

CASE NO. 16-6107

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**LIBERTARIAN PARTY OF KENTUCKY, CONSTITUTION PARTY OF  
KENTUCKY, LIBERTARIAN NATIONAL COMMITTEE, INC., AND KEN  
MOELLMAN, JR.**

*Plaintiffs-Appellants*

**v.**

**ALISON GRIMES, MARYELLEN ALLEN, DONALD W. BLEVINS,  
JOSHUA BRANSCUM, ALBERT CHANDLER III, JOHN HAMPTON,  
STEPHEN HUFFMAN, AND GEORGE RUSSEL, in their official capacities as  
the Secretary of State, Executive Director, and Members of the Kentucky State  
Board of Elections**

**AND**

**ANDREW BESHEAR, in his official capacity as the Kentucky Attorney General**

*Defendants-Appellees*

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On appeal from the United States District Court for the Eastern District of  
Kentucky, Case No. 3:15-CV-00086

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**APPELLANTS' MERIT BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to FRAP 26.1, no Appellants are subsidiaries or affiliates of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellants believe that an expedited disposition of this matter is appropriate given the election cycle and scheduling issues outlined in their Motion to Expedite. Nevertheless, because no Reply Brief is permitted, Appellants believe that oral argument will aid this Court in its disposition of this matter, and therefore request argument. Appellants note that their counsel is unavailable for in-person argument during the week of August 1 through August 5, but could accommodate telephonic oral argument (we note that Counsel for Appellees has noted his availability, but it is not clear whether there is availability for telephonic argument). This matter involves First and Fourteenth Amendment ballot access issues in a highly charged election cycle, where argument may be beneficial to the Court. The following week presents no scheduling conflicts.

## **JURISDICTIONAL STATEMENT**

The district court has federal question jurisdiction over Plaintiffs' First Amendment challenges under 28 U.S.C. §1331. On February 22, 2016, the District Court granted the Attorney General's Motion to Dismiss, but that order was not final and appealable. [Opinion, RE#26, PAGEID#287-298]. On July 8, 2016, the District Court entered its final judgment and opinion and order. [Opinion, RE#45, PAGEID#546-563; Judgment, RE#46, PAGEID#564-565].

That same day, Plaintiffs-Appellants timely appealed the district court's final findings, orders and judgment. [Notice of Appeal, RE#47, PAGEID#566-567].

Accordingly, this Court has jurisdiction over Appellants' appeal under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

This appeal presents the following questions:

- (1) Whether Kentucky's election regime imposes a severe burden to non-major political parties under *Anderson-Burdick* where: (a) there is no mechanism, other than obtaining 2% of the vote in a Presidential election, for "blanket" ballot access, requiring separate petitions for each and every office; (b) the cost and burden for these separate petitions, 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; (c) the signatures become the most

burdensome on one particular year out of four: in 2018 Plaintiffs must submit 155,500 actual valid signatures, and with a safety factor of 1.75, a total of 272,125 signatures, at a minimum cost of a staggering \$544,250; (d) the signatures at issue are required to be gathered in numerous separate petitions, which unrefuted expert testimony indicated makes them impossible to gather; (e) major parties are given four years of blanket ballot access based on their Presidential race results, without the need to submit the foregoing petitions, giving them more time to achieve the same level of electoral success than minor parties; and (f) Plaintiffs unrefuted expert and other testimony demonstrated the severe negative effects of the Kentucky ballot access scheme, demonstrating its severe effect?

- (2) Even if the District Court properly found a middle tier burden under *Anderson-Burdick*, did it commit reversible error by failing to find a constitutional violation under the First and Fourteenth Amendments where the undisputed evidence demonstrated there were numerous alternatives that did not severely burden Plaintiffs' rights, which were and are available to Defendants to vindicate their stated interests, but not implemented by Defendants?

(3) Whether the Kentucky Attorney General, given his unique role in enforcing election laws and giving advice and opinions, was and is a proper party to this matter?

(4) Whether the District Court erred in failing to grant relief and whether immediate relief should be granted given the timing of the upcoming election?

### INTRODUCTION

As this Court noted recently in *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 539 (6<sup>th</sup> Cir. 2014) (“*Hargett II*”), “this case does not involve ... rules regarding when a particular *candidate* may appear on the ballot; it involves only the requirements a political *party* must meet.” Unlike placing a single candidate on the ballot, Kentucky law has no mechanism for a minor political party or group<sup>1</sup> to achieve blanket or general ballot access, the way major parties are permitted to do, except once every four years, measured only by its candidate’s performance in the Presidential race.

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<sup>1</sup> 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).

Plaintiffs below, and particularly the Libertarian Plaintiffs, have increasingly run – or tried to run – more and more candidates for federal, state, and local office. In doing so, they achieved ever increasing levels of success – breaking 3% and then 4% in statewide state and federal races, and actually electing county officers to partisan office. The onerous ballot access scheme in Kentucky has inhibited the Plaintiffs and does not measure a modicum of support, but instead creates an ever-increasing barrier to prevent electoral competition.

## **STATEMENT OF THE CASE AND FACTS**

### **A. Background of Kentucky’s Ballot Access Laws**

Kentucky law does not permit “general” ballot access for a political party unless that party receives 2% of the vote in a Presidential race. K.R.S. 118.015, K.R.S. 118.305. If a political party’s candidate receives that percentage vote, that party may nominate its candidates and place them on the general election ballot for the following four years. *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. A “Political Party” is a group whose candidate received at least 20% of the vote in the last election for President. K.R.S. 118.015(1). A “Political Organization” is a group whose candidate received at least 2% of the vote in the last election for

President. K.R.S. 118.015(8). A “Political Group” is a political group that is not a Political Party or Political Organization. K.R.S. 118.015(9).

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

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 qualify for ballot access on an individual race-by-race basis 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. *Id.* A voter can sign only one petition per office. *Id.*

A separate petition is required for each candidate and there is no method for a political group to become ballot qualified across the board, except through obtaining the requisite votes in the Presidential election.<sup>2</sup>

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<sup>2</sup> Without statutory authority 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 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.

## **B. The Plaintiffs in this matter**

Plaintiffs in this case are the Libertarian National Committee, Inc. (“LNC”), the Libertarian Party of Kentucky (“LPKY”) (we refer to the LNC and LPKY collectively as the “Libertarians”), the Constitution Party of Kentucky (“CPKY”), and Mr. Ken Moellman, Jr., an individual voter.

LPKY is the Kentucky state affiliate of the national party, which has been harmed by Kentucky’s ballot access regime since “it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise.”

[Decl.Eckenberg, RE#16-2, PAGEID#184-188]. “The LPKY typically fields candidates for local, state, and national elections.” *Id.* LPKY has just under 5,000 voters registered as Libertarians in Kentucky.<sup>3</sup> *Id.*

The LNC is the national arm of the Libertarian Party. 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.*

The Libertarians have engaged in systemic and repeated political activities in Kentucky, including fielding candidates for Presidential and other races. *Id.* For instance, the Libertarians have each participated in signature drives placing

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<sup>3</sup> During the pendency of the litigation LPKY exceeded 5,000 voters, even though the Libertarian party is not identified in Kentucky voter registration cards, and a Libertarian voter must write in the party.

their candidates on the ballot for President every Presidential election year since 1988. *Id.*

The Libertarians have a significant modicum of support from Kentucky voters. *Id.*; [Decl. Winger, RE#16-6, PAGEID#212-235]. The Libertarians' candidate in the 2014 U.S. Senate election, David Patterson, received 44,240 votes (3.1% of the votes cast), despite his exclusion from statewide televised debates that would have boosted his election results. *Id.* In 2011, Mr. Moellman ran as LPKY's nominee for State Treasurer, receiving 37,261 votes (4.61% of the votes cast). *Id.* The Libertarians fare even better in local and county races, and have actually elected Libertarian candidates to partisan county and local offices. *Id.*

It is ordinary for other state Libertarian Parties to run multiple candidates for statewide office. [Decl. Winger, RE#16-6, PAGEID#212-235]. Just looking at 2014, the Libertarian Party ran numerous 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.*

Mr. Moellman is a registered Libertarian voter whose rights have been impaired. [Decl.Moellman, RE#16-3, PAGEID#188-199]. Mr. Moellman has been active in politics in Kentucky as both a voter and member of the LPKY. *Id.*

Similarly, CPKY “is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise.” [Decl.Krogdahl, RE#16-4, PAGEID#200-205]. CPKY typically fields, or attempts to field, candidates for certain state and national elections. *Id.*

CPKY has a modicum of support from Kentucky voters (though not as much as LPKY). CPKY qualified its candidate for President of the United States in 2008 by petition. *Id.*; [Decl.Winger, RE#16-6, PAGEID#212-235]. In 2010, CPKY ran a candidate for the 79<sup>th</sup> Kentucky House District who secured 27.4% of the vote. *Id.*

While Defendants raised certain arguments about Plaintiffs’ support in Kentucky,<sup>4</sup> Kentucky law applies a 2% vote test for President to qualify as a Political Organization. K.R.S. 118.015, K.R.S. 118.305. The last presidential race in Kentucky was in 2012. In that race, 1,797,212 voters voted.<sup>5</sup> Taking 2% of the

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<sup>4</sup> We well recognize that the Libertarians and the Constitution Party Plaintiffs may not be similarly situated with respect to the level of public support. Suggestions for the handling of any differences are discussed in the relief section IV.

<sup>5</sup> <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2012/2012genresults.pdf> (last visited 4/14/16); *Hall v. Sepanek*, 2015 U.S.

votes cast in that race, 35,944 voters would need to support Libertarians to meet the statutory Political Organization criteria. [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460].

In 2011, 37,261 Kentucky voters supported Ken Moellman, Jr., when he ran statewide for Treasurer. [Decl.Winger, RE#16-6, PAGEID#212-235]. In 2014, 44,240 Kentucky voters supported David Patterson when he ran statewide for U.S. Senate in 2014. *Id.* In two separate recent statewide races, Kentucky voters exceeding 2% of the votes cast in the last election for President have supported Libertarian candidates. *Id.*

To attempt to bolster their “no support” theory, Defendants argued about the number of Plaintiffs’ registered voters. But registered voters are substantially lower than actual support at the ballot box. [Supp.Decl.Winger, RE#37-4, PAGEID#471-474]. Mr. Patterson, the 2014 Libertarian Candidate for U.S. Senate, is a prime example. *Id.* Despite having 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. *Id.*; [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460].

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Dist. LEXIS 1536 (E.D. Ky. 2015) (judicial notice of government website appropriate).

### **C. Historical Third Party electoral results in Kentucky**

With only four exceptions, for at least the past 100 years, the only parties qualifying for automatic ballot access in Kentucky were the Democrat and Republican Parties. [Decl.Winger, RE#16-6, PAGEID#212-235]. Those exceptions occurred in 1924, 1968, 1980, and 1996. *Id.*

These four instances of past candidates (other than Republicans and Democrats) achieving over 2% of the vote do not make Kentucky's ballot access scheme reasonable or constitutional.

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

It is "impossible or virtually impossible" in the modern political landscape for minor parties to qualify for general ballot access under Kentucky's regime. *Id.*

### **D. Facts regarding the Kentucky ballot access scheme's severe burden on minor political parties, such as Plaintiffs**

1. 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. [Decl.Winger, RE#16-6, PAGEID#212-235]. This is critical for groups that wish to become qualified parties, who do not yet have any nominees. *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, typically looking at one of several races. *Id.* But Kentucky does not even allow that. *Id.* Washington and Kentucky are the only states in which it is impossible for a group to become a ballot qualified party at any time except in November of a presidential election year. *Id.*

Moreover, “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.*

## 2. Kentucky’s ballot access laws burden associational rights

Some of the most important new political parties in U.S. history were formed in midterm years. [Decl.Winger, RE#16-6, PAGEID#212-235]. If Kentucky’s scheme were in force in 1854, it would have prevented the mid-term rise of the Republican Party. *Id.*

Mr. Richard Winger, a recognized national expert at ballot access issues, opined that Kentucky’s policy of not permitting a group to become a qualified

party except through polling 2% or more for President raises significant associational rights issues. The Kentucky scheme makes it impossible for any party to be ballot qualified if that party is only interested in state political issues, even though there are many one-state parties in the United States and even though many of them have been successful. *Id.* The Progressive Party, in Vermont has eight state legislators, and yet never runs anyone for President. *Id.*

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

Kentucky's ballot access laws are too restrictive. [Decl.Winger, RE#16-6, PAGEID#212-235]. Minor parties typically do far better for all partisan offices than they do for President. *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 nationally as much as 2% for President. *Id.*

In fact, while many states look at a Governor's race, Kentucky does not even permit that, which would be a lower burden. *Id.* Nevertheless, the Libertarian Party 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.* 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.* 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, to look solely to the results of the Presidential race, and since that time has had no minor parties achieving statewide ballot access. *Id.*

Minor parties are not like independent candidates who can simply begin gathering signatures immediately after the statutory window opens. [Supp.Decl. Eckenburg, RE#37-1, PAGEID#453-460; Supp.Decl.Krogdahl, RE#37-3, PAGEID#467-470].

Until Libertarian candidates are nominated at convention, they cannot under party rules appear on the ballot. [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460]. This year, LPKY is running a candidate for the State House of Representatives, is also running at least one local candidate for office, and, with LNC, is running a Presidential slate. *Id.* The district and local candidates for the Libertarian Party have already been nominated in March, at convention.<sup>6</sup> *Id.*

The Presidential candidate for the Libertarian Party was nominated in late May 2016, at the Libertarian National Committee's convention. *Id.* That is not surprising, since the Republican and Democratic parties are just now nominating their candidates.

Until nomination occurs, the Libertarians cannot circulate petitions because Kentucky – unlike other states – has no legal process for “substitution” – the practice of circulating signatures without a nominee, such as a petition for the party itself or for the party's nominee for President. *Id.*; [Supp.Decl.Moellman, RE#36-2, PAGEID#465-466]. Instead, because Kentucky does not permit substitution, the Libertarians had to wait until its Presidential candidate was nominated on May 31, 2016 to begin the signature process. *Id.*

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<sup>6</sup> 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 nominate additional candidates if the current scheme is enjoined. [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460].

4. The requirement for separate petitions for each candidate with many signatures for political parties desiring 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 in time, of Kentucky's ballot access laws generally results in the Libertarians only being able to undertake one or two petition drives per year for one or two of their candidates, foreclosing them and their candidates from other opportunities. [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. But for the challenged ballot access laws, the Libertarians would field more than one or two candidates, per year, for statewide and national office. [Decl.Eckenberg, RE#16-2, PAGEID#184-188].

For CPKY, Kentucky's ballot access regime has kept them off the ballot in every statewide race but Presidential races in the last several decades. [Decl.Winger, RE#16-6, PAGEID#212-235].

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

Plaintiffs' expert 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.* This burden is

why Plaintiffs have never fielded more than two candidates in any Kentucky statewide election per election cycle – Kentucky’s laws and ballot access regime make it impossible as a practical matter to do so. *Id.*

Of course, it is not enough to gather 5,000 signatures – sometimes non-registered voters sign petitions, sometimes voters 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. [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. As a practical matter, between 7,500 and 8,750 signatures need to be obtained to ensure that a valid petition is submitted. *Id.*

Ms. Christina Tobin, an expert in petition gathering and circulation, indicates that the typically professional petitioners are engaged to collect these signatures. [Decl.Tobin, RE#16-5, PAGEID#206-211]. The only practical way to gather a single petition with 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.* Plaintiffs 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). [Decl.Eckenberg,

RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. 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, lowest market rate has been \$2.00 per signature for reputable firms, and is charged regardless of whether the signature is a “good” signature, or is subsequently identified as invalid. [Decl.Tobin, RE#16-5, PAGEID#206-211]. This \$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.* The law of diminishing returns applies on petition gathering, and it is far easier to obtain 5,000 signatures for a single petition that places multiple candidates on the ballot than it is to gather separate petitions at the same time. *Id.*

It is therefore impossible for a minor party to field a slate of candidates for Kentucky’s Constitutional office holders, because “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.* For these same reasons, it would be unusual for petitioning companies to take an engagement where they needed to circulate three or more petitions in the same area in the same election cycle. *Id.*

The cost to place a slate on the ballot for Kentucky's Constitutional Office holders is \$73,500 to \$105,000 per election year. [Decl.Winger, RE#16-6, PAGEID#212-235]. These costs are prohibitive for minor parties, and, to some extent, even for the major parties in Kentucky. *Id.* The Republican Party of Kentucky would have trouble raising these sorts of funds for ballot access. *Id.*

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. [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. Obviously, that does not include normal party functioning and costs of operation.

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. [Decl.Krogdahl, RE#16-4, PAGEID#200-205]. 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.*

Minor parties typically lack significant financial resources. [Decl.Winger, RE#16-6, PAGEID#212-235]. 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 significant burden

when one considers the revenue available to the party and effectively prevents that from obtaining ballot access. *Id.* 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.*

In terms of the purported state interest in avoiding a crowded or confusing ballots, expert 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.*

Moreover, “[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.*

The impact of these ballot access provisions constitutes a severe burden on minor political parties since 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. [Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. To field

candidates for each partisan race in a given four-year election cycle in the entire Commonwealth of Kentucky, the major parties receive automatic ballot access, while minor parties must gather approximately 209,808 signatures.<sup>7</sup> *Id.* Further adjusting these numbers to ensure an acceptable margin of safety outlined above of 1.5 to 1.75 times the signature minimum, 314,712 signatures are required, or 367,164 signatures using the 1.75 factor. *Id.* Thus, the cost for a minor party to achieve this feat, using paid petitioners, is ***between \$629,424 and \$734,328***. *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 signature analysis is contained in a chart placed in evidence in this matter. [Decl.Moellman, RE#16-3, PAGEID#189-199; Decl.Winger, RE#16-6, PAGEID#212-235].

While the Libertarians are now in the process of gathering signatures to place their Presidential slate on the ballot, without some change in the *status quo*, under Kentucky’s scheme they cannot also nominate and ballot-qualify a candidate for U.S. Senate, despite the fact that a Libertarian Candidate has filed with the

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<sup>7</sup> These numbers do not include partisan city offices; rather they include partisan offices at the county and state level.

FEC, cannot run multiple statewide or Congressional District petition drives at the same time, and cannot run any additional county or legislative candidates. *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.

Given the total cost and burden to field candidates for every partisan race, over a four-year election cycle, 367,164 signatures, at a cost of \$734,328, results in an average 122,388 signatures per year, at a cost of \$244,776 (elections are held three of every four years in Kentucky). [Decl.Winger, RE#16-6, PAGEID#212-235; Decl.Moellman, RE#16-3, PAGEID#188-199].

The signatures become the most burdensome on one particular year out of four: 2018 is the next extremely onerous year, requiring 155,500 actual valid signatures, and utilizing 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' unrebutted evidence make clear, these costs and burdens are difficult, if not impossible, for the major parties to achieve, much less minor parties like the Libertarians. *Id.* This 2018 effort, incidentally, requires signatures equal to 15.14% of the votes cast in Kentucky's last election for President. *Id.* 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.<sup>8</sup> *Id.* The United States Supreme Court has struck significantly less onerous requirements. *Williams v. Rhodes*, 393 U.S. 23 (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). But *Rhodes* involved a single petition, not the more onerous multiple petitions required in Kentucky.

5. Significant additional evidence establishes the burdens of Kentucky's ballot access scheme when applied to minor parties who desire to field more than one candidate per election cycle, particularly where Kentucky has less restrictive alternatives that are equal, if not better, to meet any state interests at issue

Kentucky is one of only twelve states that do 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 so. [Decl.Winger, RE#16-6, PAGEID#212-235].

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.* The average number of such candidates was 2.01. *Id.* But Kentucky only had 0.33 such candidates during that period. *Id.* Kentucky had the fewest of any state, except for

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<sup>8</sup> <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2015/2015%20General%20Election%20Results.pdf> (last visited 4/14/2016).

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

Kentucky does not treat independents and minor parties differently – rather, Kentucky does not give a minor party any practical or realistic means to achieve ballot access except in one or two elections across the state per cycle. *Id.*

Kentucky's ballot access laws, as they are written, are not tailored towards measuring a modicum of support – they instead keep candidates other than the Democrat and Republican candidates off the ballot, and appear designed to cause that result. [Decl.Winger, RE#16-6, PAGEID#212-235; Decl.Tobin, RE#16-5, PAGEID#206-211]. 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 or (c) would look at other races for qualification. *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 a severe undue burden on minor parties, such as the Plaintiffs in this case. *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 a four year, or even one-year election cycle would measure public support for the party, while not unduly and unnecessarily burdening minor parties. *Id.*

6. Kentucky's ballot access scheme is not equal between parties

Defendants argued that the burdens under Kentucky law for the major and minor parties were equal, since a minor party has to “nominate their candidates at convention.” [Brief, RE#33-1, PAGEID#323-368]. But Plaintiffs hold nominating conventions every election cycle anyways under their party rules.

[Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460; Supp.Decl. Krogdahl, RE#37-5, PAGEID#467-470].

Holding a convention for Political Organizations, or receiving a taxpayer funded primary for Political Parties (when it is contested, which it usually is not) is not burdensome. 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. [Supp.Decl.Eckenburg, RE#37-3, PAGEID#467-470].

Major parties receive four years of automatic ballot access; minor parties must petition to place their candidates on the ballot for each race. This is not equal.

**E. The proceedings below**

Plaintiffs filed this matter, a ballot access case, on December 4, 2015. [Verified Complaint, RE#1, PAGEID#1-37]. In late December both the Attorney General and Board of Elections Defendants filed Motions to Dismiss on standing grounds, and Plaintiffs responded the next day. [MtnAGDismiss, RE#6, PAGEID#81-89; MtnBOEDismiss, RE#7, PAGEID#90-97; Resp.Opp.AG, RE#8, PAGEID #110-123; Resp.Opp.BOE, RE#9, PAGEID#110-123].

On February 3, 2016, Plaintiffs filed an Emergency Motion to Expedite resolution of this matter, citing, among other things, the Commonwealth of Kentucky's election schedule, including the August 9, 2016 general candidate filing deadline, the September 9, 2016 deadline for petitions for President, and the September 19, 2016 ballot printing deadline. [Emer.Mtn.Expedite, RE#17, PAGEID#237-249].

On February 22, 2016, the Court granted the Attorney General's Motion to Dismiss, and denied the Board of Elections Defendants' Motion to Dismiss. [Order, RE#26, PAGEID#287-298].

Plaintiffs also filed their Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Summary Judgment on

February 3, 2016. [PlfsMotion, RE#16, PAGEID #153-236]. Defendants filed cross-motions for Summary Judgment on March 21, 2016. [DefsMSJ, RE#34, PAGEID#369-408]. On May 9, 2016 briefing was completed with the filing of Defendants' Reply, and argument was held on May 19, 2016. [DefsReply, RE#38, PAGEID # 478-496; Entry, RE#41, PAGEID#500].

On July 8, 2016, the District Court entered its final judgment and opinion and order. [Opinion, RE#45, PAGEID#546-563; Judgment, RE#46, PAGEID#564-565].

### **SUMMARY OF THE ARGUMENT**

Under the framework outlined in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the District Court erred by failing to find a severe burden on these political groups, warranting strict scrutiny. Kentucky's ballot access laws are unconstitutional, since they are not narrowly tailored to achieving compelling governmental interests.

Alternatively, even applying the "sliding scale" or middle-tiered scrutiny found applicable by the District Court, the challenged statutes are unconstitutional under *Anderson-Burdick* because the interests asserted by the state are not sufficiently important and can be vindicated by one of several alternatives that are not unduly burdensome on these minor parties, including: (i) a petition to elevate a political group to a political organization with blanket ballot access; (ii) to permit

the submission of a single petition to run a slate of candidates in a given election cycle; and/or (iii) utilizing statewide races other than, or in addition to, President for elevation of status.

The dismissal of the Attorney General was improper, because of his statutorily charged duties to enforce the challenged statutes.

Finally, the District Court in not granting relief to Plaintiffs, and given timing concerns, the Plaintiffs should be permitted to submit a list of Defendants of candidates to place on the ballot for the 2016 election cycle, with a remand to the District Court to fashion appropriate relief for future cycles.

## **ARGUMENT**

### **I. The District Court erred in granting Summary Judgment to Defendants and in failing to grant Summary Judgment to Plaintiffs**

This matter was decided on cross-motions for summary judgment, which this Court reviews *de novo*, drawing all reasonable inferences in favor of the nonmoving party. *Brown v. Chapman*, 814 F.3d 447, 464 (6th Cir. 2016).

Plaintiffs below raised both facial challenges to the statutes, as well as applied challenges. While Defendants attempted to pigeon hole Plaintiffs' claims into only a facial attack [Brief, RE#33, PAGEID#323-368], they ignore both the Complaint's provisions that asserted both claims and Plaintiffs' Motion that each raised both challenges. [Compl., RE#1, PAGEID#1-37; Motion, RE#16, PAGEID#153-236]. This case does not involve the constitutionality of Kentucky's

ballot access scheme 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.

This Court 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 case – whether it is facial or as-applied challenge. 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 (2010).

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

The U.S. Supreme Court articulated the contemporary standard for evaluating constitutional challenges to a state's election laws in *Anderson*, 460 U.S. 780, 788-89, and again in *Burdick*, 504 U.S. 428, 434. As this Court noted in *Hargett II*, 767 F.3d 533, 546, “[f]irst, the court must ‘consider the character and magnitude of’ the plaintiff’s alleged injury.” 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.*

This Court explained in *Hargett II* 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.* This Court 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.*

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 (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 (1971)); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

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 (1992)). Thus, 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*, 415 U.S. 724, 742 (1973), the court asked "could a reasonably diligent" candidate or group "be expected to satisfy" the provisions at issue. In *Rhodes*, the court also 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." 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.

State election regulations which impose financial burdens on candidates are severe if they work to exclude legitimate candidates from the ballot. *Bullock v. Carter*, 405 U.S. 134, 143 (1972). There, the court struck filing fees between \$1,000 and \$6,300 that had a "patently exclusionary character." *Id.* The exclusions based on wealth were inappropriate, and limited the voters' choice of candidates. *Id.*

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 noted that there was no ability "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 (1974)).

Applying the *Anderson-Burdick* test, the burden in this case is severe, or, even if it is not, given less burdensome alternatives, it fails to meet constitutional muster.

**A. Under the First and Fourteenth Amendments, the District Court erred in finding a middle tiered burden under *Anderson-Burdick* and should have found a severe burden**

In *Hargett II* this Court observed what is true here: “signature requirements as high as 5% are not facially invalid.” 767 F.3d at 546. Here, of course, the aggregate signature requirements far exceed 5% of the last Governor’s race, and, looking at the most onerous year in a four-year cycle (the next one is in 2018), requires submission of 155,500 actual valid signatures, and utilizing a safety factor of 1.75, for a total of 272,125 signatures. [Decl.Winger, RE#16-6, PAGEID#212-235; Decl.Moellman, RE#16-3, PAGEID#188-199].

Again Plaintiffs do not challenge the existence of a petition, requiring 5,000 signatures, to place a single candidate (and thus her party) on the ballot. Rather, this case involves the requirement on minor parties to submit separate petitions for various candidates with varying burdensome signature requirements and the inability to place numerous nominees on the ballot, as the major parties do, via petition.

To do so in 2018 requires signatures equal to 15.14% of the votes cast in Kentucky's last election for President. *Id.* 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. *Id.* The total cost for this 2018 effort is a staggering \$544,250. *Id.* And we know that these signatures must be gathered across multiple petitions, exponentially expanding the burden. [Decl.Tobin, RE#16-5, PAGEID#206-211].

In *Hargett II* this Court examined whether the Tennessee 2.5% petition requirement was unconstitutional as applied to the Plaintiffs in that case. 767 F.3d 533, 546. The *Hargett II* Court evaluated the effects of the signature requirement, keeping in mind other aspects of the “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 for groups such as the Plaintiffs, except to submit multiple petitions for each and every race.

In *Hargett II*, this Court observed that “[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions.” 767 F.3d at 547. This Court likewise observed that restrictions that affect a party’s primary functions raise questions of a severe burden. *Id.*, citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6<sup>th</sup> Cir. 2006).

This Court 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.” 767 F.3d at 547. This Court then looked at “‘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, this Court remanded. *Id.*

This Court explained the kind of evidence it wanted to see to determine constitutionality, including a survey of states with ballot-access requirements similar to Tennessee's. *Id.* at 549, n. 4. Here, the evidence is that the State of Washington, which changed its ballot access scheme in 2009 to a Presidential-only qualification mechanism, has not qualified any minor parties since it made this change. [Decl.Winger, RE#16-6, PAGEID#212-235].

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. *Id.* Furthermore, it is “impossible or virtually impossible” in the modern political landscape to do so. *Id.*

The better question about past experience is past success, or lack thereof, regards petitioning. Defendants’ witness, Ms. Helm, testified that from 2000

through 2010, LPKY placed 21 candidates on the ballot in Kentucky and CPKY placed seven in that same period. [Decl.Helm, RE#34-1, PAGEID#404-405].

While Ms. Helm counted the placement of both President and Vice President as separate candidacies (even though they submit one petition), LPKY has been able to place 21 candidates on the ballot, out of a total of 7,640 offices that were on the ballot in the same period that Ms. Helm looked at. [Decl.Winger, RE#16-6, PAGEID#231-235]. And CPKY even less. The fact that LPKY has been able to place candidates on the ballot in less than half a percent (0.2% to be exact) of the total races is not a vindication of Kentucky's scheme, but an indictment of it.

Taking Presidential/Vice-Presidential candidates out of this threshold, LPKY has been able to place only 13 candidates out of 7,634 offices on the ballot in a ten-year period (less than 0.2%) – and CPKY, only 1 candidate. Forcing minor parties that did not meet the vote test to pick and choose less than one quarter of 1% of the total races a year to compete in (which is what Defendants' own evidence shows) is a severe burden.

In *Storer*, 415 U.S. 724, 742, the court asked "could a reasonably diligent independent candidate be expected to satisfy" the provisions at issue? The answer here, as to being able to field more than a handful of candidates, is "NO." Kentucky fails to "provide feasible means for other political parties and other

candidates to appear on the general election ballot,” except in a small handful of races. *Id.* at 728.

In *Hargett II*, this Court 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. [Decl.Tobin, RE#16-5, PAGEID#206-211].

The *Hargett II* Court expressed concern with the failing of the State that is present here: “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. There is no showing that Defendants’ scheme, in the aggregate requiring over 15% of the votes cast in the last election for President, is necessary either.

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 not tailored to support a sufficient, much less a compelling, 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 has less restrictive alternatives that are equal, if not better, to meeting any state interests at issue, without the corresponding burden on minor parties.

Viable alternatives exist to Kentucky's scheme, including permitting a petition by a Political Group, to transform itself into a Political Organization. Unrefuted expert testimony is that 5,000 signatures by a minor party to do so would be sufficient. [Decl.Winger, RE #16-6, PAGEID#212-235].

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. Or a single petition for multiple candidates. Kentucky has simply chosen not to avail themselves of any of them. And Defendants have never explained why they could not have done so.

Defendants argued below [Brief, RE#33-1, PAGEID#323-368], 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. Courts do not agree. *Rhodes*, 393 U.S. 23 (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor). Other courts have struck much less onerous requirements. *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (10%); *Obie v. N.C. State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991) (10%); *Greaves v. State Bd. of Elections of N.C.*, 508 F. Supp. 78 (E.D.N.C. 1980) (10%); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977) (10%); *Am. Party of Ark. v. Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977) (7%); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1975) (15%); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970) (7%).

In support of their theory, Defendants pointed to cases in which a single candidate needed to submit a petition containing 5,000 signatures for statewide office. This is an attempt to compare apples to oranges.

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 *Rhodes*, 393 U.S. 23 (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 at least \$544,250

in the most onerous year of the four-year election cycle. [Decl.Moellman, RE#16-3, PAGEID#188-199). *Perez-Guzman v. Gracia*, 346 F.3d 229 (3<sup>rd</sup> Cir. 2003) (invalidating requirements due to, in part, significant costs).

In *Hargett III*, the right to automatic ballot access and its denial was deemed a “severe burden,” and subject to strict scrutiny. 791 F.3d 684 at 693. This was the case despite the fact that an individual candidate could have petitioned his or her way onto the ballot. *Id.* Here, 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 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.* In Kentucky, there is no petition ability for automatic blanket ballot access.

The *Hargett III* Court concluded that the burden was severe because minor parties had to achieve a vote test out of the gate while the “established major parties, which have more institutional knowledge and financial resources, are given

four years to obtain the same level of electoral success.” 791 F.3d at 693. 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, and unlike in *Hargett III*, where Plaintiffs 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.

Defendants have argued 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. At least in *Hargett III*, unlike Kentucky, there was a way to re-petition to achieve automatic ballot access. Kentucky’s scheme is more onerous than the scheme struck by this Court in *Hargett III*.

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.

In *Hargett III*, Tennessee countered that differences in the parties justified the differing treatment, but this Court observed 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. Kentucky could, but has not, used less restrictive means of achieving any purported state interests.

Defendants argued that *Hargett II* is distinguishable, because Plaintiffs have consistently placed an individual candidate or two on the general election ballot. [Brief, RE#33, PAGEID#323-368]. 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. 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 a smattering of ballot access were sufficient, this Court would not have struck the scheme in *Hargett III*, where the Plaintiffs had previously obtained automatic ballot access, finding the burden imposed on the Plaintiffs in that case to be “severe.” 791 F.3d at 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. *Id.*

In *Blackwell*, 462 F.3d 579, this Court properly took issue with the combined effects of Ohio’s petitioning methodology to place a candidate on the ballot. *See, also, Mandel v. Bradley*, 432 U.S. 173, 177-78 (1977) (the Court “must examine the entire scheme regulating ballot access”). The combined effects here including, without limitation: (a) no opportunity for substitution; (b) a requirement of multiple petitions (exponentially increasing the difficulty) and hundreds of thousands of combined signatures; (c) no parties, including minor parties nominate until Spring; (d) a limit of one petition signature per voter work in combination to create a severe burden. In *Blackwell*, as is the case in Kentucky, success at the ballot box resulted in automatic access. 462 F.3d 579. In *Blackwell*, as here, minimal past ballot access was no barrier to finding a severe burden. *Id.*

As here, the *Blackwell* Court noted that “Ohio’s regulations limit a far more important function of a political party - its ability to appear on the general election

ballot.” *Id.* at 588. “[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group.” *Id.* Nor did the fact that, like Kentucky, a minor party qualified for automatic ballot access in 1996 and an independent candidate in 1980 change the analysis. *Id.* at 589-590 fn.9.

As in *Blackwell*:

the restrictions ... serve to prevent a minor political party from engaging in the most fundamental of political activities - ... selecting a candidate, and placing that candidate on the general election ballot in hopes of winning votes and ultimately, the right to govern. The evidence in the record indicates the negative impact these laws have had on minor parties and on political activity as a whole in Ohio. As such, ... the Ohio system for registering minor political parties imposes a severe burden on associational rights. *Id.*

This case is more egregious than *Blackwell*, where there was a method to put the party on the ballot by petition. There is no such method in Kentucky – race-by-race petitions are necessary, numbering signatures that are collectively well over the line of constitutionality. And, as in *Blackwell*, the “the fact that an election procedure can be met does not mean the burden imposed is not severe.” *Id.* at 592.

The U.S. Supreme Court in *Storer*, 415 U.S. 724, 745 explained some differences between a “one off” or independent candidate’s campaign, and minor 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. *Id.*

Moreover, while *Storer* requires the state to treat these small parties differently than Independent candidates, Kentucky has chosen to completely ignore this requirement. *Id.*

Here, the challenged provisions cannot stand. If the burden is severe, it must be narrowly tailored to achieving a compelling government interest. As in *Blackwell*, the interests asserted by the State “include preserving the integrity and fairness of the electoral process and ensuring ... bona fide support.” 462 F.3d at 593.

Defendants argued that Kentucky’s petition signature requirement is “relatively modest,” and alleged 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, PAGEID#323-368].

But as in *Blackwell*, here “[t]he State makes no argument that [separate petitions for separate candidates totaling hundreds of thousands of signatures] is needed to ensure electoral fairness, and it would be difficult to do so.” 462 F.3d at 593.

As in *Blackwell*, while the state asserted interests in allegedly promoting stability and avoiding voter confusion, it “has put forth no evidence that these interests are compelling or that they are advanced by the [challenged provisions].”

*Id.* Moreover, as the *Blackwell* Court observed, “[t]here is some question as to whether this rationale is even reasonable. A state may not legitimately claim that preventing other parties from accessing the ballot is needed to protect political stability. ... This system serves to protect the two major parties at the expense of political dialogue and free expression, which is not justified, much less compelling.”

*Id.* Moreover,

the regulations arguably have a negative effect on limiting short-range candidates and preventing voter confusion. Political parties are organizations with short and long-term political objectives, as well as a desire for continuity and growth. By making it more difficult for parties to access the political arena, the state actually *increases* the possibility that issue-specific independent candidates will emerge to fill this void. These candidates do not offer the stability of a political party, and the sheer number leads to a greater likelihood of political instability and voter confusion. The State has made no showing that the voters of Ohio, who are able to cast an effective ballot featuring several independent candidates, would be flummoxed by a ballot featuring multiple political parties.

*Id.* at 594. Those same observations are true here. As in *Blackwell*, the restrictions here have implications on national elections as well. *Id.*

Finally, a similar regime to Kentucky’s was struck down in *Blomquist v. Thomson*, 591 F. Supp. 768 (D.Wy. 1984), where the Court invalidated Wyoming’s scheme that permitted only a petition to place a single candidate on, who could

achieve blanket ballot access at some time in the future based on vote results, finding a severe burden.<sup>9</sup>

In short, the challenged provisions constitute a severe burden, are not narrowly tailored, and are unconstitutional as applied to minor parties, such as the Plaintiffs in this case.

**B. Under the First and Fourteenth Amendments, even if the District Court properly found a middle tiered burden under *Anderson-Burdick*, it erred in finding that the interests put forward by Defendants justified the burden, versus one of several alternatives that were less burdensome but would have satisfied those same interests**

The District Court found that the burden was not severe, but instead found the burden lied between the severe burden and the rational basis review for non-discriminatory burdens.

Assuming that is the case, this requires a weighing of "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights." *Burdick*, 504 U.S. at 434, quoting *Anderson*, 460 U.S. at 789.

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<sup>9</sup> The legislature then amended the statute at issue, the District Court upheld the amended statute, and the Plaintiffs appealed. The Tenth Circuit reversed the District Court's rulings upholding the amended statute in *Blomquist v. Thomson*, 739 F.2d 525 (10<sup>th</sup> Cir. 1984).

"There is no litmus test to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and make the hard judgment that our adversary system demands." *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6<sup>th</sup> Cir. 2012); *See, also, Hargett III*, 791 F.3d 684, 693.

The burden is on the State to demonstrate how its interests are furthered by the specifically challenged provisions. *Northeast Ohio Coalition v. Husted*, 696 F.3d 580, 596 (6<sup>th</sup> Cir. 2012) ("the State does not show how these interests support the specific restriction challenged here"). Vague claims about smooth functioning of the electoral process, without a showing that the specific challenged provision is necessary to further the state's interests, is insufficient. *Obama for Am.*, 697 F.3d 423, 434. As in *Hargett III*, "[e]ven if we assume the burden is not severe, it is not justified by a sufficiently weighty state interest." 791 F.3d 684, 693.

As in *Blackwell*, there are serious questions about the state's alleged interests in demonstrating a modicum of support, maintaining stability, preventing voter overcrowding and frivolous candidates. 462 F.3d 593-594. But even allowing for these interests, the undisputed testimony was that requiring a party petition of 5,000 signatures for four years of ballot access would be sufficient to meet the state's interests without unduly burdening Plaintiffs' rights. [Decl.Winger, RE#16-6, PAGEID#212-235]. Defendants have put forward no evidence refuting that the proposed alternatives would equally advance Defendants' asserted interests.

The fact that less burdensome options were available to Kentucky, but not pursued, is fatal to Kentucky's regime, including: (1) a party petition to place the party on the ballot for four years; (2) a single petition to nominate all of a party's candidates in a given cycle; (3) less signatures on individual petitions when multiple petitions are submitted; or (4) even looking at other statewide races to measure a modicum of support.

Defendants have never explained why they need to have separate petitions for each race, totaling hundreds of thousands of signatures, versus pursuing one of the foregoing options – it cannot be ensuring support for particular candidates, since there is no guarantee of such support for major party candidates under Kentucky's scheme. As such, “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.’” *Hargett III*, 791 F.3d 684, 695. As in *Obama for Am.*, 697 F.3d 423 and *Northeast Ohio Coalition*, 696 F.3d 580, the failure to engage in meaningful tailoring renders the statute unconstitutional. *See, also, Blomquist*, 591 F. Supp. 768 (insufficient justifications for a similar scheme invalidated).

Thus, even if the District Court did properly determine that the middle tiered weighing analysis was proper under the burdens imposed, it failed to weigh the

burdens to Plaintiffs against the asserted state interests, and because less burdensome alternatives were available that would have equally met the state's interests, it erred in failing to find a constitutional violation on these facts.

**C. Under *Hargett III*, the District Court erred in failing to find an Equal Protection violation**

As noted, major parties qualify for blanket, or general, ballot access for four years, when their candidate for President obtains at least 20% of the vote. Political Groups, such as the Plaintiffs, must submit a petition for each individual race – there is no mechanism under Kentucky law to transform themselves into a Political Organization (whose candidate received 2% or more in a Presidential race), and hence qualify for ballot access.

As in *Hargett III*, Kentucky law “requires recognized minor parties to obtain [2]% of the total number of votes cast for [President] in the last [Presidential] election to retain [and obtain] ballot access beyond the current election year. In contrast, statewide political parties are given four years to obtain the same level of electoral success.” 791 F.3d 684, 693. In *Hargett III*, the Plaintiffs at least had one election of blanket ballot access to achieve success – in Kentucky they have none.

As in *Hargett III*, under Kentucky law, “in a non-[Presidential] election, a ... minor party and a statewide political party might each receive [1]% of the votes cast for [Presidential] candidates in the [Presidential] election held two years prior. .... The statewide political party, in contrast, would retain ballot access because, by

definition, it received at least [2]% of the total votes cast for [Presidential] candidates in the most recent [Presidential] election.” *Id.* at 693.

As in *Hargett III*, “the differences between these two types of parties justify having less onerous burdens on recognized minor parties than statewide political parties.” *Id.* at 694. Like Tennessee’s system, Kentucky’s regime “forces minor political parties to attain the *same* vote percentage as major political parties in *less* time.” *Id.* The evidence shows that fielding a slate of candidates, up and down the ticket, aids significantly to electoral success – something that the minor parties in Kentucky are unable to achieve. [Supp.Decl.Winger, RE#37-4, PAGEID#471-474].

As in *Hargett III*, Kentucky’s regime “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.’” 791 F.3d 684, 694.

The District Court erred in failing to find an equal protection violation.

## **II. The District Court erred in dismissing the Attorney General where he is a proper party under *Ex Parte Young***

Defendant Andrew Beshear is the Attorney General for the Commonwealth of Kentucky, and, pursuant to K.R.S. 15.242 and 15.243, is charged with the enforcement of the election laws of the Commonwealth of Kentucky. (Compl., RE#1, PAGEID#1-37). That charge includes the enforcement of K.R.S. 118.015,

and K.R.S 118.305, and he has enforced, continues to enforce, will in the future to enforce these statutes. *Id.*

This Court explained that these facts conferred standing in an almost identical case in *Hargett II*, 767 F.3d 533. There, as here, Defendants enforcement of the challenged “ballot-access laws [that] restricted the plaintiffs' political activities within the state and have limited their ability to associate as political organizations, and the plaintiffs have therefore articulated ‘a factual showing of perceptible harm’ resulting from the state's regulations.” *Id.* at 544.

Once a candidate is nominated, it is the duty of the Kentucky Secretary of State to certify to the county clerks the names of the candidates for office. K.R.S. 118.215. There is a prohibition placed upon the Kentucky Secretary of State, enforced with criminal felony charges, for improperly making a certification or withholding a proper certification. K.R.S. 118.215(4); K.R.S. 118.995(2). The Attorney General is the party charged with enforcing those provisions against the Kentucky Secretary of State and Board Defendants, under K.R.S. 15.242 and K.R.S. 15.243. That makes the Attorney General a proper party to this matter.

Last year, this Court addressed standing and the ability to state a claim in light of standing grounds for unconstitutional provisions in Kentucky’s election laws. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6<sup>th</sup> Cir. 2015). In that case, this Court noted that, as to standing:

The clearest answer is for Attorney General Conway, who has "jurisdiction, ... to investigate and prosecute violations of the election laws." Ky. Rev. Stat. § 15.242; *see also id.* § 15.243(1) (providing that "the Attorney General . . . shall enforce all of the state's election laws by civil or criminal processes"). Conway therefore has ample authority to prosecute ... criminally ... Russell properly named Conway as a defendant, and the district court properly denied Conway's motion to dismiss.

As this Court explained in *Russell*, "Kentucky's Attorney General, Secretary of State, and State Board members **are all subject to suit** here under *Ex parte Young*'s exception to Kentucky's Eleventh Amendment sovereign immunity." *Id.* at 1049. A political party's unconstitutional exclusion from the ballot has long been held to confer standing and to state a claim. *Rhodes*, 393 U.S. 23; *Storer*, 415 U.S. 724.

Probability of future injury counts as "injury" for the purpose of standing. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Plaintiffs allege sufficient facts that demonstrate they have standing. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6<sup>th</sup> Cir. 1995) (standing present to challenge Ohio election law due to threat of future potential enforcement); *Libertarian Party of L.A. County v. Bowen*, 709 F.3d 867 (9<sup>th</sup> Cir. 2013) (future plan to engage in specific activity in the next election confers standing).

As *Ex Parte Young*, 209 U.S. 123, 157 (1908), made clear, a special relation to a challenged statute, and standing, is present where a state officer is "expressly directed to see to [a statute's] enforcement." In *Young*, the Attorney General had the duty and power to enforce the challenged statutes. *Id.* In the present matter, the

Attorney General had and has a specific statutory mandate to enforce the challenged statutes. K.R.S. 15.242 and 15.243. The District Court erred in dismissing the Attorney General from this matter.

### **III. The Defendants defenses are inapplicable**

#### **A. Plaintiffs have shown a modicum of support and are willing to demonstrate public support to justify the relief they seek**

Defendants argued, on several occasions, that Plaintiffs failed to demonstrate a significant modicum of support. In *Green Party of Tennessee v. Hargett*, 700 F.3d 816, 821 (6<sup>th</sup> Cir. 2012) (*Hargett I*), this Court 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.

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) – Mr. Patterson had 44,240 votes in 2014 for U.S. Senate, and Mr. Moellman had 37,261 for State Treasurer in 2011. [Decl.Winger, RE#16-6, PAGEID#212-235]. Every time LPKY has run a statewide candidate (excepting President) it has far exceeded 20,000 statewide votes. As for CPKY, it is willing to submit a petition as a condition

of the relief it seeks (for this ballot cycle, it will be submitting a Presidential petition, and seeks to have relief based on this petition based on timing concerns).

Kentucky may require a modicum of support before treating a Political Group as a Political Organization. The problem here is that Kentucky only permits this showing in just one overly burdensome way -- the results of a Presidential race, while forgoing the following common, reasonable alternatives: (1) submit party petitions for four years of ballot access; (2) submit one petition for multiple candidates; or (3) look at other statewide races as barometers of support.

**B. This case involves the ability of general party access, not ballot access for a single candidate and involves both facial and as-applied challenges**

Defendants likewise argued that Plaintiffs asserted just a facial challenge to the 5,000 signature requirement for a single candidate race. Not so. In *Hargett III*, this Court explained the distinction between as-applied and facial challenges is not well defined. 791 F.3d 684, 691.

Plaintiffs argued and plead that the challenged are unconstitutional both facially and as-applied to minor parties who seek to run multiple candidates across multiple election cycles. [Compl., RE#1, PAGEID#1-17; Motion, RE#16, PAGEID#153-236].

### **C. Prevailing case law does not bar the claims in this matter**

Contrary to Defendants arguments, prior cases do not bar Plaintiffs' claims.

First, *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1201 (E.D. Ky. 1991), was a challenge involving an individual candidate's ability to be placed on the ballot. 776 F.Supp. 1200 at 1201. *Ehrler* did not involve, as this case does, minor political parties "blanket" or "general" ballot access once they have generated repeated statewide electoral success or otherwise established requisite support. 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 (6<sup>th</sup> Cir. 1981), and its predecessor at the district court level, *Greaves v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980) have any bearing on this matter. *Anderson* involved an independent candidate's 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.

Next, *Libertarian Party v. Davis*, 601 F. Supp. 522 (E.D. Ky. 1985), which involved 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.

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.

Defendants also cited *White*, 415 U.S. 767, for support. But *White* is different from Kentucky's scheme. 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 nominated by primary election, or parties that obtained 2% of the vote in the last election for governor 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 to put the party on the ballot. *Id.* Unlike Kentucky, in *White* there were ways other than simply success in particular prior elections, for a political party to achieve direct and general ballot access. *Id.*

A Governor's race is an easier method of obtaining a percentage of the vote than is a Presidential race. [Decl.Winger, RE#16-16, PAGEID#212-235]. Minor parties always have more success at state elections first, and using the Presidential race as the sole barometer is designed to keep them off the ballot.

*Munro v. Socialist Workers Party*, 479 U.S. 189, 194-195 (1986), the next case Defendants cited, 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 primary advanced to the general election. *Id.* The Supreme Court upheld the law, 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.

Finally, *Jenness*, 403 U.S. 431, involved an individual candidate's attempt to be placed on the ballot, and a challenge to a 5% signature requirement. As applied to an individual candidate's ballot access, and because "Georgia [had] imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes,"<sup>10</sup> the Court upheld the challenged statutes. *Id.*

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<sup>10</sup> Kentucky limits one voter to signing only one petition for each office. K.R.S. 118.315(2).

#### **D. Res Judicata and Collateral Estoppel are not applicable**

Defendants argued claim and issue preclusion [Brief, RE#33-1, PAGEID#323-368] – but again, those principles require that a Plaintiff could have, but did not raise the issues in prior litigation, including *Ehrler* and *Davis*. *Consolidated Television Cable Serv., Inc. v. City of Frankfort*, 827 F.2d 354 (6<sup>th</sup> Cir. 1988). Plaintiffs did not desire to run multiple candidates, in multiple races, in any prior case, and could not have, as a consequence, raised the issues that are raised herein, taking this matter outside the realm of res judicata and collateral estoppel. Absent such an intention, there was no standing to raise these issues and challenges in prior litigation. *Russell*, 784 F.3d 1037. 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*, 346 F.3d 229.

#### **IV. The District Court erred in not granting appropriate relief to Plaintiffs for this cycle, and given timing concerns, this Court should reverse, direct the District Court to immediately permit Plaintiffs to submit a list of candidates to Defendants for placement on the ballot for the 2016 cycle, and then fashion appropriate relief for future cycles**

Because the District Court erred with respect to the constitutional violation, it never addressed the issue of remedy. For injunctions on First and Fourteenth Amendment grounds, the usual four factor analysis condenses down into success on the merits. *ACLU of Ky. v. McCreary County, Ky.*, 607 F.3d 439, 445 (6<sup>th</sup> Cir.

2010); *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (irreparable harm from loss of constitutional rights); *Mich. Chamber of Commerce v. Land*, 725 F. Supp.2d 665 (E.D. Mich. 2010) (no harm to others to vindicate constitutional rights); *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.").

There is insufficient time to remand for fashioning of relief this election cycle. The District Court had this case under submission for over forty-five days after oral argument below. As noted in Plaintiffs' Motion for Expedited Relief, there is simply not time to remand to fashion a remedy for the 2016 cycle. Plaintiffs also seek relief from the requirements of K.R.S. 118.367 – which requires a statement of candidacy for each office to be filed by April 1. That date came and went while this case was pending below.

In *Rhodes*, 393 U.S. 23, the U.S. Supreme Court directed certain candidates be placed on the ballot, which is the precise remedy Plaintiffs seek here. The Libertarians have made the requisite showing of support through the voting results for Patterson and Moellman to be permitted to submit a list of candidates, and for what offices, they have made nominations within one week of this Court's final order.

Furthermore, both the Libertarians and the Constitution Party are undergoing a petition process now for their Presidential/Vice Presidential slates. Both parties could be permitted to turn in, with those petitions, their other nominees, for their other offices, and Defendants enjoined to certify them and place them on the ballot. *See, also, Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006) (holding that party had to be afforded recognized status, and could submit a petition to do so).

The deadline for these petitions is September 9, 2016. Plaintiffs request this Court remand, with a directive that the District Court enter an injunction within three days of such order permitting Plaintiffs seven days to provide a list of candidates to Defendants for including on the 2016 ballot, and then implement such further relief as is deemed appropriate for future election cycles.

### **CONCLUSION**

The judgment of the District Court should be reversed; Plaintiffs should be permitted to have their candidates placed on the 2016 ballot. The matter should be remanded for the District Court to implement this relief and to fashion appropriate relief for future election cycles should Kentucky elect not to change the law to comply with the Constitution.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2010, the pertinent parts of this brief contains 13,853 words in Times New Roman 14-point font.

/s/ Christopher Wiest  
Christopher Wiest (KBA 90725)

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 21 day of July, 2016, the foregoing Brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Christopher Wiest  
Christopher Wiest (KBA 90725)

**APPENDIX -- DESIGNATION OF THE DISTRICT COURT RECORD**

Plaintiffs/Appellants, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic record:

<b>Document Description</b>	<b>Record Entry No.</b>	<b>PageID</b>
Complaint and Exhibits	RE#1	1-37
Motion to Dismiss by Attorney General	RE#6	81-89
Motion to Dismiss by Board of Elections Defendants	RE#7	90-97
Plaintiffs' Response in Opposition to Motion to Dismiss by Attorney General	RE#8	98-109
Plaintiffs' Response in Opposition to Motion to Dismiss by Board of Elections Defendants	RE#9	110-123
Reply of Attorney General in Support of Motion to Dismiss	RE#13	129-142
Reply of Board of Elections Defendants in Support of Motion to Dismiss	RE#15	146-151
Motion for TRO, Preliminary Injunction, Permanent Injunction and Summary Judgment with Declarations in Support	RE#16	153-236
Emergency Motion to Expedite	RE#17	237-249
Response to Emergency Motion to Expedite	RE#19	253-258
Reply in Support of Emergency Motion to Expedite	RE#20	259-265
Order on Motions to Dismiss	RE#26	287-298
Answer by Board of Elections Defendants	RE#31	310-320
Order Expediting	RE#32	321-322

Counter Motion for Summary Judgment	RE#33	323-368
Response to Motion for Summary Judgment	RE#34	369-408
Plaintiffs Reply in Support of its Motion for Summary Judgment and Response in Opposition to Defendants Motion with Declarations in Support	RE#37	413-477
Defendants Reply in Support of Motion for Summary Judgment	RE#38	478-496
Memorandum Opinion and Order	RE#45	546-563
Judgment	RE#46	564-565
Notice of Appeal	RE#47	566-567
Transcript of Hearing	RE#48	568-643

/s/ Christopher Wiest  
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