreover, as stated previously, subsequent caselaw indicates that *Anderson* should also apply to deadlines for qualifying minor party petitions. Second, unlike this case, Oklahoma law required the parties in *Rainbow Coalition* to select their candidates during the primary election. Consequently, the state needed an early deadline for minor party qualifying petitions so it could verify the petitions before the primary candidate filing deadline, and the state needed sufficient time between the primary candidate filing deadline and the primary election to process challenges to the candidates as well as "to print ballots, and to mail out and receive absentee ballots." 844 F.2d at 745. Since Plaintiff selected its 2012 candidates during the late April convention, prior to the June primary, the state's concerns in *Rainbow Coalition* do not apply

here.[4] Finally, *Rainbow Coalition* does not control the outcome of this case, because the Court must examine the particular facts of this case in applying the *Anderson* test.

The Court now turns to the undisputed material facts of this case to determine the character and magnitude of the injury caused by the April deadline. The Court finds that but for the April deadline, Plaintiff would not have paid consultants over $15,000 to complete the qualifying petition. Although Defendant claims that Plaintiff could have obtained the signatures for the qualifying petition without consultants if it had started collecting signatures earlier in the year, the parties agree that "[w]ith a later deadline, it would have been easier for Plaintiff[] to collect the required amount of signatures on qualifying petitions using minor party volunteers" at a, presumably, significant savings to Plaintiff. (Doc. 28) at ¶ 31. The expenditure of money to hire consultants is at least a substantial, if not a severe, burden on Plaintiff resulting from the April deadline. *See Crawford*, 504 U.S. at 205 (Scalia, J., concurring) ("Burdens are severe if they go beyond the merely inconvenient.").

Defendant argues, however, that the state's interests outweigh any burden which the April deadline might impose on Plaintiff. Specifically, Defendant claims that:

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[4] Plaintiff notes that the Tenth Circuit has commented that early deadlines for qualifying minor party petitions appear "to run counter to views" in United States Supreme Court cases, like *Anderson*, "which would permit independent political parties to organize after the conventions of the major parties have chosen their tickets and platforms." *Populist Party v. Herschler*, 746 F.2d 656, 661 (10th Cir. 1984). That reasoning certainly would have been relevant to the 2012 election year in which Plaintiff held its nominating convention in late April 2012, prior to the primary and the major parties' conventions. *See* (Doc. 28) at ¶ 24. However, Plaintiff could conceivably hold any future conventions as late as July in the year of the general election. *See* NMSA 1978, § 1-8-2(B) (1969) ("names [of minor party candidates] certified to the secretary of state shall be filed on the twenty-first day following the [June] primary election in the year of the general election...."). *See also Woodruff v. Hererra*, 623 F.3d 1103 (10th Cir. 2010) (other portions of Section 1-8-2 found unconstitutional.).

> [t]he State has a strong interest in conducting an orderly election. One of the keys to the orderly conduct of an election is a manageable ballot. This means that a State may require that a party show a modicum of support before giving that party ballot access.

(Doc. 32) at 10. This assertion of a state interest is woefully inadequate for several reasons. First, it lacks any factual basis, is merely conclusory, and lacks specificity. Accordingly, the April deadline appears arbitrary and does not advance any precise state interest. Second, the fact that Defendant does not present any evidence that the previous July deadline caused problems in the orderly conduct of elections supports a conclusion that the purpose of the April deadline is to discriminate against minor parties. As Plaintiff observes, Defendant is capable of processing independent candidate qualifying petitions without any difficulty "as late as three weeks after the June primary in New Mexico." (Doc. 28) at ¶ 28. Finally, a challenge to a filing deadline does not affect the requirement that a party show a modicum of support by collecting the required number of signatures on its qualifying petition. In fact, Plaintiff does not challenge the signature numerosity requirement imposed by the State of New Mexico. In sum, the April deadline is unreasonable and discriminates against minor parties. Consequently, the state has no relevant or legitimate interest "sufficiently weighty" to justify the April deadline.

Balancing the injury caused by the April deadline, whether that injury is characterized as merely substantial or as severe, against the state's lack of a precise interest in the April deadline, the Court concludes that the April deadline violates Plaintiff's First and Fourteenth Amendment rights as a matter of law. Plaintiff is, therefore, entitled to summary judgment on its Section 1983 claims.

2. Requested Relief

Since Plaintiff prevails on its Motion for Summary Judgment, the Court will enter a judgment declaring that Sections 1-7-2(A) and 1-7-4(A) violate the First and Fourteenth

Amendments to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate." Although Plaintiff originally sought both temporary and permanent injunctive relief, it is appropriate to consider only the request for permanent injunctive relief, because the 2012 presidential election has already occurred. For the Court to enter an order granting the permanent injunctive relief Plaintiff seeks, Plaintiff must prove "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *See Southwest Stainless, LP v. Sappington,* 582 F.3d 1176, 1191 (10th Cir. 2009). The Court concludes that Plaintiff has proven these elements with respect to its request for a permanent injunction enjoining Defendant from enforcing the April deadline. Hence, the Court will permanently enjoin Defendant from enforcing Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate."

It is improper, however, for the Court to order, at this time, injunctive relief which mandates Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year. A proper regard for federal-state relations requires that this Court allow the state legislature an opportunity to enact a lawful deadline for minor parties to file qualifying petitions. *See, e.g. Maryland Citizens for a Representative General Assembly v. Governor of Md.*, 429 F.2d 606, 609 (4th Cir. 1970) (allow state legislature to address constitutionally defective law unless state legislature had opportunity to cure defective law and did not do so); *Hellebust v. Brownback*, 884 F.Supp.436,438 (D. Kan. 1995) ("In the event the legislature does

not enact a new statutory scheme that comports with the Constitution of the United States, it appears appropriate for this court to order a permanent injunction."); *Blomquist v. Thomson*, 591 F.Supp. 768, 777 (D. Wyo. 1984) ("In the interest of harmonious federal-state relations, the Court will defer any ruling upon the remedial aspects of this action until the Wyoming Legislature has had an opportunity in that session to amend the Wyoming Election Code in light of the provisions of this order."). Accordingly, the Court denies, at this time, Plaintiff's request for an order requiring Defendant to change the April deadline to a July deadline.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 26) is granted, in part, in that

1. summary judgment will be entered in Plaintiff's favor on its Section 1983 claims;

2. a judgment will be entered declaring that NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) violate the First and Fourteenth Amendments to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate;"

3. Defendant will be permanently enjoined from enforcing NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate;" and

4. Plaintiff's request for an order requiring Defendant to change the April deadline for minor parties to file qualifying petitions to a July deadline is denied at this time.

UNITED STATES DISTRICT JUDGE