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 OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT WITH SUPPLEMANTARY DECLARATIONS OF CYRUS ECKENBERG, KEN MOELLMAN, JR., MARTHINA KROGDAHL, AND RICHARD WINGER IN SUPPORT

Defendants are fundamentally and systematically mistaken in the entirety of their response and cross motion because they treat this case as something it is not.[1] At its core, "[t]his case does not involve [Kentucky's] rules regarding when a particular *candidate* may appear on the ballot; it involves only the requirements a political *party* must meet." *Green Party of Tennessee v. Hargett*, 767 F.3d 533 (6th Cir. 2014) (emphasis in original). By ignoring this distinction, they argue that this case is like others that challenged Kentucky's signature requirement for a single candidate. *See, also*, Brief, RE #33-1, at 2, *citing Libertarian Party of Ky. v. Ehrler*, 776 F.Supp. 1200, 1201 (E.D.KY 1991). But this is *not* what is being challenged here. Rather, this case challenges Kentucky's scheme as applied to multiple candidates and

[1] Plaintiffs hereby reincorporate, in support of their Response and Reply, their opening brief and evidence attached thereto. (RE#16, RE#16-1, RE#16-2, RE#16-3, RE#16-4, RE#16-5, RE#16-6).

petitions, and the ability, or lack thereof, of a "Political Group" to elevate themselves to a "Political Organization" under Kentucky's ballot access framework.

A. <u>Prevailing case law does not foreclose Plaintiffs' challenges</u>

Defendants argue, in several points in their brief, that prevailing case law constitutes some sort of *stare decisis* or bar to the claims made here. Not so. We will examine these cases.

A close reading of *Libertarian Party of Ky v. Ehrler* reveals that it was a challenge involving an individual candidate's ability to be placed on the ballot. 776 F.Supp. 1200 at 1201. *Ehrler* struck Kentucky's early deadline for nominating petitions, and the requirement that signatories be of the same political party as the candidate and the inclusion of a signer's social security number, but did not involve, as this case does, a challenge not to individual candidates' ability to be placed on the ballot, but for minor political parties to do so on a "blanket" or "general basis" once they have generated repeated statewide electoral success or otherwise established requisite support. Indeed, unless the plaintiffs in *Ehrler* intended to run multiple candidates, for multiple offices, over a period of time, as the plaintiffs in this matter do, the challenges raised in this matter would have been inappropriate to raise in *Ehrler* under both standing and ripeness grounds.

Nor does *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), and its predecessor at the district court level, *Greaves v. Mills*, 497 F. Supp. 283 (EDKY 1980) have any bearing on this matter. *Anderson* involved an <u>*independent candidate's*</u> challenge to the 5,000 signature requirement. 664 F.2d 600, 606. Mr. Greaves did not seek to run more than one candidate, or to run multiple candidates over a period of time in more than one election cycle. Unless he desired to do so, the challenges raised in this matter would have been inappropriate to raise in *Anderson* under both standing and ripeness grounds.

And finally, Defendants have cited *Libertarian Party v. Davis*, 601 F. Supp. 522 (EDKY 1985). But that case involved, again, the efforts of a single set of candidates for President and Vice President, to be placed on the ballot for a particular election cycle. It did not involve an intention to run multiple candidates, for multiple offices, over a period of time, as Plaintiffs in this matter do, and as such the challenges raised in this matter would have been inappropriate to raise in in *Davis* under both standing and ripeness grounds.[2]

This case challenges Kentucky's ballot access framework applied to ***minor parties***, and specifically the Libertarian and Constitution Party of Kentucky who desire to run ***multiple candidates for multiple offices***, over a period of time. Unlike placing a specific candidate or two candidates on the ballot, it is undisputed that Kentucky law has ***no mechanism*** for a minor political party or group[3] to achieve blanket or general ballot access, in the way that a Political Party or Political Organization can under K.R.S. Chapter 118, except through performance in the general election and then that practice is limited to the results of the Presidential race.

---

[2] Defendants likewise argue claim and issue preclusion (Brief, RE#33-1 at 20) – but again, these cases require that a Plaintiff could have, but did not raise the issues in prior litigation. *Consolidated Television Cable Serv., Inc. v. City of Frankfort*, 827 F.2d 354 (6th Cir. 1988). Plaintiffs did not desire to run multiple candidates, in multiple races, in any of those cases, and could not have, as a consequence, raised the issues that are raised herein. Absent such an intention, standing to raise these issues and challenges could not be found, and they could not have been raised. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015). Moreover, any arguments in this regard would potentially affect only the LPKY, not the claims of CPKY, the LNC or Mr. Moellman, and courts express misgivings about such defenses in the constitutional arena. *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003).

[3] We use the term "political party" and "minor party" interchangeably in this response to refer to the term as it is commonly understood, to include groups such as the Plaintiffs Libertarian Party of Kentucky and Constitution Party of Kentucky, and/or their national committees, to comprise a group of persons who have formed a political group. Where we refer to the statutory terms, we have used capitals for clarity (i.e. Political Party to refer to a political party whose candidate for president achieved 20% or more in the last presidential race, or Political Organization to refer to a political party whose candidate for president achieved 2% or more in the last presidential race).

Defendants cite *American Party of Texas v. White*, 415 U.S. 767 (1974) as supporting the constitutionality of Kentucky's scheme. But *White* is different from Kentucky's scheme. To be certain, the State of Texas in *White* had two "automatic" methods of ballot access: first, a party that obtained 200,000 votes in the last general election could nominate future candidates by primary election, or parties that obtained 2% of the vote in the last election for governor[4] could nominate future candidates by convention. *Id.* at 772-774. But there was a third method for a party to obtain blanket or general ballot access: holding conventions, and submitting supplemental signatures equal to 1% of the votes last cast for Governor. *Id.*

The bottom line was that there was a way in Texas, other than simply success in particular prior elections, for a political party to achieve direct and general ballot access. *Id.* Noting that "what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot," the *White* Court noted that the "required measure of support – 1% of the vote for governor at the last general election and in this instance 22,000 signatures – falls within the outer boundaries of support the State may require before according political parties ballot position." *Id.* at 783.

Defendants argue that Kentucky's petition signature requirement is "relatively modest," and allege that it "furthers important state interests including maintaining the stability of its political system and preventing voter confusion, ballot overcrowding, and the presence of frivolous candidacies." (Brief, RE#33-1, at 2, *citing Munro v. Socialist Workers Party*, 479 U.S. 189, 194-195 (1986)). And, applied to a *single candidate*, in a *single election cycle*, one might agree with Defendants (this Court and the Sixth Circuit previously did so in the single candidate,

[4] As noted in Mr. Winger's first Declaration, a Governor's race is an easier method of obtaining a percentage of the vote than is a Presidential race. (RE#16-16 at ¶20).

single election scenario). But that is the not the challenge brought here, despite Defendants' fervent attempts to wish it were so.

Munro, the next case Defendants cite, involved a Washington state ballot access law, that permitted ***every*** minor party candidate ballot access to an open or blanket primary (e.g. every primary voter was permitted to vote for the particular candidate, irrespective of the candidate's, or voter's party affiliation). *Id.* at 192. Those candidates who achieved at least 1% of the vote in the open primary advanced to the general election. *Id.* The law was challenged, and the Supreme Court upheld it, noting that 1% of the total vote cast in an open primary was a modicum of support, acknowledging the nature of the scheme and its inclusion of every candidate in the primary process was an open and valid way to wean down the field of potential candidates. *Id.* But, again, that is not what we have here.

Defendants next cite *Jenness v. Fortson*, 403 U.S. 431 (1971) as supporting their cause. That case involved an individual candidate's attempt to be placed on the ballot, and a challenge to a 5% signature requirement. And, as applied to an individual candidate's ability to be placed on the ballot, the Court upheld the challenged statutes.

B. **Plaintiffs have demonstrated a significant modicum of support statewide**

Defendants raise various arguments that have no support in fact, or law, for their proposition that Plaintiffs have no significant modicum of support statewide.[5] Let us take the benchmark that Kentucky law applies to qualify an organization as Political Organizations: 2% of the vote in the last general election race for President. K.R.S. 118.015, K.R.S. 118.305(1)(e), and K.R.S 118.305. The last presidential race in Kentucky was in 2012. In that race, 1,797,212

[5] We well recognize that the Libertarians and the Constitution Party Plaintiffs may not be similarly situated in this regard. Suggestions for the handling of any differences are discussed herein.

voters voted.[6] Taking 2% of the votes cast in that race, 35,944 voters would need to support Libertarians to meet the statutory Political Organization criteria. (Supp. Declaration Eckenburg ¶20). But 37,261 Kentucky voters supported, and voted for, Ken Moellman, Jr. in 2011, when he ran statewide for Treasurer in 2011, and 44,240 Kentucky voters supported David Patterson for U.S. Senate, when he ran statewide for U.S. Senate in 2014. (*Id.*). In two separate, relatively recent statewide races, Kentucky voters exceeding 2% of the votes cast in the last election for President have supported Kentucky Libertarian candidates.

In *Green Party of Tennessee v. Hargett*, 700 F.3d 816, 821 (6th Cir. 2012) (*Hargett I*), the Sixth Circuit addressed ballot access, but did not disturb the finding of the district court that found that the Green Party of Tennessee had a significant modicum of support because it obtained 20,000 votes in an election, and the Constitution Party of Tennessee had a significant modicum of support because it submitted a petition with 10,000 signatures to entitle them to be placed on the ballot. And Tennessee has a substantially higher population than Kentucky does (i.e. 1.492 times the population of Kentucky).[7]

Here, of course, the level of statewide support shown by Kentucky's voters far exceeds that shown to the Green Party in *Hargett I*. In the last several statewide elections in which Libertarians competed, not only did they achieve more than 20,000 votes (or 13,405 votes if

---

[6] http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2012/2012genresults.pdf (last visited 4/14/16); *Hall v. Sepanek*, 2015 U.S. Dist. LEXIS 1536 (EDKY 2015) (judicial notice of public government website appropriate).

[7] Kentucky's population in July, 2015 is estimated at 4,425,095. http://www.census.gov/quickfacts/table/PST045215/21 (last visited 4/14/16); *Hall, supra* (judicial notice of government website appropriate). Tennessee's population in July, 2015 is estimated at 6,600,299. http://www.census.gov/quickfacts/map/IPE120213/47 (last visited 4/14/16). *Hall, supra* (judicial notice). Thus, the 20,000 votes in Tennessee, when adjusted for population differences, equates to 13,405 votes in Kentucky; and the 10,000 signatures in Tennessee, when adjusted for population differences, equates to 6,703 signatures in Kentucky.

adjusted for population), they achieved more than 35,944 votes – which was 2% of the votes case in the last Kentucky Presidential election. Defendants arguments about the Libertarian Party not having a significant modicum of support by Kentucky voters are utterly without support and contravene *Hargett I.*

To attempt to bolster their "no support" theory, Defendants next make arguments about the number of Plaintiffs' registered voters. But as Mr. Winger explains in his supplemental declaration, registered voters are, in numerous cases, substantially lower than actual support at the ballot box. Mr. David Patterson, LPKY's candidate for U.S. Senate, is, of course, one prime example. (Supp. Declaration Winger). Despite less than 5,000 LPKY registered voters in 2014, Mr. Patterson received 44,240 votes – over 9 times the number of registered LPKY voters at that time. (Supp. Declaration Winger; Supp. Declaration Eckenburg).

Nor incidentally, does the four instances, in the past 100 years, of past candidates (other than Republicans and Democrats) achieving over 2% of the vote – in 1924, 1968, 1980, the most recent instance twenty years ago in 1996, make Kentucky's ballot access scheme reasonable or constitutional. As Mr. Winger noted, Kentucky is one of only five states in the United States that has not had a "general" ballot qualified party in the last 15 years. (Initial Declaration Winger, RE#16-6, at ¶ 19), and it is "impossible or virtually impossible" in the modern political landscape to do so. (Initial Declaration Winger, RE#16-6, at ¶ 37).

Defendants next complain that LPKY has never fielded a candidate for governor. But that is because of the very ballot access laws that are challenged here! "In light of [the state's] stringent and costly ballot-access requirements … it is understandable that plaintiffs have chosen to participate in state politics without seeking [to field candidates in any some races]." *Hargett II*, 767 F.3d 533, 544. In 2011, LPKY ran Mr. Moellman for State Treasurer, where he received

37,261 votes (more than 2% of the 1,826,058 votes case in 2008 for President). In 2015, LPKY had a slate of candidates that desired to run together, but determined that they could not do so and obtain ballot access for all of them. And, again, in 2014, they ran a candidate for U.S. Senate.

In short, Defendants fail to demonstrate that LPKY, which has demonstrated levels of support that *more than double what was found adequate* in *Hargett I*, 700 F.3d 816, 821, and votes cast for their candidates in two separate, recent statewide elections that exceeded 2% of the votes cast in Kentucky in the last Presidential race, have not achieved a significant modicum of support for the relief they have asked for.

We next turn to the Constitution Party of Kentucky. They have not achieved the levels of success at the ballot box that LPKY has, especially where, unlike LPKY, they have not run candidates for statewide office. However, CPKY is comfortable with this Court placing conditions on their being considered or treated as a Political Organization. Courts have, among other things, required petitions with requisite numbers of signatures. *See, e.g.*, *Hargett I*, 700 F.3d 816, 821; *Green Party of Ga. v. Kemp*, 2016 U.S. Dist. LEXIS 34355 (NDGA 2016) (imposing 7,500 signature requirement in Georgia, a state with more than double the population of Kentucky).[8] Indeed, this Court could, for instance, set as a requirement, that CPKY deliver to the Defendants a petition seeking that they be deemed a Political Organization signed by not less than 6,703 registered Kentucky voters (adjusted for population differences between Tennessee and Kentucky), as the court deemed sufficient in *Hargett I*, 700 F.3d 816, 821, which is extremely close to 1% of the voters in the last vote for Governor (9,736 signatures in Kentucky), *White*, 415 U.S. 767 (1% of voters in last race for Governor requirement). And, if this Court

[8] http://www.census.gov/quickfacts/table/PST045215/13 (last visited 4/14/2016).

determined that it was warranted, CPKY would be willing to submit a petition with more signatures.

Incidentally, LPKY would, if directed, likewise comply if that was the condition set – but it has repeatedly achieved election results in statewide elections, as recently as the 2014 election cycle, and before that in 2011, that were both well in excess of these signature requirements, and in fact in excess of 2% of the votes cast in the last Presidential election in Kentucky.

Defendants mistakenly argue that CPKY and LPKY are unable to gather these signatures. That is simply not so. What CPKY and LPKY are unable to do, is gather multiple ***separate*** petitions for ***different*** races, in the ***same election cycle***. In fact, as demonstrated below, the requirement is so onerous, when applied in this manner, that not even the major parties could achieve this task. The ability to gather a single petition, even with heightened signature requirements, is far easier than separate petitions, as the evidence demonstrates. (RE #16-5, #16-6).

C. **Kentucky's petition requirement**

Defendants argue that Plaintiffs seek to evade the petition requirement to place a single candidate on the ballot. Not so. This case simply does not challenge a single candidate, who submits a single petition. And, as noted above, this Court can easily qualify recognition as a "Political Organization" on: (i) achieving votes in ***any*** statewide election, within the last 4 years preceding the request to be recognized as a "Political Organization," equal to 2% of the votes cast in the last Presidential election, a modicum of support that the General Assembly has found valid; or (ii) submitting a petition with 5,000 or more signatures, or even signatures equal to 1% of the votes cast for the last election for Governor.

Right now there is *no other route*, other than achieving 2% of the vote in a Presidential election, for a party to gain direct general ballot access. Case law affords this Court discretion in fashioning a remedy for the violation.

As an aside, Defendants also argue repeatedly that Plaintiffs have not taken steps to place any of their candidates on the general election ballot for 2016. That is not true. The fact of the matter is that minor parties are not like independent candidates who can simply begin gathering signatures as soon as the window opens to do so. (See Supplemental Declarations of Eckenberg and Krogdahl). It is for that reason that U.S. Supreme Court case law requires the state to treat these groups differently than Independent candidates, a requirement that Kentucky has chosen to completely ignore. *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

Until Libertarian candidates are nominated at convention, they cannot under party rules appear on the ballot. (Supplemental Declaration Eckenberg). The Libertarian Party of Kentucky this year is running a candidate for the State House of Representatives, David Watson, who has begun the signature process, is likewise running at least one local candidate for office, and, with LNC, will run a Presidential nominee. (*Id.*). The district and local candidates for the Libertarian Party have already been nominated in March, at convention.[9] (*Id.*).

The Presidential candidate for the Libertarian Party has not been nominated yet. That will not occur until late May, 2016, at the Libertarian National Committee's convention. (*Id.*). That should not be a surprise, after all, the Republican and Democratic parties have not nominated their candidates yet either.

[9] As Mr. Eckenberg notes, these nominations occurred with a view towards the present ballot access scheme; additional, and other candidates, would have been nominated had the restrictive scheme not been in place, and the State's executive committee will likely nominate additional candidates if the current scheme is enjoined.

Until that national convention occurs, LPKY and LNC cannot circulate petitions – because Kentucky – unlike other states – has no legal process for "substitution" – the practice of circulating signatures without a nominee, say a petition for the party itself or for the party's nominee for President. (*Id.*; Supplemental Declaration Moellman). Instead, because Kentucky does not permit substitution, LPKY and LNC must wait until the candidate is nominated at convention – at the end of May of this year in Orlando, Florida, and then, but not until then, they will begin the signature process. (*Id.*).

And both LNC and LPKY have taken preparatory steps to circulate the petitions for President. (*Id.*). In fact, they anticipate gathering the requisite number of signatures to place the party's nominee for President on the general election ballot. (*Id.*).

But what they cannot do, without some change in the *status quo*, is ***also*** nominate and ballot-qualify a candidate for U.S. Senate, despite the fact that a Libertarian Candidate has filed with the FEC. (*Id.*). They cannot run multiple statewide petition drives at the same time, and especially not running several local candidates and a candidate for Kentucky State House. (*Id.*). They cannot also run Congressional district petition drives at the same time, or multiple Kentucky State House and State Senate petitions. (*Id.*). They cannot do these things because of Kentucky's onerous ballot access scheme. (*Id.*).

That is the very point of this lawsuit: there is no way for LPKY to run multiple petition drives for multiple candidates for a political party that continues to grow in popularity and results in Kentucky, restricting them to one or two candidates per cycle.

Indeed, the cost and burden to field candidates for every partisan race, over a four-year election cycle, in Kentucky requires, as a practical matter, ***367,164 signatures, at a cost of $734,328*** – and fielding these candidates for office is exactly what these Plaintiffs desire to do.

(Initial Declaration Winger & Moelman, RE#16-3 ¶ 13, Exhibit B; RE#16-6 ¶ 38, Exhibit B). On average, that results in 122,388 signatures per year, at a cost of $244,776 (elections are held three of every four years in Kentucky). Just to put this into perspective, Kentucky is *requiring, as a practical matter, Plaintiffs to gather total signatures over a four-year period equal to 20.4% of the votes cast in Kentucky's last election for President*. Or, if one prefers the last race for Governor, *signatures equal to 37.68% of the votes cast in Kentucky's last election for Governor*.[10]

And the signatures become the most burdensome on one particular year out of four: 2018 will be a particularly onerous year, requiring 155,500 actual valid signatures, and with a safety factor of 1.75, a total of 272,125 signatures. (*Id.*). The total cost for this effort in 2018 is a staggering $544,250. As Plaintiffs' evidence and declarations make clear, these costs and burdens are difficult, if not impossible, for the major parties, much less minor parties like the Libertarians. (*Id.*).

Even looking at a single year 2018, Plaintiffs would be required to gather 272,125 signatures, which *was 15.14% of the votes cast in Kentucky's last election for President*. Or, if one prefers the last race for Governor, *signatures equal to 27.9% of the votes cast in Kentucky's last election for Governor*. The United States Supreme Court has struck significantly less onerous requirements. *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor).

[10] http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2015/2015%20General%20Election%20Results.pdf (last visited 4/14/2016).

D. Kentucky's Ballot Access Laws, as Applied to these Minor Parties, Violate the First and Fourteenth Amendments

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 III*"). *Hargett III* 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***. While Defendants have attempted to pigeon hole Plaintiffs' claims into only a facial attack (Brief, RE#33, at 14), that ignores the Complaint in this matter, which asserted both claims (RE#1), Plaintiffs' opening brief (RE#16), and fact that Plaintiffs concede that the laws in question are likely constitutional as applied to a single candidate in a single race, or even a small political party that only desires to run one or two candidates in an election cycle. But that is not what this case is about.

2. Kentucky's laws are unconstitutional

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 II*"), "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 (*emphasis added*, noting candidates in the plural).

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.

3. Kentucky's laws impose a severe burden on these Plaintiffs

Hargett II 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)." 767 F.3d 533 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 II* 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 II* what is true here: "signature requirements as high as 5% are not facially invalid." *Id.* But then the Court, in *Hargett II* went on to examine whether the Tenneessee 2.5% petition requirement was unconstitutional as applied to the Plaintiffs in that case. *Id.* In *Hargett II*, 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.

Unlike its mechanisms for Political Parties, or even the Political Organizations, Kentucky law has no mechanism to place multiple candidates on the ballot for multiple races, except to submit multiple petitions for each and every race. Indeed, the cost and burden to field candidates for every partisan race, over a four-year election cycle, in Kentucky requires, as a practical matter, ***367,164 signatures, at a cost of $734,328*** – and fielding these candidates for office is

exactly what these Plaintiffs desire to do. (Initial Declaration Winger & Moelman, RE#16-3 ¶ 13, Exhibit B; RE#16-6 ¶ 38, Exhibit B).

In the most burdensome year, the next of which will occur in 2018, Kentucky requires 155,500 actual valid signatures to accomplish this multiple candidate ballot access, and with a safety factor of 1.75, a total of 272,125 signatures, which is equivalent to *15.14% of the votes cast in Kentucky's last election for President* or *27.9% of the votes cast in Kentucky's last election for Governor*. (*Id.*). The total cost for this effort in 2018 is a staggering $544,250. As Plaintiffs' evidence and declarations make clear, these costs and burdens are difficult, if not impossible, for the major parties, much less minor parties like the Libertarians. (*Id.*).

Again – to be clear – Plaintiffs do not challenge the existence of a petition, requiring 5,000 signatures, to place a single candidate (and his or her 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.

In *Hargett II*, the Sixth Circuit observed that "[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions." 767 F.3d 544, 547. 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 547-548. 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, has not qualified any minor parties since it made this change. (RE#16-6).

Past history in Kentucky has resulted in no ballot qualified minor parties, with four notable exceptions, the last occurring twenty years ago, over a 100-year period. As Mr. Winger noted, Kentucky is one of only five states in the United States that has not had a "general" ballot qualified party in the last 15 years. (RE#16-6, at ¶ 19), and it is "impossible or virtually impossible" in the modern political landscape to do so. (RE#16-6, at ¶ 37).

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." 767 F.3d 548. Here, Ms. Tobin, who operates nationally,

explains that it is simply not possible or practical to run multiple petition drives at once. (RE#16-5).

The Sixth Circuit in *Hargett II* 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." 767 F.3d 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 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 obtain 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. (RE#16; Supplemental Declarations).

And here, there are a ***number of viable alternatives available to the Defendants*** that furthers their asserted state interests, none of which they even mention or address in their response (perhaps because they know what we all know – there is no justification for Kentucky's ballot access scheme when it is applied to minor parties seeking to field multiple candidates in an election cycle), that further Defendants interests, while not trampling on the rights of the Plaintiffs.

The simplest methodology – to both ensure a modicum of support, and to meet the state's other interests, is ***to permit a petition***, by a Political Group, to transform itself into a Political Organization, with a requisite number of signatures. Mr. Winger has testified that requiring 5,000 signatures by a minor party to do so would be sufficient. (RE #16-6).

Other methods include allowing *any* statewide vote in which a political group achieves more than 2% of the votes cast in the last Presidential race to qualify the group. The methods are numerous. Kentucky has simply chosen not to avail themselves of any of them. And the Defendants do not explain why they could not have done so in their response brief.

Defendants incredibly appear to claim (Brief, RE#33-1, at 17), that there is no severe burden to a requirement that requires minor parties, such as the Plaintiffs in this matter, to having to gather a total of 272,125 signatures in a single election year to field a whole slate of candidates, which *was 15.14% of the votes cast in Kentucky's last election for President, or 27.9% of the votes cast in Kentucky's last election for Governor*. *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor).

In support of this theory, they again point to cases in which a ***single candidate*** needed to submit a petition containing 5,000 signatures for statewide office. There could not be a more glaring example of Defendants attempts to compare apples to oranges to try to justify the unjustifiable.

The burden is not minimal – and it is discriminatory. The burden is more onerous than the scheme struck by the U.S. Supreme Court in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor). The burden costs $544,250 in the most onerous year of the four-year election cycle. (RE#16-3). *Perez-Guzman v. Gracia*, 346 F.3d 229 (3d Cir. 2003) (invaliding requirements due to, in part, significant costs).

This case, like *Hargett III*, 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." 791 F.3d 684, 693. There, the district court concluded, and the Sixth Circuit confirmed that the challenged statutes denied the "plaintiffs the same four calendar years afforded to statewide political parties to secure automatic ballot access." *Id.* at 691. More fundamentally, the statute was struck despite the fact that an individual candidate could have petitioned his or her way onto the ballot. *Id.*

In *Hargett III*, the right to automatic ballot access and its denial was deemed a "severe burden," and subject to strict scrutiny. *Id.* at 693. In this case, of course, other than securing at least 2% of the vote in the Presidential race, there is ***no other automatic ballot access option in Kentucky***. In *Hargett III*, the threshold to be considered a major party was achieving 5% or more in the Governor's race, and other parties could petition their way to becoming automatically ballot access qualified by submitting a petition with signatures equal to at least

2.5% of the signatures cast in the last race for governor. *Id.* at 689-690. The minor parties then lost this automatic ballot access qualification if (and when) they failed to achieve at least 5% of the votes cast in a subsequent election (other than governor). *Id.* They would then have to *submit petitions again* to regain ballot access. *Id.* Here, there is no petition ability for automatic blanket ballot access in Kentucky. *See, also, Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056 (ED Ark. 2006) (holding that party had to be afforded recognized status, and could submit a petition to do so).

As with *Hargett III*, 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 automatically *for four years*. The *Hargett III* 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 III* 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 *significantly worse than Hargett III* – minor parties can only obtain

general automatic ballot access in Kentucky by achieving 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), and unlike in *Hargett III*, where they had at least a year after obtaining this automatic blanket ballot access, there is no other method to even petition to gain this same status.

Nor was the existence of the ability to petition to regain ballot access sufficient to save the statute in *Hargett III*. But at least in *Hargett III*, there was a way to re-petition to achieve automatic ballot access. Not so in Kentucky. Here, in 2018 for instance, Plaintiffs must gather 272,125 signatures to field a slate of candidates in a single year's election cycle, at a cost of $544,250, *requiring, as a practical matter, Plaintiffs to gather signatures that were 15.14% of the votes cast in Kentucky's last election for President* or *27.9% of the votes cast in Kentucky's last election for Governor*. *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor).

Moreover, the Kentucky scheme treats independent and single candidates better than non-major parties who desire to obtain blanket ballot access: the independent candidate need only submit a single petition. The minor party, on the other hand, must submit multiple petitions.

Defendants argue that Kentucky's scheme is not like *Hargett III* because Kentucky's scheme does not give Plaintiffs less time to obtain the same level of electoral success. But Kentucky's scheme does not give Plaintiffs *any time* to obtain the same level of success. Kentucky's scheme is more onerous than the scheme struck by the Sixth Circuit in *Hargett III*.

In *Hargett III*, 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.* (emphasis added). 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.* Here there is no time to obtain the requisite support to stay a Political Organization: that right is denied at the outset. 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. 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.

Defendants next argue that *Hargett II* is different (but make no mention of *Hargett III*), because Plaintiffs have consistently placed an individual candidate or two on the general election ballot. (Brief, RE#33, at 20-21). But this, again, misses the mark. It is not the requirement of a 5,000 signature petition in a ***single race*** that is the issue. And, while there is no dispute that Plaintiffs have placed a single candidate (or slate for President/Vice President), on the ballot in a

single election cycle, via petition, that does not render the scheme constitutional as applied to political groups, like Plaintiffs, who desire to run multiple candidates for office in a single election cycle – or to retain automatic ballot qualification for a four-year period.

Indeed, if the mere existence of past success in a single race were sufficient, the Sixth Circuit would not have struck the scheme in *Hargett III*, where the Plaintiffs had previously obtained automatic ballot access in the past previously, finding the burden imposed on the Plaintiffs in that case to be "severe." 791 F.3d 684, 694. Under *Hargett III*, Kentucky's ballot access scheme, as applied to minor parties, such as the Plaintiffs, who desire to run multiple candidates per election cycle, over a period of time, can only be deemed a severe burden. 791 F.3d 684, 694.

The U.S. Supreme Court in *Storer v. Brown*, 415 U.S. 724, 745, 94 S. Ct. 1274 (1974) helped explain some of these differences that is present in a "one off" or independent candidate's campaign, and that present for political parties, such as the Plaintiffs, that desire to run multiple candidates for multiple offices:

> the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization **contemplates a statewide, ongoing organization with distinctive political character**. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status.

Here, the challenged provisions cannot stand.

4. Kentucky's laws do not survive strict scrutiny, or the *Anderson-Burdick* Framework

"A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 793, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

"Restrictions on ballot access burden [the] fundamental right[]... 'of individuals to associate for the advancement of political beliefs.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) (*citing Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24(1968)).

Under *Anderson*, this Court must "first consider the character and magnitude of the asserted injury" to plaintiffs' association rights. 460 U.S. at 789. Freedom to associate for political ends has little practical value if the plaintiffs cannot place their candidates on the ballot and have an equal opportunity to win votes. *Illinois State Bd. of Elections*, 440 U.S. at 184 (*citing Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24(1968)). Furthermore, the impact of the challenged legislation on voters is relevant to this inquiry. *See Illinois State Bd. of Elections*, 440 U.S. at 184 (ballot access restrictions also burden the fundamental right of voters to "cast their votes effectively"). This is because "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972). Ballot access regulations may impinge on voters' rights by "limit[ing] the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786 (*quoting Bullock*, 405 U.S. at 143).

After considering the magnitude of the burden, this Court "must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule." *Id.* at 789..

Finally, this Court "must ... determine the legitimacy and strength of each of [the state] interests, [and] the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. "The results of this evaluation will not be automatic; ...there is 'no substitute for the hard judgments that must be made.'" Id. at 789-90 (*citing Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). Kentucky must regulate elections "by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. "[B]allot access must be genuinely open to all, subject to reasonable requirements." *Lubin*, 415 U.S. at 719 (*citing Jenness v. Fortson*, 403 U.S. 431, 439, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971)); *Crawford v. Marion county Election Bd.*, 553 U.S. 181, 205, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (Scalia, J., concurring) ("*Burdick* forged Anderson's amorphous 'flexible standard' into something resembling an administrable rule." (*citing Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992))).

When the right to vote and freedom to associate "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (*citing Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed.

2d 711 (1992)). Thus, while strict scrutiny does not automatically apply to ballot access claims, an election regulation may be subject to strict scrutiny review if the regulation is sufficiently severe. *Crawford*, 553 U.S. at 205. Justice Scalia had suggested that a burden is "severe if it goes beyond the merely inconvenient." *Crawford*, 553 U.S. at 205.

In *Storer v. Brown*, the court asked "could a reasonably diligent independent candidate be expected to satisfy" the suspect regulation. 415 U.S. 724, 742, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974). In yet another case, the court found that "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." *Williams v. Rhodes*, 393 U.S. at 31. "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742 (1974).

State election regulations which impose financial burdens on candidates are severe if they work to exclude legitimate candidates from the ballot. *Bullock*, 405 U.S. at 143. There, the court struck filing fees between $1,000 and $6,300. *Id.* at 136.

The *Bullock* Court found the size of the fees had a "patently exclusionary character." *Id.* at 143. Since the statute provided no alternative means of accessing the ballot, "[m]any potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Id.* Furthermore, the exclusionary fees would limit the voters' choice of candidates and would fall with unequal weight "on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." *Id.* at 144.

Building on *Bullock*, the Court in *Lubin* strictly scrutinized California's substantially smaller filing fees. 415 U.S. at 710 (striking a $701.60 filing fee). The *Lubin* Court focused on the lack of alternative means to access the ballot and held that "a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." Id. at 718. Such alternative means include requiring minor political parties "to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." *Id.* (*citing American Party of Texas v. White*, 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974).

As noted before, under *Hargett III*, which determined that a ballot access scheme that was less burdensome than Kentucky's ballot access scheme was a "severe burden" commands a similar finding here. 791 F.3d 684, 694.

Defendants argue that that its scheme furthers state interests of "maintaining the stability of its political system, as well as preventing voter confusion, ballot overcrowding and frivolous candidacies." (Brief, RE#33-1, at 22-23). As to the stability of the political system, that "interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1996). The evidence in this case, of course, suggests that if the state were to require a single petition for automatic ballot access, or Political Organization recognition, of at least 5,000 signatures, then the state would avoid any semblance of voter confusion, ballot overcrowding, or frivolous candidacies. (RE#16-6, ¶¶ 33-34). By its very definition, this less restrictive means of achieving the state's ends renders the more restrictive framework Kentucky has adopted unconstitutional under a strict scrutiny framework.

But let us assume that this Court does not find the requirement that Plaintiffs must submit separate petitions in 2018 to run candidates in each partisan race in Kentucky, totaling 272,125

signatures in an election cycle to field a whole slate of candidates, which *was 15.14% of the votes cast in Kentucky's last election for President*, or *27.9% of the votes cast in Kentucky's last election for Governor*, at a cost of $544,250, for Plaintiffs to run their candidates as "severe." Let us instead assume that this Court finds that the burden is less than severe – in that instance, this Court is directed to "weigh the burden on the plaintiffs against the state's asserted interest and the chosen means of pursuing it." *Hargett III*, 791 F.3d 684, 693, *citing Hargett II*, 767 F.3d at 546. The analysis is fundamentally one of necessity, whereby this Court is instructed to "consider the extent to which those [identified state] interests make it necessary to burden the plaintiff's rights." *Id.* There is no such necessity for not adopting one of the many less onerous alternatives here.

Defendants cite various cases that upheld 3% and 5% signature requirements as relevant and, they argue, determinative. *See, e.g. Swanson v. Worley*, 490 F.3d 894, 903 (11th Cir. 2007) (3% of votes cast in last governor's election); *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005). But yet again, in the same tiring and irrelevant argument, Defendants attempt to defend the indefensible by trying to make this case into that which it is not. Requiring a petition to be submitted, with 5,000 signatures, is not the issue. Indeed, these Plaintiffs would not quarrel with a requirement to submit a petition with 5,000 signatures to qualify as a Political Organization with four years of automatic ballot access.

What is the justification for all of these separate petitions? If the state is interested in the support for particular candidates, what makes them so sure that individual Democrats or Republicans have support? Particularly if they are uncontested in a general and primary election cycle?

Kentucky could constitutionally permit the circulation of one petition on behalf of multiple candidates in a particular election cycle, ensuring support for all of the candidates that are running. Why not permit petitions by these minor party Plaintiffs to recognize them as Political Organizations with 5,000 signatures? Why not permit other statewide races, where a party's candidate receives more than 2% of the votes cast in the last race for President to qualify a party as a Political Organization?

Defendants do not explain why these alternatives are not sufficient to meet the state's stated interests. But that is exactly is what they are required to do to "weigh the burden on the plaintiffs against the state's asserted interest and the chosen means of pursuing it." *Hargett III*, 791 F.3d 684, 693, *citing Hargett II*, 767 F.3d at 546.

All of those things meet the state's purported interests, and all of them impose a significantly lower burden on Plaintiffs' constitutional rights.

As such, the restrictions in question are not "justified by sufficiently weighty state interests." *Hargett III*, 791 F.3d 684, 694. As in *Hargett III*, Defendants here "argue the burden is justified because political parties are different from [political groups] and these differences justify the state's imposition of different burdens on them." *Id.* (Brief, RE#33-1, at 24-28). But, as explained in *Hargett III*, and which the Defendants seem to be unable to comprehend, "[i]f anything, here, the differences between these two types of parties **justify having less onerous burdens on [political groups] than statewide political parties**." *Id.* (emphasis added).

Again, Defendants cite *Jenness v. Fortson*, 403 U.S. 431 (1971) as supporting their cause and their proposition that, they allege "none of [Kentucky's] three paths to the general election ballot is 'inherently more burdensome' on political groups than any other." (Brief, RE#33-1 at 25). But that case involved an individual candidate's attempt to be placed on the ballot, and a

challenge to a 5% signature requirement by that candidate. And, as applied to an individual candidate's ability to be placed on the ballot, the Court upheld the challenged statutes.

Fundamentally, Defendants argument about none of the three paths being "inherently more burdensome" may have some truth to it, when applied to one candidate. But, as has been a troubling and repeated attempt to compare apples to oranges, Defendants miss the mark when the path to ballot access for major parties is compared in the aggregate to minor parties, such as these Plaintiffs, that desire to run multiple candidates for multiple offices over a period of time.

In 2018 to run candidates in each partisan race in Kentucky, Plaintiffs must submit separate petitions totaling 272,125 signatures, at a cost of $544,250, in an election cycle to field a whole slate of candidates, which *was 15.14% of the votes cast in Kentucky's last election for President, or 27.9% of the votes cast in Kentucky's last election for Governor.* (RE #16-3, 16-6). The major parties need to run candidates in primaries, many of which will be uncontested, and gather 4,914 signatures to place their candidates on the ballot, perhaps gather 8,600 signatures using the 1.75 safety factor, for a total cost of $17,200. (*Id.*).

It is difficult, if not impossible, to understand how these burdens are close to equal – particularly when one looks at the fact that the Republican Party of Kentucky has not raised close to the $544,250 per year in recent years. (RE#16-3 ¶3). For these Defendants to argue that the burden is not the same, despite the fact that total cost on these minor parties would exceed what the major parties raise, is utterly confounding. More problematically, the differences between major and minor parties "***justify having less onerous burdens on recognized minor parties*** than statewide political parties." *Hargett III*, 791 F.3d 684, 694.

To support their theory that these requirements are really all equal, the Defendants argue that "placing candidates on the general election ballot as nominees of 'political organizations' is

more burdensome, because they have to nominate their candidates at convention. (Brief, RE#33-1 at 25). Again, each of these Plaintiffs conduct nominating conventions every election cycle anyways under their party rules. (Supplemental Declarations of Eckenberg and Krogdahl). These are not burdensome requirements. And, for the Libertarians, because of their size and organization and level of participation and public support, they conduct conventions just as the major parties do: first at congressional district levels, and then at the state level, every election cycle. (Supplemental Declarations of Eckenberg).

Defendants next cite *American Party of Texas v. White*, 415 U.S. 767 (1974) as supporting the constitutionality of Kentucky's scheme. But *White* is different from Kentucky's scheme. To be certain, the State of Texas in *White* had two "automatic" methods of ballot access: first, a party that obtained 200,000 votes in the last general election could nominate future candidates by primary election, or parties that obtained 2% of the vote in the last election for governor[11] could nominate future candidates by convention. *Id.* at 772-774. But there was a third method for a party to obtain blanket or general ballot access: holding conventions, and submitting supplemental signatures equal to 1% of the votes last cast for Governor. *Id.*

Defendants point to the fact that four times in the last 100 years, the last time 20 years ago, a candidate other than a Democrat or Republican achieved over 2% to qualify as a Political Organization. (Brief, RE#33-1 at 26). But again, Kentucky is only one of five states that has not had a party do so in the last 15 years, one of only two states that only uses the Presidential election as the sole barometer of support (and it is the most difficult measurer to achieve

[11] As noted in Mr. Winger's first Declaration, a Governor's race is an easier method of obtaining a percentage of the vote than is a Presidential race. (RE#16-16 at ¶20).

success), and the modern political landscape makes this a terribly difficult, if not almost impossible feat.[12] (Declaration Winger, RE#16-6).

Defendants next argue that Plaintiffs have failed to achieve a significant modicum of support in Kentucky, despite, again, the fact that the Libertarian Plaintiffs, at the very least, have achieved statewide vote results well in excess of 2% of the number of votes last cast for President, in both 2011 and more recently in 2014.

In *Green Party of Tennessee v. Hargett*, 700 F.3d 816, 821 (6th Cir. 2012) (*Hargett I*), the Sixth Circuit addressed ballot access, but did not disturb the finding of the district court that found that the Green Party of Tennessee had a significant modicum of support because it obtained 20,000 votes in an election, and the Constitution Party of Tennessee had a significant modicum of support because it submitted a petition with 10,000 signatures to entitle them to be placed on the ballot. The Plaintiffs here, particularly the Libertarians, have far exceeded, on several occasions, the 20,000 votes in a statewide election found sufficient in *Hargett I* (and those votes were in a state with almost 1.5 times the population of Kentucky). CPKY is willing to submit a petition as a condition of the relief it seeks.

Finally, Defendants argue that Plaintiffs have taken no steps to obtain ballot access this election cycle. But the Supplemental Declarations tell a far different story. (Supplemental Declarations Eckenberg, Krogdahl). Plaintiffs must nominate their candidates at conventions before the candidates run as these minor party's candidates. (*Id.*). And, for Presidential nominees, just as the major parties nominate at convention, these minor parties must nominate at a national convention. (*Id.*). LPKY is running a candidate for the State House, who is gathering

[12] Although to be fair, this may be the year the Libertarian party polls over 2% in Kentucky, given the extreme unpopularity and "negatives" in polling of the two apparent major party nominees, Hillary Clinton and Donald Trump.

signatures; and a couple of local candidates. (*Id.*). But LPKY cannot run other candidates – except for President this year, because of the onerous Kentucky ballot access laws. (*Id.*).

Defendants argue that Kentucky may require a modicum of support before treating a Political Group as a Political Organization. And that argument is correct, insofar as it goes. The problem is that it only permits this showing in just one overly burdensome way: the results of a Presidential race. Kentucky could, but does not, permit a petition to be signed by 5,000 voters that would elevate the Political Group to a Political Organization. Kentucky could, but does not, permit a Political Group to circulate one petition to place all of its candidates on the ballot in an election cycle. Kentucky could even look to other statewide races to measure public support, where LPKY at least has made a showing of this support.

Kentucky does none of these things. And Defendants citation to *White*, as we have shown, was a more open and easier ballot access scheme than is present in Kentucky. 415 U.S. 767 (1974). *White* permitted conventions (which these Plaintiffs already hold) and a petition to be utilized whereby the parties would submit petitions equal to 1% of the signatures in the last Governor's race to obtain general ballot access. Here, that would be signatures equaling 9,743 signatures. Plaintiffs would welcome this option with open arms.

At bottom, the challenged statutes impose "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.'" *Hargett III*, 791 F.3d 684, 695.

E. Injunctive Relief is Warranted

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).

1. Success on the merits

Defendants are incorrect about the merits: Plaintiffs have demonstrated that they are entitled to judgment in their favor as a matter of law.

2. Irreparable harm

On irreparable harm, Defendants argue that Plaintiffs still have time to place their candidates on the 2016 ballot by petition. But we have demonstrated that, except for specific races, i.e. President, LPKY's candidate in a State House race, etc, it is not possible to do so. And, for those races that Plaintiffs are going to field candidates, including President, the fact of

the matter is that there remain yet more races that Plaintiffs would field candidates other than these races, but for the challenged ballot access requirements.

More fundamentally, "to 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.").

3. Harm to others/Public Interest

Defendants argue that an injunction here would implicate harm to others, and would cause voter confusion, avoiding ballot overcrowding and the presence of frivolous candidacies. As discussed previously, the recognition of the Libertarian Party, as a Political Organization, in light of its having run statewide candidates in the last four years and, in that race, achieved over 2% of the votes last cast for President would result in the inclusion of one, and only one, additional Political Organization. No other "political group" has done so.

As Mr. Winger has informed this Court, and Defendants do not dispute, requiring a petition to be submitted by CPKY with either 5,000 signatures or 9,743 signatures (the number

of signatures equal to 1% of the votes cast in the last race for Governor), would not result in ballot overcrowding or voter confusion. (RE #16-6).

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).

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.").

F. CONCLUSION

Plaintiffs have demonstrated their entitlement to an injunction and summary judgment for declaratory and injunctive relief.

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 14 day of April, 2016.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)