No. 19-2503

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LIBERTARIAN PARTY OF ARKANSAS; SANDRA CHANEY RICHTER; MICHAEL PAKKO; RICKY HARRINGTON, JR.; CHRISTOPHER OLSON; MICHAEL KALAGIAS,
Plaintiffs-Appellees,

v.

JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas,
Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of Arkansas
No. 4:19-CV-00214 KGB (Hon. Kristine G. Baker)

Appellant's Motion for a Stay of a Preliminary Injunction Pending Appeal and for Expedited Consideration of this Appeal

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LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

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INTRODUCTION

In Arkansas, new political groups seeking across-the-board ballot access must win 3% of the vote or collect signatures equal to 3% of the turnout in the most recent gubernatorial election. Any voter can sign a ballot petition, and in practice, that means groups must collect signatures of just 1.5% of all registered voters to win the ability to nominate candidates to every partisan office. That is far below the 5%-signature threshold upheld in *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and similar requirements upheld elsewhere.

The district court here rejected that precedent. Instead, it concluded that requiring groups to collect more than 10,000 signatures—or just 0.5% of registered voters—unconstitutionally burdened ballot access. Having done so, it ordered Arkansas to certify the Libertarian Party of Arkansas as a political party and allow it to name candidates for every partisan office if it collected just 10,000 signatures. That judicially imposed threshold is likely to be reversed.

But appeals take time, and in election cases, that time can make effective review impossible. It can also lead to voter and candidate confusion, prompting additional, last-minute litigation. To avoid that, Arkansas seeks a stay of the district court's preliminary-injunction order. *See* Fed. R. App. P. 8. Alternatively, to lessen that order's harm, Arkansas requests expedited consideration of this appeal and asks that any oral argument be scheduled no later than December 2019.

BACKGROUND

A. Statutory Background

The Libertarian Party of Arkansas (LPAR) and five members challenge Arkansas's requirement that to obtain across-the-board ballot access, a new political group must generally obtain "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." Ark. Code Ann. 7-7-205(a)(2). But Arkansas actually provides "a number of alternative paths" for ballot access. *Green Party of Ark. v. Martin*, 649 F.3d 675, 677-79 (8th Cir. 2011) (*GPAR*). In fact, Arkansas law provides specific mechanisms both for individual candidates to qualify for particular offices and for groups to nominate candidates for every partisan race. Those provisions ensure that only candidates enjoying a modicum of support appear on the ballot.

What individual candidates must do varies by office. For instance, any group may nominate Presidential and Vice Presidential candidates by collecting 1,000 signatures from registered voters. *See* Ark. Code Ann. 7-8-302(5)(B). Those nominees appear on the ballot along with the group's name, and if a group's nominees win 3% of the vote, it will become a political party entitled to across-the-board ballot access. *Id.* 7-1-101(27)(A). Individuals may likewise qualify for the presidential ballot by collecting 1,000 signatures. *Id.* 7-8-302(6)(A).

Individual candidates may also qualify for down-ballot contests by collecting a specified number of signatures. *Id.* 7-7-103(b)(1). Candidates meeting those requirements will be listed on the ballot as independents, but groups and parties are free to endorse particular candidates. Indeed, nothing prevents groups from endorsing individuals as the official Green, Libertarian, Reform, or Socialist party candidates.

Alternatively, a group may become a "political party" and secure the ability to nominate candidates for every partisan office on the ballot. *Id.* 7-7-102. As noted, a group may do that by winning at least 3% of the vote in the previous gubernatorial or presidential election. *Id.* 7-1-101(27)(A). If a group's gubernatorial and presidential candidates continue to win at least 3% of the vote, that group will retain the ability to nominate candidates for every partisan office. *Id.* 7-1-101(27)(C). Indeed, both major parties retain across-the-board access based on that provision. *See, e.g.*, Exhibit C (DE 17-1, 2018 Election Results at 89-91). This Court previously upheld that ballot-retention requirement. *See GPAR*, 649 F.3d at 687.

Groups that fail to win 3% of the vote (or that are seeking ballot access for the first time) may also obtain across-the-board access by meeting the "petition requirements for new political parties." Ark. Code Ann. 7-7-205. Under those re-

quirements, groups must demonstrate a modicum of support by collecting "signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor." *Id.* 7-7-205(a)(2). Having satisfied that modicum-of-support requirement, a new political party may nominate candidates for every partisan office. *Id.* 7-7-102(b).

For the 2020 election, Arkansas's modicum-of-support requirement equals 26,746 signatures. Exhibit A (DE 31, PI Order 4) (Order). Signatures must be submitted *no later* than September 5, 2019. *Id.* (citing Ark. Code Ann. 7-7-205(a)(6)). And while signatures cannot be more than 90 days old when submitted, groups may begin collecting signatures at any time. Ark. Code Ann. 7-7-205(a)(4)(B). That means groups can begin collecting early, and if they appear unable to collect sufficient signatures within 90 days of their start date, they may continue collecting on a rolling 90-day basis until September 5. Thus, as relevant here, if a group began collecting on April 1 and on June 28 it appeared the group would not meet the threshold, it could redouble its efforts and continue collecting until it succeeded.

Those requirements, moreover, are based on experience. Before 2019, Arkansas allowed groups to obtain across-the-board access with just 10,000 signatures. *See* Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 1 (amending Ark. Code Ann. 7-7-205(a)(2)). Under that provision, groups routinely

obtained access and just as routinely failed to satisfy the 3% ballot-retention requirement. That experience led Arkansas to conclude that 10,000 signatures were "insufficient to reflect the will of the voters" and ensure that only candidates enjoying a modicum of support appeared on the ballot. Act 164 of 2019, sec. 2. In response, Arkansas adopted a 3% modicum-of-support requirement more in line with the ballot-retention requirement and modified a handful of deadlines.

While that change brings the two requirements closer together, the 3% modicum-of-support requirement is ultimately less demanding than the ballot-retention requirement. While both involve a 3% threshold, it is more difficult to win, for example, 26,746 of 891,545 actual votes cast in 2018 than it is to collect 26,746 signatures from the 1.7 million registered voters in Arkansas, any one of whom may sign multiple petitions. That's undoubtedly true because in contrast to the petition process—where registered voters may sign any number of new-political-party petitions—winning actual votes is a zero-sum game that requires convincing voters to support one candidate over others.

B. Factual and Procedural Background

LPAR is a perennial third party. It has never won 3% of the gubernatorial vote. Instead, between 2012 and 2018, it obtained across-the-board ballot access by satisfying the old 10,000-signature requirement. Year after year, it promptly

fell off the ballot. Order 8. The closest LPAR ever came to meeting the ballot-retention requirement was in the 2018 gubernatorial election. *Id.* Winning just 25,885 votes, it was far from competitive. The *losing* major-party candidate won over 280,000 votes (more than 10 times LPAR's share) and the winning candidate won more than 580,000 votes (over 20 times LPAR's share). *See* Exhibit C at 89-91.

LPAR claims—and the district court agreed—that requiring it to collect more than 10,000 signatures to obtain across-the-board ballot access imposed a severe burden and was unconstitutional. But there is no evidence that LPAR even tried to comply with Arkansas's 3% modicum-of-support requirement. Indeed, there is no evidence that LPAR intensified its efforts to collect signatures this year, sought professional assistance, raised additional money to help with its petition drive, or really did *anything* different than it did to comply with the previous 10,000-signature requirement. And perhaps most revealing, LPAR turned in a facially insufficient number of signatures *months before* the September 5 deadline. *See* Order 61-63.

Instead, LPAR's ballot-access plan was litigation. On March 28, 2019—about five weeks after Arkansas's new modicum-of-support requirement took effect, and months before any of the ballot-access deadlines—LPAR and five mem-

bers sued. LPAR alleged that the modicum-of-support requirement and its September 5 compliance deadline violated the Constitution, and it asked the district court to lower the requirement to 10,000 signatures and move the compliance date. A little more than a month later, LPAR filed a preliminary-injunction motion.

On June 4, the district court held a preliminary-injunction hearing. LPAR did not present any expert testimony or evidence about what it would need to do to meet Arkansas's modicum-of-support requirement. Nor did it present evidence concerning its ability to hire professional canvassers. Rather, it relied exclusively on the testimony of the individual plaintiffs. And that testimony underscored how little they had done to even attempt compliance.

For instance, while LPAR started collecting signatures on April 1, 2019 (and intended to submit signatures 90 days later), Michael Pakko, LPAR's chair, admitted that LPAR did not really begin collecting signatures in earnest until at least mid-April. *See* Exhibit B (Tr. of June 4 Hr'g 24:5-7) (Tr.). Two plaintiffs (one, a perennial LPAR candidate, and the other, LPAR's vice chair) also testified that—some *two months* after LPAR began collecting signatures—they had done barely any work at all on the petition drive. *See* Order 15-16; Tr. 80:21-81:1 (Kalagias) ("no set plans" to collect signatures); Tr. 85:20-23 (Olson) (no "specific plans"). And despite that lackadaisical start, LPAR ultimately decided to submit just 18,667

signatures on June 28, 2019—*just under* 90 days after it started collecting and *months before* the actual deadline. *See* Order 61-63.

In response, Arkansas presented expert testimony concerning the modicum-of-support requirement's alleged burdens and how LPAR could comply. To start, Peyton Murphy, until recently in the elections division of the Secretary's office, testified about the lack of restrictions on who can sign new-political-party petitions. For example, Murphy explained that there is no limit to the number of ballot-access petitions that a voter can sign, that there are no restrictions on who can collect signatures, and that there are no special geographic requirements. *See* Tr. 91:3-96:25. He contrasted those lax requirements with the regulations governing the collection of signatures for referenda. *See id.*

Dr. Trey Hood, a University of Georgia political science professor, also testified. He explained that based on his extensive experience studying ballot-access laws around the country, the challenged requirement would not freeze the political status quo. Tr. 185:25-186:6, 202:16-18. To the contrary, citing examples from other States, Dr. Hood testified that Arkansas's laws are similar to other regulations. Tr. 202:12-15; *see* Tr. 194:7-197:10. And based on his experience, Dr. Hood explained why he believed that LPAR could meet Arkansas's 3% modicum-of-support requirement. Tr. 202:19-21.

Arkansas also presented expert testimony from political consultant Meghan Cox. She testified that based on her extensive experience running petition drives—throughout the country and in Arkansas—LPAR could collect the required number of signatures. Tr. 161:14-162:3. She explained that, in contrast to other states, Arkansas's restrictions on signature collection were "very lax and pretty easy." Tr. 139:18-142:1. As a result, she testified complying would be "a relatively easy logistical job." Tr. 161:14-18. Indeed, to underscore the point, Cox detailed examples of how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. Tr. 141:7-142:1, 150:11-159:23, 161:23-162:4, 163:7-164:25. As one example, she offered unrebutted testimony that LPAR could run a 75-day petition drive—using 7-9 canvassers, 40% paid and 60% volunteer—that would satisfy Arkansas's 3% requirement for approximately $55,000. Tr. 141:12-142:1, 163:7-164:24; *see* Order 23.

C. District Court's Order

On July 3, 2019, the district court held that Arkansas's modicum-of-support requirement for across-the-board ballot access was likely unconstitutional and preliminarily enjoined it. Order 59-60. It concluded that threshold severely burdened LPAR's constitutional right because it believed LPAR could not meet that requirement. *Id.* 36-48. But the district court did not point to any evidence or testimony demonstrating LPAR could not comply. Rather, it simply declared that LPAR's

unsupported, self-serving representations, its lackadaisical efforts at the time of the preliminary-injunction hearing, and its decision to submit a facially insufficient number of signatures months before the deadline meant that it could not comply. *See id.* 37-41, 61-63.

It likewise dismissed Cox's *unrebutted* testimony detailing how LPAR could comply with Arkansas's not-particularly-burdensome requirement. *Id.* 39-40. In fact, the district court attempted to sidestep Cox's testimony entirely by declaring that "[t]here is no evidence that the LPAR has the financial resources or volunteer base necessary to achieve Ms. Cox's projections." *Id.* 39. The district court did not explain why it was Arkansas's burden—as opposed to LPAR's—to present evidence concerning LPAR's resources. Nor did it explain why it had resolved the purported evidentiary void against the defendant. Moreover, even if the district court were entitled to reverse the burden of proof, its suggestion conflicted with evidence that LPAR routinely spent *at least* $30,000 to comply with the 10,000-signature requirement and that it was employing volunteers and 5 paid canvassers. Tr. 36:1-10, 47:5-21.

Given the weakness of that argument, the district court also attempted to fill the evidentiary void through a series of *sua sponte* calculations designed to demonstrate Cox's assumptions were unrealistic. Order 39-41. Those calculations ulti-

mately rested on the district court's assumption that LPAR had employed "approximately 150 volunteer canvassers and five paid" in the months leading up to the preliminary-injunction hearing and had failed to keep pace with Cox's projections. *Id.* 39. But contrary to that assumption, Pakko testified that at the time of the hearing, "maybe a dozen people" had "actually worked hard at going out and collecting signatures, more than just, you know, asking their spouse and neighbors to sign." Tr. 47:5-21.

Having found Arkansas's modicum-of-support requirement constituted a severe burden, the district court next turned to Arkansas's interest. *See* Order 48-52. Finding no evidence of ballot overcrowding, the district court declared Arkansas had no interest whatsoever. *Id.* 51. It did not address Arkansas's interest in keeping "frivolous candidates" off ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). And applying strict scrutiny, it faulted Arkansas for failing to justify the precise number of signatures it has chosen to require. Order 48-51. As a result, it found Arkansas had failed to demonstrate a compelling interest that would justify a severe burden.

Finally, concluding that 10,000 signatures was the maximum constitutionally permissible signature requirement for across-the-board access, the district court ordered Arkansas to grant LPAR across-the-board access if it submitted that many signatures. *Id.* 59-60. Although it relied heavily on the compliance deadline

and the 90-day collection window to hold the modicum-of-support requirement unconstitutional, *see id.* 44-47, the district court enjoined only the modicum-of-support requirement, *id.* 59-60. It left the timing in Arkansas's ballot-access laws untouched.

Thereafter, on July 12, 2019, Arkansas sought a stay. After nearly four weeks, the district court has not ruled on that motion. Consequently, the district court has "failed to afford the relief requested" and Arkansas brings this motion. Fed. R. App. P. 8(a)(2)(A)(ii).

ARGUMENT

This Court should stay the district court's preliminary-injunction order pending appeal because Arkansas is likely to succeed on the merits, the people of Arkansas will suffer irreparable harm absent a stay, the balance of the equities clearly favors a stay, and a stay is in the public interest. *See Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). Indeed, courts regularly take action in election-law cases, like this, to maintain the status quo pending review. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (vacating injunction pending appeal in election-law case); *Brakebill v. Jaeger*, 905 F.3d 553, 555-56 (8th Cir. 2018) (staying district court's injunction); *accord Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014).

Alternatively, to minimize confusion and mitigate the risk of last-minute election litigation, expedition is warranted. *See* 28 U.S.C. 1657(a) ("the court shall expedite . . . any action for temporary or preliminary injunctive relief").

I. Arkansas is likely to succeed on the merits.

Although voting is of "'fundamental significance'" to American government, "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, elections are not primarily about advancing political association. 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.'" *Id.* at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). And "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.*

As a result of this concern with fair and efficient elections, courts apply a sliding-scale analysis to ballot-access regulations. To "discern the level of scrutiny required" under this analysis—and thus the nature of the interest Arkansas needed to justify the modicum-of-support requirement—the district court was required "to analyze the burdens imposed." *GPAR*, 649 F.3d at 681. Because the modicum-of-support requirement "imposes only modest burdens," Arkansas's "important regulatory interests" in managing "election procedures" suffice to justify it. *Wash.*

State Grange v. Wash. State Republican Party, 552 U.S. 442, 451-52 (2008) (quotation marks omitted). Moreover, even if the more exacting standard for *severely* burdensome regulations applied, the requirement would survive because it is narrowly tailored to serve a compelling interest. *See GPAR*, 649 F.3d at 680.

The district court erred as a matter of law on both fronts. It overinflated the modicum-of-support requirement's supposed burdens, and it undervalued Arkansas's compelling interest in ensuring that only non-frivolous candidates appear on the ballot. Those errors raise "serious doubts" about the correctness of its decision, demonstrate Arkansas is likely to succeed on the merits, and warrant staying the preliminary injunction. *Brady*, 640 F.3d at 792. At a minimum, those errors justify expedition.

A. Any supposed burden on LPAR is not severe.

The modicum-of-support requirement does not impose a severe burden; therefore, it is not unconstitutional. *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 694 (8th Cir. 2011) (*LPND*). This Court reviews de novo the district court's contrary conclusions. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (burdensomeness is "a legal determination subject to de novo review").

Because the district court never assessed the modicum-of-support requirement in light of the "eligible pool" of those who can sign ballot-access petitions, it

overstated the requirement's burdensomeness. As this Court previously explained, "the Supreme Court does not merely consider the percentage stated in a challenged law." *LPND*, 659 F.3d at 695. "Rather, it determines the percentage of support based on the 'eligible pool.'" *Id.* In *LPND*, the eligible pool was "[t]he number of people eligible to vote in the primary," which was "about 75% of the general population." *Id.* at 696. A requirement that a candidate obtain votes equal to 1% of the general population, therefore, "would become 1.33% of the eligible pool of adults who can vote." *Id.*

Here, by contrast, the eligible-pool analysis lowers the relevant threshold. To satisfy the modicum-of-support requirement, LPAR needs 26,746 signatures—3% of the 2018 gubernatorial turnout. *See* Order 4. But the eligible pool from which LPAR may collect signatures is *much larger* than those who voted in the 2018 gubernatorial election. Regardless of electoral participation or party affiliation, any registered voter can sign an LPAR petition. *See* Tr. 91:3-96:25. And there were 1,750,077 registered voters in Arkansas as of June 1, 2018. Order 19; Tr. 116:2-5. Therefore, the so-called "three-percent requirement" is actually a 1.5% requirement. (It requires 26,746 signatures out of an eligible pool of 1,750,077; and $26,746 \div 1,750,077 \approx 0.01528$.) The district court's failure to engage in this analysis—indeed, the phrase "eligible pool" appears nowhere in its order—led it to overstate the modicum-of-support requirement's burden.

With the burden properly calculated, the modicum-of-support requirement easily satisfies decades of precedent. In the 1970s, the Supreme Court upheld a requirement that a candidate submit "a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." *Jenness*, 403 U.S. at 432. And subsequently, this Court identified "5% of the number of votes cast in the previous gubernatorial election" as the "upper threshold of reasonable" ballot-access requirements. *LPND*, 659 F.3d at 695-96. Arkansas's 3% modicum-of-support requirement falls "well below" that threshold. *Id.*; *see GPAR*, 649 F.3d at 686-87 (referencing "far more burdensome ballot access schemes" approved elsewhere).

An Eleventh Circuit decision upholding Alabama's similar ballot-access regime further underscores the point *See Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). Alabama's modicum-of-support requirement is nearly identical to Arkansas's requirement. It requires "petitions include 'the signatures of at least *three percent* of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, city, district, or other political subdivision in which the political party seeks to qualify candidates for office.'" *Id.* at 897. But Alabama has a much tougher ballot-retention requirement than Arkansas, setting that threshold at 20%. *Id.* at 896-97. Thus, while Alabama and Arkansas have

a nearly identical modicum-of-support requirement, Alabama's ballot-retention requirement is *over six times* more difficult to meet.

The Eleventh Circuit, however, rejected a challenge to Alabama's ballot-access regime. Indeed, the Eleventh Circuit explained that a "long line of [Supreme Court and circuit] precedent" establishes "that Alabama's three-percent signature requirement is a reasonable, nondiscriminatory restriction that imposes a *minimal burden* on plaintiffs' rights." *See id.* at 904 (emphasis added).

By contrast, the district court here refused to follow that same decades-old precedent. *See* Order 44-47. That refusal largely boils down to a single distinction: The other States had more liberal timing requirements. For instance, their compliance deadlines fell closer to the general election, or they did not impose a time limit similar to Arkansas's rolling 90-day window for signature gathering. *See id.* 45-46. But even if Arkansas's timing requirements were unconstitutional (and they aren't), that could not possibly justify preliminarily enjoining a constitutional modicum-of-support requirement. Indeed, if the *timing* of Arkansas's ballot-access deadlines is the problem, then the district court should have enjoined the *timing provisions*—not the modicum-of-support requirement. Yet the district court preliminarily enjoined *only* the modicum-of-support requirement and left the timing provisions untouched. *See id.* 56-60.

Therefore, on its face, the preliminary injunction is completely divorced from any supposed harm. That alone means that Arkansas is likely to prevail on appeal since "injunctive relief must be narrowly tailored to remedy only the specific harms established by the plaintiff." *Lytle v. U.S. Dep't of Health & Hum. Servs.*, 612 F. App'x 861, 862-63 (8th Cir. 2015); *see Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) ("An injunction must be tailored to remedy specific harm shown.").

In addition to disregarding decades of precedent and failing to tailor its injunction, the district court also committed reversible evidentiary failures. As noted above, *see supra* p. 9, undisputed evidence established that to satisfy the modicum-of-support requirement LPAR would need about 9 full-time canvassers for 75 days, and that a professional ballot-access firm could do this for around $55,000 using 40% paid canvassers and 60% volunteer canvassers. LPAR offered no evidence to contradict these expert projections. Yet the district court dismissed them out-of-hand because it believed it was "unrealistic" to expect volunteer canvassers to collect the number of signatures projected. *See* Order 40.

That conclusion largely rested on the district court's clearly erroneous assertion that LPAR had employed "approximately 150 volunteer canvassers and five paid" in the months leading up to the preliminary-injunction hearing and had failed to keep pace with Cox's projections. *Id.* 39. But the testimony the district court

cited actually only established that LPAR had "maybe a dozen" canvassers, and it was not clear how many of them were working full time. Tr. 47:5-21 (Pakko); *see* Tr. 24:5-7 (although ballot-access drive started on April 1, LPAR did not have all its canvassers working until at least two weeks later).

The district court further erroneously penalized Arkansas for LPAR's failure to offer evidence of its financial resources. Although the district court correctly noted this lack of evidence, it oddly suggested that a lack of evidence proved that LPAR could not finance a successful campaign. *See* Order 39-41. But a lack of evidence does not amount to a "clear showing" that the modicum-of-support requirement imposes a severe burden, which is required at the preliminary-injunction stage. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quotation marks omitted); *see Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (preliminary injunction requires "rigorous [likelihood-of-success] showing").

Moreover, even assuming that LPAR could not afford a $55,000 ballot-access petition drive, the district court cited no precedent for the proposition that $55,000 amounts to a severe burden. Nor could it have done so. Indeed—given the cost of modern campaigns—"it would be strange to say that a viable statewide political party cannot be expected to shoulder a $50,000 burden for statewide ballot

access for its nominees." *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 30 (1st Cir. 2016).

Because any alleged burdens "are not severe, Arkansas's 'asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party's rights.'" *GPAR*, 649 F.3d at 685 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). When this Court upheld Arkansas's ballot-retention requirement, it cited Arkansas's "important regulatory interest" in preventing "frivolous candidacies" and reducing "voter confusion." *Id.* at 686. Arkansas's 3% modicum-of-support requirement similarly furthers those interests. Indeed, like the retention requirement, it "tie[s] the test for a political party's support to the race[] for governor," which is traditionally one of "the two races in Arkansas that have garnered the most overall votes, thus furthering Arkansas's interests by providing the broadest basis on which to test a party's support." *Id.*

The district court rejected Arkansas's interests because it thought the old 10,000-signature requirement was sufficient. *See* Order 51 ("There is no record evidence that explains what facts made it necessary or even advisable to more than double the signatures required for a new political party to gain ballot access."). But this Court has never required "empirical evidence attempting to establish what may happen absent" a challenged ballot-access regulation. *GPAR*, 649 F.3d at

686. Rather, the district court should have concluded—as *GPAR* did—that whatever burdens are imposed, "they are significantly outweighed by Arkansas's important regulatory interests." *Id.* at 687. Therefore, Arkansas is likely to prevail on the merits, and a stay is warranted.

B. Alternatively, the modicum-of-support requirement is narrowly tailored to further a compelling state interest.

The onus was on LPAR to establish a severe burden. Because it did not, Arkansas "need not assert a compelling interest" in its ballot-access requirements. *Wash. State Grange*, 552 U.S. at 458. Instead, as noted above, Arkansas only needed to cite an important regulatory interest, and the district court's contrary finding (Order 48-52) warrants reversal. Yet even if the compelling interest standard applies, Arkansas is likely to prevail.

The district court took an erroneously limited view of the sorts of compelling interests that justify regulations like the modicum-of-support requirement. The only potentially compelling interest that the district court acknowledged is preventing ballot overcrowding. *Id.* 51. But the Supreme Court has recognized that a State's interest in keeping "frivolous candidates" off the ballot gives it "the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Anderson*, 460 U.S. at 788 n.9. Similarly, this Court has recognized a "state's interest in *eliminating frivolous candidates*." *LPND*, 659 F.3d at 697 (emphasis added). Thus, Arkansas has a

compelling interest in ensuring that only viable candidates appear on the ballot—an interest related to but not coextensive with the interest in preventing ballot over-crowding. The district court erroneously ignored that interest.

The district court also applied an incorrect legal standard to determine whether the modicum-of-support requirement is narrowly tailored. It faulted Arkansas for not demonstrating that it was necessary to increase the signature threshold from 10,000 to 3% of the votes cast in the last gubernatorial election. Order 51. That "is really an argument about the number of [signatures] required," *LPND*, 659 F.3d at 698, and a suggestion Arkansas's selection was not sufficiently precise. But anytime a State sets a signature threshold it will be "necessarily arbitrary," *id.*, and that is why—contrary to the district court's approach—the relevant inquiry is whether the requirement is reasonable, not whether it would survive strict and exacting scrutiny. Indeed, the Supreme Court has never "required a State seeking to impose reasonable ballot access restrictions to make a particularized showing that voter confusion in fact existed before those restrictions were imposed." *Munro v. Socialist Workers Party*, 479 U.S. 189, 204 (1986). Thus, the district court erred when it imposed a more exacting standard and reversal is likely.

II. The remaining factors favor a stay.

Absent a stay, Arkansas and its citizens face irreparable harm. By definition, a State's "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); *see Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Moreover, in election-law cases, stays are particularly appropriate since unlawful injunctions "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5; *see Brakebill*, 905 F.3d at 559-60. Preventing that confusion is also undoubtedly in the public interest.

Likewise, far from inflicting harm, a stay would prevent harm to the plaintiffs. For instance, with a preliminary injunction in place, LPAR and potential LPAR candidates (including the individual plaintiffs) have no incentive to pursue ballot access by alternative means. Instead, potential candidates probably believe (understandably so) that they can run as the LPAR nominee. But when—as is likely—this Court vacates the district court's preliminary injunction, that will no longer be true. And by the time that happens, those candidates may find themselves unable to meet the alternative ballot-access deadlines. *See* Ark. Code Ann. 7-7-103(b)(1)(A) (amended by 2019 legislation) (May 1, 2020 independent filing deadline).

Further, even if a stay might somehow harm LPAR, that would not preclude a stay. To the contrary, a stay would still be warranted unless "the balance of equities" favors LPAR "so decidedly" as to "outweigh" Arkansas's strong showing that it is likely to succeed on the merits and the harm to others. *Brady*, 640 F.3d at 794.

Additionally, any potential harm to LPAR could be minimized through expedition. A stay is warranted.

III. Expedition is warranted.

This Court should expedite this election-law appeal to minimize the harm to Arkansas, its citizens, and potential candidates. *See Brady*, 640 F.3d at 793 (noting expedition would "minimize harm" by "allow[ing] the case to be resolved well before" deadlines). As noted at the outset, appeals take time and in election-law cases, time can render effective review impossible. Indeed, absent a stay or, at a minimum, a decision well in advance of the May 1, 2020 independent-candidate deadline, Arkansans face the prospect of significant last minute ballot-access litigation. To avoid that, Arkansas requests that no briefing extensions be allowed and that this Court hear argument no later than December 2019.

CONCLUSION

For these reasons, this Court should stay the district court's preliminary injunction, expedite this appeal, or both.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, according to the word-count feature in the word-processing software used to prepare it, this motion contains 5,195 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a 14-point, proportionally spaced typeface.

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/s/ Nicholas J. Bronni
Nicholas J. Bronni

CERTIFICATE OF SERVICE

I certify that on August 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Nicholas J. Bronni
Nicholas J. Bronni