**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF KENTUCKY**
**FRANKFORT DIVISION**

| | | |
|---|---|---|
| **THE LIBERTARIAN PARTY OF KENTUCKY, *et. al.*** | **:** | **Case No. 3:15-CV-86 GFVT** |
| | **:** | ***Electronically Filed*** |
| **Plaintiffs** | **:** | |
| **v.** | **:** | |
| **ALISON LUNDERGAN GRIMES, et. al.** | **:** | |
| **Defendants** | **:** | |

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND SUMMARY JUDGMENT WITH DECLARATIONS OF CYRUS ECKENBERG, KEN MOELLMAN, JR., MARTHINA KROGDAHL, CHRISTINA TOBIN, AND RICHARD WINGER IN SUPPORT**

Plaintiffs, by and through Counsel, seek a temporary restraining order, preliminary injunction,[1] permanent injunction, and summary judgment against enforcement of K.R.S. 118.015, K.R.S. 118.305(1)(e), and K.R.S 118.315 generally or facially, or, in the alternatively, "as applied" to the Plaintiffs, political parties that have established a modicum of public support in Kentucky and their members; and specifically, they seek an order directing that their duly nominated candidates be placed on ballots in Kentucky general elections going forward.

## I. FACTS

1. Background of Kentucky's Ballot Access Laws

[1] Depending on the Court's schedule, it may be possible and even advisable to move to consolidate these proceedings under FRCP 65(a)(2) with a permanent injunction hearing. Plaintiffs desire certain discovery prior to a hearing on a permanent injunction if summary judgment is not appropriate, particularly if Defendants contest any of the factual testimony placed of record with this motion, but believe that all discovery could be completed under a compressed schedule, with shortened deadlines for response, within 60 days of the filing of this motion.

Kentucky law does not permit "general" ballot access for a political party unless that party receives over 2% of the vote in a Presidential race. K.R.S. 118.015, K.R.S. 118.305(1)(e), and K.R.S 118.305. If a political party's candidate receives over that percentage vote, that party may nominate its candidates, and place them on the general election ballot, for a period of four years, with no further steps insofar as the Commonwealth of Kentucky is concerned. *Id.* There is no other way for a political party to receive blanket ballot access – even if they run candidates in other statewide races. *Id.*

Kentucky utilizes a three tiered system for political groups and ballot access. At the top of the tier are "Political Parties." They are defined in K.R.S. 118.015(1) as follows: "A 'political party' is an affiliation or organization of electors representing a political policy and having a constituted authority for its government and regulation, and whose candidate received at least twenty percent (20%) of the total vote cast at the last preceding election at which presidential electors were voted for."

Next are "Political Organizations." They are defined in K.R.S. 118.015(8) as follows: "'Political organization' means a political group not constituting a political party within the meaning of subsection (1) of this section but whose candidate received two percent (2%) or more of the vote of the state at the last preceding election for presidential electors."

Finally, there are "Political Groups." They are defined in K.R.S. 118.015(9) as follows: "'Political group' means a political group not constituting a political party or a political organization within the meaning of subsections (1) and (8) of this section."

Pursuant to K.R.S. 118.305(1)(a), (b), (c), and (d), candidates for Political Parties and Political Organizations automatically earn ballot access, and do so for a four-year period following the presidential election.

While the statutes are not specific, the Board of Elections has determined that third party candidates, such as those of the Libertarian and Constitution parties, are to be treated as "independent candidates" under K.R.S. 118.305(1)(e), and thus may individually qualify for ballot access by obtaining the number of signatures required in K.R.S. 118.315(2). For statewide office, 5,000 signatures are required; for a Congressional district, 400 signatures are required; for a state house or senate district, 100 signatures are required.

A separate petition, with signatures, is required for each candidate and there is no method for a political group to become ballot qualified across the board, except through the results of the Presidential election.[2] The only time and method by which a political group can become a Political Party or Political Organization, is by receiving votes in the Presidential election. There is no method to obtain, by petition or otherwise, ballot access generally, or on a blanket basis for a political group, under Kentucky law.

2. Background on the Plaintiffs in this matter

Plaintiffs in this case include the Libertarian National Committee, Inc., the Libertarian Party of Kentucky, the Constitution Party of Kentucky, and Mr. Ken Moellman, Jr., an individual voter.

As outlined in the Complaint, the Libertarian Party of Kentucky ("LPKY"), "and its members, have suffered an individualized and group harm from the acts and practices herein complained of, and, in particular, it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise." (Declaration Eckenberg ¶4). "As a consequence of

[2] There is one notable exception to this requirement – without statutory authorization -- the Kentucky Board of Elections has permitted a single petition to be submitted for two federal offices statewide (i.e. U.S. Senator and U.S. President). That practice is remarkable because it demonstrates the workability of permitting a single petition to be submitted with the requisite number of signatures for all races in a particular election year.

the Defendants actions and omissions, LPKY will and continues to suffer harm that is likely to recur in the future." *Id.* "The LPKY typically typically fields candidates for local, state, and national elections, who will be subject to similar actions of those complained of herein." *Id.* LPKY has just under 5,000 voters registered as Libertarians in Kentucky.[3] *Id.*.

Similarly, the Libertarian National Committee ("LNC"), "and its members, have suffered an individualized and group harm from the acts and practices of Defendants, both in the past and in the future." (Declaration Eckenberg ¶7). Furthermore, the actions complained of herein will cause future harm and are likely to recur in the future, as the LNC typically fields candidates for local, state, and national elections, who will be subject to similar actions and restrictions similar to those complained of herein. *Id.* at ¶8. In particular, the LNC is significantly impaired in running its candidates for office under the restrictive ballot access laws that are the subject of this suit. *Id.*

Both the LNC and LPKY have engaged in systemic and repeated political activities in Kentucky, including fielding candidates for Presidential and other races. *Id.* at ¶9. For instance, the LNC and LPKY have each participated in signature drives placing their candidates on the ballot for President every Presidential Election Year since 1988. *Id.*

The LNC and LPKY have a significant modicum of support from Kentucky voters. *Id.* at ¶12; (Declaration Winger ¶ 24). For instance, the LNC and LPKY's candidate in the 2014 U.S. Senate election, David Patterson, received 44,240 votes, which was 3.1% of the votes cast, despite his exclusion from statewide televised debates that would have boosted his election results. *Id.* In 2011, Ken Moellman, Jr. ran as the LPKY's nominee for State Treasurer,

[3] This is notable because the Libertarian party is not identified in Kentucky voter registration cards; instead, a Libertarian voter must specifically check the "other" box and hand write in the Libertarian party.

receiving 37,261 votes, which was 4.61% of the votes cast in that election. *Id.* LPKY and LNC fare even better in local and county races, and have actually elected Libertarian candidates to county and local office. *Id.*

And, similarly, the Constitution Party of Kentucky ("CPKY") "and its members, have suffered an individualized and group harm from the acts and practices complained of, and in particular "it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise." (Declaration Krogdahl ¶4). Furthermore, the actions complained of herein will cause future harm and are likely to recur in the future, as the CPKY typically fields, or attempts to field, candidates for certain state and national elections, who will be subject to similar actions of those complained of herein." *Id.* at ¶5.

CPKY also has a modicum of support from Kentucky voters. The CPKY qualified its candidate for President of the United States in 2008 by gathering the requisite number of signatures. *Id.* at ¶7; (Declaration Winger ¶¶ 24, 25). In 2010, CKPY ran a candidate for the 79th Kentucky House District who secured 27.4% of the vote. *Id.*

It is very ordinary for the Libertarian Party to run multiple candidates for statewide office, when such offices are up. (Declaration Winger ¶ 42). Just looking at 2014, the Libertarian Party ran a number of statewide partisan candidates around the country: Alaska 3, Arkansas 8, Colorado 5, Delaware 2, DC 5, Florida 2, Georgia 5, Hawaii 2, Illinois 6, Indiana 3, Iowa 4, Kansas 2, Maryland 2, Michigan 13, Minnesota 4, Montana 2, Nebraska 3, New York 3, North Dakota 3, Ohio 2, Oregon 2, South Carolina 2, South Dakota 6, Tennessee 2, Texas 15, Wisconsin 4, Wyoming 4. *Id.*

As for Mr. Moellman, he was and is a registered Libertarian voter, whose "rights to associate and vote for candidates from his political party are impaired by the actions and

omissions of the Defendants in this case." (Declaration Moellman ¶3). Mr. Moellman, as an individual voter and member of the LPKY, likewise has been active in politics in Kentucky. *Id.* at ¶¶ 3,5.

3. Historical Backdrop of Third Party Electoral Results in Kentucky

Historically in Kentucky, at least for the past 100 years, with four exceptions, the only Political Parties or Political Organizations that qualified for automatic ballot access was the Democratic and Republican Parties. (Declaration Winger ¶18). The first exception was 1924 (91 years ago), when Robert La Follette received 4.72% in Kentucky under the Progressive party, which qualified that party as a Political Organization. *Id.* In 1968 George Wallace was the nominee of the American Party in Kentucky, and received 18.3% of the vote, which qualified that party as a Political Organization. *Id.* In 1980 John Anderson used the ballot label "Anderson Coalition" in Kentucky and received over 2% of the vote, so that party was a Political Organization and qualified that party for ballot access in 1981, 1982, 1983, and 1984. *Id.* In 1996 Ross Perot ran under the "Reform" party, received over 2% of the vote, qualifying that party as a Political Organization gave that party ballot access in 1997, 1998, 1999, and 2000. *Id.*

Moreover, as further evidence of the burden of Kentucky's ballot access scheme, Kentucky is one of only 5 states that hasn't had any ballot-qualified ***parties***, other than from the Democratic or Republican parties, in the last 15 years. *Id.* ¶¶19, 43. The others are New Jersey, Pennsylvania, Virginia and New Hampshire. *Id.*

4. Kentucky's ballot access scheme constitutes a significant burden on minor political parties, such as the Plaintiffs

    a. The vast majority of states – but not Kentucky -- permit a minor party to obtain ballot qualification before any particular election, usually through petition

Thirty-eight states permit a political group to transform itself into a ballot qualified party before any particular election, and before it has chosen any nominees. (Declaration Winger ¶8) This aspect of ballot access law in these 38 states is very useful for groups that wish to become qualified parties, yet who do not yet have any nominees. *Id.* For example, in 2010, a group called Americans Elect announced it intended to qualify itself as a political party in as many states as possible, and then it said it would let all the voters of the United States vote in an on-line presidential primary to determine who the Americans Elect presidential nominee would be. *Id.* Americans Elect proceeded to qualify itself as a party in 31 states during 2011 and early 2012. *Id.* But because Kentucky has no procedure for a group to become a qualified party before it has chosen its nominees, Americans Elect was unable to qualify in Kentucky.[4] *Id.*

Of the remaining 12 states, in ten of those states, even though a group must choose nominees before it can begin to get itself and its nominees on the ballot, at least the group can become a qualified party by polling a certain share of the vote in a midterm year. *Id.* at ¶9. But Kentucky does not even allow that. *Id.* Washington and Kentucky are the only states it in which it is impossible for a group to become a qualified party at any time except in November of a presidential election year. *Id.*

[4] Ultimately, the group abandoned the effort on May 17, 2012, indicating it had decided not to run anyone for President after all.

b. Kentucky's ballot access laws are bad public policy, and are not tailored to support a state interest

Some of the most important new political parties in U.S. history were formed in midterm years. *Id.* at ¶10. The Republican Party was formed on July 6, 1854, a midterm year. *Id.* It went on to win a plurality of the U.S. House of Representatives in the fall 1854 election. *Id.* If a new important party were formed in the United States in our era, in a midterm year, such a group would not be able to become a qualified party in Kentucky for over two years. *Id.*

Mr. Richard Winger, a recognized national expert at ballot access issues, opines that Kentucky's policy of not permitting a group to become a qualified party except through polling 2% or more for President is inadvisable for two reasons: first, it makes it impossible for any party to be ballot qualified in Kentucky if that party is only interested in state political issues. *Id.* at ¶11. He notes that there are many one-state parties in the United States that only desire to influence state policy, and many of them have been successful. *Id.* The Progressive Party, in Vermont has eight state legislators, and yet never runs anyone for President. *Id.* If Vermont had Kentucky's ballot access laws, the Progressive Party could not obtain ballot qualified status. *Id.*

c. Using a Presidential election as the sole barometer for ballot access for a political party is far too restrictive, and not rooted in any state interest

Mr. Winger likewise opines that Kentucky's ballot access laws are too restrictive. *Id.* at ¶12. This is because minor parties typically do far better for all partisan offices than they do for President. *Id.* Thus, making President the only means to attaining qualified status is severely restrictive. *Id.* The Libertarian Party has elected state legislators in Alaska, New Hampshire, and Vermont, and has an additional state legislator in Nevada. *Id.* But the Libertarian Party has never polled as much as 2% for President. *Id.* Notwithstanding this fact, it has been a ballot qualified party in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut,

Delaware, DC, Florida, Georgia (for statewide office only), Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming (41 states and D.C.). *Id.* But if every state had the Kentucky definition of a ballot-qualified party, the Libertarian Party would never have been a qualified party in any state. *Id.*

Even if a state were to provide that the only way for a political group or party to achieve automatic ballot access was by means of results in a single race, the most burdensome race in which to poll is the Presidential election. *Id.* at ¶20. In all other states, except for Kentucky and Washington, there are other elections (particularly mid-term elections), or a petition mechanism, in which to put a party generally on the ballot. *Id.* Prior to 2009, the State of Washington permitted a party to obtain ballot access generally by obtaining 5% of the vote in ***any*** statewide election. *Id.* In 2009, Washington changed its law, only permitting the Presidential race to count, just like Kentucky does. *Id.* Prior to 2009, minor parties, including the Libertarian Party, could and did qualify for ballot access in statewide races in Washington. *Id.* Since 2009, no minor party has achieved statewide ballot access generally in Washington. *Id.*

d. The requirement to obtaining separate petitions for each candidate, when a political party desires to field multiple candidates, is not feasible, far too costly, and practically impossible for major parties, much less minor parties such as the Plaintiffs

The cost – both monetary and as a time commitment associated with Kentucky's ballot access laws, generally results in LPKY and LNC only being able to undertake one petition drive per year for one of their candidates, foreclosing them and their candidates from other opportunities. (Declaration Eckenberg ¶10; Declaration Moellman ¶4; Declaration Winger ¶21).

But for the challenged ballot access laws, LPKY and LNC would field more than one candidate, per year, for statewide and national office. (Declaration Eckenberg ¶10). Specifically, Kentucky permits the placement of an "independent" candidate on the ballot, by obtaining 5,000 signatures. *Id.*

For the CPKY, Kentucky's ballot access regime has kept them off the ballot in every statewide race but Presidential races in the last several decades. (Declaration Winger ¶22).

Kentucky's ballot access regime constitutes a sever burden on minor political parties' fundamental functions as a political party – namely the ability to field candidates for office. *Id.* at ¶23.

Mr. Winger explains that 5,000 signatures may be "an acceptable alternative for an 'independent' candidate, but it is an extremely poor threshold and a significant burden for a political party to field a slate of candidates, or even more than one or two candidates per election cycle." *Id.* at ¶26. This burden is why LPKY, LNC, and CPKY have never fielded more than one or two candidates in any statewide election per election cycle – Kentucky's laws and ballot access regime make it impossible as a practical matter to do so. *Id.* at ¶27.

Of course, it is not merely enough to gather 5,000 signatures – sometimes non-registered voters sign petitions, sometimes people sign more than one, and for these, and other reasons, typically 1.5 to 1.75 times the required number is what is required as a practical matter to ensure the petition counts. (Declaration Eckenberg ¶11; Declaration Moellman ¶8; Declaration Winger ¶27). As a practical matter, 7,500 signatures are turned in, and up to 8,750 signatures may need to be obtained to ensure that a valid petition is submitted. *Id.*

Ms. Christina Tobin, an expert in petition gathering and circulation, and the President of Free and Equal, Inc., a recognized professional petitioning firm, indicates that the typically

professional petitioners are engaged to collect these signatures. (Declaration Tobin ¶ 12). Ms. Tobin only practical way to gather 5,000 or more signatures is either with (1) an extremely organized, and typically large, group of volunteers; or (2) through the use of a professional paid petitioner. *Id.* at ¶ 13. Mr. Moellman and Mr. Eckenburg explain that they can find volunteers and have the organization to obtain some of the required signatures in a statewide race, *for a single race*, in a *single election cycle* (and would need to pay a professional signature gathering organization for the rest of the signatures). (Declaration Eckenburg ¶ 15; Declaration Moellman ¶ 10; Declaration Winger ¶ 29). But as a practical matter, it is impossible to gain access for more than two candidates in a statewide race given the signature threshold (and would be a difficult task even for one of the major political parties). *Id.*

For paid petitioners, the going market rate is $2.00 per signature for reputable firms, and is charged regardless of whether the signature is a "good" signature, or is subsequently identified as valid. (Declaration Tobin ¶ 14). Ms. Tobin likewise explains that the $2.00 per signature amount is for a single petition – it becomes exponentially more difficult (and expensive) to have a voter sign more than one petition at a time. *Id.* at ¶¶ 15, 16. Ms. Tobin also testifies to what is essentially the law of diminishing returns on petition gathering, and explains that it is far easier to obtain 5,000 signatures for a single petition that places two or more candidates on the ballot than it is to have to gather separate petitions at the same time. *Id.* at ¶ 16.

Ms. Tobin renders her expert opinion that it is "impossible" for a minor party to field a slate of candidates for Kentucky's Constitutional office holders, noting that "the cost alone is more than a minor party can afford, and it is not possible to engage in one single petition drive to put that many candidates on the ballot." *Id.* at ¶ 17. For these same reasons, it would be unusual for Ms. Tobin or her company to take an engagement where they needed to circulate three or

more petitions in the same area in the same election cycle. *Id.* at ¶ 18. Nor is there cost savings to be had for people or political groups to engage a petitioner – or Ms. Tobin's company, to circulate more than one petition, because of the effects of diminishing returns. *Id.* at ¶ 19.

Mr. Winger opines that $1.50 to $2.00 is the cost for signatures, and the corresponding cost to place a slate on the ballot for Kentucky's Constitutional Office holders is $73,500 to $105,000 per election year. (Declaration Winger at ¶ 28). Mr. Winger notes that these costs are prohibitive for minor parties, and, to some extent, even for the major parties in Kentucky, as he cites the total amount raised by the Republican Party of Kentucky and certain Republican Party candidates for Constitutional office in the last couple election cycles. *Id.* at ¶ 30.

Both Mr. Moellman and Mr. Eckenburg confirm that the Libertarian Party candidates can raise slightly over $100,000 in a major race, but those would be for the candidate and not the party, and that the LPKY could perhaps raise, at most $50,000 in a particular election cycle. (Declaration Moellman ¶12; Declaration Eckenburg ¶17; Declaration Winger ¶36). Obviously, that does not include normal party functioning and costs of operation.

Ms. Krogdahl testifies that CPKY lacks financial resources to pay professional petitioners, circulates petitions themselves, and has never fielded more than one candidate in a single ballot cycle due to Kentucky's ballot access provisions. (Declaration Krogdahl at ¶6). She confirms that it is not that CPKY lacks voter support to field candidates – but rather that voters are reluctant to sign more than one petition at a time. *Id.*

As Mr. Winger notes, minor parties typically lack significant financial resources. (Declaration Winger at ¶ 31). Furthermore, in states requiring 5,000 signatures or more, for a candidate or party, when one considers the burden of gathering ***more than one petition***, the cost of signature collection alone is a burden when one considers the revenue available to the party

and effectively prevents that from obtaining ballot access. *Id.* at ¶ 32. Moreover, even where the party or candidate has sufficient resources to collect the requisite number of signatures to obtain ballot access on *more than one petition*, the cost of signature collection represents such a burden that they rarely have sufficient funds to conduct an effective campaign. *Id.*

Mr. Winger also discusses the state interest in avoiding a crowded or confusing ballot: his research has shown that "if a state requires at least 5,000 signatures, even if the state allowed a party petition or multiple candidates on the same petition, it will never have a crowded ballot, if 'crowded ballot' is defined as a ballot with more than 9 candidates for a single office." *Id.* at ¶33.

He further notes that "[n]ationally, where as many as six (or even more) candidates have appeared on the general election ballot as candidates for statewide or federal office, which has occurred on at least 50 occasions since the principle of 'avoiding voter confusion' was first enunciated by the U.S. Supreme Court, there is and has been no evidence that there was any voter confusion in those elections." *Id.* at ¶34.

Mr. Winger likewise confirms what history already shows: "it is impossible, or virtually impossible for a political party, other than the Democratic or Republican Party, to achieve general or automatic ballot access in Kentucky, by obtaining 2% or more in a Presidential race, in view of the modern political environment." *Id.* at ¶37.

The impact of these ballot access provisions constitute a severe burden on minor political parties, and are remarkable when one considers that there is no way, other than obtaining signatures for each and every race, or receiving over 2% of the vote in a Presidential election, to establish ballot access in Kentucky for a political group. *Id.* at ¶38; (Declaration Moellman at ¶13). For instance, to field candidates for each partisan race in a given four-year election cycle

in the entire Commonwealth of Kentucky, the Republican or Democratic parties need only gather approximately 5,188 signatures state-wide; while minor parties must gather approximately 209,808 signatures.[5] *Id.* Further adjusting these numbers to ensure access by building in an acceptable margin of safety outlined above of 1.5 to 1.75 times the signature minimum, 262,260 signatures are required. *Id.* Using simple math, the cost for a minor party to achieve this feat, using paid petitioners, is $524,520. *Id.* That is more money than the Republican Party of Kentucky – a major party, that now holds the majority of Kentucky's constitutional offices, and a majority in the Kentucky Senate – has raised in recent state-wide Constitutional office years. *Id.*

This analysis is contained in a chart attached to the declarations of Mr. Winger and Mr. Moellman, which Mr. Winger and Mr. Moellman prepared. (Declaration Moellman ¶14; Declaration Winger ¶39).

e. <u>There is significant additional evidence of the burdens of Kentucky's ballot access scheme when applied to minor parties who desire to field more than one candidate per election cycle</u>

As yet further evidence of the significant burden of Kentucky's ballot access scheme, Kentucky is one of only twelve states that does not permit a political party to have a single petition be submitted for across-the-board ballot access for every partisan office in the state on a general election ballot – and the only state in the Sixth Circuit that does not permit a political party to qualify for automatic ballot access. (Declaration Winger ¶40).

Mr. Winger further notes that "[f]or Governor, the median state in the United States had 1.33 independent and minor party candidates on the ballot (on the average for each election) over the period 1990-2013." *Id.* at ¶41. The average number of such candidates was 2.01. *Id.* But Kentucky only had .33 such candidates during that period. *Id.* Kentucky had the fewest of any

[5] These numbers do not include partisan city offices; rather they include state-wide partisan offices at the county and state level.

state, except for Alabama, Washington, and New Mexico. *Id.* So it was the 4th worst in the country. *Id.*

These facts simply underscore the mechanisms provided for under Kentucky law, Kentucky does not treat independents and minor parties differently – rather, Kentucky does not give a minor party (i.e. a party that has failed to have its Presidential candidate achieve over 2% of the vote in a Presidential election) any practical or realistic means or mechanism to achieve ballot access. *Id.* at ¶44.

f. Kentucky's ballot access scheme simply does not further a state interest in any meaningful way, is not tailored to any such interest, and has less restrictive alternatives that are equal, if not better, to meeting any state interests at issue, without the corresponding burden on minor parties

Kentucky's ballot access laws, as they are written, are not tailored towards measuring a modicum of support – they are instead keep candidates other than the Democratic and Republican candidates off the ballot, and appear designed to cause that result. *Id.* at ¶45. If Kentucky were interested in measuring public support for a candidate, group of candidates, or a political party, while preventing voter confusion or crowded ballot, they would (a) permit the circulation of a single petition to place multiple candidates of the same party on the ballot or (b) permit a petition to be submitted to place the party on the ballot for a four-year election cycle. *Id.*

Based on all of the foregoing, Kentucky's ballot access regime, applied to non-Democratic and non-Republican parties, make it impossible to systemically place candidates on the ballot, and constitute an undue burden on minor parties, such as the Plaintiffs in this case. *Id.* at ¶46.

Ms. Tobin likewise concludes that "Kentucky's ballot access laws, as they are written, are not tailored towards measuring a modicum of support – they are instead keep candidates

other than the Democratic and Republican candidates off the ballot, and appear designed to cause that result." (Declaration Tobin at ¶20). If Kentucky were interested in measuring public support for a candidate, group of candidates, or a political party, they would permit the circulation of a single petition to place multiple candidates of the same party on the ballot. *Id.* Voters are significantly more likely to sign a single petition than more than one, regardless of the content of the petition. *Id.* Other than suppressing minor parties, there is no reason not to permit the circulation of a single petition to place multiple candidates on the ballot cycle. *Id.* Or, as an alternative to that, a single petition to place an entire party on the ballot for an election cycle would likewise measure public support for the party, which furthers a state interest, while not unduly and unnecessarily burdening minor parties. *Id.*

## II. LAW AND ARGUMENT

### A. Standard for Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On review of a summary judgment order, all evidence is construed in the light most favorable to the non-moving party. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). Plaintiffs submit that the evidence submitted herewith demonstrates no genuine issue of material fact, and therefore summary judgment is appropriate on their claims for declaratory relief and a permanent injunction.

### B. Standard for Granting Temporary Restraining Orders, Preliminary Injunctions and Permanent Injunctions

When deciding whether to issue a temporary restraining order or preliminary injunction, the court must consider the following four factors:

(1) Whether the movant has demonstrated a strong likelihood of success on the merits;

(2) Whether the movant would suffer irreparable harm;

(3) Whether issuance would cause substantial harm to others; and

(4) Whether the public interest would be served by issuance.

*Suster v. Marshall*, 149 F.3d 523, 528 (6th Cir. 1998); *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These "are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

When analyzing a motion for temporary restraining order or preliminary injunction, "the 'likelihood of success' prong is the most important [factor] and often determinative in First Amendment cases." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009); *see also Aristotle Pub. v. Brown*, 61 F. App'x 186, 188 (6th Cir. 2003). The standards for preliminary injunctions and permanent injunctions are essentially the same with the exception that for a permanent injunction the plaintiff must show actual success on the merits rather than the likelihood of success. *ACLU of Ky. v. McCreary County, Ky.*, 607 F.3d 439, 445 (6th Cir. 2010).

### C. Kentucky's Ballot Access Laws Violate the First and Fourteenth Amendments (and Likelihood of Success on the Merits, and Success on the Merits)

The First Amendment of the U.S. Constitution provides, in relevant part, that "Congress shall make no law ... abridging the freedom of speech..." The First Amendment has been incorporated under the Fourteenth Amendment to apply to the states, including the Commonwealth of Kentucky, under *Gitlow v. New York*, 268 U.S. 652 (1925). The First Amendment likewise contains a guarantee of the freedom to associate. *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958). The Fourteenth Amendment likewise contains guarantees of liberty and equal protection.

1. Facial or as-applied?

The Sixth Circuit again had occasion to review Tennessee's ballot access regime in *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015) ("*Hargett II*"). *Hargett II* first addressed an important aspect of this challenge – whether it is facial or as-applied. The Court explained: "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* at 691, *citing Citizens United v. FEC*, 558 U.S. 310, 331, (2010). "In fact, a claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications." *Id.*, *citing John Doe No. 1 v. Reed*, 561 U.S. 186, 194, (2010). In constitutional challenges reaching beyond the plaintiff's circumstances, the plaintiff must satisfy the "standards for a facial challenge to the extent of that reach." *Id.*

For a facial challenge to a statute or court rule, the courts, and in light of risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[ ] the free exchange of ideas," the overbreadth doctrine permits courts to invalidate a law on its face "if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 443 (2010).

We submit that Kentucky's laws are unconstitutional both facially and as-applied.

2. Kentucky's laws are unconstitutional under the *Hargett* cases from the Sixth Circuit, *Williams v. Rhodes*, and *Storer v. Brown*

At the outset, and as noted by the Sixth Circuit recently in *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 539 (6th Cir. 2014) ("*Hargett I*"), "to be clear, this case does not involve Tennessee's rules regarding when a particular *candidate* may appear on the ballot; it involves

only the requirements a political *party* must meet." Incidentally, the analysis is the same whether brought as a pure First Amendment Challenge, or an Equal Protection challenge, or both. *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012).

First, "the right of individuals to associate in political organizations, and the right of citizens to cast a meaningful vote, are among the most important values in our democracy." *Id.* at 545, *citing Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) and *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968). Furthermore, "[a]ssociational rights and voting rights are closely connected, since 'the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot.'" *Id.* But, "states may impose reasonable restrictions on ballot access to ensure that political candidates can show a 'significant modicum of support' from the public," *Id. citing Jenness v. Fortson*, 403 U.S. 431, 442 (1971), "and to avoid 'election- and campaign-related disorder,'" *Id. citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). As such, "State restrictions on ballot access therefore 'are not automatically subjected to heightened scrutiny.'" *Id.*

In *Williams v. Rhodes*, 393 U.S. 23, the U.S. Supreme Court addressed Ohio's ballot access regime. In that case, the State of Ohio required a new political ***party*** to submit a petition with a number of signatures equal to 15% of the votes cast in the last gubernatorial campaign. *Id.* at 25. The major parties, to remain on the ballot, needed to obtain votes equal to 10% of the last gubernatorial campaign. *Id.* And, "Ohio laws make no provision for ballot position for independent candidates as distinguished from political parties." *Id.* The *Williams* Court was clear that "[n]o extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence

and thus place substantially unequal burdens on both the right to vote and the right to associate." *Id.* at 31.

*Williams* was likewise clear that "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id.* "So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Id.* "In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" *Id.*

Finding the laws unconstitutional, the Supreme Court in *Williams* directed the placement of the challenging political parties on the ballot, to the extent the state's election machinery (i.e. printing of the ballots) was not compromised. *Id.* at 34.

Turning then to *Storer v. Brown*, 415 U.S. 724, 728 (1974), the U.S. Supreme Court observed that the "State must also provide feasible means for other political parties and other candidates to appear on the general election ballot." Furthermore, "past experience [of electoral success] will be a helpful if not always an unerring guide." *Id.* at 742. Moreover, "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Id.* at 745. As such, "the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." *Id.* at 746.

Here, of course, Kentucky treats minor party candidates who do not (i) run a candidate for President; and (ii) achieve at least 2% of the vote, ***exactly*** like an independent candidate. To

be technical, applying Kentucky's laws on their face, Kentucky actually treats minor parties worse, since the laws on their face do not permit a minor party to place their candidates on the ballot period if they did not poll at least 2% in the last Presidential race. This presents a classic chicken and egg problem – the minor party cannot ever get a candidate on the ballot, and therefore cannot ever qualify to be on the ballot in the future. For purposes of a constitutionality analysis, the statute must be judged as written. *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991).

Taking the statutes as written, there is no way to place any candidates of the Libertarian or Constitution parties on any ballot in Kentucky. As written, they cannot ever achieve the results in the Presidential race, because they can never qualify for that access. But even putting those issues aside (which render Kentucky's ballot access scheme facially unconstitutional), the application by the Kentucky Board of Elections – Defendants in this case – of the petition requirements to minor political parties (as opposed to independent candidates), renders the statutes equally unconstitutional.

In either case, Kentucky simply does not "provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." *Storer*, 415 U.S. at 746.

*Hargett I* noted that the "U.S. Supreme Court articulated the contemporary standard for evaluating constitutional challenges to a state's election laws in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and again in *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)." *Id.* at 546. "First, the court must 'consider the character and magnitude of' the plaintiff's alleged injury." *Id.* Next, it "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it must assess the "legitimacy and strength of each of those

interests," as well as the "extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The Sixth Circuit in *Hargett I* explained that "[t]he first step in this analysis is important. When the restrictions imposed by the state are 'severe,' they will fail unless they are narrowly tailored and advance a compelling state interest." *Id.* Conversely, if "the regulations are minimally burdensome and nondiscriminatory, rational-basis review applies, and the regulations will usually pass constitutional muster if the state can identify 'important regulatory interests' that they further." *Id.* The Sixth Circuit then observed that "many regulations 'fall in between these two extremes,'" in which case courts "engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.*

The Sixth Circuit then noted in *Hargett I* what is true here: "signature requirements as high as 5% are not facially invalid." *Id.* But then the Court, in *Hargett I* went on to examine whether the Tenneessee 2.5% petition requirement was unconstitutional as applied to the Plaintiffs in that case. *Id.* In *Hargett I*, the Sixth Circuit noted that "[t]o answer this question, we evaluate the effects of the signature requirement on the plaintiff political parties, keeping in mind that other aspects of Tennessee's ballot-access scheme might operate so as to make the signature requirement either harder or easier to meet." *Id.* at 547.

Again – to be clear – Plaintiffs do not challenge the existence of a petition, requiring 5,000 signatures, to place a candidate (or party) on the ballot. Rather, Plaintiffs challenge the imposition and application of this requirement on minor parties to place more than one candidate in a given election cycle on the ballot and the inability to place the entire party on the ballot, as the major parties do, via petition.

The Sixth Circuit observed that "[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions." *Id.* The Sixth Circuit likewise observed that "[i]f a restriction does not 'affect a political party's ability to perform its primary functions,' such as organizing, recruiting members, and choosing and promoting a candidate, the burden typically is not considered severe." *Id*., *citing Blackwell*, 462 F.3d at 586.

The Sixth Circuit then held that "Tennessee's ballot-access rules strike at the very heart of the plaintiffs' primary functions and no doubt constrain their opportunities to effect political change. But this fact alone does not permit us to conclude that the burden is severe; we must also consider 'the effect of the regulations on the voters, the parties and the candidates' and 'evidence of the real impact the restriction has on the [political] process.'" *Id.* Finding the record insufficiently developed on that point, particularly in light of recent changes to Tennessee's ballot access laws in response to the litigation at issue, the Sixth Circuit remanded. *Id.*

The Sixth Circuit did credit the fact that "'[p]ast experience will be a helpful, if not always an unerring, guide' in evaluating the effects of a signature requirement" but noted that there was less relevance to past history given the fact that Tennessee had recently changed its ballot access scheme. *Id.* at 574-548. The Sixth Circuit then explained the kind of evidence it wanted to see to determine the constitutionality of the Tennessee ballot access scheme, including that the Plaintiffs "might survey states with ballot-access requirements similar to Tennessee's current ones to determine whether minor parties have had success in appearing on the ballot in those states." *Id.* at 549 fn4. Here, of course, we see Mr. Winger's evidence that the State of Washington, which changed its ballot access scheme to a Presidential-only qualification mechanism, did not qualify any parties.

Past history in Kentucky has resulted in no ballot qualified minor parties, with four notable exceptions, over a 100-year period. The Sixth Circuit also observed that the Plaintiffs "might obtain affidavits from party organizers in other states describing the difficulties that they encounter complying with requirements similar to Tennessee's." *Id.* Here, Ms. Tobin, who operates nationally, explains that it is simply not possible or practical to run more than one petition at once.

The Sixth Circuit in *Hargett I* also expressed concern with the failing of the State: "we agree with the district court that the defendants have not, at least at this point, put forth compelling interests to support a signature requirement of 2.5%, rather than something lower." *Id.* at 549.

Plaintiffs here challenge Kentucky's ballot access laws as applied political parties other than the Democratic and Republican parties, such as the Plaintiffs (and their voters, such as Mr. Moellman), and in particular, those parties that desire to run one or more candidates in an election cycle.

The evidence submitted in support of this Motion establishes, that (a) the vast majority of states – but not Kentucky -- permit a minor party to obtain ballot qualification before any particular election, usually through petition, vindicating their state interests while not unnecessarily burdening minor party rights; (b) Kentucky's ballot access laws are bad public policy, and are not tailored to support a state interest; (c) using a Presidential election as the sole barometer for ballot access for a political party is far too restrictive, and not rooted in any state interest; (d) The requirement to obtaining separate petitions for each candidate, when a political party desires to field multiple candidates, is not feasible, far too costly, and practically impossible for major parties, much less minor parties such as the Plaintiffs; (e) there is

significant additional evidence of the burdens of Kentucky's ballot access scheme when applied to minor parties who desire to field more than one candidate per election cycle; and (f) Kentucky's ballot access scheme simply does not further a state interest in any meaningful way, is not tailored to any such interest, and has less restrictive alternatives that are equal, if not better, to meeting any state interests at issue, without the corresponding burden on minor parties.

This case, like *Hargett II*, also involves both a First Amendment and Fourteenth Amendment challenge: "the plaintiffs argue that the ballot-retention statute denies them an equal opportunity to exercise their rights to association and political expression." *Id.* at 693. As with *Hargett II*, this Court should "start by determining the burden placed on recognized minor parties." *Id.* To maintain ballot access, the major parties (and minor parties) must achieve at least 2% in a Presidential year in Kentucky, at which point they remain on the ballot. The *Hargett II* Court noted that "a recognized minor party and a statewide political party might each receive 3% of the votes cast for gubernatorial candidates in the gubernatorial election held two years prior. The recognized minor party would lose ballot access because it did not receive the 5% retention percentage." *Id.* However, "[t]he statewide political party, in contrast, would retain ballot access because, by definition, it received at least 5% of the total votes cast for gubernatorial candidates in the most recent gubernatorial election." *Id.*

The Sixth Circuit in *Hargett II* concluded that the burden of the Tennessee ballot access regime was severe "[b]ecause recognized minor parties must obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election to retain ballot access … considering that established major parties, which have more institutional knowledge and financial resources, are given four years to obtain the same level of electoral success." *Id.* In Kentucky, the burden is at least equal, if not worse – minor parties in Kentucky must achieve 2%

or more in a Presidential race (which Mr. Winger has testified to is the most burdensome and difficult race to poll in, as evidenced by statewide race results where the Libertarians, at least, have achieved well over the 2% threshold).

In *Hargett II*, Tennessee countered that differences in the parties justified the differing treatment, but the Sixth Circuit responded that "the differences between these two types of parties justify having less onerous burdens on recognized minor parties than statewide political parties." *Id.* Moreover, as is the case here, "Tennessee's ballot-retention statute clearly imposes a heavier burden on minor parties than major parties by giving minor parties less time to obtain the same level of electoral success as established parties." *Id.*

Nevertheless, "[b]ecause this statute imposes a greater burden on minor parties without a sufficient rationale put forth by the state, it violates the Equal Protection Clause. It impermissibly 'freezes the status quo' and does not allow 'a real and essentially equal opportunity for ballot qualification.'" *Id.*

The same is true here. Obviously, Kentucky could, but has not, used less restrictive means of achieving any purported state interest: it could (a) permit the circulation of a single petition to place multiple candidates of the same party on the ballot; (b) permit a petition to be submitted to place the party on the ballot for a four-year election cycle; or (c) potentially utilize races, other than a Presidential race, as appropriate measures of support (though this also raises issues under *Hargett II*). In formulating any of these alternatives, Kentucky would have a fair amount of leeway (for instance, Kentucky could require 10,000 signatures for a party petition), or even require that such a petition be submitted by a particular date. But any of these alternatives are far less burdensome than the current scheme, which contains no such opportunities and prevents an impossible measure for minor parties to meet.

Either facially, or, in the event that fails, as applied, Plaintiffs have demonstrated actual success on the merits.

**D. Irreparable Harm**

"[T]o the extent that [the moving party] can establish a likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (*quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). After all, the United States Supreme Court has repeatedly recognized, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (*quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). The same is true of Equal Protection. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."). Having demonstrated likelihood of success, Plaintiffs have likewise demonstrated irreparable harm from the enforcement of the unconstitutional statutes – either facially – or as applied.

**E. Harm to Others**

There is no harm to others that is implicated if the state and local officials must obey the Constitution. *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (E.D. Mich. 2010). *See, also, Foster v. Dilger*, 2010 U.S. Dist. LEXIS 95195 (EDKY 2010) (no substantial harm to others, even where registry incurred printing costs, where constitutional rights at stake); *ACLU v. McCreary County*, 96 F. Supp. 2d 679 (ED KY 2000) (no substantial harm to others).

### F. Public Interest

As for the fourth factor, the public interest always strongly favors the vindication of constitutional rights and the invalidation of any state action, which infringes on those rights or chills their confident and unfettered exercise. *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (E.D. Mich. 2010). "It is in the public interest not to perpetuate the unconstitutional application of a statute." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *see also G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

## III. CONCLUSION

Plaintiffs have demonstrated their entitlement to (1) a temporary restraining order, preliminary injunction, and/or permanent injunction; and (2) summary judgment for declaratory and injunctive relief, directing Defendants to place Plaintiffs' duly nominated candidates on the Kentucky ballot. At a minimum, Plaintiffs have established cause for the immediate setting of a hearing to determine the merits of this matter.

Respectfully submitted,

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)
Paul Darpel (KBA 84989)
Chris Wiest, Atty at Law, PLLC
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
859/486-6850 (v)
513/257-1895 (c)
859/495-0803 (f)
chris@cwiestlaw.com

/s/ Jack S. Gatlin
Jack S. Gatlin (KBA 88899)
Thomas B. Bruns (KBA 84985)
Brandon N. Voelker (KBA 88076)
FREUND, FREEZE & ARNOLD
Chamber Office Park
2400 Chamber Center Drive, Ste 200
Ft. Mitchell, KY 41017
Phone: (859) 292-2088
Fax: (859) 261-7602
jgatlin@ffalaw.com

**Attorneys for Plaintiffs**

**CERTIFICATE OF SERVICE**

I certify that I have sent a copy of the foregoing to all counsel of record via filing in the Court's CM/ECF system, which provides notice and service of same to each party of record, this 3 day of February, 2016.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)