No. 16-1034

In the Supreme Court of the United States

THE LIBERTARIAN PARTY OF KENTUCKY, *et al.*,
Petitioners,

v.

ALISON LUNDERGAN GRIMES,
SECRETARY OF STATE OF THE
COMMONWEALTH OF KENTUCKY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Within the Petition, petitioners demonstrate that Kentucky law does not permit "general" ballot access for a political party unless that party receives over 2% of the vote in a Presidential race. KRS §118.015, KRS §118.305(1)(e), and KRS §118.305(1)(a), (b), (c), and (d). If a political party's candidate for President receives more than 2% of the vote, that party automatically earns access on Kentucky's general election ballot for all its candidates for office for the following four years. *Id.* There is no other way for a political party to receive blanket ballot access in Kentucky – not by petition, and not even if they run candidates in other statewide races. *Id.* Candidates of third parties who have not achieved 2% of the vote in a Presidential election are treated as "independent candidates" under KRS §118.305(1)(e), and may qualify for ballot access on an individual race-by-race basis only by obtaining the number of signatures required at KRS §118.315(2).

Petitioners challenge Kentucky's ballot access qualifications on several constitutional grounds. As discussed within their Petition, petitioners demonstrate that the Sixth Circuit's decision here directly conflicts with those of several sister circuit courts and this Court. Petitioners present three questions for this Court's resolution.

Respondents are desperate to avoid Kentucky's burdensome and unconstitutional ballot access scheme becoming scrutinized by this Court. Respondents are willing to say anything within their *Brief in Opposition* to circumvent scrutiny. Respondents disparage petitioners for misrepresenting the record before the courts below by allegedly not disclosing that the

Libertarian Party obtained 2% of the vote in the 2016 Presidential election. They are wrong.

Respondents also argue that petitioners did not preserve their contention that the equal protection analysis in ballot access cases incorporates a non-discrimination principle. That is incorrect.

Last of all, respondents argue that the demonstrable burden imposed upon minority parties, whose candidates failed to obtain 2% of the vote during the most recent presidential election, passes constitutional muster. In doing so, respondents engage in a shell game because this case does not involve ballot access rules regarding when a particular *candidate* may appear on the ballot; it involves only the requirements a political *party* must meet.

The questions presented are vital and important and should be decided by this Court to prevent the federal constitutional principles afforded to a minority political party seeking general ballot access from meaning different things in different courts across the country. As to respondents' specific arguments urging the Court to decline any further scrutiny of Kentucky's ballot access scheme, the Court should invoke the well-established Kentucky rule that, "We resist the temptation to chase these alluring rabbits and keep our eye on the squirrel." *Louisville Asphalt Co. v. Cobb*, 310 Ky. 126, 129, 220 S.W.2d 110, 112 (1949).

ARGUMENT

1. Respondents suggest that this Court should not grant certiorari because petitioners supposedly failed to inform that the Libertarian Party's candidate for President in the 2016, Gary Johnson, received more than 2% of the vote and, as a consequence, the Libertarian Party automatically earns access on the general election ballot for all its candidates for office statewide for the following four years. The argument is incorrect because petitioners informed the Court at page 9 of the Petition that with only five exceptions -- 1924, 1968, 1980, 1996, **and 2016** – for at least the past 100 years, the only parties qualifying for automatic ballot access in Kentucky were the Democrat and Republican parties. Petitioners also showed that these five instances do not make Kentucky's ballot access scheme reasonable or constitutional. The 2016 result underscores the unreasonableness of Kentucky's ballot scheme. Despite some of the most unpopular candidates in perhaps the last one hundred years at the top of the Republican and Democrat tickets, and despite a credible Libertarian Party Presidential candidate who was a former two-term state governor, the Libertarians barely met the 2% threshold – a result that they are unlikely to achieve again in the absence of such extraordinary circumstances, if ever. Petitioners' expert had it right – the threshold is "virtually impossible" to meet – and 2016 was certainly an exceptional year. These parties will continue to be undermined in 2020 and beyond from Kentucky's scheme, and it warrants review.

Respondents also argue that this case is moot because petitioners Libertarian Party of Kentucky and

Libertarian National Committee, Inc. earned automatic access on Kentucky's general election ballot for all their candidates for office statewide for the following four years. The case is not moot because the 2016 presidential candidate for petitioner Constitution Party, Darrell Castle, did not receive 2% of the vote. Thus, this case remains very much alive for the Constitution Party and is not moot. *Sosna v. Iowa*, 419 U.S. 313, 401-402 (1975). Moreover, as noted above, it appears clear that the Libertarians may again fall under the threshold in 2020 and the record of evidence suggests as much.

Respondents argue that the Constitution Party's presence here is of no moment because it lacks a modicum of support. Petitioners acknowledge that Kentucky may require a modicum of support before treating a Political Group as a Political Organization. The problem here is that Kentucky only permits this showing in just one overly burdensome and unconstitutional way -- the results of a Presidential race, while forgoing common, reasonable alternatives for minority parties discussed at pages 22-23 and 37 & n. 10 of the Petition and in the testimonies of petitioners' experts. [Decl.Winger, Doc.#16-6, PAGEID#212-235; Decl.Tobin, Doc.#16-5, PAGEID#206-211].

The constitutional infirmities present with the Kentucky ballot access statutes are also not moot for the Libertarian Party. It earned access to the Kentucky general election ballot for the next four years. The access came about because the Democrat and Republican parties chose to nominate candidates for the 2016 Presidential election who had record-

setting poll results for unpopularity – both having in excess of 50% unfavorability at several points in time. Will unique circumstances be present in the 2020 Presidential election, as they were five other times in the past 100 years, to enable the Libertarians to garner 2% of the vote and have another four years of access? While the Libertarian Party may appear on the ballot for the next four years, the infirmities of Kentucky's unconstitutional ballot access requirements render it easily capable of repetition, yet evading review. *Sosna*, 419 U.S. at 400-401, citing *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972) ("Although appellee now can vote, the problem to voters posed by the Tennessee residence requirements is capable of repetition, yet evading review.").

2. Respondents falsely argue that certiorari should not be granted because petitioners supposedly failed to preserve for certiorari review the Petition's first Question Presented.

Petitioner's non-discrimination analysis under Equal Protection Clause was squarely presented to the trial court and to the Sixth Circuit for decision. First, at Point II(C)(2) of *Plaintiffs' Memorandum in Support of Their Motion for. . . Summary Judgment* (Doc. #16-1, PAGEID #179), petitioners informed the trial court that this case involves, among other things, a Fourteenth Amendment challenge as Kentucky's ballot access statute denies them an equal opportunity to exercise their rights to association and political expression. Petitioners contended:

> The Sixth Circuit in *Hargett [III]* [*Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015)], concluded that the burden of the Tennessee

ballot access regime was severe "[b]ecause recognized minor parties must obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election to retain ballot access … considering that established major parties, which have more institutional knowledge and financial resources, are given four years to obtain the same level of electoral success." *Id.* In Kentucky, the burden is at least equal, if not worse – minor parties in Kentucky must achieve 2% or more in a Presidential race (which [petitioners' expert, Richard] Winger has testified to is the most burdensome and difficult race to poll in, as evidenced by statewide race results where the Libertarians, at least, have achieved well over the 2% threshold).

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

Nevertheless, "[b]ecause this statute imposes a greater burden on minor parties without a sufficient rationale put forth by the state, it violates the Equal Protection Clause. It

> impermissibly 'freezes the status quo' and does not allow 'a real and essentially equal opportunity for ballot qualification.'" *Id.*
>
> The same is true here.

(*Memorandum in Support of . . . Summary Judgment* (Doc. #16-1, PAGEID #179-180).

Petitioners relied upon Sixth Circuit precedent and underlying analysis to complete the non-discrimination/Equal Protection argument because that was all that should have been needed. Alas, it was not. On appeal, at Point I(C) of *Appellant's Merit Brief*, (Doc. #18, pp. 58-59), petitioners squarely presented the issue that "Under *Hargett III [Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015)], the District Court erred in failing to find an Equal Protection violation." 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 access threshold 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. Petitioners concluded their Equal Protection Clause argument before the Panel thusly:

> As in *Hargett III*, Kentucky's regime "imposes a greater burden on minor parties without a sufficient rationale put forth by the state, it violates the Equal Protection Clause. It impermissibly 'freezes the status quo' and does not allow 'a real and essentially equal opportunity for ballot qualification.'" 791 F.3d 684, 694.
>
> The District Court erred in failing to find an equal protection violation.

(*Appellant's Merit Brief*, Doc. #18, p. 59).

Regrettably, the Sixth Circuit declined to decide the issue. Thereafter, to obtain a decision and to alert the Sixth Circuit that it was creating a circuit split, at Point I within the *Petition of Plaintiffs/Appellants for Panel Rehearing and Rehearing En Banc* (Doc. #23, pp. 7-13), petitioners again presented the issue *en banc* of applying the principle of non-discrimination in the Equal Protection Clause to ballot access cases. Petitioners rewrote their analysis on this issue to show that the Panel's lack of a decision would contradict decisions in sister circuits[1] that recognize that the

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[1] *Schulz v. Williams*, 44 F.3d 48, 60 (2nd Cir. 1994); *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411, 415-416 (2nd Cir. 2004); *Reform Party of Allegheny County v. Allegheny County Dept. of Elections*, 174 F.3d 305, 315 (3rd Cir. 1999) (en banc); *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984); *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992); *Socialist*

Equal Protection Clause affords protection from discrimination against minor parties. Petitioners did not limit their discussion of the non-discrimination requirement to the favorable, intra-circuit decision of *Hargett III*; but rather expanded the discussion of the issue to not only show the Panel's inconsistency with *Hargett III* but, most importantly, the decision's creation of a split of authority with sister circuits and with this Court in *Anderson/Burdick*.

The first issue stated in the first Question Presented was preserved below.

3. The remainder of the *Brief in Opposition* is comprised of respondents recasting this case as a challenge to Kentucky's ballot access scheme as applied to individual candidates, where Kentucky's petition signature requirement has been upheld from challenges by individual candidates who are not Democrats or Republicans. Petitioners cautioned at page 3 of the Petition, "this case does not involve … rules regarding when a *particular candidate* may appear on the ballot; it involves only the requirements a political *party* must meet." *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 539 (6th Cir. 2014). Consequently, respondents' authorities upholding when a candidate may appear on the ballot are inapposite. *Cf. Anderson v. Mills*, 664 F.2d 600, 606 (6th Cir. 1981) (involving an independent candidate's challenge to the 5,000 signature requirement and who did not seek to run more than one candidate or to run multiple candidates over a period of time in more than one

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Workers Party v. Rockefeller, 314 F. Supp. 984, 995 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970).

election cycle); *Libertarian Party v. Ehrler*, 776 F. Supp. 1200, 1201 (E.D. Ky. 1991) (involving an individual candidate's challenge to be placed on the ballot and did not involve minor political parties' general ballot access once they have generated repeated state wide electoral success); *Libertarian Party v. Davis*, 601 F. Supp. 522 (E.D. Ky. 1985) (involving ballot access efforts of a single set of candidates for President and Vice President and did not involve, as here, the running of multiple candidates, for multiple offices, over a period of time).

Respondents argue that the ballot access scheme as applied to minority parties attempting to run candidates for multiple office races is not burdensome or unequal. The undisputed evidence is to the contrary and is detailed at pages 10-23 of the Petition. Kentucky's scheme does involve the requirement of minority parties incurring professional petition gathering expenses that are avoided by the Democrat and Republican Parties. Contrary to the statements of *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 576-577 (6th Cir. 2016); *Green Party of Arkansas v. Martin*, 649 F.2d 675, 683 (8th Cir. 2011), and *Libertarian Party v. Gardner*, 126 F. Supp.3d 194, 205 (D.N.H. 2015), *aff'd.,* 843 F.3d 20 (1st Cir. 2016), the uncontroverted evidence at pages 10-23 of the Petition shows that Kentucky's ballot access scheme imposes severe cost burdens on minority parties' right to ballot access because of the practical need to hire and train professional petition gatherers for individual candidates. Christina Tobin, an expert in petition gathering and circulation, testified that professional petitioners are generally engaged to collect these signatures. [Decl. Tobin, RE#16-5, PAGEID#206-211].

The only practical way to gather a single petition with 5,000 or more signatures for a single candidate is either with: (i) an extremely organized, and typically large, group of volunteers, or (ii) through the use of a professional paid petitioner. *Id.* Petitioners can find volunteers and have the organization to obtain some of the required signatures in a statewide race, *for a single race*, in a *single election cycle* (and would need to pay a professional signature gathering organization for the rest of the signatures). [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. As a practical matter, it is impossible to gain access for more than two individual candidates in a statewide race given the signature threshold and would be a difficult task even for one of the major political parties. *Id.*

Respondents assure us that petitioners have had no problems in consistently placing their candidates on the ballot. However, the better question about past experience is past success, or lack thereof, in regard to petitioning. Respondents' witness, Mary Sue Helm, testified that from 2000 through 2010, the Libertarian Party placed 21 candidates on the ballot in Kentucky and the Constitution Party placed seven in that same period. [Decl.Helm, RE#34-1, PAGEID#404-405]. While Ms. Helm counted the placement of both President and Vice President as separate candidacies (even though they submit one petition), the Libertarian Party had been able to place 21 candidates on the ballot, out of a total of 7,640 offices that were on the ballot in the same period that Ms. Helm looked at. [Decl.Winger, RE#16-6, PAGEID#231-235]. And the Constitution Party even less. The fact that the

Libertarian Party had been able to place candidates on the ballot in less than half a percent (0.2% to be exact) of the total races is not a vindication of Kentucky's scheme, but an indictment of it.

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

In *Storer v. Brown*, 415 U.S. 724, 742 (1973), the Court asked "could a reasonably diligent independent candidate be expected to satisfy" the provisions at issue? The answer here, as to being able to field more than a handful of candidates, is "**NO**." Kentucky fails to "provide feasible means for other political parties and other candidates to appear on the general election ballot," except in a small handful of races. *Id.* at 728.

CONCLUSION

For the reasons stated in the Petition and here, the Court should issue a writ of certiorari issue for the three questions presented.

Respectfully submitted,

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