IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LIBERTARIAN PARTY OF ARKANSAS, *et al.* — **PLAINTIFFS**

v. — **Case No. 4:19-cv-00214-KGB**

JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas — **DEFENDANT**

RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Does the Constitution require ballots to include anyone nominated by a group that obtains 10,000 signatures? Plaintiffs, the Libertarian Party and associated individuals, claim that it does because any greater signature requirement infringes their "wish to have the right to cast their votes effectively for Libertarian candidates in Arkansas in 2020." (Plaintiffs' Brief in Support of their Complaint and Motion for Preliminary Injunction, Doc. 13 (Motion), at 11.) But elections are not about abstract wishes. They are about picking winners and losers—that is, "the function of the election process is 'to winnow out and finally reject all but the chosen candidates.'" *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). And "attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.*

The U.S. Constitution itself recognizes the States' role in ensuring that elections run smoothly. It endows the States with the duty to regulate the "Times, Places and Manner of holding Elections." U.S. Const. art. I, sec. 4, cl. 1. Arkansas, like most States, exercises that duty by "impos[ing] on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." *Lubin v. Panish*, 415 U.S. 709, 718 (1974).

This year, Arkansas increased the percentage that new political parties must satisfy to obtain across-the-board ballot access. This change in Arkansas's modicum-of-support requirement means that new political parties in Arkansas must now make a showing of voter support comparable to the showing that Arkansas has long required of established political parties. But the plaintiffs (referred to from here on as the Libertarian Party) ask the Court to preliminarily enjoin the amended requirement so that new political parties need just 10,000 signatures to obtain across-the-board ballot access. Yet the Libertarian Party does not acknowledge that courts at all levels of the federal and state judiciaries have upheld laws similar to Arkansas's modicum-of-support requirement against constitutional challenge.

Separately, Arkansas also moved forward its primary elections in presidential election cycles. This had the secondary effect of moving forward all the deadlines in Arkansas law that are based either directly or indirectly on the date of the primary, including the deadline for new political parties to file with the Secretary of State, the defendant here, a petition for ballot access that satisfies the modicum-of-support requirement. The Libertarian Party nonetheless claims that the change is unconstitutional. But this deadline and others changed as a result of Arkansas's desire to have an earlier presidential primary and not of any attempt to freeze minor parties out of Arkansas politics. So the Libertarian Party's constitutional challenge to the new-party filing deadline also fails. For these reasons, and those discussed below, the Court should deny the Libertarian Party's motion for a preliminary injunction.

BACKGROUND

I. Arkansas's Comprehensive Ballot-Access Regime

The Libertarian Party's brief grossly oversimplifies Arkansas's ballot-access regime. It leaves the impression that Arkansas has a single process for selecting which candidates appear on the ballot—the modicum-of-support requirement—with a single arbitrary deadline for filing

signed petitions, all designed specifically to freeze the Libertarian Party out of the State's electoral process. (*See, e.g.*, Motion 12.) The reality is quite different than that. "When considered as a whole, . . . Arkansas's ballot access laws 'do not operate to freeze the political status quo,'" because they "do not prevent [the Libertarian Party] from participating in the electoral process." *Green Party of Ark. v. Martin*, 649 F.3d 675, 685 (8th Cir. 2011) (quoting *Jenness v. Fortson*, 403 U.S. 431, 438 (1971)). The modicum-of-support requirement is not the only avenue open for the Libertarian Party. And the petition-filing deadline did not arise from an arbitrary scheme to sandbag the Libertarian Party's chances at electoral success. Rather, that deadline is a function of the constellation of other deadlines in Arkansas's election laws.

A. Paths to Ballot Access

The Libertarian Party has a variety of options for obtaining access to the Arkansas ballot. *See Green Party of Ark.*, 649 F.3d at 677-78 (describing "a number of alternative paths" that allow "access to Arkansas's ballot as a candidate for elected office").

1. Political-Party Definition.—One option would be for the Libertarian Party to qualify as a "political party." Arkansas allows political parties to put forward a full slate of candidates for each general election, *including* the ability to place a candidate on the ballot for every partisan office up for a vote at that election. *See* Ark. Code 7-7-102(a); *id.* 7-8-201, -302(5)(A)(i) (same, for nominees for President and Vice President of the United States); *see also id.* 7-10-103 (laying out procedure for candidates seeking nonpartisan office). Put differently, a qualified political party—unlike individual independent candidates—can automatically place candidates on the ballot "for United States Senate, United States House of Representatives, or state, district, county, township, or applicable municipal office to be voted upon at a general election" without showing that any particular candidate enjoys any amount of support whatsoever. *Id.* 7-7-102(a). To receive such broad, automatic access to each and every

partisan office, Arkansas requires a "preliminary showing of a significant modicum of support." *Jenness*, 403 U.S. at 442.

Established political parties make this showing through past electoral performance. Arkansas law defines a "political party" as "any group of voters that at the last preceding general election polled for its candidate for Governor in the state or nominees for presidential electors at least three percent (3%) of the entire vote cast for the office." Ark. Code 7-1-101(27)(A). Established parties must continue to meet this three-percent, electoral-support cutoff to retain their power to nominate a full slate of candidates for each general election. "When any political party fails to obtain three percent (3%) of the total votes cast at an election for the office of Governor or nominees for presidential electors, it shall cease to be a political party." *Id.* 7-1-101(27)(C). Faced with a constitutional challenge to the three-percent cutoffs in Arkansas's political-party definition, the Eighth Circuit upheld Arkansas's law. *See Green Party of Ark.*, 649 F.3d at 679, 687 (rejecting the Green Party's First and Fourteenth Amendment challenges to these cutoffs).

2. Modicum-of-Support Requirement.—Whether a group loses its political-party status by failing to meet the three-percent cutoff or never had political-party status to begin with, it may satisfy a modicum-of-support requirement and obtain the power to automatically nominate a slate of candidates across the State in the next general election. *See* Ark. Code 7-7-205. With the modicum-of-support requirement satisfied, a new political party may nominate a full slate of candidates for the next Arkansas general election but must do so by convention rather than primary election. *Id.* 7-7-102(b); *see id.* 7-7-205(c)(4); *id.* 7-8-302(5)(A)(ii) (allowing new political parties to select presidential nominees at a convention).

Under the modicum-of-support requirement, which is the focus of the Libertarian Party's claims here (*see* Motion 1-2; Complaint ¶¶ 20-25), a group seeking to become a new political party must make a nearly identical showing of electoral support as an established political party. Such a group forms a new political party "by filing a petition with the Secretary." Ark. Code 7-7-205(a)(1). Until this election cycle, that petition needed to contain "the signatures of at least ten thousand (10,000) registered voters in the state." *See* Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 1 (amending Ark. Code 7-7-205(a)(2) by striking 10,000-signature requirement and replacing with current text). But the General Assembly amended the modicum-of-support requirement so that it now mirrors the political-party definition. Consequently, a group's petition to form a new political party must now "contain at the time of filing the signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor in the immediately preceding general election for Governor." Ark. Code 7-7-205(a)(2); *cf. id.* 7-1-101(27) (defining "political party"). The signatures on that petition must meet two simple requirements: They must be from "registered voters," and they must not be "dated more than ninety (90) days before the petition is submitted." *Id.* 7-7-205(a)(2), (4)(B); *see* Ark. Const. amend. 51, sec. 9(a) (laying out Arkansas's voter-registration requirements).

The General Assembly made clear its purposes for unifying the modicum-of-support requirement with the political-party definition. The former modicum-of-support requirement was "insufficient to reflect the will of the voters of Arkansas." Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 2. The reasons for this are clear. Take the 2020 general election as an example. A political party whose candidate received at least 26,746 votes in the 2018 gubernatorial race (out of 891,545 total votes cast in that race) would retain its power under

Arkansas law to nominate a full slate of candidates for the 2020 general election. (*See* Murphy Decl., Ex. D, 2018 Election Results.) (The Declaration of Peyton Murphy is being simultaneously filed with this brief.) But a political party whose 2018 gubernatorial candidate received less than 26,746 votes would not. Under the old version of the modicum-of-support requirement, however, that same now-defunct political party could still nominate a full slate of candidates for partisan offices across the entire State by simply collecting the signatures of just 10,000 registered voters. The current modicum-of-support requirement, by contrast, requires that now-defunct political party to show a similar modicum of support as an established political party—26,746 signatures to match the required 26,746 votes. Indeed, because voting is a zero-sum game while registered voters can sign as many petitions as they like, new parties have a larger pool of eligible voters from which to draw. This makes the three-percent modicum-of-support requirement for new political parties significantly easier to satisfy than the three-percent cutoff for established parties. The General Assembly has simply closed a 10,000-signature loophole in its ballot-access regime.

3. "Political Group" Presidential Nominee.—Qualifying as a political party—whether through the three-percent cutoff in the political-party definition or through the modicum-of-support requirement—is not the only path to ballot access. Arkansas also allows a "political group" to show the required modicum of support through performance in the presidential race. *See* Ark. Code 7-8-302(5)(B). (Note that the term "political group" is not defined in Arkansas law.) A political group that wishes to have candidates for President and Vice President of the United States printed on the Arkansas ballot must submit a petition to the Secretary with the signatures of 1,000 qualified electors. *Id.*; *see id.* 7-1-101(33) (defining "qualified elector" as "a person who holds the qualifications of an elector and who is registered pursuant to Arkansas

Constitution, Amendment 51"). If a political group satisfies that 1,000-signature requirement, then its presidential and vice presidential nominees will be included on the ballot, along with the political group's name. In the 2016 general election, for example, the Arkansas presidential ballot included candidates from the Better for America Party and the Green Party, neither of which nominated candidates in any down-ballot races. (*See* Murphy Decl., Ex. C, 2016 Election Results.) A political group that has used this process to obtain access to the presidential ballot will itself become a "political party" if it "polled for its . . . nominees for presidential electors at least three percent (3%) of the entire vote cast for the office." *Id.* 7-1-101(27)(A).

In short, any political group can obtain presidential ballot access with a 1,000-signature petition and will subsequently become a political party if the group's presidential nominee obtains three percent of the vote. Once that happens, it will have the same power to nominate a full slate of candidates as any other political party in Arkansas.

4. Independent Candidates.—Apart from these various ballot-access paths for political parties, Arkansas also provides paths to the ballot for independent candidates. On the presidential ballot, the requirements for independent candidates are largely the same as those for political groups that have not met the political-party definition. *See id.* 7-8-302(6)(A) (allowing independent candidates for President and Vice President of the United States on the ballot with a 1,000-signature petition). For down-ballot races, the ballot-access requirements for those who wish to run as independent candidates depend on the level of the office that the candidate seeks. For "a district, county, or township office," a person wishing to run as an independent candidate must "file petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required." *Id.* 7-7-103(b)(1)(A). For a "state office or

for United States Senator," a person wishing to run as an independent candidate must "file petitions signed by not less than three percent (3%) of the qualified electors of the state or which contain ten thousand (10,000) signatures of qualified electors, whichever is the lesser." *Id.* 7-7-103(b)(1)(B). In either case, the signatures must be from "a registered voter" and can be collected only during the 90-day period preceding the independent-candidate filing deadline. *Id.* 7-7-103(b)(2), (3)(B).

"[F]rom the point of view of one who aspires to elective office" in Arkansas, a variety of "alternative routes are available to getting his name printed on the ballot." *Jenness*, 403 U.S. at 440.

B. Nomination-Certification Procedures

No matter which ballot-access path a person or a group chooses to pursue, a potential candidate will not make it on the ballot unless his or her nomination is certified according to Arkansas law. *See* Ark. Code 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."). As with the Libertarian Party's near-sighted portrayal of Arkansas's holistic ballot-access regime, the Party's treatment of Arkansas's nomination procedures myopically pulls a single date out of context—the deadline for putative new political parties to file petitions fulfilling the modicum-of-support requirement. *See* Motion 2; Complaint ¶¶ 26-30. But that deadline must be viewed in the context of the myriad other deadlines in the run-up to a general election.

Before explaining how the new-party filing deadline fits in that context, a word about Arkansas election terminology. Arkansas law provides for "preferential primary elections," "general primary elections," and "general elections." A general election is just what it sounds

like: "the regular biennial or annual . . . election of United States, state, district, county, township, and municipal officials." Ark. Code 7-1-101(16).

But Arkansas uniquely defines the terms "preferential primary election" and "general primary election." Of the two, the definition of "preferential primary election" more closely resembles the customary definition of "primary election." In a preferential primary election, if a candidate for an office receives a majority of the votes cast for that office, then that candidate is the party's nominee for that office. Ark. Code. 7-7-304(f)(1); *cf. election (3), primary election*, Black's Law Dictionary 632 (10th ed. 2014) (defining "primary election" as a "preliminary election in which a political party's registered voters nominate the candidate who will run in the general election"). After a party has held a preferential primary election, if all that party's nominations have already been determined, then that party does not hold a general primary election. Ark. Code 7-7-202(b)-(c). If for any office no candidate receives a majority of the votes cast during the preferential primary election for that office, however, then the two candidates for that office who received the most votes will face each other in a general primary election. *Id.* 7-7-304(f)(2). A general primary election in Arkansas, therefore, resembles what is usually just called a runoff election. *See election (3), runoff election*, Black's Law Dictionary 632 (10th ed. 2014) (defining "runoff election" as an "election held after a general election, in which the two candidates who received the most votes—neither of whom received a majority—run against each other so that the winner can be determined").

The new-party filing deadline that the Libertarian Party challenges is related to the timing of Arkansas's primary elections. (A more comprehensive list of deadlines for the 2020 election cycle is attached to this brief after the signature page as an appendix.) This legislative session, the Arkansas General Assembly changed the date of the primaries. Under the old law, the

preferential primary election took place on "the Tuesday four (4) weeks before the general primary election," which was held on "the third Tuesday in June preceding the general election." *See* Act 545, sec. 2, 92d Arkansas General Assembly, Reg. Sess. 2019 (amending Ark. Code 7-7-203(a)-(b), regarding timing of preferential and general primary elections). If that law remained in effect for the 2020 election cycle, then the next preferential primary election would take place on May 19, 2020, with the general primary election following on June 16. But Act 545 moved those dates forward "[f]or years in which the office of President of the United States will appear on the ballot at the general election." *Id.* (enacting Ark. Code 7-7-203(b)(2)).

Starting with the 2020 presidential election, Arkansas's preferential primary election will take place in presidential years "on the first Tuesday after the first Monday in March"—commonly known as "Super Tuesday"—with the general primary election following four weeks later. *Id.*; *see* Op. Ark. Att'y Gen. No. 2019-034, 2019 WL 2179028, at *1 (May 15) (advising the Secretary that acts passed by the Arkansas General Assembly in 2019 will take effect on July 24, 2019). This made permanent a change that the General Assembly had enacted as a one-time measure applicable only to the 2016 presidential election. *See* Act 4, secs. 1, 7, 90th General Assembly, 1st Extraordinary Sess., 2015 Ark. Acts vol. 2, at 371-72, 375 (moving preferential primary election to Super Tuesday but expiring on December 31, 2016). Super Tuesday will next occur on March 3, 2020.

The Arkansas General Assembly's "desire to participate in the nationwide 'Super Tuesday' presidential primary" led to "a corresponding shift in a variety of other deadlines." *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 180 (5th Cir. 1996). In the 2020 election cycle, for example, by January 16, 2020, each county board of election commissioners must deliver absentee ballots to the county clerk for mailing. Ark. Code 7-5-407(a)(1). To allow for time to

prepare the ballots, the Secretary and each county clerk must—by December 19, 2019—certify to the county boards of election commissioners a list of the candidates who have filed the papers necessary to run for office. *Id.* 7-7-203(d). And most relevant to the Libertarian Party's allegations, to ensure that the Secretary and the county clerks can process those papers, candidates must file them by the end of the seven-day "party filing period." *See id.* 7-7-301(a) (requiring candidates who wish to compete for office in party primaries to make certain filings before the end of the party filing period); *id.* 7-7-205(c)(3) (same, for candidates who wish to compete for office at a new party's nominating convention). For the 2020 general election, the party filing period runs from Monday, November 4, to Tuesday, November 12, 2019. (Monday, November 11 is Veterans Day.) *See* Act 545, sec. 2, 92d Arkansas General Assembly, Reg. Sess. 2019 (amending Ark. Code 7-7-203(c)(1), which sets the party filing period for presidential election cycles); Ark. Code 7-1-108 (providing for deadlines that fall on holidays).

Each of these deadline changes and others arose from Arkansas's desire to participate in Super Tuesday. That final change, pushing back the party filing period, led to the new-party filing deadline that the Libertarian Party challenges. *See* Motion 2, 10. Since 2013, the new-party filing deadline has fallen 60 days before the party filing period. *See* Act 1356, sec. 2, 89th General Assembly, Reg. Sess., 2013 Ark. Acts vol. 1, at 5712 (amending Ark. Code 7-7-205(a)(6) to increase this from 45 days to 60 days). Requiring new parties to file their petitions 60 days before the party filing period makes sense. This gives the Secretary 30 days to determine whether the petition is sufficient, *see* Ark. Code 7-7-205(b)(1), and if the Secretary determines that the petition is insufficient, it then gives a putative new party another 30 days to challenge that determination in Pulaski County Circuit Court, *see id.* 7-7-205(c)(5). To allow time for these processes before the party filing period leading up to Super Tuesday 2020, the

next new-party filing deadline falls on September 5, 2019. (In its filings, the Libertarian Party miscalculated this deadline when it claims that it falls instead on September 4, which is 61 days before the party filing period. *See, e.g.*, Motion 2; Complaint ¶ 10.)

The Libertarian Party portrays the September 5 new-party filing deadline as part of a scheme specifically targeted at "prevent[ing] the LPAR from having a reasonable opportunity to obtain ballot access." Motion 12. But that deadline—along with the other changes made to the Arkansas election calendar starting with the 2020 cycle—flows from the decision to move the preferential primary election forward to Super Tuesday.

II. Minor Parties' Electoral History in Arkansas

The historical performance in Arkansas elections of the two most prominent minor parties is a case study for the need to bring the new-party signature requirement into line with the three-percent, electoral-support cutoff for retaining status as a "political party" under the statutory definition. *See* Ark. Code 7-1-101(27). In 2006, 2008, 2010, 2012, and 2014, the Green Party of Arkansas satisfied the old 10,000-signature requirement to become a new political party. *See Green Party of Ark.*, 649 F.3d at 679. (*See also* Murphy Decl., Exs. A, B, 2012 & 2014 Election Results.) And in 2012, 2014, 2016, and 2018, the Libertarian Party satisfied the now-defunct 10,000-signature requirement to obtain the power to place candidates on the ballot for each and every office at the general election. (*See* Pakko Aff., Doc. 12-1 ¶ 4.) The Libertarian Party in particular took advantage of that power, nominating candidates for whatever office they wished to pursue. For instance, the Libertarian Party nominated a man named "Elvis D. Presley," first in 2014 for Commissioner of State Lands; then, in 2016 for State Senate District 26; and most recently, in 2018 for U.S. Congress District 1. (*See* Murphy Decl., Exs. B-D, 2014, 2016, & 2018 Election Results.) *See also* Elvis Presley – U.S. Congress District 1, Libertarian Party of Ark. (accessed May 22, 2019), https://lpar.org/2018-candidates/elvis-

presley/; AETN Debate: District 1 Congress (Oct. 8, 2018; accessed May 22, 2019), https://youtu.be/t5b21yiN-G4. As this illustrates, qualifying as a new political party through the signature-gathering process endows minor parties with the power to place anyone of the party's choosing on the ballot in Arkansas.

After consistently obtaining across-the-board ballot access through the signature-gathering process, both parties just as consistently failed in each election to win enough gubernatorial or presidential votes to retain their status as a "political party" under Arkansas law. *See* Ark. Code 7-1-101(27)(A) (creating a three-percent cutoff of the votes cast for governor or president to remain a political party). For example, the Green Party did not even nominate a 2018 gubernatorial candidate after its 2016 presidential candidate received less than one percent (0.8%, to be precise) of the vote. (*See* Murphy Decl., Ex. C, 2016 Election Results.) For its part, the Libertarian Party came as close as it ever has to retaining its political-party status in the 2018 gubernatorial race. Even then, the Libertarian Party's candidate obtained only 25,885 votes, nearly 1,000 votes short of the three-percent cutoff and over 250,000 votes short of the losing major-party candidate—not to mention the more than 550,000 votes the Libertarian Party's candidate would have needed to *win the election.* (*See* Murphy Decl. Ex. D, 2018 Election Results.)

Both the Green Party and the Libertarian Party—the two most prominent minor parties in American politics—have consistently failed to show "a significant modicum of support" among the Arkansas electorate. *Jenness*, 403 U.S. at 442. But they have in the past remained able to continue nominating candidates for *each and every* partisan office as a political party because of the substantial disconnect between the three-percent cutoff for retaining political-party status and the 10,000-signature provision in the old version of the modicum-of-support requirement.

This disconnect has allowed these parties to dodge the effect of the three-percent cutoff—a cutoff that the Eighth Circuit has upheld against constitutional challenge. *See Green Party of Ark.*, 649 F.3d at 677. Now the modicum-of-support requirement contains a three-percent cutoff similar to—but less demanding than—the cutoff upheld in that case. *Cf. Jenness*, 403 U.S. at 433 (requiring signatures equal to five percent "of the *total number of electors eligible to vote in the last election*"—not just five percent of those who actually voted). Arkansas has thus created a system where it can ensure *ex ante* that enough Arkansans even want a potential new party on the ballot to make it mathematically possible that such a party will hit the three-percent cutoff in the gubernatorial or presidential race.

The Constitution does not prohibit Arkansas from requiring the Green Party, the Libertarian Party, or any other minor political party to show that it can hit the three-percent cutoff, whether before or during an election. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.").

STANDARD OF REVIEW

When considering whether to issue a preliminary injunction, the Court must balance four factors: the likelihood that the Libertarian Party will succeed on the merits of its constitutional challenge to two piece of Arkansas's comprehensive ballot-access regulations; the threat of irreparable harm to the Party without an injunction; the harm that Arkansas would suffer from an injunction; and the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). But where, as here, "a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute . . . the moving party must make a more rigorous showing that it is 'likely to prevail on the merits.'" *Planned Parenthood of Ark. & E. Okla. v.*

Jegley, 864 F.3d 953, 957-58 (8th Cir. 2017) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). In this context, "likely" means that the Libertarian Party must prove that is more likely than not going to prevail on the merits of its claims before the Court can preliminarily enjoin any provision of Arkansas's ballot-access regime. *See Rounds*, 530 F.3d at 730-32 (rejecting "fair chance" of success standard in challenges to state statutes, "with 'fair chance' meaning something less than 50 percent"). Although the Court must find that the Libertarian Party is likely to succeed on the merits before it *grants* the motion for a preliminary injunction, the Court may *deny* the motion solely on the basis of a lack of irreparable harm, without considering the merits. *See id.* at 732 n.5 ("[I]n some cases, lack of irreparable injury is the factor that should begin and end the *Dataphase* analysis.").

ARGUMENT

I. The Libertarian Party is not likely to succeed on the merits of its claim that Arkansas's modicum-of-support requirement violates the First Amendment or the Equal Protection Clause.

The Constitution does not invalidate Arkansas's law simply because it burdens a party's ability to place candidates on the ballot. Indeed, "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And the Supreme Court has acknowledged the necessity of such burdens, because "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). So the Constitution does not "automatically invalidate[] every substantial restriction on the right to vote or to associate." *Id.* at 729. Nor does strict scrutiny apply, as the Libertarian Party asserts, simply because this case "involves election laws that burden a minor political party." (Motion 5-6.) The Supreme Court long ago rejected this "erroneous assumption." *See Burdick*, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that

imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.").

The Court instead insists on a "case-by-case assessment of the burdens and interests affected by a disputed statute, focusing on the statute as part of a ballot access scheme in its totality." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011). Here, because the Arkansas statute's "burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction." *Burdick*, 504 U.S. at 439. Rather, Arkansas's "important regulatory interests" are "enough to justify [its] reasonable, nondiscriminatory restrictions." *Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (quotation marks omitted). Reviewing a law that conditioned ballot access on a five-percent cutoff similar to the three-percent cutoff in Arkansas's modicum-of-support requirement, the Supreme Court itself held that such a ballot-access cutoff was justified by a State's interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442; *see id.* at 433 (describing the signature cutoff as requiring a number of signatures equal to at least five percent "of the total number of electors eligible to vote in the last election").

Based on *Jenness* and the many similar decisions since, no part of Arkansas's ballot-access regime violates the First Amendment, and the Libertarian Party's First Amendment claim will fail. The same reasoning leads to the same conclusion about its claim under the Equal Protection Clause. *See Libertarian Party of N.D.*, 659 F.3d at 702 (applying same standard to equal-protection claim as applied to First Amendment claim). As a result, the Libertarian Party cannot make a rigorous showing that it is likely to succeed on the merits of its challenge to these Arkansas statutes. *See Rounds*, 530 F.3d at 732-33. The Court must therefore deny the motion for a preliminary injunction.

A. Regardless of which standard the Court applies to Arkansas's ballot-access regime, the Libertarian Party is not likely to succeed on its First Amendment claim.

The standard that the Court must apply when considering the Libertarian Party's claims varies "depend[ing] upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. If Arkansas's ballot-access regime imposes "only modest burdens" on the Libertarian Party, then it is constitutional as long as it comprises "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 452 (2008) (quotation marks omitted). Only if Arkansas's ballot-access regime "impose[s] a severe burden" on the Libertarian Party must the State demonstrate that the challenged provisions "are narrowly tailored to serve a compelling state interest." *Id.* at 451 (quotation marks omitted).

Neither of the provisions challenged by the Libertarian Party—the modicum-of-support requirement (now with its three-percent cutoff) nor the new-party filing deadline (as moved forward because of the desire to participate in Super Tuesday)—impose a severe burden on the Libertarian Party. In fact, regarding the modicum-of-support requirement, the Supreme Court has said that three percent falls *at the low end* of facially permissible signature requirements. *See Am. Party of Tex. v. White*, 415 U.S. 767, 789 (1974) ("Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face . . . ."). But regardless of the relatively light burden these two provisions place on the Libertarian Party, both are narrowly drawn to serve compelling state interests. Thus, no matter which standard the Court applies, the Libertarian Party is not likely to succeed on the merits of its First Amendment claim.

1. Because the modicum-of-support requirement does not impose a severe burden on minor parties, it must only be reasonable and nondiscriminatory.

Now that Arkansas's modicum-of-support requirement includes a signature cutoff equal to three percent of the number of votes cast in the last gubernatorial race, the Libertarian Party claims that these requirements have become unconstitutional. The Libertarian Party's entire argument on this point amounts to little more than a citation to two district-court orders—neither of which were appealed to the Eighth Circuit, and one of which is more than two decades old—considering long-defunct signature-cutoff numbers. *See* Motion 9-10. But the Libertarian Party's single-minded focus on these two decisions misses the broad consensus—across all levels of the federal and state judiciaries—that signature-cutoff numbers based on percentages that equal *and exceed* the cutoff in Arkansas's modicum-of-support requirement are constitutional. *See, e.g.*, *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016) (remarking that "[n]either the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much"); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 792 (11th Cir. 1983) ("[a]pplying what appear[ed] to be rather settled law" even in 1983 to uphold Florida's petition regulations that required minor political parties to obtain signatures equal to three percent of the State's registered voters); *Libertarian Party N.H. v. State*, 910 A.2d 1276, 1279, 1281-82 (N.H. 2006) (applying federal law to uphold four-percent cutoff in State's political-party definition and three-percent cutoff for groups that do not meet that definition). Under this broad judicial consensus, Arkansas's interest in, among other things, the stability of its electoral democracy justifies the light burden that the modicum-of-support requirement places on minor parties.

i. For starters, binding precedent precludes ruling the modicum-of-support requirement unconstitutional. After the two district-court decisions in question, the Eighth Circuit rejected a

challenge to the three-percent cutoff in Arkansas's political-party definition. *See Green Party of Ark.*, 649 F.3d at 677-79 (upholding provision now codified as Ark. Code 7-1-101(27)(C)). As explained in more detail above, *see supra* Background I.A, that three-percent cutoff closely resembles the challenged provision in the modicum-of-support requirement. *Compare* Ark. Code 7-1-101(27)(C) ("When any political party fails to obtain three percent (3%) of the total votes cast at an election for the office of Governor or nominees for presidential electors, it shall cease to be a political party"), *with id.* 7-7-205(a)(2) (requiring new political parties to submit a petition that "contain[s] at the time of filing the signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor in the immediately preceding general election for Governor"). The Eighth Circuit has thus held that Arkansas may, consistent with the U.S. Constitution, impose on established political parties a requirement substantially similar to the requirement that Arkansas now imposes on new political parties. Indeed, if anything, the three-percent retention provision upheld by the Eighth Circuit is stricter than the requirement at issue here because the retention provision requires people to show up and vote, while the registration-requirement merely requires registered voters to sign a petition.

Thus, at most, the provision that the Libertarian Party challenges did nothing more than amend Arkansas law so that *all* political parties, old and new, must now demonstrate a similar "modicum of support," which the Eighth Circuit approved in *Green Party of Arkansas*. *See Jenness*, 403 U.S. at 442. Arkansas has not severely burdened the Libertarian Party or any other political party by insisting that its ballot-access requirements apply equally to all parties. *See Green Party of Ark.*, 649 F.3d at 683 ("We cannot conclude that § 7-1-101(21)(C) [now 7-7-

101(27)(C)] severely infringes the Green Party's association rights specifically by encouraging successful participation in the gubernatorial and presidential elections.").

Beyond the Eighth Circuit's approval of a three-percent cutoff related to the modicum-of-support requirement, the Supreme Court, federal courts of appeals, three-judge district courts, and state supreme courts have all approved of signature-gathering provisions with cutoffs that equal or exceed the three-percent cutoff that the Libertarian Party challenges. *See, e.g.*, *Jenness*, 403 U.S. at 432, 442 (upholding requirement that each independent candidate submit "nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question"); *Beller v. Kirk*, 328 F. Supp. 485 (S.D. Fla. 1970) (three-judge district court) (upholding three-percent cutoff closely resembling the cutoff in Arkansas's modicum-of-support requirement), *aff'd without opinion sub nom. Beller v. Askew*, 403 U.S. 925 (1971); *Tripp v. Scholz*, 872 F.3d 857, 860, 864-66 (7th Cir. 2017) (upholding cutoff that required signatures equaling five percent of the number of voters in the relevant district who voted in previous election, with additional requirement that signatures be collected in a 90-day window); *Swanson*, 490 F.3d at 896-97 (upholding cutoff that required signatures equaling three percent of the number of votes cast for governor in the relevant geographic area); *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 367 (1st Cir. 1993) (upholding cutoff that required signatures equaling five percent of the number of votes cast in the preceding gubernatorial election); *Rainbow Coal. v. Okla. State Election Bd.*, 844 F.2d 740, 741, 744 (10th Cir. 1988) (same, five percent of the number of votes cast in last general election); *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982) (same, five percent of the number of votes cast for president or governor); *Green Party of Alaska v. State Div. of Elections*, 147 P.3d 728, 730, 733 (Alaska 2006) (applying federal precedent to uphold a requirement that political parties

have registered voters equal in number to three percent of the votes cast in the last gubernatorial race); *Libertarian Party N.H.*, 910 A.2d at 1279, 1281-82 (same, four-percent cutoff in State's political-party definition and three-percent cutoff for groups that do not meet that definition); *Libertarian Party of Ore. v. Roberts*, 750 P.2d 1147, 1149, 1154-55 (Ore. 1988) (upholding requirement that minor parties acquire district-by-district access through signatures equaling five percent of the district's last general-election turnout for Congress); *see also Burdick*, 504 U.S. at 435 n.3 ("We have previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii's one-percent requirement.") (collecting cases).

The three-judge district court's order in *Beller v. Kirk*, 328 F. Supp. 485, which the Supreme Court affirmed without an opinion, 403 U.S. 925, illustrates the clear, longstanding validity of Arkansas's modicum-of-support requirement. *See Storer*, 415 U.S. at 739 n.10 (citing *Beller* with approval). In *Beller*, a group wished to act as a political party and nominate a slate of candidates "for various state and local offices." 328 F. Supp. at 485. Florida law required that group "to submit petitions to the various County Commissioners for verification in order to supply the Secretary of State with verified signatures of three percent of the registered electors of the State of Florida." *Id.* at 485-86. The plaintiffs brought First and Fourteenth Amendment challenges to that three-percent cutoff. *Id.* at 486. Noting that "the three percent petition requirement [wa]s well within the outer limits of" the Supreme Court's precedent, the court held that the requirement was "reasonable" and "not arbitrary, discriminatory or unconstitutional." *Id.* "Based on this long line of precedent," this Court should conclude that Arkansas's "three-percent signature requirement is a reasonable, nondiscriminatory restriction that imposes a minimal burden on plaintiffs' rights." *Swanson*, 490 F.3d at 904.

Neither the Libertarian Party nor the two district-court decisions on which it relies acknowledge this long line of precedent. (*See* Motion 9-10 (citing *Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006), and *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996)).) Most glaringly, both decisions cite the Supreme Court's decision in *Jenness* only once, and then only for the generalized proposition that States may require a demonstration of a modicum of public support. *See Daniels*, 445 F. Supp. 2d at 1062; *Priest*, 970 F. Supp. at 699. But *Jenness* specifically upheld a more-difficult-to-satisfy cutoff than the one challenged in *Daniels* or *Priest*, or the cutoff in the modicum-of-support requirement that the Libertarian Party challenges here. *See* 403 U.S. at 432.

Additionally, the *Jenness* Court found that any burden imposed by that cutoff was "balanced by the fact that [the State] ha[d] imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.* at 442. Since *Jenness*, the Eighth Circuit has emphasized that the burden imposed by a signature-gathering requirement is determined based on the "eligible pool"—*i.e.*, the percentage of voters who are eligible to sign a petition. *See Libertarian Party of N.D.*, 659 F.3d at 695 ("[T]he Supreme Court does not merely consider the percentage stated in a challenged law. Rather, it determines the percentage of support based on the 'eligible pool.'").

The eligible pool in Arkansas is quite large—equal to the number of registered voters in the State. Like the State in *Jenness*, Arkansas imposes no restrictions on voters' ability to sign petitions circulated by prospective political parties. *See* Ark. Code 7-7-205(a)(2), (4)(B) (requiring only that signatures be from "registered voters" and not be "dated more than ninety (90) days before the petition is submitted"). Without any analysis of the eligible pool in Arkansas, however, the district-court orders relied on by the Libertarian Party nonetheless

concluded that "Arkansas's three percent requirement in its party recognition scheme is not narrowly drawn to serve a compelling state interest." *Daniels*, 445 F. Supp. 2d at 1062. Because they did not discuss the eligible pool, *Daniels* and *Priest* incorrectly analyzed the question whether Arkansas law imposes a severe burden.

The two district-court decisions that form the basis of the Libertarian Party's arguments do not bind this Court. *See Camreta v. Greene*, 563 U.S. 692, 709 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 *Moore's Federal Practice* § 134.02[1][d], at 134–26 (3d ed. 2011))). And because those decisions barely cited—and certainly failed to apply—binding and on point Supreme Court precedent, this Court should not even look to them as persuasive authority.

ii. This Court should instead rule that Arkansas's interests in regulating its elections justify the slight burdens imposed by the modicum-of-support requirement. A State's interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election" justifies ballot-access regulations like Arkansas's modicum-of-support requirement. *Jenness*, 403 U.S. at 442; *see Green Party of Ark.*, 649 F.3d at 686 (holding that the three-percent cutoff in the political-party definition promoted political stability "by preventing ballot overcrowding, frivolous candidacies, and voter confusion"). The State's related interest in "the stability of the political system" also justifies restrictions on the participation of third parties. *See Storer*, 415 U.S. at 736 ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."). In fact, "third-party candidates would themselves be harmed if there were no barriers to including such candidates on the ballot. . . . If there were 98 independent candidates,

none could hope for a nontrivial vote." *Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004). Arkansas's interests in avoiding confusing, deception, and frustration of the democratic process; in the stability of its political system; and in ensuring that only potentially viable candidates appear on the ballot—these interests justify the three-percent, modicum-of-support requirement.

The precedent acknowledging these interests requires the Court to deny a preliminary injunction, notwithstanding the Libertarian Party's final two arguments. It faults Arkansas for lacking specific evidence of ballot overcrowding. (Motion 12.) But the Eighth Circuit has explicitly held that "Arkansas is not compelled to provide empirical evidence attempting to establish" the link between these "significant" interests and similar ballot-access regulations. *Green Party of Ark.*, 649 F.3d at 686; *see id.* (recognizing a State's interest in not facing "endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate" (quoting *Munro*, 479 U.S. at 195)). Similarly, although the Libertarian Party suggests that the current "petition signature requirement . . . is unnecessary" in comparision to the now-defunct 10,000-signature requirement (Motion 12), the mere existence of "repealed statutes" that "are somewhat less restrictive" does not "demonstrate that there is a way of governing minor political parties which is less restrictive than the means prescribed by present statutes," *Arutunoff*, 687 F.2d at 1380.

Finally, Arkansas's initiative process illustrates how little burden the modicum-of-support requirement imposes on the Libertarian Party. Under the Arkansas Constitution, "[e]ight per cent of the legal voters may propose any law and ten per cent may propose a constitutional amendment by initiative petition." Ark. Const. art. 5, sec. 1. Based on registered voters as of June 1, 2017 (1,670,119), eight percent equals 133,610 signatures and ten percent equals 167,011 signatures. *See* Registered Voters as of June 1, 2017, Secretary of State of Arkansas,

https://www.sos.arkansas.gov/uploads/elections/June_1%2C_2017_Registered_Voters.pdf. Not only does this require eight to ten percent *of registered voters*, the Arkansas Constitution also restricts where in the State those voters reside. *See* Ark. Const. art. 5, sec. 1 ("Upon all initiative or referendum petitions provided for in any of the sections of this article, it shall be necessary to file from at least fifteen of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county."). Contrast the burden of the initiative process's signature requirement with the modicum-of-support requirement, which just requires signatures equal to three percent of the voters turning out at the last gubernatorial race. (*See* Hood Decl. ¶ 5 n.3 ("Turnout in midterm elections almost always lags behind turnout in presidential election years. As a consequence, tying the 3% party petition requirement to gubernatorial elections reduces the number of total signatures over what would be necessary if the requirement was based on presidential votes.").) (The Hood Declaration is being filed simultaneously with this brief.)

Despite these heavy burdens, initiated acts and constitutional amendments regularly make it onto the ballot in Arkansas. (*See* Hood Decl. ¶¶ 14-15.) Over just the last 20 years, 14 initiatives have made it onto the Arkansas ballot. (*Id.*) And that does not account for proposed initiatives that have reached the needed number of signatures but not appeared on the ballot for some other reason. *See* Ark. Const. art. 5, sec. 1 (discussing procedures for judicial review of sufficiency of state-wide petitions). If initiative petitions can so regularly make it on the Arkansas ballot with over 100,000 signatures, then minor political parties can surely meet the light burden of obtaining 26,746 signatures.

Arkansas's ballot-access regime is considerably less burdensome than its ballot-initiative process for one more reason. Unlike with the initiative process, minor-party candidates always

retain the ability to seek ballot access as independents or, in presidential races, through the "political group" ballot-access provisions. These alternative paths to ballot access require much smaller numbers of signatures—only 1,000 signatures for access to the presidential ballot. *See supra* Background I.A. Even though independent candidates appear on the ballot without a party designation, research shows that non-major party candidates do equally well regardless of whether they run with a party designation after their name on the ballot. (*See* Hood Decl. ¶¶ 9-12.)

Given the weight of the precedent supporting Arkansas's interests and the relatively light burden that the modicum-of-support requirement imposes, the Libertarian Party is not likely to prevail on the merits of its challenge to the modicum-of-support requirement.

2. Regardless of whether the new-party filing deadline imposes a severe burden, Arkansas's ballot-access regime is narrowly drawn to serve compelling interests.

As just detailed, the Supreme Court, various courts of appeals, and state supreme courts have all held that the U.S. Constitution allows a State to require potential new political parties to comply with ballot-access regulations similar to Arkansas's modicum-of-support requirement. Yet the Libertarian Party insists that moving the new-party filing deadline forward in presidential years—as a result of Arkansas's decision to participate in Super Tuesday—renders the modicum-of-support requirement unconstitutional. Because the three-percent cutoff in the modicum-of-support requirement clearly does not violate the Constitution, however, the Libertarian Party's burden, if it exists at all, emanates from the earlier deadline and not the three-percent cutoff. But even the earlier new-party filing deadline is narrowly drawn to serve a compelling interest.

To be clear, the earlier deadline does not impose a severe burden on the Libertarian Party or any other minor party. As was discussed above, *see supra* Background I.B, the "nominating process . . . naturally involves a series of deadlines." *Tex. Indep. Party*, 84 F.3d at 186. And

"[t]hese deadlines emanate from the date of the primary election." *Id.* The Libertarian Party does not claim that moving the preferential primary election forward to Super Tuesday violated the Constitution but that somehow moving forward the many other deadlines that must precede Super Tuesday does violate the Constitution. The Fifth Circuit rejected just such a claim in *Texas Independent Party*. In fact, it held that moving forward the deadline to comply with otherwise constitutional requirements was not even a severe burden on those plaintiffs. *See id.* ("Requiring minor parties and independent candidates to meet constitutional petitioning requirements at an earlier stage is not a severe burden."). The same is true here. As a result, strict scrutiny does not apply to the new-party filing deadline that the Libertarian Party challenges.

The connection between the decision to move Arkansas's preferential primary election to Super Tuesday and the earlier new-party filing deadline also highlights the Libertarian Party's misapplication of *Priest* and *McLain*. The *Priest* court there focused on the number of days between the filing deadline and the general election, suggesting that even "filing dates of either March or April in a general election year 'would normally pass before any real political activity or interest therein could be expected.'" 970 F. Supp. at 698 (quoting *Am. Party v. Jernigan*, 424 F. Supp. 943, 949 (E.D. Ark. 1977)). Whether that was true in 1996 when *Priest* was decided or in 1977 when *Jernigan* was, the simple fact that Arkansas's presidential primary now occurs in March of the election year means that it is no longer true. Consider the number of candidates that have, in May 2019, already declared their intention to run in the November 2020 presidential election. It has already topped 20. Beyond that, in many presidential election years, the major parties' candidates are now known by late February or early March. *See* Martin, *Fixing the Presidential Nominating System: Past and Present*, 93 N.Y.U.L. Rev. 728, 754 (2018) (giving

examples from recent elections). *Priest*'s concerns do not apply here. Similarly, although *McLain v. Meier* remarked that a petition-filing deadline of "200 days before the general election is a burden of some substance," 851 F.2d 1045, 1049 (8th Cir. 1988), the court ultimately upheld that deadline because it was "primarily the consequence of rescheduling the primary," *id.* at 1050. The same is true here.

Moreover, *McLain* went on to acknowledge that a State has an interest in ensuring the administrability of its ballot-access regime, an interest which justifies the new-party filing deadline that the Libertarian Party challenges in this case. *See id.* (noting State's interest in giving itself time "to verify the signatures on the petitions and to print absentee ballots"). The Eleventh Circuit discussed this interest in *Swanson*. That court rejected a challenge to Alabama's decision to move its petition-filing deadline earlier because that State "need[ed] the additional time afforded by the earlier . . . deadline to verify petition signatures and to perform other administrative duties connected to the election cycle." 490 F.3d at 912 n.18 (quotation marks omitted). This includes the need to allow time "between the deadline for petitions and the election to enable challenges to the validity of the petitions to be made and adjudicated." *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004). "The more extensive the procedure that a state provides, the more time the state will need in order to determine whether a candidate has qualified." *Id.* at 735. The Secretary also needs time to determine the validity of the signatures on a petition. And if the Secretary determines that a petition is insufficient, Arkansas law allows the putative new political party to seek judicial review of that determination. Ark. Code. 7-7-205(c)(5). The earlier deadline for new parties to file petitions ensures adequate time for these procedures to play out.

The Libertarian Party offers no alternative dates for the new-party filing deadline that it would consider permissible. Even if it had, "the mere identification of a less burdensome alternative is not dispositive in election cases such as this one." *Libertarian Party of N.D.*, 659 F.3d at 698. It will not do for the Libertarian Party to argue that some marginally later deadline would protect Arkansas's interests to the same extent as the current new-party filing deadline. *See McLain*, 851 F.2d at 1050 ("A litigant could always point to a day slightly later that would not significantly alter a state's interests until the point at which primary elections could not be held at all."). Under such an approach, "[a]ny numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all." *Libertarian Party of Fla.*, 710 F.2d at 793. To overcome Arkansas's compelling interest in maintaining the current new-party filing deadline, the Libertarian Party must "present[] evidence that would enable to a court to prescribe a shorter period." *Nader*, 385 F.3d at 735. Because it has failed to do so, its First Amendment challenge to the new-party filing deadline is not likely to succeed on the merits.

B. For largely the same reasons that the Libertarian Party is not likely to succeed on its First Amendment claim, it is not likely to succeed on its Equal Protection Clause claim.

The Libertarian Party purports to bring a separate challenge to Arkansas's ballot-access regime under the Equal Protection Clause. (*See* Complaint ¶¶ 26-30.) But in the absence of a facially discriminatory statute or some evidence of a disparate impact, the Eighth Circuit applies the same analysis to equal-protection challenges to ballot-access laws that it applies to First Amendment challenges. *See Libertarian Party of N.D.*, 659 F.3d at 702-03. The Libertarian Party makes no allegations of facial discrimination. Nor could it; Arkansas's "regulation is nondiscriminatory, that is, it does not differentiate among Republicans, Democrats, and Libertarians." *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996). And the only suggestion of

disparate impact is that Arkansas law requires "minor and major parties each [to] comply[] with a requirement more easily met by major parties." *Libertarian Party of N.D.*, 659 F.3d at 703. But the Eighth Circuit has previously rejected similar arguments. *See id.* As a result, the Libertarian Party's Equal Protection Clause claim is not likely to succeed on the merits for the same reasons as its First Amendment claim.

II. The Libertarian Party has not shown that it faces a threat of irreparable harm absent a preliminary injunction—itself a sufficient reason to refuse a preliminary injunction.

Alongside the Libertarian Party's failure to establish that it is likely to succeed on the merits of its claims, it has failed to show a threat of irreparable harm. To show a threat of irreparable harm, the Libertarian Party "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)). Its failure to make that showing is an independent reason to deny the motion for a preliminary injunction. *See Rounds*, 530 F.3d at 732 n.5.

Regarding the modicum-of-support requirement's three-percent cutoff for petition signatures, the Libertarian Party suggests that "conduct[ing] a petition drive" in an attempt to hit that cutoff would itself amount to sufficient harm to warrant a preliminary injunction. (Motion 8.) It offers no evidence of concrete "obstacles [it has] faced in collecting valid signatures." *Swanson*, 490 F.3d at 898. Instead, it offers only hypothetical difficulties that it might face in gathering the required number of signatures. (*See* Pakko Aff., ECF No. 12-1 ¶ 10.) It does not even affirm that it is currently attempting to gather the required signatures. Hypothetical problems that may be caused or exacerbated by the Libertarian Party's own actions cannot show a clear and present need for equitable relief. The hypothetical nature of the alleged injury notwithstanding, it is unlikely that the Libertarian Party could ever show irreparable harm based

on a three-percent signature requirement. "Neither the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much, or that six months (or more) is too little time within which to gather the signatures from a pool of substantially all voters." *Libertarian Party of N.H.*, 843 F.3d at 26.

Besides not being entitled to any injunction at all, the Libertarian Party's requested injunction is much too broad in light of the harms that it does allege. The Party obtained 2.9% of the 2018 gubernatorial vote. (*See* Murphy Decl., Ex. D, 2018 Election Results.). In light of that, its request that the Court create by injunction a new 10,000-signature requirement is not "narrowly tailored to remedy only the specific harms" that the Libertarian Party alleges. *Lytle v. U.S. Dep't of Health & Hum. Servs.*, 612 F. App'x 861, 862 (8th Cir. 2015). (*See* Motion 13 (requesting that the Court create 10,000-signature requirement).) As a matter of fact, the Libertarian Party is unable to show that a modicum-of-support requirement of 2.9% or less causes it any harm at all—much less irreparable harm that would entitle it to a preliminary injunction.

Thus, the Libertarian Party's harm—if indeed it faces a threat of irreparable harm at all—would arise from the length of time that it has to gather signatures, 90 days. *See* Ark. Code 7-7-205(a)(4)(B). Therefore, were an injunction to issue, it "must be narrowly tailored to remedy only" harms related to that 90-day window. *Lytle*, 612 F. App'x at 862; *see Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) ("An injunction must be tailored to remedy specific harm shown."). An injunction reaching beyond the harm supposedly caused by the signature-gathering window would go beyond the harm actually alleged by the Libertarian Party. The Court may not, therefore, even consider an injunction touching upon any other aspect of Arkansas's ballot-access regime. *See Rogers*, 676 F.2d at 1214-15 (vacating injunction, among

other reasons, because it was not tailored enough); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604-06 (7th Cir. 2007) (vacating injunction that "fail[ed] to comply with the rule requiring courts to tailor injunctive relief to the scope of the violation found" (quotation marks omitted)).

III. The harms to Arkansas and the public interest that would result from an injunction outweigh any supposed harm to Plaintiffs.

The Libertarian Party bears the burden of proving that "the balance of equities so favors [it] that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys., Inc.*, 640 F.2d at 113. Given Arkansas's interest in regulating its elections and the public interest in enforcing the law, the Libertarian Party cannot hope to meet this burden.

The Supreme Court's decisions make clear that the State has various interests in regulating elections: in "the stability of its political system," *Storer*, 415 U.S. at 736; "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot," *Jenness*, 403 U.S. at 442; "in avoiding confusion, deception, and even frustration of the democratic process at the general election," *id.* Granting the Libertarian Party's motion for a preliminary injunction would harm each of those interests by making Arkansas's ballot-access regime less effective.

More generally, Arkansas on behalf of the public has a strong interest in seeing its laws enforced. So the Court has also made clear that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Put differently by the Chief Justice, "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets

omitted), *cited with approval by Abbott*, 138 S. Ct. at 2324 n.17; *accord Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). The harm that a preliminary injunction would cause the State and people of Arkansas outweighs any alleged harm that the Libertarian Party would suffer without an injunction.

CONCLUSION

For these reasons, the Secretary respectfully requests that the Court deny the Libertarian Party's motion for a preliminary injunction.

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Respectfully submitted,

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APPENDIX OF DEADLINES FOR THE 2020 ELECTION

Below is a timeline of the 2020 election cycle's deadlines, in reverse chronological order, which demonstrates the finely tuned and interrelated nature of Arkansas's election calendar.

GENERAL ELECTION

Tuesday, November 3, 2020: The 2020 general election will be held on Tuesday, November 3, 2020. Ark. Code 7-5-102 (providing date of general election for all offices other than President and Vice President of the United States); *id.* 7-8-301 (same, for President and Vice President of the United States).

- 15 Days Before General Election – Monday, October 19, 2020: Early voting begins. Ark. Code 7-5-418(a)(1)(A).

- 20 Days Before General Election – Wednesday, October 14, 2020: The county board of election commissioners must publish in a local newspaper a notice of the upcoming election that includes, among other things, "[t]he candidates and offices to be elected at that time." Ark. Code 7-5-202(a)(1).

- 47 Days Before General Election – Thursday, September 17, 2020: The county board of election commissioners must deliver absentee ballots to the county clerk for mailing. Ark. Code 7-5-407(a)(1).

- September 15, 2020: Independent candidates for President or Vice President of the United States who have qualified for the ballot must submit a list of electors, which will become the list of Arkansas's electors if the independent candidate is successful in the general election. Ark. Code 7-8-302(6)(C).

- 72 Days Before General Election – Monday, August 24, 2020: Each county's board of election commissioners must hold a public meeting where the order of candidates' names on the ballot is determined by lot. Ark. Code 7-5-207(c)(1). (Note that 72 days falls on Sunday, August 23, 2020, which is extended to the next day by Ark. Code 7-1-108.)

- 75 Days Before General Election – Thursday, August 20, 2020:

    - The Secretary and the clerk of each county must submit to each county board of elections "full lists of all candidates to be voted for in their respective counties as the nominations have been certified or otherwise properly submitted to him or her." Ark. Code 7-5-203.

    - A "political group" that has qualified by petition to nominate candidates for President and Vice President of the United States must certify the names of its candidates. Ark. Code 7-8-302(5)(D).

- 10 Days After "Political Group"/Independent Candidate Deadline – August 13, 2020: The Secretary must determine whether petitions filed by political groups or independent candidates are sufficient. Ark. Code 7-8-302(5)(B), (6)(A).

- 90 Days Before General Election – Wednesday, August 5, 2020: Each state and county committee of a political party must certify its nominated candidates. Ark. Code 7-7-203(h)(1)(B)(i), (2)(B)(i).

- August 3, 2020: "Political groups" and independent candidates must file petitions containing 1,000 signatures to be included on the general election ballot for President and Vice President of the United States. *See* Ark. Code 7-8-302(5)(B), (6)(A).

- 100 Days Before General Election – Monday, July 27, 2020: The Secretary and each county clerk must notify the state or county committees of the political parties that the committees must certify their nominated candidates. Ark. Code 7-7-203(h)(1)(A), (2)(A). (Note that 100 days falls on Sunday, July 26, 2020, which is extended to the next day by Ark. Code 7-1-108.)

GENERAL PRIMARY ELECTION

Tuesday, March 31, 2020: In presidential election years like 2020, the general primary election is held "on the Tuesday four (4) weeks following the preferential primary election." Act 545, 92d Arkansas General Assembly, Reg. Sess. 2019, sec. 2 (enacting Ark. Code 7-7-203(a)(2)).

- 10 Days Before General Primary Election – Monday, March 23, 2020: The county board of election commissioners must publish in a local newspaper a notice of the upcoming primary that includes, among other things, "[t]he candidates and offices to be elected at that time." Ark. Code 7-5-202(a)(1). (Note that 10 days falls on Saturday, March 21, 2020, which is extended to the next day that is not a weekend or holiday by Ark. Code 7-1-108.)

PREFERENTIAL PRIMARY ELECTION

Tuesday, March 3, 2020: In presidential election years, the preferential primary election is held "on the first Tuesday after the first Monday in March." Act 545, 92d Arkansas General Assembly, Reg. Sess. 2019, sec. 2 (enacting Ark. Code 7-7-203(b)(2)).

- 15 Days Before Preferential Primary Election – Monday, February 17, 2020: Early voting begins. Ark. Code 7-5-418(a)(1)(A).

- 20 Days Before Preferential Primary Election – Wednesday, February 12, 2020: The county board of election commissioners must publish in a local newspaper a notice of the upcoming primary that includes, among other things, "[t]he candidates and offices to be elected at that time." Ark. Code 7-5-202(a)(1).

- 47 Days Before Preferential Primary Election – Thursday, January 16, 2020: The county board of election commissioners must deliver absentee ballots to the county clerk for mailing. Ark. Code 7-5-407(a)(1).

- 66 Days Before Preferential Primary Election – Monday, December 30, 2019: If an unopposed candidate in a preferential primary dies or withdraws before the primary, then there is a vacancy. Ark. Code 7-7-106(a). If the vacancy is filled more than 66 days before the primary, then the name of the candidate filling the vacancy will be printed on the ballot instead of the original candidate. *Id.* 7-7-106(d). (Note that 66 days falls on Saturday, December 28, 2019, which is extended to the next day that is not a weekend or holiday by Ark. Code 7-1-108.)

- 72 Days Before Preferential Primary Election – Monday, December 23, 2019: Each county's board of election commissioners must hold a public meeting where the order of candidates' names on the ballot is determined by lot. Ark. Code 7-7-305(b). (Note that 72 days falls on Sunday, December 22, 2019, which is extended to the next day that is not a weekend or holiday by Ark. Code 7-1-108.)

- 75 Days Before Preferential Primary Election – Thursday, December 19, 2019: The Secretary and each county clerk must certify to the appropriate county board of election commissioners "a list of the names of all candidates who have filed party certificates." Ark. Code 7-7-203(d).

- 92 Days Before Preferential Primary Election – Monday, December 2, 2019: When the preferential primary election is held in March of presidential-election years, the Secretary and the clerk of each county must certify to each county board of election commissioners a list of all candidates whose names should appear on the ballot during the preferential primary election. Act 545, 92d Arkansas General Assembly, Reg. Sess. 2019, sec. 3 (enacting Ark. Code 7-7-304(a)(1)(B), (b)(1)(B)).

PARTY FILING PERIOD

Monday, November 4, 2019, through Tuesday, November 12, 2019: In presidential election cycles, the party filing period begins at noon on the first Monday in November preceding the general primary election and ends at noon on the seventh day after it began. Act 545, 92d Arkansas General Assembly, Reg. Sess. 2019, sec. 2 (enacting Ark. Code 7-7-203(c)(1)(B)). Seven days after November 4, 2019, is November 11, which is Veterans Day, so the deadline is extended to the next day (although the statute is silent about the noon deadline). *See* Ark. Code 7-1-108 (election law deadlines falling on holidays are extended to next day that is not a weekend or holiday).

- Before the End of the Party Filing Period:

  - "Candidates for political party nominations" must file (depending on the office for which the candidate is seeking election) with the Secretary or with the appropriate county clerk a "political practices pledge," which is described in the code. Ark. Code 7-6-102(a)(1); *see id.* 7-7-301(a). Any candidate who fails to file a pledge during the party filing period will not be included on the ballot. *Id.* 7-7-301(c).

  - Write-in candidates must file their notice of write-in candidacy, political practices pledge, and affidavit of eligibility before the end of this period. Ark. Code 7-5-205(3); *see id.* 7-6-102(a)(4) (requiring political practices pledge to be filed

simultaneously with notice of write-in candidacy); *id.* 7-7-103(a)(1) (providing further explanation of filing requirements for independent candidates other than those for President or Vice President of the United States).

- 60 Days Before Party Filing Period – Thursday, September 5, 2019: A new political party must submit a petition with the requisite number of signatures by this date. Ark. Code 7-7-205(a)(6). The Secretary then has 30 days to determine the sufficiency of the petition. *Id.* 7-7-205(b)(1). If the Secretary determines that the petition is deficient, then the putative new political party may challenge that determination in Pulaski County Circuit Court. *Id.* 7-7-205(c)(5). The 60-day, pre-party filing period deadline, therefore, allows time for testing the Secretary's determination of a petition's sufficiency.