CASE NO. 16-6107

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

PLAINTIFFS/APPELLANTS

v.

ALLISON 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*

DEFENDANTS/APPELLEES

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

PETITION OF PLAINTIFFS/APPELLANTS FOR PANEL REHEARING AND REHEARING *EN BANC*

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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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INTRODUCTION/RULE 35 STATEMENT

Appellants respectfully request panel rehearing pursuant to FRAP 40, and that this Court rehear this appeal *en banc* pursuant to FRAP 35.[1] *En banc* consideration is necessary to secure or maintain uniformity of the Court's decisions and this appeal involves questions of exceptional importance.[2] Pursuant to FRAP 35(a)(2): (1) the panel decision conflicts with a decision of the United States Supreme Court or of the Court to which the petition is addressed (including, without limitation: *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015) ("*Hargett III*"), *Green Party of Tenn. v. Hargett*, 767 F.3d 533 (6th Cir. 2014) ("*Hargett II*"), and *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)), and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions; and (2) this appeal involves one or more questions of exceptional importance, namely the rights of third and minor parties throughout the Sixth Circuit; further the Panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have

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[1] Appellants do not seek *en banc* review of the Attorney General's Motion to Dismiss decision.

[2] We recognize, of course, that due to timing concerns, the opportunity for relief for the 2016 election cycle has, or will, likely come and go, in light of the Panel decision and the September 9, 2016, deadline for Presidential petitions, at which point Kentucky ballots will be finalized and printed; however, this case was brought by political parties that run candidates over the course of several election cycles, and relief is possible for the 2018 election cycles and beyond.

addressed these issues and materially threatens ballot access for every minor party in each of the states that comprise this Circuit.

ARGUMENT

I. The Panel's Decision Contradicts Decisions in Sister Circuits That Have Recognized that the *Anderson/Burdick* Analysis Incorporates a Non-Discrimination Principle and failed to address this issue, which was presented in the briefing.

The Supreme Court first clearly stated a non-discrimination principle in its ballot access jurisprudence in *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), which invalidated draconian limitations on minor-party ballot access:

> It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause.

In *Anderson v. Celebrezze*, 460 U.S. 790, 793-794 (1983), the Court further explained: "A burden that falls *unequally* on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It *discriminates* against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." (Emphasis added).

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court further elaborated on its non-discrimination principle:

> when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. (Citations omitted).

This exact same framework was described in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The *Anderson/Burdick* framework presumes "nondiscriminatory restrictions." Discriminatory restrictions violate the First and Fourteenth Amendments even though the same restrictions applied across-the-board would not do so.

A political party, as a party, has a constitutional interest in coming into being. *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("[T]his Court has recognized the constitutional right of citizens to create and develop new political parties."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (same); *Storer v. Brown*, 415 U.S. 724, 745 (1974) ("[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other").

Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), provides an example. There, the Third Circuit ruled that although Pennsylvania's anti-fusion law did not itself violate the First Amendment, Pennsylvania's denying fusion only to minor parties violated Equal Protection:

> *because of the discriminatory aspects* of the Pennsylvania statutes, the burdens imposed by them on voters and on political parties are more onerous than those involved in *Timmons [v. Twin Cities Area New Party, 520 U.S. 551 (1997).]* In *Timmons,* the asserted burdens existed in the context of an across-the-board ban on fusion. In the instant case, the burden is exacerbated because Pennsylvania has allowed the major parties to cross-nominate but has disallowed minor parties from doing the same. (Emphasis added).

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), offers another example. There, Florida required that minor party candidates for President submit signatures to access the ballot and pay signature-verification fees. Neither requirement was unconstitutional and both had previously been upheld. *Id*. at 1540. The candidate's challenge was based on allowing major-party candidates to waive the fee while prohibiting minor candidates from doing so. Even though the burden imposed by the signature-verification fee was not "severe," *id*. at 1544, the discriminatory treatment was found unconstitutional under *Anderson*/*Burdick*.

This Court also recognized this principle of non-discrimination in *Hargett III*, 791 F.3d 684 (6th Cir. 2015). As in *Hargett III*, the Kentucky scheme denies "plaintiffs the same four calendar years afforded to statewide political parties to secure automatic ballot access." *Id.* at 691. The statute was struck despite the fact that an individual candidate could have petitioned his or her way onto the ballot, or achieved ballot access through electoral results, like Kentucky. *Id.*

In *Hargett III*, the right to automatic ballot access and its denial was deemed a "severe burden," and subject to strict scrutiny. *Id.* at 693. In this case, 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 automatic ballot access by submitting a petition with signatures equal to at least 2.5% of the votes cast in the last governor's election. *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.* The *Hargett III* Court struck this ballot access scheme. Kentucky's scheme is even worse, because there is no petition ability for automatic blanket ballot access in Kentucky. *See, also, Green Party of Ark. v. Daniels*, 445 F. Supp.2d 1056 (E.D. Ark. 2006); *Libertarian Party of S.D. v. Krebs*, 2016 U.S. Dist. LEXIS 75208 (D.S.D. June 2016).

The Panel's decision *did not even address* this aspect of *Hargett III* and the application of Equal Protection, even though it was separately set forth by Plaintiffs in their Merit Brief as a *separate assignment of error*. For this reason alone, the Panel's decision should be reconsidered.

The Panel's decision failed to recognize the nondiscrimination principle of *Anderson/Burdick* and in doing so not only improperly applied Supreme Court precedent, but also rendered a decision in conflict with decisions of the Third and

Eleventh Circuit, and this Court's decision in *Hargett III*. It ignored uncontested evidence that demonstrated multiple petitions had a diminishing return effect on minor parties. [Decl. Tobin, RE #16-5, PAGEID #206-211]. Indeed, this same unrefuted evidence demonstrated that it was impossible for *any* party to gather separate petitions totaling the number of signatures at issue.[3] [Decl. Winger, RE#16-6, PAGEID #212-235].

The Panel's sustaining Kentucky's discriminatory ballot access scheme conflicts with decisions of Sister Circuits and decisions of the Supreme Court. The Panel held that Kentucky's ballot-access scheme falls "well short of 'severe'" because, it opined, in contravention of unrefuted evidence to the contrary, that while gaining 2% of the votes in a presidential election may impose some financial costs and required greater campaign efforts, those costs certainly do not constitute "exclusion or virtual exclusion from the ballot," the standard the Panel found had to be met to constitute a severe burden. (Opinion, RE #21-2, p. 6). This holding

[3] The Panel took issue with Plaintiffs failing to present evidence that they actually ran, or tried to run, candidates for each and every partisan race in Kentucky. Plaintiffs' uncontested evidence showed they nominated candidates for office in view of Kentucky's scheme, nominated as many candidates as they could achieve ballot access for, and but for the scheme, would field candidates for each those offices. [Decl./Suppl. Decl. Eckenburg, RE#16-2, PAGEID#184-188, RE#37-1, PAGEID#453-460]. It is hard to understand the criticism that Plaintiffs had to accomplish, or try to accomplish, something they knew they could not do. Courts have struck down requirements by states that require parties to identify their candidates in advance of an election cycle. *Libertarian Party of Ill. v. Ill. State Bd. of Elections*, 2016 U.S. Dist. LEXIS 22176 (ND Ill. 2016).

ignores the unrefuted evidence to the contrary and the decisions of Sister Circuits that have invalidated similar discriminatory and burdensome laws.

The Second Circuit in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), found unconstitutional a New York membership law distinguishing between "political parties," which won at least 50,000 votes in the last gubernatorial election, and "political organizations," which had not. Both could run candidates, but "[a] number of unique benefits accrue[d] to a Party [that had won more than 50,000 votes]." *Id*. at 415. Among these benefits included automatic ballot access. *Id*. at 415-416.

In *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), the Tenth Circuit likewise invalidated a scheme that fell unequally on new or small political parties.

In *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), [] *summarily aff'd*, 400 U.S. 806 (1970), the District Court, and the Supreme Court summarily affirming, concluded "that the effect of these provisions … is to deny independent or minority parties which have succeeded in gaining a position on the ballot but which have not polled 50,000 votes for governor … an equal opportunity to win the votes of the electorate." *Id*. at 995.

The Second Circuit reached this same result in *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994). “It is clear that the effect of these provisions ... is to deny

independent or minority parties ... an equal opportunity to win the votes of the electorate." *Id*. at 60 (citation omitted).

Because of the Circuit split rendered by the Panel's decision, its conflict with prior Sixth Circuit decisions, and its tension with Supreme Court precedent, *en banc* review is appropriate.

II. Requiring a showing of "exclusion or virtual exclusion" to sustain a "severe burden," and the other justifications for the "burden" decision given by the Panel runs contrary to precedent from this Court, Sister Courts, and the U.S. Supreme Court

The Panel held that the burden imposed upon Plaintiffs by Kentucky's ballot-access restrictions is not "severe" because it believed that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot." (Opinion, RE #21-2 at p. 5). The Panel then found that the 2% Presidential race requirement was not a severe burden based upon extremely sporadic ballot results that occurred only four times in the last 100 years, and equated election results in a Presidential race with petitioning requirements. (*Id.* at pp. 5-7). This rationale runs afoul of clearly established precedent from this Court, Sister Courts, and the U.S. Supreme Court. *En banc* review of the Panel's holdings is warranted.

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." *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).

Contrary to the Panel's view, Justice Scalia, with Justices Alito and Thomas, have suggested that a burden is "severe if it goes beyond the merely inconvenient." *Crawford*, 553 U.S. at 205.

In *Storer*, 415 U.S. 724 at 742, the Court asked "could a reasonably diligent" candidate or group "be expected to satisfy" the provisions at issue. In *Williams*, 393 U.S. 23, 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 (emphasis added). Some regularity is not, as the Panel determined, four times in 100 years.

In *Hargett II*, 767 F.3d 533, 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 (6th Cir. 2006). This Court explained the kind of evidence it wanted to see in *Hargett II*, to determine the severity of the burden. *Id.* at 549, n. 4. Here, the unrefuted evidence established exactly that evidentiary basis. [Decl. Eckenberg, Moellman, Krogdahl, Tobin, Winger, RE #16-2, RE #16-3, RE #16-4, RE #16-5, RE #16-6; PAGEID#184-236; Supp. Decl. Eckenburg, Moellman, Krogdahl, Winger, RE#37-1, RE#37-2, RE#37-3, RE#37-4, PAGEID#453-474]. This unrefuted evidence established a significant limitation upon these minor parties that limited them to a couple of elections per election cycle they could compete in, out of thousands. Instead, because they could appear on a couple of ballots per year, the "exclusion or virtual exclusion" from the ballot standard imposed by the Panel was not met.

The Panel's apparent requirement of a showing of "exclusion or virtual exclusion" from the ballot to meet a "severe burden" was rejected by this Court in *Blackwell*, 462 F.3d 579, 592, when it noted "the fact that an election procedure can be met does not mean the burden imposed is not severe." *Id.*; *citing Anderson*, 460 U.S. at 791, n. 12. The impact of the Panel's decision sanctions a law passed by a state in this Circuit that would permit only the political party that prevailed in the last Presidential election to field candidates for more than three offices around the state. Such a law would not result in the "exclusion or virtual exclusion" of the

other major party, or any minor party, since they can compete in at least two or three races, the precedent set by the Panel would sustain it. Such a scheme is not only a severe burden, it is a *threat to democracy.* And the Panel's decision invites the enactment of just such a scheme.

The Panel equated achieving 2% in the Presidential race to a signature requirement of 2%. That notion, refuted by the only evidence of record that addressed the issue, was also rejected by the U.S. Supreme Court in *Jenness*, 403 U.S. 431, 440, which suggested that the burden of vote achievement was greater than that of a petitioning requirement. *Jenness* likewise stands for the unremarkable proposition that burdens that freeze the *status quo* are impermissible.

The Panel ignored the "chicken and egg" freezing of the *status quo* problem in its analysis on this score. The unrebutted evidence in this case established that down ticket races affects Presidential performance, and Presidential performance is affected by down ticket races. [Decl. Winger, RE #37-4, PAGEID #471-474]. There is no way to break the cycle, without the ability to place the entire party and all of its nominees, on the ballot. This is even more troublesome considering the uncontested evidence of record that demonstrated a diminishing return issue regarding multiple petition drives at the same time. [Decl. Tobin, RE #16-5, PAGEID #206-211]. The Panel's decision, treating vote results and petitioning requirements as equivalents, runs afoul of *Jenness*' observation that "the grossest

discrimination can lie in treating things that are different as though they were exactly alike." 403 U.S. 431, 441-42.

In *Hargett III*, 791 F.3d 684, this Court likewise found a severe burden, and an equal protection violation, even though the party could have achieved vote results for ballot access, and even though the party could likewise have submitted a petition to achieve ballot access. *Hargett III* conflicts with the Panel decision.

In *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n,* 800 F.3d 913, 921 (7th Cir. 2015), the Seventh Circuit was clear that "where the electoral scheme interferes with the marketplace by restricting the number of candidates a party may nominate, … the State has severely burdened the voter's ability to cast a meaningful and effective vote." Kentucky's scheme does just that. The Panel's decision conflicts with *Common Cause*. *En banc* review is clearly warranted and appropriate.

III. The "flexible" analysis employed by the Panel to uphold Kentucky's ballot scheme runs against clearly established precedent from this Court, Sister Courts, and the U.S. Supreme Court

Even assuming that the Panel appropriately found that the "flexible analysis" of *Anderson*, 460 U.S. at 789 was applied, its decision conflicts with prior published decisions from this Court, warranting *en banc* review. As support, the Panel cited to the 2000 Florida Presidential election in terms of the state interests in avoiding "voter confusion, ballot overcrowding, and frivolous candidacies."

But peer reviewed research, by Plaintiffs' own expert (and others), refutes this.[4] The record evidence demonstrated that significantly less burdensome measures would be effective at meeting those purported interests. [Decl. Winger, RE #16-6, PAGEID #212-235; Supp. Decl. Eckenburg, RE #37-1, PAGEID #453-460; Supp. Decl. Krogdahl, RE #37-3, PAGEID #467-470].

The Panel ignored the less burdensome, but equally effective means that would have vindicated the state's asserted interests, conflating them with "second-guess[ing] the legislative decisions of the Kentucky General Assembly." (Opinion, p. 10). In the end, this ignores *Anderson*'s mandate that the Courts determine "the extent to which those interests make it ***necessary*** to burden the plaintiff's rights." 460 U.S. at 789 (emphasis added). "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id. at 806, citing Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973). *Anderson* thus calls for a tailoring analysis that weighs necessity with burden, and not a rubber stamp when a state asserts interests generally.

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[4] Richard Winger. Election Law Journal: Rules, Politics, and Policy. April 2006, 5(2): 170-200. *Green Party of Ark. v. Daniels*, 445 F. Supp.2d 1056, 1060 (E.D. Ark. 2006) (citing same). Plaintiffs had no opportunity to address the apparent concerns by the Panel, but scholarly research is clear that the poor design of the "butterfly ballot," rather than the number of candidates, was the cause of the issues in Florida.

That aspect of the Panel's decision is in conflict with *Hargett II*, 767 F.3d 533 at 549, where this Court noted that Tennessee failed to support their requirements of 2.5%, versus something lower. *Id.* Here, Kentucky has put forward no evidence supporting their chosen 2% scheme. This Court in *Hargett II* questioned the asserted state interests because "Tennessee's supposed interest in avoiding 'voter confusion' is undermined by its rules that liberally grant ballot access to independent candidates," *Id.*, something also present in this case.

The Second Circuit likewise analyzed the "fit," or lack thereof, in *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000). In *Lerman*, the Second Circuit invalidated a ballot petition witness residency requirement, on the grounds that the requirement was not necessary to advance the interests put forth by the state. The same is true here, where the Defendants did not even attempt to argue that the less burdensome alternatives available[5] would not have been sufficient to vindicate the proffered interests. *See, also, Green Party of Ga. v. Kemp*, 2016 U.S. Dist. LEXIS 34355 (N.D. Ga. 2016).

The Panel's *Anderson* "flexible analysis" conflicts with *Hargett II*, *Lerman*, and warrants *en banc* review of the question of whether, if far less burdensome requirements on minor parties are available, which also effectively meet the state's

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[5] This includes permitting mid-term elections for the vote test; a single petition for all of a parties' candidates; or a petition to place the entire party on the ballot for a four-year cycle, even with a heightened signature requirement.

purported interests, but are not pursued, is the scheme constitutional under *Hargett II* and *Lerman*, let alone the "new" flexible analysis that requires nothing in the way of tailoring?

CONCLUSION

The Panel's decision conflicts with this Court's precedent, and the precedent of Sister Circuits, as well as the U.S. Supreme Court's precedent. It serves as a dangerous invitation to states within the Sixth Circuit to eliminate, entirely, party petition procedures, to treat non-major parties exactly like independent candidates, and for even a major party to discriminate against the other majority party by limiting the number of races in which they can compete. It warrants *en banc* review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon Counsel for the Appellants this 7th day of September, 2016 via the Court's CM/ECF system, which will provide notice to all Counsel of Record.

/s/ Christopher Wiest___________
Christopher Wiest (KBA 90725)

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 35 AND 6TH CIRCUIT RULE 35

This response complies with the type-volume limitations of Fed. R. App. P. 35 because it does not exceed 15 pages, excluding the parts of the response exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the response has been prepared in proportionally spaced typeface using Microsoft Office Word 10.0 in 14 point Times New Roman font.

/s/ Christopher Wiest___________
Christopher Wiest (KBA 90725)

APPENDIX

Panel Decision

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 16-6107, *Libertarian Party of Ky., et al v. Grimes, et al*
Originating Case No. : 3:15-cv-00086

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Robert R. Carr

Enclosures

Mandate to issue.

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0212p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF KENTUCKY; LIBERTARIAN NATIONAL COMMITTEE, INC.; KEN MOELLMAN, JR.; CONSTITUTION PARTY OF KENTUCKY, *Plaintiffs-Appellants*, *v*. ALISON LUNDERGAN GRIMES, Secretary of State of the Commonwealth of Kentucky; JOSHUA G. BRANSCUM, JOHN HAMPTON, STEPHEN HUFFMAN, DONALD BLEVINS, JR., ALBERT B. CHANDLER, III, and GEORGE RUSSELL, Members of the State Board of Elections; MARYELLEN B. ALLEN, Executive Director, Kentucky State Board of Elections; ANDREW G. BESHEAR, Attorney General, all in their official capacities, *Defendants-Appellees*.	No. 16-6107

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 3:15-cv-00086—Gregory F. Van Tatenhove, District Judge.

Decided and Filed: August 26, 2016

Before: MERRITT, BOGGS, and McKEAGUE, Circuit Judges.

COUNSEL

ON BRIEF: Christopher Wiest, Robert A. Winter, Jr., CHRIS WIEST, AAL, PLLC, Crestview Hills, Kentucky, for Appellants. Jonathan T. Salomon, Katherine Lacy Crosby, TACHAU MEEK PLC, Louisville, Kentucky, for Appellee Grimes and Board of Elections Appellees. S. Travis Mayo, Matt James, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee Beshear.

OPINION

BOGGS, Circuit Judge. Appellants are the Libertarian Party of Kentucky, the Libertarian National Committee, the Constitution Party of Kentucky, and Ken Moellman, Jr., an individual voter and former Libertarian Party candidate for Kentucky state office. The gravamen of appellants' complaint is that Kentucky law unconstitutionally burdens appellants' First and Fourteenth Amendment rights to freedom of political association and equal protection by categorizing the Libertarian Party and Constitution Party as "political groups," which must petition to list their candidates for state and local office on election ballots, rather than as "political parties" or "political organizations," which enjoy "blanket" ballot access for all the candidates they nominate. The district court concluded that the Commonwealth of Kentucky's three-tiered ballot-access scheme was a constitutional means of exercising the Commonwealth's power to regulate elections. We affirm.

I

The Commonwealth of Kentucky classifies a political association as (1) a "political party" if it received at least twenty percent of the total vote cast in the last presidential election, (2) a "political organization" if it received at least two percent of the vote of the state in the last presidential election, or (3) a "political group" if it fails to qualify as a "political party" or a "political organization." Ky. Rev. Stat. § 118.015. Political candidates who are members of a political party or political organization may gain ballot access by winning their party's nomination at a convention or in a primary election. *Id.* §§ 118.305, .325, .105. Members of a political group, on the other hand, must obtain voters' signatures on a qualifying petition in order to gain ballot access. *Id.* § 118.305(1)(d). The signature requirement is 5,000 for a statewide office; 400 for the United States House of Representatives; 100 for a county officer, member of the Kentucky General Assembly, or Commonwealth's Attorney; and twenty-five or fewer for various other local offices. *Id.* § 118.315(2). Individuals may sign more than one petition for the same office only if each petition nominates a soil and water conservation district supervisor (of which seven are elected to staggered terms for each of Kentucky's 120 counties); in all other cases, if an individual signs multiple petitions for the same office, only the signature on the first

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petition to be filed is counted. *Ibid.* Petitioning may begin approximately one year preceding the election for which a candidate seeks ballot access, and petitions must be filed with the Secretary of State or county clerk by the second Tuesday in August preceding the election, allowing approximately nine months for candidates to gather signatures. *Id.* § 118.365(5).

Appellants' argument is essentially this: the two-percent requirement for blanket party access to the general-election ballot is "impossible, or virtually impossible" to satisfy, and the alternative means of fielding candidates by petition is unconstitutionally burdensome—not as applied to any individual candidate for a specific office, but rather as applied to the Libertarian Party and Constitution Party as political associations, because these associations must incur high costs of gathering and filing petitions in order to field a slate of candidates for state and local office. Appellants' Br. 11. Appellants argue that by allowing political parties and organizations blanket ballot access without the need for petitioning, and by requiring groups like the Libertarian Party and Constitution Party to incur heavy burdens by filing petitions, the Commonwealth's ballot-access laws deny appellants equal protection and "appear designed" to "keep candidates other than the Democrat and Republican candidates off the ballot." *Id.* at 23. Appellants challenge the Commonwealth's laws "both facially and as applied," *id.* at 29, and appellants' arguments "have characteristics of as-applied and facial challenges." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)).

We have previously held that the 5,000-signature requirement to petition for statewide-office ballot access is consistent with the Equal Protection Clause. *Anderson v. Mills*, 664 F.2d 600, 606–07 (6th Cir. 1981). The Eastern District of Kentucky has also upheld the 5,000-signature requirement in a challenge under the First and Fourteenth Amendments involving appellant Libertarian Party of Kentucky. *Libertarian Party v. Davis*, 601 F. Supp. 522, 523–25 (E.D. Ky. 1985). Both cases involved challenges arising from the denial of ballot access to specific candidates. We have not yet, however, evaluated the constitutionality of the two-percent requirement for *blanket* party access to the general-election ballot under either the First Amendment or the Fourteenth Amendment, nor have we evaluated the constitutionality of the

petitioning requirements as applied to a political association as a whole.[1] We do so today, following the well-established *Anderson-Burdick* framework, which "serves as 'a single standard for evaluating challenges to voting restrictions.'" *Green Party of Tenn. v. Hargett*, 791 F.3d at 692 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012)).

II

The United States Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), established a three-step framework for evaluating state restrictions on ballot access. The first step of *Anderson-Burdick* is to consider the "character and magnitude" of the restriction: "severe" restrictions are subject to heightened scrutiny, "minimally burdensome" restrictions are subject to rational-basis review, and regulations falling in the middle warrant a "flexible analysis" that weighs the state's interests and chosen means of pursuing them against the burden of the restriction. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (citing *Anderson* and *Burdick*). The second step is to "identify and evaluate" the state's interests and justifications for its restrictions. *Id.* at 546. The third step is to assess the "legitimacy and strength" of those interests to determine whether the restrictions are constitutional burdens on ballot access. *Ibid.*

[1] Appellants challenge the effect on the Libertarian Party and the Constitution Party of the various petitioning requirements (and not only the 5,000-signature requirement to petition for a nominee to statewide office), including the requirement in most cases to file a separate petition with unique signatures for each nominee rather than filing a single petition per election year. Notably, the number of signatures required for each petition is both relatively modest and roughly congruent to the number of registered voters in the political unit represented by each corresponding political office: 5,000 signatures for statewide office, for instance, represents roughly 0.15% of the 3,261,183 voters registered in Kentucky as of August 2016, State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by district), http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf; 400 signatures for the United States House of Representatives represents just under 0.1% of the number of voters registered in each of Kentucky's six congressional districts; and 100 signatures for the Kentucky General Assembly represents roughly 0.3% of the number of voters registered in each of Kentucky's 100 house districts and roughly 0.1% of the number of voters registered in each of Kentucky's thirty-eight senate districts. *Ibid.* While there is surely some variance in the ratio of required signatures to registered voters at the county-or-lower level (since the signature requirements are fixed, while the number of registered voters per county ranges from 1,734 in Robertson County to 573,650 in Jefferson County), there is likely also variance in the difficulty of obtaining signatures depending on factors such as whether a county is predominantly urban or rural, and in any event the requirements of 100 or fewer signatures for county- or lower-level offices do not impose a severe burden for the reasons we set forth below. State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by county), http://elect.ky.gov/statistics/Documents/voterstatscounty-20160811-031759.pdf.

A

At the first step, we hold that the burden of the Commonwealth's ballot-access restrictions on appellants is not "severe." The hallmark of a severe burden is exclusion or virtual exclusion from the ballot. *Compare Lubin v. Panish*, 415 U.S. 709, 719 (1974) (striking $701.60 filing fee for ballot-access petition because it excluded indigent candidates from running for office with no reasonable alternative means of access), *and Williams v. Rhodes*, 393 U.S. 23, 24, 35 (1968) (striking "series of election laws," including requirement that minor political parties file a petition signed by the number of voters equal to fifteen percent of the votes cast in the preceding gubernatorial election, because it "made it virtually impossible" for any party other than the Republican Party and Democratic Party to gain ballot access), *with Jenness v. Fortson*, 403 U.S. 431, 438 (1970) (upholding a requirement that five percent of all registered Georgia voters sign candidate's petition for ballot access and noting that even serious restrictions on third parties' ballot access are generally upheld unless they truly operate to "freeze the political status quo").

In some circumstances, the "combined effect" of ballot-access restrictions can pose a severe burden. *Citizens to Establish a Reform Party v. Priest*, 970 F. Supp. 690, 699 (E.D. Ark. 1996) (citing *Republican Party of Ark. v. Faulkner*, 49 F.3d 1289 (8th Cir. 1995)); *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582–83 (6th Cir. 2006) (striking down Ohio regulatory scheme where minor political parties could gain general-election ballot access only if they both participated in the March primary and—120 days prior to the March primary—filed a petition with signatures equal to one percent of the votes cast in the previous statewide election); *see also Jenness*, 403 U.S. at 442 (noting that Georgia's higher-than-most five-percent signature requirement was "balanced by the fact that Georgia has imposed no arbitrary restrictions whatever" on voters who want to sign multiple petitions). A very early filing deadline, for example, combined with an otherwise reasonable petitioning requirement, can impose a severe burden, especially on independent candidates or minority parties that must gather signatures well before the dominant political parties have declared their nominees. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 739–40 (1974) (remanding for further factual development where a California requirement that a party obtain approximately 325,000 signatures on a petition within a twenty-four-day period may have posed a severe burden); *Council of*

Alternative Political Parties v. Hooks, 121 F.3d 876, 880 (3d Cir. 1997) (holding that a filing deadline fifty-four days before the primary election was an unconstitutional burden); *McLain v. Meier*, 637 F.2d 1159, 1163–64 (8th Cir. 1980) (finding "particularly troublesome" a filing deadline ninety days before the primary election); *Priest*, 970 F. Supp. at 697–98 (concluding that a filing deadline in January, more than four months before the primary election, was an "unreasonable burden").

The burden of the Commonwealth's ballot-access scheme on appellants thus falls well short of "severe": while the blanket-access requirement of gaining two percent of the votes in a presidential election may impose some financial costs on the Libertarian Party and the Constitution Party to the extent that meeting the threshold may require greater campaign efforts, those costs certainly do not constitute exclusion or virtual exclusion from the ballot. After all, the requirement that a minor party secure two percent of the actual votes cast in a presidential election is not substantially different from a requirement that a party secure signatures of two percent of the registered voters in a jurisdiction: indeed, the absolute number of votes required (35,944 out of 1,797,212 cast in the 2012 election, for example) is significantly lower than the number of signatures that would be required under a regulation that required the signatures of two percent of registered voters (65,224 out of 3,261,183)—and even such a burden would fall well below the five-percent requirement that the Supreme Court upheld in *Jenness*, 403 U.S. at 442. See State Bd. of Elections, Commonwealth of Ky., *Official 2012 General Election Results* (2012), http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2012/2012genresults.pdf; State Bd. of Elections, Commonwealth of Ky., Voter Registration Statistics Report (2016) (August report by district), http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf.

Further, the two-percent requirement for blanket ballot access cannot constitute exclusion or virtual exclusion because blanket access is only one of two ballot-access mechanisms. The alternative option of filing petitions for each candidate's candidacy remains, as we have held before, *see Anderson v. Mills*, 664 F.2d at 606–07, a reasonable means of ballot access.

Although appellants argue that meeting the two-percent requirement "is impossible, or virtually impossible," Appellants' Br. 11, third parties in Kentucky have done exactly that several times in recent election cycles: the American Party in 1968, the Anderson Coalition in

1980, and the Reform Party in 1996. Appellants contend that "if [a] party is only interested in state politics," it is "impossible" for such a party to gain blanket ballot access. Appellants' Br. 12 (citing the Progressive Party of Vermont, which has eight state legislators but does not field any presidential candidates, as an example of the sort of political group that would find it very difficult to gain blanket ballot access under a statute like Kentucky's). But while that argument may have some force, since a party that failed ever to field a presidential candidate would be unable to gain two percent of the votes in a *presidential* election, the hypothetical burden of Kentucky's regulation on a hypothetical party has no bearing on appellants, and we do not decide how severe, if at all, such a burden would be.

Moreover, appellants have not demonstrated that the "combined effect," *Priest*, 970 F. Supp. at 699, of the Kentucky regulation is to impose a severe burden on their access to the ballot. Indeed, the Libertarian Party has satisfied the petitioning requirement and fielded a candidate for President of the United States in every presidential election since 1988. Even the Constitution Party—which boasts fewer than 400 registered voters in Kentucky—has placed a presidential candidate on the ballot in 2000, 2004, and 2008. See State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by district), http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf. Unlike the pre-primary filing deadlines in Hooks, 121 F.3d at 880, *McLain*, 637 F.2d at 1163–64, and *Priest*, 970 F. Supp. at 698, Kentucky allows political groups to file petitions for candidacy three months before the general election, and provides such groups approximately nine months to gather a quantity of signatures that amounts in almost all cases to less than 0.3% of the number of registered voters in the political unit that corresponds to each office. Ky. Rev. Stat. §§ 118.365(5), .315(2).

Appellants further argue that the burden of the regulation is severe because of the cost on the party of filing separate petitions for each office for which the party wishes to field a candidate. Appellants argue that if they wished to field a candidate for every state and county office over a four-year term,[2] the cost of petitioning would be as much as $734,328: $2 per

[2]Notably, over the four-year term including the 2017–2020 election years, appellants would have to field candidates for a total of 2,590 offices: 2,457 offices for the 2018 election, six for the 2019 election, and 127 for the 2020 election. Nothing in the record would indicate that appellants have ever sought or now seek to nominate candidates to anywhere near that number of offices over a four-year term.

signature for the 367,164 unique signatures that appellants claim would be required to satisfy the petitioning requirements for every office while maintaining a "safety factor" of 1.75.[3] Appellants compare this to the filing fee that the Supreme Court struck down in *Lubin*, 415 U.S. at 719. Appellants' Br. 31–32. But appellants cite figures based on the market rate charged by "professional petitioners" to gather signatures, even though nothing in the Kentucky regulation requires the use of such professionals. *Id.* at 16. And again, appellants present the hypothetical maximum cost of petitioning without demonstrating any likelihood that appellants would actually field a full slate of candidates for every state and county office during an actual four-year term. Thus, unlike the mandatory filing fee in Lubin, the incidental costs of gathering signatures on petitions do not come close to exclusion from the ballot, and thus do not impose a severe burden on ballot access.

Having concluded that the burden on appellants is not so "severe" as to warrant strict scrutiny, we also conclude that the burden is not so "minimal" as to warrant rational basis review. *Green Party of Tenn. v. Hargett*, 767 F.3d at 546 (citing *Burdick*, 504 U.S. 428). A burden is minimal when it "in no way limit[s] a political party's access to the ballot." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997) (holding "minimal" any burden imposed by a regulation that prohibited an individual from appearing on the ballot as the candidate for more than one party), and *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (upholding statute allowing only registered members of a party and registered independents to vote in a primary election)). Here, the burden of the Kentucky regulation on appellants is at least somewhat greater than minimal because appellants must either earn sufficient votes in a presidential election to gain political-organization status, presumably at more-than-minimal cost in terms of time, effort, and money, or engage in petitioning that is not required of major political parties, with the result that minor parties will necessarily spend time, effort, and money gathering signatures that they could otherwise spend campaigning for candidates. To the extent that a minor party therefore fields fewer candidates or earns fewer votes than it would if it enjoyed blanket ballot access without having to earn it, the Kentucky regulation imposes a more-than-minimal burden. Since the

[3] Safety factor refers to the ratio of actual signatures gathered to signatures required. Candidates generally gather more signatures than required to hedge against the risk of invalid or duplicate signatures. Appellants' Br. 1–2.

Kentucky regulation thus falls somewhere "in between" minimal and severe, *Green Party of Tenn. v. Hargett*, 767 F.3d at 546, we will next engage in the "flexible analysis," *Anderson v. Celebrezze*, 460 U.S. at 789, that the district court rightly employed.

B

At the second step of *Anderson/Burdick*, we hold that Kentucky has an important interest in ensuring that candidates demonstrate a "significant modicum of support," *Jenness*, 403 U.S. at 442, before gaining access to the ballot, primarily in order to avoid voter confusion, ballot overcrowding, and frivolous candidacies.

Under Article I, Section 4, of the United States Constitution, it falls to the states to prescribe the "times, places and manner of holding Elections," subject to some federal oversight. U.S. Const. art. I, § 4, cl. 1. The Supreme Court has held that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic process." *Storer*, 415 U.S. at 730 (finding a significant state interest in avoiding ballot confusion to be a valid justification for requiring independent candidates to be politically disaffiliated with other parties for one year before the primary election); *see also Timmons*, 520 U.S. at 364, 366 (noting that "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials" and that states have a "strong interest in the stability of their political systems").

The Commonwealth of Kentucky has asserted interests in avoiding the voter confusion, ballot overcrowding, and frivolous candidacies that would likely arise in increasing frequency as the number of parties with blanket ballot access increased. The district court rightly noted that the privilege of blanket access is significant, for any party with blanket access may field as many candidates as it nominates to every state and local election for a four-year term, adding a potentially great number of candidates to ballots statewide. The interests cited are central to the regulation of elections: for example, much of the controversy attendant to the 2000 presidential election in Florida was occasioned by the fact that Florida permitted ten parties to be included on the presidential ballot, leading to a variety of confusing and unorthodox ballot designs that would not have been necessary with a smaller number of parties. Thus, the Commonwealth may

sensibly require the kind of broad-level support that is measured by a political group's ability to garner two percent of the vote in a presidential election.

C

Finally, at step three of *Anderson/Burdick*, we hold that the Commonwealth of Kentucky's legitimate interests in regulating elections are sufficiently strong to justify its chosen means of achieving them, even if less restrictive means might be available. Appellants contend that rather than requiring political groups to obtain two percent of the votes in a presidential election in order to enjoy blanket ballot access, Kentucky should alternatively allow mid-term or gubernatorial election results to qualify a political association as a political party or organization. Appellants' Br. 13. Our job, however, is not to second-guess the legislative decisions of the Kentucky General Assembly but only to evaluate whether those decisions pass constitutional muster, and for the reasons discussed above in Parts II-A and II-B, the strength of Kentucky's interests in avoiding voter confusion, ballot overcrowding, and frivolous candidacies outweighs the modest burden of the ballot-access regulations on appellants.

As for the petitioning requirement, appellants argue that they should be able to file a single petition rather than separate petitions for each candidate. While such a scheme would almost certainly require less time and effort of appellants if they chose to field many candidates in a given election year, it is not the system that Kentucky has chosen and that we now uphold.

III

We also affirm the district court's grant of Attorney General Beshear's motion to dismiss. The district court properly held that the Attorney General was not a proper defendant because the Attorney General's general enforcement powers did not provide a basis on which to grant appellants relief.

Accordingly, the district court's judgment is AFFIRMED.

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v.

ALISON LUNDERGAN GRIMES, Secretary of State of the Commonwealth of Kentucky; JOSHUA G. BRANSCUM, JOHN HAMPTON, STEPHN HUFFMAN, DONALD BLEVINS, JR., ALBERT B. CHANDLER, III, and GEORGE RUSSELL, Members of the State Board of Elections; MARYELLEN B. ALLEN, Executive Director, Kentucky State Board of Elections; ANDREW G. BESHEAR, Attorney General, all in their official capacities,
Defendants - Appellees.

Before: MERRITT, BOGGS, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk