No. 16-3794

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LIBERTARIAN PARTY OF ARKANSAS; KRISTIN VAUGHN; ROBERT CHRIS HAYES; DEBRAH STANDIFORD; MICHAEL PAKKO,
Plaintiffs-Appellees,

v.

MARK MARTIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF ARKANSAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Arkansas, Western Division

Honorable James M. Moody, Jr., District Judge
D.C. No. 4:15-cv-00635-JM

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The trial court in the case below, after a bench trial, correctly granted judgment for Plaintiffs against Defendant Secretary of State by declaring the ballot access scheme for Arkansas unconstitutional as it related to new political parties' state candidates, who must be nominated at their new political party's nominating convention several months before the major political parties (Republicans and Democrats) hold a preferential primary election and three weeks later a primary runoff election. The trial court found that there was no legitimate state interest served by requiring an earlier nominating convention for new political parties.

Counsel for Appellees feels that due to the extensive record in the case below and the close analysis needed, it would be advantageous to the Court of Appeals to be able to ask questions at oral argument—particularly as to the continuing problem the laws in question present for new political parties, the reoccurring problem the Libertarian Party of Arkansas has had with the laws in question, the actual problems created by the current law in allowing multiple voting by the same individual in nominating conventions and major party primary elections, sore loser candidates, and a restriction on political activity farther away from the when the public becomes interested in politics and current political issues are clearly defined. Counsel for Appellees requests oral argument of 20 minutes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 8th Cir. R. 26.1A, the Libertarian Party of Arkansas, Kristin Vaughn, Robert Chris Hayes, Debrah Standiford, and Michael Pakko, who are the Plaintiffs-Appellees, are a political party and individuals and not a publicly held corporation or other publicly held entity or trade association, do not have a parent corporation, there are no other publicly held corporations or other publicly held entities, not a party to the appeal, that have a financial interest in the outcome of the litigation, and this case does not arise out of a bankruptcy proceeding. There are no prior or related appeals.

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STATEMENT OF THE CASE

The instant appeal involves an election law and ballot access case on behalf of the Libertarian Party of Arkansas (hereinafter "LPAR") and four registered Arkansas voters and supporters of the Libertarian Party (hereinafter "the Libertarians"). The LPAR was the only minor political party to obtain recognition for ballot status in Arkansas for the 2015-2016 election cycle. Because the LPAR was a new political party in Arkansas in 2015-2016, and will be so in the future, it did not nominate its candidates for the General Election at a primary election, but nominated its candidates by convention. Ark. Code Ann., § 7-7-205(c)(2). Any candidates nominated by the convention are required to file a political practice pledge with the Secretary of State or County Clerk during the party filing period. Ark. Code Ann., § 7-7-205(c)(3). The party filing period (i.e., for the Republican and Democratic parties) was set for the 2016 election cycle for a one-week period beginning at noon on the first Monday in November preceding the General Primary Election (viz.: November 2, 2015) and ending at noon on the 7th day thereafter (viz.: November 9, 2015). Because the party nominating convention for the LPAR had to be completed before the nominating period, it was necessary for the 2015-2016 election cycle for the LPAR to have its nominating convention in October of 2015. In the 2018 election cycle the nominating convention for new political parties will have to be in February of 2018.

Unlike the primary elections for the Republicans and Democrats in Arkansas (where Arkansas voters can simply cast their votes after a long primary election season at voting precincts near where they live), the Libertarians in Arkansas have to have the nominating convention of the LPAR at a central location in Arkansas, since all candidates and Libertarian voters must travel to the nominating convention (as to traveling distances to vote see the concern expressed by the Eighth Circuit in *Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289, at 1298 (8th Cir. 1995)). Because of jobs and family commitments, the convention was held on Saturday, October 24, 2015, in North Little Rock, Arkansas. It was felt that the next available Saturday, October 31, 2015, would not be as convenient for the candidates and voters because it would be on Halloween and might adversely impact those candidates and voters who had small children, thus lessening attendance. In any event, either October date was more than one year from the date of the General Election in Arkansas on November 8, 2016, and more than four months before the Republicans and Democrats would hold their primary election to select their candidates for the same November 2016 General Election. The new, earlier deadline to conduct the LPAR nominating convention has been moved twice in recent years. In 2013, it was moved from May to early March, and now has been moved from March to early November of the year before the General Election, and in 2018 it will be back to March. The Republican and

Democratic parties have passed these newer deadlines for new political parties which make them select the minor parties' final candidates at a time when the major parties' selection process is just getting underway. As a result, the LPAR was limited to come up with a full slate of candidates.

As set forth in Plaintiffs' Complaint (Joint App., pp. 9-20), three of the individual Libertarians (Vaughn, Hayes, and Standiford) are not only Arkansas registered voters, but were unable to determine if they could be candidates for the LPAR for the 2016 General Election because of the earliness of the October 24, 2015 Nominating Convention. The other individual Plaintiff (Pakko) is the current Chair of the LPAR and, thus, was familiar with the negative impact of having such an early nominating convention. (Bench trial of July 11, 2016, Tr. pp. 9-88; Joint App., pp. 411-490). All the individual Libertarians wished to have the right to cast their votes effectively for Libertarian candidates in Arkansas in 2016. However, the workings of the current laws in question, not only require an unnecessarily early decision, but substantially limit the time for Libertarian voters in Arkansas to consider late breaking developments and to find out who their candidates are and participate in the political process with the candidates during the more than four months before the Republicans and Democrats have their primary election.

Specifically, what the LPAR and the Libertarians asked for in affirmative relief from the District Court was that they be allowed to conduct a further

nominating convention to correct or supplement the convention held on October 24, 2015, no later than the date of the preferential primary election in Arkansas for the Republican and Democratic parties (i.e., March 1, 2016). Ark. Code Ann. §§ 7-7-202(a) and 7-7-203(b). In fact, Arkansas did not even start to finalize its General Election ballot for November 8, 2016, until after the general primary runoff election for the major parties, which were conducted on March 22, 2016. This remedy was requested because of the unnecessarily early convention which the LPAR was forced to conduct on October 24, 2015, and the resulting loss of potential candidates, campaigning time, political discussion, and substitution or replacement candidates for those candidates cannot be a candidate for other reasons. As demonstrated by the testimony of Michael Pakko, there is harm in having a nominating convention well before the General Election and the Primary Election of the major parties in Arkansas.

Because of the early date of the nominating convention, many individuals were not at that time able to make a commitment for an election that was more than a year off and many of the political issues for the next election were not yet well formed or known. Not only are new political developments constantly occurring, but there is no necessity to have a minor party's candidate selected at a convention many months before the Republicans and Democrats in Arkansas select their candidates in a primary election and a subsequent run-off primary election, if

necessary. On the other hand, the Libertarians, in many cases, had little time to get to know their candidates who showed up at their nominating convention on October 24, 2015, let alone, have the time for extended discussion and review of developing political events in contrast to what is allowed for the Republican and Democratic parties.

This appeal concerns the important question of whether Arkansas may require a newly recognized political party to select its nominees for the General Election several months before the major parties select their nominees. The District Court below, in answering this question, found that if the LPAR were allowed to conduct its nominating convention at the same time as the preferential primary elections in Arkansas for the Republican and Democratic parties, there would be no voter confusion because the nominating process for all political parties would be conducted at the same time, there would be no possibility of a "sore loser" candidate (Order of July 15, 2016, Findings of Fact, p. 4, ¶17, Joint App., p. 642), and that the statutory scheme concerning ballot access for new party state candidates was unconstitutional since it required new political parties to nominate their candidates before the end of the filing period and several months before the preferential primary election of the major parties, and because the Secretary of State had not articulated any valid interest in requiring the LPAR, or any new political party, to nominate their candidates by a convention which must

take place before the preferential primary. (Order of July 15, 2016, Conclusions of Law, pp. 1-7, ¶¶ 8, 10, 11, and 12, Joint App., pp. 639-645).

The laws in question effective for the 2016 Arkansas General Election cycle were as follows, to-wit:

Ark. Code Ann. § 7-7-101

The name of no person shall be printed on the ballot in any general or special election in this state as a candidate for election to any office unless the person shall have been certified as a nominee selected pursuant to this subchapter.

Ark. Code Ann. § 7-7-203(c)(1)

(c)(1) The party filing period shall be a one-week period beginning at 12:00 noon on the first Monday in November preceding the general primary election and ending at 12:00 noon on the seventh day thereafter.

Ark. Code Ann., § 7-7-205(c)(2) and 7-7-205 (c)(3)

(c)(2) A new political party formed by the petition process shall nominate candidates by convention for the first general election after certification.

(c)(3) A candidate nominated by convention shall file a political practices pledge with the Secretary of State or county clerk, as the case may be, during the party filing period.

However, Ark. Code Ann. § 7-7-203(a), (b), and (c)(1) are changed, effective December 31, 2016, to read as follows:

(a) The general primary election shall be held on the second Tuesday in June preceding the general election.

(b) The preferential primary election shall be held on the Tuesday three (3) weeks before the general primary election.

(c)(1) The party filing period shall be a one-week period ending at 12:00 noon on the first day in March and beginning at 12:00 noon one (1) week prior to the first day in March.

SUMMARY OF THE ARGUMENT

The Secretary of State in his Brief misunderstands the correct meaning and interpretation of the election laws in question as to new party nominating convention by arguing that they are ambiguous as to when a new political party must conduct its nominating convention, as well as the correct application of standing, the correct application of as-applied and facial challenges, the difference between declaratory and injunctive relief requested in the case below, and the failure of the Secretary of State to present any evidence of any state interest as to the ballot access scheme for new political parties' state candidates in Arkansas which the District Court declared unconstitutional (Order of July 15, 2016, pp. 1-7, Joint App., pp. 639-645).

Injury to fundamental rights would be suffered by the LPAR and the Libertarians and other new political parties in Arkansas if they are not allowed to vote for their preferred candidates in Arkansas and have sufficient time to select and judge those candidates at a nominating convention on a basis and timeline which is closer to the general election and at least equal to what is allowed for the major parties in Arkansas. While the laws in question reverted back after 2016 to a nominating deadline for new political parties which is nearer the General Election,

it is still many months before the major political parties have to select their nominees. Particularly, the harm to voters and the public is the damage to "political dialogue and free expression" that is done when political parties are unnecessarily restricted from participating in the public discourse. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, at 594 (6th Cir. 2006). As the Eighth Circuit Court of Appeals has stated in reviewing election laws: "our primary concern is not the interest of [the] candidate . . . but rather, the interest of the voters who choose to associate together to express their support for [that] candidacy and the views . . . espoused." *Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999), quoting *Anderson v. Celebrezze*, 406 U.S. 780, 806 (1983).

The Court of Appeals should look to the standard of review in judging ballot access and election laws which affect minor political party candidates and their supporters—particularly as same relate to the unnecessarily early and discriminatory nominating convention deadline in Arkansas relative to the much later primary election dates for the major political parties, the relatively limited time to review and consider potential candidates and developing political issues and events, and the fact that the Secretary of State could show no interest, regulatory or otherwise, to justify the discriminatory election laws requiring the new political parties in Arkansas to nominate their candidates several months

before the major political parties nominate their candidates at preferential primary and primary runoff elections.

As to the standard of review in a ballot access and election law case, the analytical test applied by the United States Supreme Court in *Anderson v. Celebrezze*, *Id*., is appropriate. In *Anderson,* the United States Supreme Court set forth a standard to be used in determining whether election laws are unconstitutionally oppressive of potential voter's rights. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by litmus-paper tests that will separate valid from invalid restrictions, but rather that the Court ". . . must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze*, 406 U.S., at 789. The Supreme Court then set forth three criteria which the Court is expected to follow:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rules. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the Plaintiffs rights. Only after weighing all these facts is the reviewing Court in a position to decide whether the challenged provision is unconstitutional. *Anderson v. Celebrezze*, 460 U.S., at 789.

Thus, the Supreme Court has set forth the standard which the Court is to use in analyzing specific provisions of ballot access laws as are involved in this appeal.

In fact, " ... because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson v. Celebrezze*, 460 U.S., at 793, n.16. After all, "the State may not be a 'wholly independent or neutral arbiter' as it is controlled by the political parties in power, 'which presumably have an incentive to shape the rules of the electoral game to their own benefit.'" *Blackwell*, 462 F.3d at 587 (quoting from *Clingman v. Beaver*, 544 U.S. 581 (2005) (O'Conner, J., concurring). Since this appeal involves election laws that burden a minor political party, and the corresponding constitutional right of individuals to political expression and association, the appropriate standard of review which should be required for this Court is strict scrutiny, so that state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White*, 415 U.S. 767, at 780-781 (1974).

Further, the U.S. Supreme Court has noted that the First and Fourteenth Amendments establish "[t]he right of citizens to create **and develop** new political parties." [Emphasis added]. *Norman v. Reed*, 502 U.S. 279, 288 (1992). See also *Green Party of Arkansas v. Priest*, 159 F.Supp.2d 1140, at 1144 (E.D. Ark. 2001). LPAR and the Libertarians would suggest to the Court of Appeals that it is

significant that the U.S. Supreme Court did not only mention the right to create new political parties, but also added the right to develop new political parties. "New parties struggling for their place **must have the time and opportunity** to organize in order to meet reasonable requirements for ballot position, **just as the old parties have had in the past**." [Emphasis added]. *Williams v. Rhodes*, 393 U.S. 23, at 32 (1968). We can only imagine the complaints that would occur if the Republican and Democratic parties in Arkansas had to select their nominees several months before the nominees were selected for new political parties.

> It 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. * * * "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 . . . . By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity in competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many other challenges to the status quo have in time made their way into the political mainstream. . . . In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, at 270 (1964)—are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. at 793-794. (quoted with the approval of four judges of the Eighth Circuit in *Manifold v. Blunt*, 873 F.2d 178 (8th Cir. 1989)).

Therefore, the first consideration the Court must look to is the character and magnitude of the asserted injury to the Plaintiffs' First and Fourteenth Amendment rights. Since in the instant case the injury to the rights of the Plaintiffs would limit the LPAR in its nominating process for the Arkansas ballot, there cannot be a dispute in the least that the damage would be of a fundamental nature. Federal Appellate Courts have noted that when election deadlines are far in advance of an election, they force minor parties to recruit candidates at a time when major party candidates are not known and when voters are not politically engaged. See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 594 and *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3rd Cir. 1997).

The next step the Court must look to under the *Anderson* test is the identification and evaluation of the precise interests put forth by the State of Arkansas as justifications for the burden imposed by the laws in question. While Arkansas does have a right to properly supervise elections in Arkansas, election restrictions which impact minor political parties and their supporters must be necessary to serve a compelling state interest. The teaching of the United States Supreme Court is that:

> "even when pursuing a legitimate interest, a state may not choose means that **unnecessarily restrict** constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that states adopt the **least drastic means** to achieve their ends. *Lubin v. Panish*, 415 U.S. 709, 716 . . .; *Williams v. Rhodes*, 393 U.S. at 31-33 . . .. **This requirement is particularly important where restrictions on access to the ballot are**

> **involved**. The states' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the development of the nation. [emphasis added]. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 185 (1979).

Further, in particularly considering the nominating process of political parties, the U.S. Supreme Court, in an opinion written by Justice Scalia, stated:

> What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States may regulate freely. To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. *California Democratic Party v. Jones*, 530 U.S. 567, at 572-573 (2000).

Thus, the Arkansas statutory scheme for new political parties who must nominate their candidates at a nominating convention before the party filing period will continue to result in the new political party's candidates having to be chosen several months before the preferential primary election or the general primary election of the major political parties. As the U.S. Court of Appeals for the Eighth Circuit has stated: ". . . it is important that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary." *McLain v. Meier*, 637 F.2d 1159, at 1164 (8th Circuit 1980). As the U.S. Supreme Court stated in an election controversy: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting,

and the interests of those who are disadvantaged by the classification". *Williams v. Rhodes*, 393 U.S. 23, at 31 (1968).

ARGUMENT

I. PLAINTIFFS LPAR AND THE LIBERTARIANS HAVE STANDING

A. Standard of Review

The standard of appellate review as to the District Court's judgment, after a bench trial, as to this issue is *de novo* as to conclusions of law. On appeal, a District Court's rulings on issues of law are reviewed *de novo*. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005); (citing *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001)). Findings of Fact are subject to review under Fed. R. Civ. P. 52(a) and, in the context of a constitutional challenge to State election laws, require the Appellate Court to weight "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate" against "the precise interests put forth 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 Plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. at 789.

B. Discussion

All the Plaintiffs in the case below to one extent or another had standing. The LPAR, along with the individual Libertarians in the case at bar, all had standing to challenge the Arkansas statutory scheme for ballot access for new political parties and the requirement and timing of a nominating convention. Not only does the LPAR have standing as a former recognized new political party in Arkansas (and as a several times past and future new political party in Arkansas), but the LPAR has associational standing "[e]ven in the absence of injury to itself" because it is representative of its members, see *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Further, the individual Libertarians have standing as Arkansas voters, even if they are not currently candidates for elective office. The U.S. Court of Appeals for the Eighth Circuit has recognized a voter's right to challenge election laws based on his standing as a voter, even though he did not meet the constitutional age requirement to run as a candidate for President of the United States. *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988). Plaintiffs have ". . . standing to challenge a state law regulating elections when that law 'would restrict [their] ability to vote for the candidate of [their] choice or dilute the effect of [their] vote if [their] chosen candidate were not fairly presented to the voting public.'" *McLain v. Meier*, 851 F.2d at 1048; also see, *Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999). The Eighth Circuit's primary concern was the law's impact on "voters who [choose] to associate together to express their support" for a candidate, not the

impact on the candidate. *McLain v. Meier, Id.,* quoting *Anderson v. Celebrezze*, 460 U.S. at 806. Besides voters who choose to associate together, the Eighth Circuit has also allowed a political party to challenge a state's election law to the extent it affected a new political party. *Green Party of Arkansas v. Martin*, 649 F.3d 675, 677-679 (8th Cir. 2011).

Also consider, *Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289 (8th Cir. 1995), wherein the Republican Party challenged the Arkansas election laws that said a political party had to choose all its nominees via primary and had to pay to administer those primaries. While the District Court upheld the election laws in question, the Eighth Circuit Court of Appeals struck the laws down. Under the laws in question, the Republican Party still had some nominees, e.g., in 1994, the Republican Party had nominees for U.S. Representatives in all four House districts, it elected seven state senators and twelve state representatives. However, the Republican Party still had far less money than the Democratic Party and the Republicans couldn't afford to set up many primary polling places, so that inhibited the number of candidates they could run for legislature and partisan county office. Under the Secretary of State's theory in his Brief, the Republican Party would not have had standing to challenge the election system in the *Republican Party of Arkansas* case because it did manage to run some candidates—just as the LPAR managed to run some

candidates in 2016. In many ways, the *Republican Party of Arkansas* case is on point with the case at bar, e.g., just as new party supporters must travel long distances to the nominating convention in Arkansas, so too did the Eighth Circuit note that "Voters wishing to cast ballots in a Republican Primary are forced to travel long distances, in some cases as much as sixty miles." *Republican Party of Arkansas*, 49 F.3d at 1298. Also, Arkansas argued that ". . . the Arkansas election code is facially neutral in character, explicitly favoring no particular party; . . ." *Republican Party of Arkansas*, 49 F.3d at 1299, something that could certainly not be said in the case at bar because the law favors the Republican and Democratic parties by allowing them to select their candidates much later than a new political party in Arkansas. In fact, when one thinks of the difference between attending a nominating convention in Arkansas and voting at a local precinct in a primary, at least it should be noted that one can vote at a precinct relatively quickly compared to the time required to attend a nominating convention—which for many voters would require traveling a much greater distance than the sixty miles that concerned the Eighth Circuit in the *Republican Party of Arkansas* case. However, for some reason, *Republican Party of Arkansas* is not mentioned in the Brief of the Secretary of State.

Similarly, the U.S. Supreme Court allowed the American Independent Party and the Socialist Labor Party to challenge election laws without first even

attempting compliance and found they had standing. *Williams v. Rhodes*, 393 U.S. 23, 28 (1968); also see *Id.* at 45-46 (Harlan, J., *concurring*), and *Id.* at 65 (Warren, C.J., *dissenting*). Therefore, the District Court was correct below in its order of July 15, 2016, in finding that several of the Plaintiffs had standing in the case at bar (Order of July 15, 2016, Conclusions of Law, pp. 4-5, ¶¶ 1 and 3; Joint App., pp. 642-643). In fact, all of the Plaintiffs should have been found to have standing.

While only two of the Libertarians below and the LPAR sought injunctive relief on an as-applied basis for the 2016 general election, all the Plaintiffs below clearly sought a declaratory judgment as to the constitutional problem of the statutory scheme for ballot access for new political parties' state candidates requiring the nominating convention to be conducted several months before the preferential primary election. The reason the District Court could declare the laws as to ballot access for new political party candidates unconstitutional, but deny the injunctive relief requesting the placement of four newly nominated state candidates on the general election ballot was because the District Court felt that the issue of whether new political party candidates could be required to file political practice pledges at the same time as other potential nominees and candidates was not before the District Court and the LPAR's new four state candidates had not shown that there was a reason they could not have complied with the filing deadline. (Order of July 15, 2016, Conclusions of Law, pp.6-7, ¶¶ 13, 14, and 15; Joint App., pp. 644-

645). The District Court had earlier foreshadowed its decision as to injunctive relief for the 2016 election in its decision of February 25, 2016 (Order Denying Preliminary Injunction, pp. 1-4; Joint App., pp. 343-346), when it indicated that all political party candidates would have to decide whether to run for office by the party filing date of November 9, 2015, (which in 2018 will be a one week period ending at 12:00 noon on March 1, 2018, Ark. Code Ann. § 7-7-203(c)(1)), whether Republican, Democrat, or Libertarian.

II. THE DISTRICT COURT WAS CORRECT IN DECIDING THE CONSTITUTIONAL ISSUE

A. Standard of Review

The standard of appellate review as to the District Court's judgment, after a bench trial, as to this issue is *de novo* as to conclusions of law. On appeal, a District Court's rulings on issues of law are reviewed *de novo*. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005); (citing *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001)). Findings of Fact are subject to review under Fed. R. Civ. P. 52(a) and, in the context of a constitutional challenge to State election laws, require the Appellate Court to weight "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate" against "the precise interests put forth 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 Plaintiff's rights."

Burdick v. Takushi, 504 U.S. at 434, quoting *Anderson v. Celebrezze*, 460 U.S. at 789.

B. Discussion

The Secretary of State is incorrect in his Brief in asserting that it was improper for the District Court to rule on the constitutional issue for the reasons set forth below. The District Court, in its Order of July 15, 2016, (Order of July 15, 2016, pp. 1-7, Joint App., pp. 639-645), declaring Arkansas' statutory scheme for ballot access for new political parties' state candidates unconstitutional, stated in its Conclusions of Law on page 6, paragraphs 10, 11, and 12 (Joint App., p. 644) that:

> The Secretary of State has not articulated any valid interest in requiring the Libertarian Party of Arkansas, ***or any new political party***, ***to nominate their candidates by a convention which must take place before the preferential primary***. Even though the Court finds the Libertarian Party of Arkansas' burden to be minor, ***there is no interest, regulatory or otherwise, to justify this restriction by the State***. Applying the balancing test of *Green Party of Ark. v. Martin*, ***the Court finds the Arkansas statutory scheme concerning ballot access for new party state candidates to be unconstitutional.*** [Emphasis added].

Therefore, the District Court found that "the Arkansas statutory scheme for ballot access for state candidates of new political parties is unconstitutional", not just for the LPAR, and not just for the election cycle in 2016, but as a statutory scheme for ballot access for new political parties. Nowhere in its Order of July 15, 2016, did the District Court say that its decision applied only to the LPAR or only to the

2016 election cycle. In further evaluating the District Court's ruling, it is important to remember that the LPAR and the Libertarians in paragraph IV of their Complaint (Joint App., pp 12) sought ". . . a judgment declaring Ark. Code Ann. §§ 7-7-101, 7-7-203(c)(1), 7-7-205(c)(2), and 7-7-205(c)(3), as applied to the Plaintiffs for the 2016 Arkansas General Election ***and, in its previous and subsequent version which was in effect before the 2016 election cycle and will be in effect after December 31, 2016, for all subsequent general elections in the State of Arkansas*** and the facts and circumstances relating thereto, unconstitutional in that it violates in its application to the Plaintiffs herein for the 2016 Arkansas General Election, ***and all subsequent Arkansas General Elections***, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983." [Emphasis added].

Other Courts have recognized that ". . . alternative party candidates and major party candidates are not similarly-situated. Because Democrats and Republicans will participate in June primaries, there are valid reasons of administrative necessity and voter education for requiring these candidates to file petitions in April. Such reasons do not apply to alternative party candidates who cannot compete in primaries and will not appear on any ballot until November." *Counsel of Alternative Political Parties v. Hooks*, 121 F.3d 876, 882-883 (3rd Cir. 1997). "[S]ometimes the grossest discrimination can lie in treating things that are

different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). However, in Arkansas the laws in question do not even have the virtue of treating new party nominations and major party nominations equally, but require new parties like the LPAR to select its nominees well before the major parties select their nominees so as to allow the Republican and Democratic parties to include consideration of all events prior to their primary elections, but after the LPAR has been forced to select its nominees.

"Other courts have found requirements for party nomination by minor parties that are set either before or at the same time as the major parties to be unconstitutional as a violation of equal protection under the Fourteenth Amendment to the U.S. Constitution." *Whig Party of Alabama v. Siegleman*, 500 F.Supp. 1195, 1203-1205 (N.D. Ala., S.D., 1980)(wherein the Court found Alabama's law requiring minor political parties to file their petitions on the date of the first primary election, which was roughly two months before the General Election and before they could ascertain the names of their most formidable opposition candidates of the major parties, unconstitutional and allowed the deadline to be six days after the date for the second primary election for the major parties); *Toporek v. South Carolina State Election Com'n*., 362 F.Supp. 613, 619-620 (D.S.C., Columbia Div., 1973)(which declared unconstitutional the requirement that a minor party hold its nominating convention not later than the

time for closing polls on the date of the primary election and five months before the General Election); and *United Citizens Party v. South Carolina State Election Com'n*., 319 F.Supp. 784, 788-789 (D.S.C., Columbia Div., 1970)(which declared unconstitutional a requirement for the minor political party to submit nominees no later than the date for closing of primary entries for the major parties and some seven months prior to the General Election). Not only are the election requirements in question herein worse than the requirements condemned in Alabama and South Carolina hereinabove, but the same problem exists in the advantage given to the major political parties because "the already entrenched major political parties are well aware of the minor parties' and independent nominees long before the date by which they (the major parties) are required to declare their nominees in the office of the Secretary of State." *Whig Party of Alabama v. Siegleman*, 500 F.Supp. at 1204.

The request in the LPAR and the Libertarians' Complaint for declaratory relief is exactly what the District Court did. In its Order of July 15, 2016 (Joint App., pp. 639-645), the District Court found that the Arkansas statutory scheme for ballot access for new political parties is unconstitutional. However, in judging it "as-applied" to the LPAR and the Libertarians' request for injunctive relief placing four newly nominated candidates on the Arkansas general election ballot, the Court found no evidence that their inability to timely file for office by the close of the

filing deadline for the 2016 general election was due to the statutory scheme at issue and, therefore, denied LPAR and the Libertarians' request for injunctive relief placing the four newly nominated candidates on the Arkansas general election ballot in 2016. An as-applied challenge argues that a law is unconstitutional as enforced against the plaintiffs before the court. "[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." *Citizens United v. Fed. Election Comm'n*, 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. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). As the U.S. Supreme Court has noted:

> The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held. *Storer v. Brown*, 415 U.S. at 737, n.8 (1974).

The District Court's ruling below, when considered in the light of the U.S. Supreme Court's teaching in *Storer* above, is not only helpful to the LPAR (which has been a new party three times in recent election cycles in Arkansas—see Dr.

Pakko's testimony on p. 12, lines 1-4 of Tr. of hr. on motions, February 19, 2016; Joint App., pp. 171), but will be helpful to any new party in Arkansas.

The decision of the District Court denied the as-applied injunctive relief requested of placing four new candidates on the Arkansas ballot in 2016, but granted the declaratory relief requested of declaring the ballot access scheme for new political parties in Arkansas unconstitutional. The Secretary of State continues to confuse an as-applied challenge and a facial challenge as same relates to the District Court's Order of July 15, 2016, declaring the Arkansas ballot access scheme for new political parties unconstitutional. Not only did the LPAR and the Libertarians challenge the election laws requiring unnecessarily early nominating conventions for new political parties in 2016 (to which they have been subjected three times per Dr. Pakko's testimony, Joint App., p. 171), but, as stated in paragraph IV of the LPAR and Libertarians' complaint (Joint App., p. 12), The LPAR and Libertarians challenged the Arkansas ballot access scheme for new political parties for future elections. As stated above, not only can a claim have characteristics of as-applied and facial challenges, but "the 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." *Citizens United*, 558 U.S. at 331.

While the LPAR and the Libertarians request for injunctive relief was denied as to putting certain candidates on the general election ballot in 2016, this was done because the Court treated established political parties, new political parties, and their candidates—whether nominated by preferential primary or nominating convention—equally by having the candidates' political practices pledges due at the same time for all candidates during the party filing period, along with having the new political party's nominating convention to be at the same time as the preferential primary election, rather than requiring the nominating convention of a new political party in Arkansas to be conducted several months earlier than the preferential primary election for the established political parties.

Thus, while the LPAR and the Libertarians did not get their injunctive relief as to having their additional state office candidates who were nominated at their second convention on February 27, 2016, placed on the ballot for the 2016 general election for the reasons explained by the Court in its Conclusions of Law, paragraphs 13, 14, and 15 on pages 6 and 7 of its Order of July 15, 2016 (Joint App., pp. 644-645), the LPAR and Libertarians were successful in receiving a declaratory judgment which held Arkansas's statutory scheme for ballot access for new political parties unconstitutional. Said statutory scheme for ballot access for new political parties will still be unconstitutional in future election cycles because after December 31, 2016, Ark. Code Ann. § 7-7-203(a) will return the general

primary runoff election from the fourth Tuesday of March to the second Tuesday of June in 2018 and subsequent election years thereafter, with the preferential primary election remaining three weeks before the general primary runoff election, thus putting it in late May of an election year, and, under Ark. Code Ann. § 7-7-203(c)(1), the seven day political practices pledge and party filing period will be moved to start from the first Monday in November in the year before the general election to a one-week period ending at 12:00 noon on March 1 and beginning at 12:00 noon one week prior to the first day in March of the election year.

Therefore, the Arkansas statutory scheme for ballot access for state candidates of new political parties will still require the nominating convention to be conducted several months before the preferential primary election and before the end of the party filing period, (i.e., probably in February), and will continue to be unconstitutional. Such a finding of unconstitutionality is neither "technical" nor "insignificant," and changes the legal relationship between the parties.

While the Court in its decision of July 15, 2016, did not mention that new political parties had to conduct their nominating convention approximately a year before the 2016 general election, the court did emphasize the deadline for the new party nominating convention of before the end of the party nominating period and 113 days before the preferential primary elections of the Republican and Democratic parties. The District Court's ruling of the unconstitutionality of the

Arkansas election laws as to newly recognized political parties and the timing requirements for their nominating convention well before the preferential primary elections of the Republican and Democratic parties will be enforceable and change the relationship between new political parties and the State of Arkansas so as to provide guidance to the Arkansas Legislature in correcting the laws in question so that they apply equally and fairly to new and established political parties.

The Secretary of State is totally wrong in claiming that the District Court erred in deciding a constitutional issues which was not necessary to decide. It is precisely because this is an election law case that the Court was correct in making its decision as to the unconstitutionality of ballot access laws in Arkansas for state candidates of new political parties because this is simply another election law case which is capable of repetition, yet evading review. In fact, the LPAR has over several election cycles faced the exact same problem as was considered in the case below as a new political party and will face the same problem again in future elections as again a new political party in Arkansas.

The Secretary of State is incorrect in arguing that Ark. Code Ann., Section 7-7-205(c)(3) is ambiguous and does not clearly require candidates nominated by convention to file their political practices pledges during the party filing period. The Secretary of State challenges the District Court's order of July 15, 2016 (Joint App., pp. 639-645), by contending that Ark. Code Ann. § 7-7-205(c)(3), which

requires a candidate nominated by convention to file a political practices pledge during the party filing period, does not specify when the nominating convention must be conducted and is, therefore, ambiguous. Of course, the LPAR and Libertarians also challenged the constitutionality of Ark. Code Ann. § 7-7-205(c)(2), which requires a new political party to nominate its candidates at a convention for the first general election after certification. Thus, the Secretary of State's argument that the laws in question do not specifically require the nominating convention of a new political party to be before a candidate of a new political party files his or her political practices pledge during the party filing period is not only without merit, but defies the meaning of the words of the laws in question. Obviously, if a new party candidate who is nominated by convention has to file his or her political practices pledge during the party filing period, that candidate must first be nominated at a convention beforehand. Reading the four laws challenged, Ark. Code Ann. §§ 7-7-101, 7-7-203(c)(1), 7-7-205(c)(2), and 7-7-205(c)(3), there is no question but that the District Court in its decision of July 15, 2016, correctly interpreted the laws in question as requiring nomination at a party convention before a new party candidate could file his political practices pledge. In fact, the District Court even went so far as assuming that the new political party could hold its nominating convention as late as the end of the party filing period, (Order of July 15, 2016, Conclusions of Law, p. 6, ¶8, Joint App., p.

644) (which would have required the new party nominated candidates to file their political practices pledges almost immediately thereafter). Further, there would still be the problem of conducting the nominating convention at a central location in Arkansas on a date convenient for potential candidates and voters to show up. This consideration is not discussed at all in the Brief of the Secretary of State despite the concerns of the Eighth Circuit in the *Republican Party of Arkansas* case as to traveling more than sixty miles in order to vote.

The Secretary of State argues that the District Court by declaring the laws in question unconstitutional, actually prevents these unsuccessful nominees of a new political party from running for another office. The Secretary of State refers to certain selected testimony from the transcript of the motion hearing on February 19, 2016, wherein Dr. Pakko talked about sometimes candidates who failed at one office at a nominating convention, were able to run for another office successfully at the nominating convention. While the foregoing is simply a demonstration as to how the Libertarians have tried to make the best of an unconstitutional law, it hardly constitutes a compelling state interest or any state interest at all. The fact is that if the nominating convention for newly recognized political parties in Arkansas can be conducted on the same date as the preferential primary election, unsuccessful candidates for one new political party office could still have the opportunity to seek another new political party office at the nominating convention

if they filed their political practices pledge during the political party filing period for both offices. Of course, if this is not allowed by the political party and/or the state, then there is no harm in equal treatment for both new political parties and established political parties.

The Secretary of State's argument makes no sense at all as to recognized state interests because under the current unconstitutional law of having the nominating convention for new political parties many months before the preferential primary election, an unsuccessful candidate at a new political party convention could later file during the political party filing period for the office he was denied at the new political party's nominating convention as a candidate—i.e., sore loser, in one of the established party's primaries or, as established at trial of the case below, Libertarian voters at the new party's nominating convention can under current law—after casting votes at the nominating convention—also vote in one of the established party's preferential primary elections several months later (see testimony of Leslie Bellamy, Director of Elections for the Secretary of State, Bench Trial Tr., p. 117, line 16-p. 138, line 5; Joint App. pp. 525-540). In this regard, it should be considered that the U.S. Supreme Court has spoken of the State's interest in confining each voter to one vote in one primary election, ". . . and that to maintain the integrity of the nominating process, the State is warranted in limiting the voter to participating in but one of the two alternative procedures . .

. ." *Storer v. Brown*, 415 U.S. 724, at 741 (1974). Thus, the current unconstitutional Arkansas statutory scheme for ballot access for new political parties actually allows new party members who are unsuccessful in obtaining the new party's nomination for an office at the nominating convention to defy the State's interest in preventing sore losers, as well as to defy the State's interest in preventing double voting in the nominating process. The Secretary of State's argument on this point is simply illogical. The Court's decision of July 15, 2016, would avoid the problems discussed above as well as end the disadvantage of the new party in having to pick their nominees before they knew who will be running for an office as a Republican or Democrat, let alone who will actually be the major parties' nominees.

The Secretary of State misunderstands the distinction between an as-applied request for injunctive relief and the fact that a request for declaratory relief can be a mixture of an as-applied and facial challenge. The Secretary of State continues to argue that because the District Court denied the as-applied injunctive relief requested, the District Court should not have granted declaratory relief in declaring the statutory scheme for ballot access for new political parties in Arkansas unconstitutional. It is important to remember that the LPAR and the Libertarians did not just seek relief for the 2016 general election because in paragraph IV of their Complaint (Joint App., p. 12), they sought ". . . a judgment declaring Ark.

Code Ann. §§ 7-7-101, 7-7-203(c)(1), 7-7-205(c)(2), and 7-7-205(c)(3), as applied to the Plaintiffs for the 2016 Arkansas General Election ***and, in its previous and subsequent version which was in effect before the 2016 election cycle and will be in effect after December 31, 2016, for all subsequent general elections in the State of Arkansas*** and the facts and circumstances relating thereto, unconstitutional in that it violates in its application to the Plaintiffs herein for the 2016 Arkansas General Election, ***and all subsequent Arkansas General Elections***, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983." [Emphasis added].

Because the laws requiring new parties to have their nominating conventions several months before the preferential primary of the established parties will continue, coupled with the fact that the LPAR has been subjected to the law several times before 2016, and with other new parties will be subjected to the laws in question in the future, the Court was correct in finding Arkansas's statutory scheme for ballot access for new political parties to be unconstitutional. The Court was further right in finding not only standing, but also that the case was ripe for decision. "The touchstone of a ripeness inquiry is whether the harm asserted has 'matured enough to warrant judicial intervention.'" *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Circuit 2014) (quoting *Vogel v. Foth & Van Dyke Assocs., Inc*., 266 F.3d 838, 840 (8th Circuit 2001)). Only if a claim rests upon contingent future

events that may not occur as anticipated, or indeed may not occur at all, is it not ripe for adjudication. *Parrish v. Dayton*, 761 F.3d at 875-876 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). In no way could the instant case be said to involve a judicial review of a hypothetical or speculative disagreement. *Parrish v. Dayton, Id*.; also see *Nebraska Pub. Power Dist. v. MidAm. Energy Co*., 234 F.3d 1031, 1038 (8th Cir. 2000).

While Plaintiffs' request for injunctive relief was denied as to putting certain candidates on the general election ballot in 2016, this was done because the Court treated established political parties, new political parties, and all of their potential candidates—whether nominated by preferential primary or nominating convention—equally by having the candidates' political practices pledges due at the same time for all candidates during the party filing period, along with having the new political party's nominating convention to be at the same time as the preferential primary election, rather than requiring the nominating convention of a new political party in Arkansas to be conducted several months earlier than the preferential primary election for the established political parties.

The District Court in its order of July 15, 2016, correctly applied the balancing test of *Green Party of Arkansas v. Martin* in considering the interest of the Plaintiffs as opposed to the interests of the State. The statutory scheme for ballot access for new political parties' candidates will still be unconstitutional in

future election cycles because after December 31, 2016, Ark. Code Ann. § 7-7-203(a) returned the general primary runoff election from the fourth Tuesday of March to the second Tuesday of June in 2018 and subsequent election years thereafter, with the preferential primary election remaining three weeks before the general primary runoff election, thus putting it in late May (3rd or 4th Tuesday) of an election year, and, under Ark. Code Ann. § 7-7-203(c)(1), the seven day political practices pledge and party filing period will be moved to start from the first Monday in November in the year before the general election to a one-week period ending at 12:00 noon on March 1 and beginning at 12:00 noon one week prior to the first day in March of the election year. Therefore, the Arkansas statutory scheme for ballot access for new political parties will still require the nominating convention to be conducted several months before the preferential primary election, and will continue to be unconstitutional. Such a finding of unconstitutionality is neither "technical" nor "insignificant," and changes the legal relationship between the parties. While the United States Supreme Court and the Eighth Circuit have "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls", *Green Party of Arkansas v. Martin*, 649 F.3d 675, 685-686 (8th Cir. 2011), the laws properly declared unconstitutional by the District Court below are not neutral and reasonable because of the failure of proof by the Secretary of State at the trial.

The Eighth Circuit Court of Appeals has applied a balancing test in judging the constitutionality of election laws, which was referenced by the District Court in its Order of July 15, 2016, Conclusions of Law, ¶¶ 7 and 12, in finding the Arkansas statutory scheme concerning ballot access for new political party state candidates to be unconstitutional. *Green Party of Arkansas v. Martin*, 649 F.3d at 680. As the Court stated in its Order of July 15, 2016, Findings of Fact, pp. 2-4, ¶¶ 11, 12, and 17:

> The Libertarian Party of Arkansas feels that it would have been advantageous to it as a political party and important to the rights of political association and political speech guaranteed by the First and Fourteenth Amendments to the United States Constitution if its members and all voters of Arkansas if the Libertarian Party of Arkansas were allowed to select its nominees for partisan political office in Arkansas at the same time that the Republicans and Democrats conducted their preferential primary election, on March 1, 2016. [Order of July 15, 2016, ¶11]
>
> The Libertarian Party of Arkansas and its members feel that if their nominating convention could be held on the same date as the preferential primary election for the Republican and Democratic parties in Arkansas that it would assist them in being treated equally with the major political parties, allow them an equal amount of time for campaigning and evaluation of potential candidates for their party, produce more viable Libertarian candidates for the General Election, create favorable publicity for the Libertarian Party of Arkansas, and allow the nominating convention to be conducted at a time which is not only equal to the date when the major political parties select their nominees, but also allow a selection time which is closer to the General Election and during a time when there is increased public interest in politics and awareness of the issues relevant to the current election cycle. [Order of July 15, 2016, ¶12]
>
> If the Libertarian Party of Arkansas were allowed to conduct its nominating convention at the same time as the preferential primary election in Arkansas for the Republican and Democratic parties, there would be no voter

> confusion because the nominating process for all political parties would be conducted at the same time. Further, there would be no possibility of a "sore loser" candidate. [Order of July 15, 2016, ¶ 17]

On the other hand, in balancing the LPAR and the Libertarians' interest with the interest of the Secretary of State, the District Court, in its Order of July 15, 2016, declaring Arkansas' statutory scheme for ballot access for new political parties unconstitutional, stated in its Conclusions of Law on page 6, paragraphs 10, 11, and 12 that:

> The Secretary of State has not articulated any valid interest in requiring the Libertarian Party of Arkansas, ***or any new political party***, ***to nominate their candidates by a convention which must take place before the preferential primary***. Even though the Court finds the Libertarian Party of Arkansas' burden to be minor, ***there is no interest, regulatory or otherwise, to justify this restriction by the State***. Applying the balancing test of *Green Party of Ark. v. Martin*, ***the Court finds the Arkansas statutory scheme concerning ballot access for new party state candidates to be unconstitutional.*** [Emphasis added].

Because the Secretary of State could not prove any valid interest in requiring any new political party to nominate their candidates by a convention before the preferential primary election, the Court correctly found that "the Arkansas statutory scheme for ballot access for new political parties is unconstitutional", not just for the LPAR, and not just for the election cycle in 2016, but as a statutory scheme for ballot access for new political parties.

The Court was correct in granting the declaratory relief requested by the LPAR and the Libertarians in their lawsuit by having Arkansas's ballot access

scheme for new political parties declared unconstitutional so that in the future new political parties which nominate by convention (a position the LPAR has found itself in three times) will have the right to conduct their nominating convention at the same time the major political parties conduct their preferential primary election. Further, all candidates for partisan office in Arkansas of either new political parties who nominate by convention or the established political parties who nominate at the preferential primary election will be treated equally per the District Court's order of July 15, 2016, because all candidates will have to file their political practices pledges at the same time during the political party filing time period. Of course, it is not necessary for the this Court to rewrite the election laws in question since the Arkansas legislature should be allowed the opportunity to address the District Court's order declaring Arkansas's statutory scheme for ballot access for new political parties unconstitutional.

III. THE DISTRICT COURT WAS CORRECT IN GRANTING PLAINTIFFS' COSTS AND ATTORNEY FEES.

A. Standard of Review

The standard of appellate review as to the District Court's judgment, after a bench trial, as to this issue is *de novo* as to conclusions of law. An appellate court reviews ". . . de novo the legal issues related to the award of attorney's fees and costs . . . and review[s] for abuse of discretion the actual award of attorney's fees and costs." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 896 (8th

Cir. 2009); citing *Sturgill v. United Parcel Serv*., 512 F3d. 1024, 1036 (8th Cir. 2008); quoting *Thompson v. Wal-Mart Stores, Inc*., 472 F.3d 515, 516 (8th Cir. 2006), also see, *Richmond v. Southwire Co*., 980 F.2d 518, 520 (8th Cir. 1992) (where the District Court has substantial discretion in awarding costs to a prevailing party under 28 U.S.C. § 1920 . . . and Fed. R. Civ. P. 54(d) . . .). On appeal, a District Court's rulings on issues of law are reviewed *de novo*. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005), citing *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001).

B. Discussion

Judgment was entered for the LPAR and Libertarians in the case below on July 18, 2016 (Joint App., p. 646). On July 27, 2016, pursuant to 28 U.S.C. § 1920, the LPAR and Libertarians filed a verified Bill of Costs and supporting Memorandum Brief (Joint App., pp. 647-653 and Doc. No. 52) for their $400.00 filing fee, and for their $100.00 *pro hac vice* filing fee for James C. Linger, $83.20 for the deposition of Michael Pakko, and $127.80 for the transcript of the motion hearing on February 19, 2016, which was used and admitted as a joint exhibit at the bench trial on July 11, 2016, pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure (Joint App., pp. 647-653). On August 11, 2016, the Secretary of State filed Objections and Response to Plaintiffs' Bill of Costs and Supporting Memorandum Brief (Joint App., pp. 716-719 and Doc. No. 56). The LPAR and

Libertarians filed their Response and Memorandum Brief in Opposition to Defendant's Objections and Response to Plaintiffs' Bill of Costs (Joint App., pp. 776-781).

Pro hac vice fees are recoverable pursuant to holdings of the Eighth Circuit Court of Appeals. While the Secretary of State asserted below that certain U.S. Courts of Appeals do not allow as costs the recovery of *pro hac vice* filing fees, he admits that "the Eighth Circuit currently holds that *pro hac vice* fees are recoverable as fees of the Clerk under 28 U.S.C. § 1920." *Craftsman Limousine, Inc. v. Ford Motor Co*., 579 F.3d 894, 898 (8th Cir. 2009). The District Court properly followed the ruling of the Eighth Circuit in *Craftsman Limousine*.

The transcription fees paid by the LPAR and the Libertarians for the deposition of Michael Pakko were taxable as costs at the discretion of the District Court. "District Courts have substantial discretion in awarding costs under Rule 54(d)." *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006), citing *Zotos v. Lindbergh Sch. Dist*., 121 F.3d 356, 363 (8th Cir. 1997). In the *Smith* decision above, the Eighth Circuit found that the District Court had not abused its discretion by taxing costs for depositions not used at trial, except as to "delivery costs for these depositions." *Smith, Id.* "[E]ven if a deposition is not introduced at trial, a district court has discretion to award costs if the deposition was 'necessarily obtained for use in [a] case' and was not 'purely investigative.'"

Id., quoting *Slagenweit v. Slagenweit*, 63 F.3d 719, 720 (8th Cir. 1995) (*per curiam*). It should be remembered that Dr. Michael Pakko, while testifying at the hearing on Plaintiffs' Motion for Preliminary Injunction, was the only live witness testifying for the Plaintiffs at the non-jury trial conducted on July 11, 2016. For whatever reason Dr. Pakko's deposition was taken by Secretary of State, the LPAR and Libertarians were required to pay for a copy of the deposition to review Dr. Pakko's testimony, prepare for trial, and make a decision as to the use of the transcript of the preliminary injunction hearing at the bench trial conducted on July 11, 2016. The District Court in granting the request as to costs of $83.20 for a copy of Dr. Pakko's deposition was acting in its discretion.

On July 29, 2016, pursuant to 42 U.S.C. § 1988, Fed. R. Civ. P. 54(d)(2), and L. R. 54.1, the LPAR and Libertarians filed a Motion for Attorney Fees and Supporting Memorandum Brief with attached affidavits in support of their fee request (Joint App., pp. 654-656, 657-715). On August 12, 2016, the Secretary of State filed Objections and Response to Plaintiffs' Request for Attorney Fees and Supporting Memorandum Brief (Joint App., pp. 720-729). The LPAR and Libertarians filed their Response and Memorandum Brief in Opposition to the Secretary of State's Objections and Response to Plaintiffs' Request for Attorney Fees (Joint App., pp. 782-790).

The attorney's fees motion requested fee awards in the following amounts: (1) James C. Linger attorney's fee, $27,475.00; (2) Non-taxable costs and expenses expended by attorney Linger, $217.38; and (3) W. Whitfield Hyman attorney's fee, $9,101.00, for a total attorney's fees and non-taxable costs and expenses of $36,793.38. The above figures represented 78.5 hours at $300.00 per hour and 15.7 hours at $250.00 for James C. Linger, and 47.9 hours at $190.00 per hour for W. Whitfield Hyman. James C. Linger requested his non-taxable expenses and costs in the amount of an additional $217.38 as set forth in his Affidavit. In considering the aforesaid Motion, the LPAR and Libertarians requested the Court to consider those twelve factors approved by the United States Court of Appeals for the Fifth Circuit as set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974); and approved by *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); Also see, *Keslar v. Bartu*, 201 F.3d 1016, 1018 (8th Cir. 2000). (Joint App., p. 658).

As the decisions of the above courts make clear, the Federal Courts in the various states in the Eighth Circuit have specific guidelines to follow in setting reasonable attorney's fees in civil rights cases. *Hensley v. Eckerhart*, *Id*.; see also, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Further, the Eighth Circuit Court of Appeals has stated that plaintiffs that are considered prevailing parties in litigation should be awarded reasonable attorney fees and the 1976 Civil Rights Attorney

Fee Act is designed to encourage private enforcement of the public interest and should be liberally construed to achieve the public purposes involved in the congressional enactment. *Keup v. Hopkins*, 596 F.3d 899, 905-906 (8th Cir. 2010); *Warnock v. Archer*, 380 F.3d 1076, 1083-1084 (8th Cir. 2004); *Cody v. Hillard*, 304 F.3d 767, 772-773 (8th Cir. 2002); and *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997).

Contrary to the assertion of the Secretary of State, the LPAR and the Libertarians are prevailing parties for purposes of granting attorney fees and costs. In determining whether a civil rights plaintiff is a prevailing party within the meaning of § 1988, the United States Supreme Court has stated: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *State Teachers Asn'n. v. Garland Indep. Sch. Dist*, 489 U.S. 782, 791-792 (1989), citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). Also see, *Hensley v. Eckerhart*, 461 U.S. 424, at 433 (1983).

The U.S. Court of Appeals for the Eighth Circuit in the case of *Jacobson v. City of Coates*, 171 F.3d 1163 (8th Cir. 1999) reversed a trial Judge's denial of attorney fees requested pursuant to 42 U.S. Code, § 1988, where the District Court characterized appellant's victory as "technical and insignificant," thereby precluding prevailing party status. In reversing the District Court, the Eighth

Circuit noted that the District Court had determined that one of two challenged ordinances was unconstitutional, and, thus, the legal relationship between the parties was changed so that the District Court had erred in failing to award attorney fees. However, the Eighth Circuit, in reversing the District Court's denial of attorney's fees, did note that the District Court retained the discretion to determine the appropriate fees pursuant to *Denesha v. Farmer's Ins. Exch*., 161 F.3d 491, 501 (8th Cir. 1998).

Similarly, in considering a decision of the Sixth Circuit in *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir. 2001), it was held that a plaintiff was a prevailing party even though 12 of his 14 claims were dismissed. In an earlier Sixth Circuit case, the Court ruled that "[a]ny enforceable judgment, or comparable type of relief, or settlement, . . . will generally make a plaintiff a 'prevailing party.'" *Owner-Operator Indep. Driver's Assn., Inc. v. Vissell*, 210 F.3d 595, 597 (6th Cir. 2000). As the U.S. Supreme Court has held in deciding whether or not attorney fees should be awarded and whether a party is considered a "prevailing party" under 42 U.S. Code, § 1988, there should be some form of judicial relief such as a declaratory judgment or injunctive relief or monetary damages. *Hewitt v. Helms*, 482 U.S. 755, 759-760 (1987).

In regard to the instant appeal, the LPAR and Libertarians should be considered the prevailing parties inasmuch as the District Court declared on July

15, 2016, that the Arkansas statutory scheme for ballot access for new political parties' candidates found in Ark. Code Ann., §§ 7-7-101, 7-7-203(c)(1), 7-7-205(c)(2), and 7-7-205(c)(3) is unconstitutional. Because the Court granted a declaratory judgment and declared these laws unconstitutional, the LPAR and the Libertarians should be considered prevailing parties under the applicable law. The LPAR and Libertarians would further call this Court's attention to those significant facts set forth on pages 5 and 6 of their Memorandum Brief in Support of their Motion to Set Amount of Reasonable Attorney Fees with Affidavits in support thereof (Joint App., pp. 661-662).

The District Court has discretion in awarding attorney fees in considering such factors as degree of success and whether there has been duplication of work effort. The declaratory relief requested by the LPAR and the Libertarians below in their lawsuit was 100% successful in having Arkansas's ballot access scheme for new political parties declared unconstitutional so that in the future new political parties which nominate by convention (a position the LPAR has found itself in three times) will have the right to conduct their nominating convention at the same time the major political parties conduct their preferential primary election. Further, all candidates for partisan office in Arkansas of either new political parties who nominate by convention or the major and established political parties who nominate at the preferential primary election will be treated equally per the District

Court's order of July 15, 2016, because all candidates will have to file their political practices pledges at the same time during the political party filing time period. Of course, it is not necessary for the Court to rewrite the election laws in question since the Arkansas legislature should be allowed the opportunity to address the District Court's order declaring Arkansas's statutory scheme for ballot access for new political parties unconstitutional.

As to duplicative work and reduction of hours, because of the fact that the LPAR and the Libertarians did not receive their injunctive relief requested for the 2016 election of having the new candidates of the LPAR nominated on February 27, 2016, placed on the Arkansas general election ballot, it should be noted that both attorneys reduced the number of hours they were requesting. Additionally, both Mr. Hyman and Mr. Linger asked for half their time for the hearing on the Motion for Preliminary Injunction and other motions that were held on February 19, 2016, because they did not receive the preliminary injunctive relief they requested. Also, Mr. Linger eliminated his travel time totally for his attendance at said motions hearing, and only Mr. Hyman attended the second deposition of Dr. Pakko in Little Rock. These adjustments and deductions, along with other deductions, coming to a total reduction of 50.4 hours, are a significant reduction that was done by the attorneys themselves. The District Court, of course, had discretion in making further adjustments which it felt necessary. The District

Court, in fact, made a number of other deductions because of duplicate work and reduced the attorney fees awarded to Mr. Hyman (District Court Order Granting Plaintiffs' Motion for Costs, and Granting in Part Plaintiffs' Motion for Attorney Fees, and Denying Defendant's Motion to Alter or Amend, pp. 1-4, Joint App., pp. 813-816). Therefore, the judgments for costs and attorney fees against the Secretary of State should be affirmed for the reasons set forth above.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT SECRETARY OF STATE'S MOTION TO ALTER OR AMEND JUDGMENT.

A. Standard of Review

The standard of appellate review as to the District Court's judgment, after a bench trial, as to this issue is *de novo* as to conclusions of law. On appeal, a District Court's rulings on issues of law are reviewed *de novo*. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005), citing *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001). Findings of Fact are subject to review under Fed. R. Civ. P. 52(a) and, in the context of a constitutional challenge to State election laws, require the Appellate Court to weight "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate" against "the precise interests put forth 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 Plaintiff's rights."

Burdick v. Takushi, 504 U.S. at 434, quoting *Anderson v. Celebrezze*, 460 U.S. at 789. An appellate court reviews a trial court's denial of a motion to alter or amend judgment for abuse of discretion. *Broadway v. Norris*, 193 F.3d 987 (8th Cir. 1999), citing *Sanders v. Clemco Indus*., 862 F.2d 161, 169 (8th Cir. 1988).

B. Discussion

On August 12, 2016, the Secretary of State filed a Motion to Alter or Amend Findings and Conclusions, Motion to Alter or Amend Judgment, and for Relief from Judgment, pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60(b), respectively, and supporting Brief (Joint App., pp. 730-761, and 762-775). The LPAR and Libertarians filed their Response and Memorandum Brief in Opposition to Defendant's aforesaid Motion to Alter or Amend Findings and Conclusions, Motion to Alter or Amend Judgment, and for Relief from Judgment, pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60(b). (Joint App., pp. 791-804).

Fed. R. Civ. P. 52(b) concerns a motion to amend or add additional findings to a court's ruling. It may be filed along with a motion under Fed. R. Civ. P. 59. Fed. R. Civ. P. 59(e) simply refers to the timing of a motion to alter or amend a judgment, while Fed. R. Civ. P. 60(b) sets forth the grounds for relief from a final judgment. While the Secretary of State did not specify which grounds he was seeking relief from under Fed. R. Civ. P. 60(b), the only one that would apply would be Fed. R. Civ. P. 60(b) (6), which simply states for "any other reason that

justifies relief." "Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *Innovative Home Healthcare, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998)(internal quotations omitted). A Rule 59(e) motion is only appropriate when "a manifest error affects 'the correctness of the judgment.'" *Norman v. Arkansas Dept. of Education*, 79 F.3d 748, 750 (8th Cir. 1996) (citations omitted). Likewise, a Rule 52(b) motion simply follows the reasons that would allow a court to consider a Rule 59 motion, with a corresponding relief of the judgment under Rule 60(b)(6) if the Court should find there were valid reasons for the granting of the motions under 52(b) and 59(e).

The Secretary of State in his aforesaid motions and supporting brief, for the reasons argued hereinabove in this brief, misunderstands the correct meaning and interpretation of the election laws in question by arguing that they are ambiguous as to when a new political party must conduct its nominating convention, as well as the correct application of standing, the correct application of as-applied and facial challenges, the difference between declaratory and injunctive relief requested herein, and the failure of the Secretary of State to present evidence of any State interest as to the ballot access scheme for new political parties' state candidates in Arkansas which the District Court declared unconstitutional. Because the District Court correctly granted declaratory relief finding unconstitutional the ballot access

law for new political party candidates, the combined motions of the Secretary of State filed below to alter or amend findings and conclusions, as well as to alter or amend the judgment and grant relief from the judgment, pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60(b), were without merit and were correctly denied by the District Court. (Joint App. pp. 813-816).

CONCLUSION

WHEREFORE, premises considered, Plaintiffs-Appellees request that, upon full consideration of this appeal, the Court of Appeals affirm the decision of the United States District Court for the Eastern District of Arkansas, Western Division, in the case below, and grant such other and further relief as to which Plaintiffs-Appellees may be entitled, and which this Court may deem equitable and just.

Respectfully submitted this 23rd day of January, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to pursuant to Fed. R. App. P. 28 (a) (10) and 28 (b), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN FED. R. APP. P. 32 (a)(7)(B)(iii), THE BRIEF CONTAINS:

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