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

LIBERTARIAN PARTY OF ARKANSAS, SANDRA CHANEY RICHTER, MICHAEL PAKKO, RICKY HARRINGTON, JR, CHRISTOPHER OLSON, and MICHAEL KALAGIAS, ...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.	)	

PLAINTIFFS' RESPONSE AND CONCISE STATEMENT
WITH SUPPORTING AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION FOR STAY PENDING APPEAL
AND TO SHORTEN PLAINTIFFS' TIME TO RESPOND

On July 3, 2019, the District Court granted Plaintiffs' motion for preliminary injunction and allowed the Libertarian Party of Arkansas (hereinafter sometimes referred to as "LPAR") to obtain ballot access if they submitted 10,000 valid petition signatures of Arkansas registered voters to the Arkansas Secretary of State. [Dkt. No. 31]. On Friday, July 12, 2019, at approximately 6:27 and 6:28 in the evening, Defendant John Thurston, Secretary of State for the State of Arkansas (hereinafter referred to as "Secretary Thurston") filed a Motion to Stay Pending Appeal and to Shorten Plaintiffs' Time to Respond to July 19, 2019, at 5:00 p.m. C.T., with a supporting brief [Dkt. Nos. 34 and 35]. On July 17, 2019, the District Court issued an Order taking the Motion to Stay Pending Appeal under advisement and allowing the Plaintiffs to respond to Secretary Thurston's motion by 5:00 p.m. C.T. on July 24, 2019 [Dkt. No. 39]. The District Court further noted in its Order that Secretary Thurston, beyond generally citing the time-sensitive nature of the case, ". . . has not articulated any other reasons why plaintiffs' time to respond to the motion should

be shortened to seven calendar days, five business days. If there are time-pressing matters in this case of which the Court is not aware that informs such a time table, Secretary Thurston may file a motion to reconsider." As of the filing of this pleading, Secretary Thurston has not filed a motion to reconsider. Because Secretary Thurston does not meet any of the four factors set forth in the four-factor stay analysis set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), for the reasons set forth hereinbelow, Secretary Thurston's Motion to Stay Pending Appeal is without merit and should be denied.

I. Secretary Thurston is not likely to succeed on the merits of his appeal.

The current Arkansas election scheme for the recognition of new political parties results in a deadline which is fourteen months, or approximately 425 days, before the general election. This distance from the General Election is far worse than when the 3% requirement was previously declared unconstitutional in the two cases noted in this Court's preliminary injunction order [Dkt. No. 31]. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ark., 1996); and *Green Party of Arkansas v. Daniels*, 445 F.Supp.2d 1056 (E.D. Ark., W.D. 2006). Secretary Thurston still seems to think that he would prevail on the merits as to the new challenged law which is much worse than the old law. In the Eighth Circuit decision of *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988), the Eighth Circuit was troubled by a third-party filing deadline "more than 200 days before the November election." Arkansas has now far exceeded with the new September 5, 2019, deadline the 200 days which troubled the Eighth Circuit in *McLain*. As the Eighth Circuit said in an earlier McLain case, and as referenced in this Court's preliminary injunction order, restrictions on ballot access "may not go beyond what the state's compelling interests actually require," *McLain v. Meier*, 637 F.2d 1159, at 1163 (8th Cir. 1980), and must be "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659

F.3d 687, at 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d at 1049). "In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest." *Moore v. Martin*, 854 F.3d 1021, at 1026 (8th Cir. 2017). Other than mentioning a modicum of support, Secretary Thurston presents no real compelling state interest in his brief which could not be served by a less drastic means.

Secretary Thurston does suggest that it would have been better for the LPAR to have turned in their petitions later than June 28, 2019, because they could have given up petitioning done in early April for petitioning in late June or early July because the petitioning drive really did not get started until the middle of April. However, this is mere speculation and shows a cavalier attitude as to what is actually required in petitioning. As the Court noted in its preliminary injunction order, Mr. Pakko was clear that the LPAR had begun its petition drive in April of 2019 because they wanted to avoid the hot summer months and at a time when students were still in school and on college campuses, rather than when people were out of town and not on vacation during the summer months [Dkt. No. 31, ¶ 28]. It is pure speculation that giving up part of April for part of July would have brought in more signatures for the LPAR. Because the petitioning time before September 5, 2019, is so far removed from the General Election in November of 2020, Mr. Pakko's testimony that petitioning in April, May, and June is better than petitioning in June, July, and August, is entirely credible because the earlier petitioning is more conducive to actually collecting signatures considering that all the months involved are at times when people have lessened political interest and knowledge.

Besides the problem with the September 5, 2019, deadline, the previously mentioned cases of *Citizens to Establish a Reform Party in Arkansas v. Priest*, *Id.*; and *Green Party of Arkansas v. Daniels*, *Id.*, where the 3% of the previous vote for Arkansas Governor as the requirement for a

ballot access petition to form a new political party in Arkansas was held unconstitutional, present additional reasons why Secretary Thurston is not likely to succeed in his appeal. This is partly because the new deadline for petition signatures of September 5, 2019, is much earlier than the January 2, 1996 deadline declared unconstitutional in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 692-693, 698, ¶ 17, and the 26,746 valid signatures required by the new law challenged herein is also worse than the 21,505 signatures condemned in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 691, ¶ 2, 698-699, as well as the 24,171 signatures condemned in *Green Party of Arkansas v. Daniels*, 445 F.Supp. 2d, at 1059-1060, 1061-1063, when 150 days was allowed for the petitioning period rather than the current 90 day period. Additionally, while the Eighth Circuit in 2011 upheld the 3% of the Governor or Presidential vote retention requirement for continued political party recognition in Arkansas, it did so by noting that the Green Party could repetition again under the 10,000 petition signature ballot access requirement. See, *Green Party of Arkansas v. Martin*, 649 F.3d 675, at 678, 683, n.8, 684, 684, n.10, 685 (8th Cir. 2011)—as noted by this Court in its preliminary injunction order [Dkt. No. 31, p. 32]. None of this bodes well for Secretary Thurston's contention that he is likely to succeed on the merits.

II. The three percent petition signature requirement for new political party ballot access recognition has never been complied with in Arkansas.

Plaintiffs also think it is important for the District Court to note that, while the District Court found in its Preliminary Injunction Order of July 3, 2019, that the Reform Party in 1996 was the only party to ever have successfully petitioned for party formation in Arkansas under the old 3% petition requirement [Dkt. No. 31, p. 37, ¶ 3(a)], this finding was based on a citation to a stipulation entered into by the Green Party and the Arkansas Attorney General's office in 2006 in the case of *Green Party of Arkansas v. Daniels*, 445 F.Supp. 2d, at 1058, ¶ 6. However, the

stipulation relied on by the District Court is actually incorrect. It is a mystery why the Green Party and the Arkansas Attorney General entered into an incorrect stipulation. A close look at the 1996 decision in *Citizens to Establish a Reform Party in Arkansas* makes clear that the Reform Party did not actually comply with the 3% petition requirement. As the District Court in 1996 noted in its decision, by the then petition deadline of January 2, 1996, ". . . the Reform Party representatives were required to file the Petition in the office of the Secretary of State, containing at least 21,505 signatures of qualified Arkansas electors. [A Petition] containing 28,546 signatures was filed with the Secretary of State by representatives of the Reform Party on January 2, 1996." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 693, ¶¶ 19 and 20. However, after the Secretary of State finished verifying the petitions the Reform Party had turned in, the Secretary of State on February 16, 1996, rejected the Reform Party petitions to qualify as a new political party because ". . . the Petition contained 17,262 valid signatures, which was 4,243 signatures short of the required 21,505." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 691, ¶ 2. Thus, the Reform Party did not qualify under the law then in place requiring 3% of the previous vote for governor for petition signatures to form a new political party, but was recognized and put on the Arkansas ballot in 1996 by order of the District Court because the District Court enjoined enforcement of the Arkansas law in question ". . . and Plaintiffs are deemed to have qualified as a new political party in view of the 17,262 signatures validated by Secretary of State Priest on February 16, 1996." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 699, ¶ 21.

Additionally, the District Court issued a permanent injunction order against Secretary of State Priest to the effect that Plaintiffs were allowed ballot access for the November 1996 General Election and that the Reform Party could select its candidates for office by convention. *Citizens*

to Establish a Reform Party in Arkansas v. Priest, 970 F.Supp. at 701, ¶ 28(d). The foregoing is important because the 3% requirement which Secretary Thurston thinks is likely to be upheld has never been complied with in Arkansas by any new political party or even an independent candidate. Past election experience has been found to be a guide as to the constitutionality of an election law, particularly if a party has qualified with some regularity as opposed to if it has not. *McLain v. Meier*, 637 F.2d at 1165 (which struck down an election law in reliance on evidence that only one political party had complied with the law since 1939 until the time of the decision of the Eighth Circuit in 1980), also see *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589-590 (6th Cir. 2006) (which struck down an election law in reliance on evidence that no political party since the year 2000 had complied with the law); and *Storer v. Brown*, 415 U.S. 724, 742 (1974) (which sets forth a usage test). In fact, the previous times in 1996 and 2006 when a similar law was found unconstitutional were at times when the deadline was at least four months or more later than it currently is on September 5, 2019, and also when more time to petition was allowed.

If the District Court found in 1996 that a January 2 petition deadline in the general election year was unconstitutional and unnecessarily difficult to comply with, it is not hard to imagine how the Court would have felt about a deadline four months earlier.

> Only in the election year itself do issues begin to coalesce such that minority parties with opposing or different views may emerge. At such an early point in the election year, it is often difficult to get volunteers from the voting public to become involved in the petition collection process. As noted by the court in *American Party v. Jernigan*, 424 F.Supp. 943, 949 (E.D. Ark. 1977), the 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." See also, *New Alliance Party v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (early deadline places significant burden on minor political parties because voters are disinterested any length of time before an election). It is also more difficult to get volunteers for the minor parties, to attract media coverage, and to attract financial support early in the process, which impacts the petition process, and, therefore, ballot access, as well. See *Anderson v. Celebrezze*, 460 U.S. at 780, 792, 103 S.Ct. at 1565, 1572.

> Even the influence of increment weather is recognized as a rationale for finding early petition filing deadlines unconstitutional. E.g., *Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118, 121-122 (W.D. Okla. 1984) (inclement weather a hindrance to petition signature gathering, resulting in deprivation of constitutional rights). *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 698, ¶16.

Despite the foregoing cases, Secretary Thurston seems to believe a much earlier petition deadline is going to be upheld as necessary and constitutional along with a previously held unconstitutional requirement of 3% of the previous vote for governor as a requirement for petition signatures. As the Eighth Circuit has stated:

> . . . most voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties. This dissatisfaction often will not crystalize until party nominees are known [citations omitted]. Accordingly, it is important that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary. *McLain v. Meier*, 637 F.2d at 1164.

III. The District Court did not erroneously declare that Arkansas's ballot access regime imposes a severe burden.

Secretary Thurston in his brief to a large extent engages in unsupported conclusions, exaggerations, and misstatements. Perhaps the most significant, unsupported conclusion and misstatement made is his assertion on page 4 of his brief that the Court preliminarily enjoined the modicum of support requirement on the basis of the LPAR's supposed lack of resources to comply with that requirement. In fact, as set forth hereinabove, the Court based its preliminary injunction order to a significant extent on the history of the 3% modicum of support requirement and the failure of other parties to comply with it, the Eighth Circuit's decision in *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) upholding a 3% retention requirement which recognized the workability and compliance with a 10,000 petition signature ballot access requirement, the

changes in the petition filing deadline, the 90-day petitioning period, the distance between the deadline and periods of time which are closer to the General Election when interest is greater, the total lack of ballot overcrowding in Arkansas, and the extent that the LPAR had partially completed its petition drive in 2019. No legal case exists or has been shown where a political party petition deadline more than a year before the General Election, and with a petition signature requirement that has never been complied with, has been held not to constitute a severe burden, let-alone being held constitutional.

Finally, another significant misstatement in Secretary Thurston's brief is on page 1 where he states that "[t]his Court erroneously concluded that the Libertarian Party's purported inability to comply with certain of Arkansas's ballot-access laws made the entire regime severely burdensome." As noted above, the problems the LPAR was having with complying with the law were not the only reason the Court granted the preliminary injunction. After all, the Court did not state that the entire regime of ballot access laws was severely burdensome, but concentrated on the unnecessarily early petition deadline, the 90-day petitioning period, the distance of a General Election more than a year away from the deadline, and the reinstated 3% signature petition requirement. Secretary Thurston nowhere in his brief explains why it is necessary to put back in place a requirement that was never complied with. Of further interest and significance, Secretary Thurston's expert, Professor Hood of the University of Georgia, noted that the LPAR's candidates at the top of the ticket had received 1.52% of the total statewide vote in Arkansas in 2012, 2.03% in 2014, 2.64% in 2016, and 2.9% in 2018.[1] Thus, the LPAR had shown an increasing progression toward the 3% retention requirement approved by the Eighth Circuit in *Green Party of Arkansas*

[1] In other recent statewide races the LPAR candidate has done even better than 3%. In 2016, the LPAR candidate for U.S. Senate, Frank Gilbert, received 3.96% of the total statewide vote. In 2018, the LPAR candidate for State Treasurer, Ashley Ewald, received 29.1% of the total statewide vote [Dkt. No. 17-1, Declaration of Peyton Murphy, Exhibit "C", pp. 57-59, Exhibit "D", pp. 99-101].

v. Martin, Id. Faced with the probability that the LPAR would successfully obtain the 10,000 petition signatures required for political party recognition again, and then satisfy the 3% of the vote retention requirement in 2020, the Arkansas General Assembly--overwhelmingly controlled by the Republican party--passed a new law restoring the twice constitutionally discredited 3% petition requirement for new party recognition and, just to make sure, passed a new law which required a petition signature deadline of September 5, 2019, for the 2020 General Election cycle. Secretary Thurston's argument that this Court erroneously found the burden severe is absurd.

IV. Arkansas's ballot access regime is not narrowly tailored to serve a compelling governmental interest.

The Eighth Circuit has recently noted in a ballot access case from Arkansas that ". . . the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest. *Moore v. Martin*, 854 F.3d 1021, 1026 (8th Cir. 2017). In no way has Secretary Thurston done this in his brief or at the hearing on the Motion for Preliminary Injunction. The problem Secretary Thurston has is that when the Eighth Circuit upheld the 3% retention requirement as to a new political party obtaining at least 3% of the vote for governor, they did so based on the fact that a new political party could then petition again for Arkansas ballot access by turning in 10,000 petition signatures of Arkansas registered voters by a deadline that was at least set during the General Election year rather than in the year before. *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011). Further, in a second appeal from a District Court decision in Arkansas which declared a March 1 deadline during the General Election year to be unconstitutional, the Eighth Circuit dismissed an appeal because it had become moot because the Arkansas General Assembly had amended the deadline by moving it to May 1 of the General Election year, but refused to vacate the District Court judgment and let it stand because of the Arkansas General Assembly having previously changed the law in the past and then having the

law challenged as unconstitutional, because the public interest was at stake. *Moore v. Thurston*, __ F.3d __, No. 18-1382 (8th Cir., July 1, 2019). The election law challenged herein is not narrowly tailored to serve a compelling governmental interest, but is tailored to serve the interest of keeping the LPAR off the Arkansas ballot for the 2020 General Election and deprive the LPAR of the chance to achieve 3% or more of the total vote for its presidential candidate.

V. A stay pending appeal is not necessary because there is no harm to the State of Arkansas or the public interest which would outweigh the harm to the Libertarian Party of Arkansas and its supporters.

While Secretary Thurston argues that failure to grant a stay of this Court's decision of July 3, 2019, would result in harm to the State of Arkansas and the public interest which would outweigh the harm to the Libertarian Party of Arkansas, in fact, the result would be the exact opposite. There would be no harm to the State of Arkansas unless one confuses the interests of the Republican Party with the State. What would happen without the stay being granted is the same as happened in 2018 and 2016, when the LPAR successfully petitioned with more than the 10,000 valid petition signatures needed, or, like in 2006, when the Green Party, or, in 1996, when the Reform Party failed to meet the 3% petition requirement and were put on the ballot by the Court. On the other hand, the harm to the LPAR would be that the Secretary of State would not complete his obligation to validate for sufficiency the 18,667 petition signatures of Arkansas voters turned into Secretary Thurston's office on June 28, 2019, in a timely manner within the thirty (30) days of filing required by Ark. Code Ann. § 7-7-205(b)(1).[2] Recognizing and validating these signatures will determine if there are 10,000 valid petition signatures of Arkansas voters. Past

[2] It has been noted that the Secretary of State's office has in the past timely handled significantly higher numbers of petition signatures within a 30-day period. *Moore v. Martin*, 854 F.3d, at 1029, n.11. Also see the order and judgment of the District Court in *Moore v. Thurston* [formerly Martin], Case No. 4:14-cv-00065 JM, (E.D. Ark. Jan. 25 and 31, 2018) [Dkt. Nos. 65 and 67, ¶ 28] (which indicates that a trained worker with the Arkansas Secretary of State's office can verify 4-5 petition signatures per minute).

experience has shown that it is highly likely that there will be more than enough valid petition signatures under a law that has actually been complied with by new political parties in Arkansas, rather than the challenged 3% petition signature requirement which has never been complied with without a court order. Not only would there be harm to the LPAR, but there would be harm to the Arkansas public interest and all Arkansas registered voters who would be denied a further choice in the General Election in 2020. The evidence in the case was very clear that the Arkansas ballot was not only never overcrowded, but in many instances--even with third parties on the ballot--the Arkansas ballot still lacked in many cases a choice for Arkansas voters in the General Election. The interest of the public of Arkansas has recently been a factor considered by the Eighth Circuit in dismissing the Secretary of State's appeal as moot, but letting stand a 2018 decision of the U.S. District Court for the Eastern District of Arkansas in *Moore v. Martin,* case no. 4:14-cv-00065 JM (E.D. Ark. Jan. 25 and 31, and April 30, 2018) [Dkt. Nos. 65, 66, 67, and 96].

> But even if the Secretary is not at fault for the mootness here, the public interest weighs in favor of allowing the district court's judgment to stand. As we previously observed in *Moore*, 854 F.3d at 1026, independent candidates and voters have repeatedly—and successfully—challenged Arkansas's ballot-access requirements. We thus conclude that the public interest is best served by a substantial body of judicial precedence limiting the burden that those requirements may place on candidates' and voters' First and Fourteenth Amendment rights. *Moore v. Thurston*, __ F.3d __, No. 18-1382 (8th Cir. July 1, 2019).[3]

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Claude of the Fourteenth Amendment, which embraces freedom of speech." *Nat'l Ass'n for Advancement of*

[3] The district court order and judgment left in place by the Eighth Circuit can be found in Moore v. Thurston [formerly Martin], Case No. 4:14-cv-00065 JM, (E.D. Ark. Jan. 25 and 31, and April 30, 2018) [Dkt Nos. 65, 66, 67, and 96].

Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958). The U.S. Supreme Court has explained that "strands of 'liberty'" are interwoven through questions of ballot access:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

The candidates who appear on the ballot are crucial to the voters' exercise of those First and Fourteenth Amendment rights. "[V]oters can assert their preferences only through candidates or parties or both." *Anderson*, 460 U.S. 780, at 787 (1983). "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Third-party and independent candidates play an important role in the voter's exercise of his or her rights. "The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" *Anderson v. Celebrezze*, 460 U.S. at 787 (internal citations omitted). "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.*

VI. Conclusion

Recently, the U.S. Court of Appeals for the Sixth Circuit upheld a denial of a stay by a U.S. District Court in the Eastern District of Michigan which had preliminarily enjoined a 30,000 petition signature requirement in a ballot access case, which is less than 1% of the last gubernatorial vote in Michigan, and ordered the state to accept *Graveline's* filing as complete

and determine the validity of the signatures in time to place *Graveline* on the ballot if he had sufficient ballot signatures of at least 5,000, and at least 100 valid signatures from registered voters in each of at least half of the 14 congressional districts of Michigan. *Graveline v. Johnson*, 336 F.Supp. 3d 801, 816-817 (E.D. Mich. 2018), *stay denied*, 747 Fed. App'x. 408 (6th Cir. 2018). Not only did the District Court deny an emergency motion for stay pending emergency appeal, but as noted above, the Sixth Circuit denied the motion for a stay of the District Court's preliminary injunction pending appeal. This serves as another indication that Secretary Thurston is not likely to prevail on appeal and that the motion to stay should be denied. Secretary Thurston has shown no necessity for the increased petition signature requirement, the petition deadline fourteen months before the general election, the ninety day petitioning period, and a credible compelling state interest that could not be served by less drastic means. Under the factors and equities to be considered in answering whether a stay should be granted of a preliminary injunction pending appeal, *Hilton v. Braunskill*, 481 U.S. at 776, Secretary Thurston has failed to show why this Court should grant his Motion for Stay Pending Appeal. The Court's relief granted in its preliminary injunction order to the LPAR is both conservative and narrowly tailored by the restraint exercised in only restoring the 10,000 petition signature requirement and not at this time changing the petition signature deadline or petition signature 90-day gathering period, as well as not disturbing other election laws of Arkansas's election regime.

WHEREFORE, premises considered, the Plaintiffs request that Defendant's Motion for Stay Pending Appeal be denied.

Respectfully submitted this 24th day of July, 2019.

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