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)

Brief of Defendant-Appellant

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

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

The district court preliminarily enjoined Arkansas's requirement that groups seeking across-the-board ballot access must collect signatures from just 1.5% of registered voters. It held that requirement severely burdened the Libertarian Party of Arkansas's ability to access the ballot and was unconstitutional. That conclusion conflicts with decades of precedent upholding significantly larger signature requirements. *E.g.*, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a 5% signature requirement). The district court then declared the Libertarian Party constitutionally entitled to across-the-board ballot access so long as it collects just 10,000 signatures—or an amount equal to just half-a-percent of all registered voters. The district court's refusal to follow precedent warrants reversal.

At best, the district court suggested that consistent case law was distinguishable because Arkansas law imposes different compliance deadlines. Like Arkansas's signature requirement, those deadlines are neither burdensome nor unconstitutional. But even if those deadlines were problematic, that would not justify leaving those supposedly problematic provisions untouched and enjoining Arkansas's otherwise constitutional signature requirement. The district court's contrary conclusion defies logic and further underscores the need for reversal.

To address those and other errors, Defendant-Appellant Secretary of State John Thurston believes that twenty minutes of oral argument per side is warranted.

TABLE OF CONTENTS

Summary of the Case and Statement Regarding Oral Argument i

Table of Authorities iv

Statement of Jurisdiction..1

Statement of the Issues Presented 2

Statement of the Case...3

A. Statutory Framework 3

1. Arkansas's Modicum-of Support Requirement 3

2. Arkansas Electoral Deadlines 8

B. Factual & Procedural Background 10

1. LPAR...10

2. Proceedings Below 11

C. Decision Below 19

D. Appellate Proceedings 24

Standard of Review 25

Summary of the Argument...27

Argument..29

I. Because Arkansas's ballot-access laws do not impose a severe burden, LPAR is not likely to succeed on the merits. 29

A. Arkansas's modicum-of-support requirement falls well below the upper threshold for reasonable ballot-access requirements. 31

B. LPAR failed to demonstrate that Arkansas's modicum-of-support requirement severely burdens it. 38

C. Arkansas's compliance deadlines are not severely burdensome..42

D. Arkansas's important regulatory interests justify its ballot-access regime...44

II. Alternatively, because Arkansas's ballot-access laws are narrowly tailored to further compelling state interests, LPAR is not likely to succeed on the merits. 47

III. The district court's preliminary injunction is not narrowly tailored. 50

IV. The district court failed to properly consider the remaining preliminary-injunction factors. 53

Conclusion 56

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 2, 53

Anderson v. Celebrezze,
460 U.S. 780 (1983) 4, 10, 23, 47

Arutunoff v. Okla. State Election Bd.,
687 F.2d 1375 (10th Cir. 1982) 36

Bell v. Sellevold,
713 F.2d 1396 (8th Cir. 1983) 25

Beller v. Kirk,
328 F. Supp. 485 (S.D. Fla. 1970), *aff'd without opinion sub nom. Beller v. Askew*, 403 U.S. 925 (1971) 35

Burdick v. Takushi,
504 U.S. 428 (1992) 29

Camreta v. Greene,
563 U.S. 692 (2011) 37

Caplan v. Fellheimer Eichen Braverman & Kaskey,
68 F.3d 828 (3d Cir. 1995) 55

Citizens to Establish a Reform Party in Ark. v. Priest,
970 F. Supp. 690 (E.D. Ark. 1996) 37

Coal. for Econ. Equity v. Wilson,
122 F.3d 718 (9th Cir. 1997) 53

Dataphase Sys., Inc. v. CL Sys., Inc.,
640 F.2d 109 (8th Cir. 1981) (en banc) 25

Donovan v. Bierwith,
680 F.2d 263 (2d Cir. 1982) 26

e360 Insight v. The Spamhaus Project,
500 F.3d 594 (7th Cir. 2007) 51

Falls v. Nesbitt,
966 F.2d 375 (8th Cir. 1992) 51

Gen. Motors Corp. v. Harry Brown's, LLC,
563 F.3d 312 (8th Cir. 2009) 25

Graves v. Romney,
502 F.2d 1062 (8th Cir. 1974) 52

Green Party of Alaska v. State,
147 P.3d 728 (Alaska 2006) 36

Green Party of Ark. v. Daniels,
445 F. Supp. 2d 1056 (E.D. Ark. 2006)....................37

Green Party of Ark. v. Martin,
649 F.3d 675 (8th Cir. 2011) 2

Green Party of Ark. v. Martin,
649 F.3d 675 (8th Cir. 2011) (*GPAR*) .... passim

Jenness v. Fortson,
403 U.S. 431 (1971).................... passim

Libertarian Party N.H. v. State,
910 A.2d 1276 (N.H. 2006) 35

Libertarian Party of Fla. v. Florida,
710 F.2d 790 (11th Cir. 1983) 36

Libertarian Party of Me. v. Diamond,
992 F.2d 365 (1st Cir. 1993)....................36

Libertarian Party of N.D. v. Jaeger,
659 F.3d 687 (8th Cir. 2011) (*LPND*) .... passim

Libertarian Party of N.H. v. Gardner,
843 F.3d 20 (1st Cir. 2016).................... 22, 36, 41

Libertarian Party of Ore. v. Roberts,
750 P.2d 1147 (Ore. 1988)....................36

McLain v. Meier,
851 F.2d 1045 (8th Cir. 1988) 46, 49

Missouri v. Jenkins,
515 U.S. 70 (1995)....................2, 50

Munro v. Socialist Workers Party,
479 U.S. 189 (1986)....................48

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) 25

Ostergren v. Cuccinelli,
615 F.3d 263 (4th Cir. 2010) 51

Planned Parenthood Ark. & E. Okla. v. Jegley,
864 F.3d 953 (8th Cir. 2017) 25, 40

Planned Parenthood Minn., N.D., S.D. v. Rounds,
530 F.3d 724 (8th Cir. 2008) (en banc) 25, 26

Populist Party v. Herschler,
746 F.2d 656 (10th Cir. 1984) 34

Purcell v. Gonzalez,
549 U.S. 1 (2006) (per curiam)... 2, 49, 53, 54

Rainbow Coal. v. Okla. State Election Bd.,
844 F.2d 740 (10th Cir. 1988) 36

Salt Lake Tribune Publ'g Co. v. AT&T Corp.,
320 F.3d 1081 (10th Cir. 2003) 55

Second City Music, Inc. v. City of Chi.,
333 F.3d 846 (7th Cir. 2003) 2, 55

St. Louis Effort for AIDS v. Huff,
782 F.3d 1016 (8th Cir. 2015) 2, 51, 53

Storer v. Brown,
415 U.S. 724 (1974)... 29, 32, 39

Swanson v. Worley,
490 F.3d 894 (11th Cir. 2007) 2, 34, 35, 40

Tex. Indep. Party v. Kirk,
84 F.3d 178 (5th Cir. 1996) 9

Tripp v. Scholz,
872 F.3d 857 (7th Cir. 2017) 35

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008)... 30, 47

Williams v. Rhodes,
393 U.S. 23 (1968)...42

Winter v. Nat. Res. Defense Council, Inc.,
555 U.S. 7 (2008) 40

Constitutional Provisions

Ark. Const. art. 5 15

Statutes

28 U.S.C. 1292 1

28 U.S.C. 1331 1

28 U.S.C. 1343 1

Ak. Code Ann. 7-1-101 .... 4, 5, 6

Ark. Code Ann. 7-7-102 .... 5, 6

Ark. Code Ann. 7-7-103 .... 4, 8, 16, 55

Ark. Code Ann. 7-7-203 .... 3, 9, 10

Ark. Code Ann. 7-7-205 5
-205(a)(2) 3, 4, 5
-205(a)(4)(B) 3, 8
-205(a)(6) 3, 8, 45
-205(c)(3) 45

Ark. Code Ann. 7-7-301 45

Ark. Code Ann. 7-8-302 4

Session Laws

Act 188,
87th Arkansas General Assembly, 2009 Regular Session 8

Act 1356,
89th Arkansas General Assembly, 2013 Regular Session 9

Act 164,
92d Arkansas General Assembly, 2019 Regular Session 7

Act 545,
92d Arkansas General Assembly, 2019 Regular Session 9

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1343(a)(3). On July 3, 2019, it entered an order preliminarily enjoining the Secretary from enforcing an Arkansas law requiring groups seeking across-the-board ballot access to collect signatures equal to approximately 1.5% of registered voters. ADD56-60. On July 12, the Secretary timely filed a notice of appeal of that order. JA162. This Court has jurisdiction under 28 U.S.C. 1292(a).

STATEMENT OF THE ISSUES PRESENTED

1. Supreme Court precedent holds that States may require groups seeking across-the-board ballot access to demonstrate a modicum of support. Applying that standard, courts have routinely upheld ballot-access petition requirements more demanding than Arkansas's requirement that groups gather signatures equal to approximately 1.5% of registered voters. Did the district court err in refusing to follow that precedent?

> **Apposite Authority:** *Jenness v. Fortson*, 403 U.S. 431 (1971); *Green Party of Ark. v. Martin*, 649 F.3d 675 (8th Cir. 2011); *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687 (8th Cir. 2011); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007).

2. By creating a new 10,000-signature requirement, did the district court erroneously fail to tailor its preliminary injunction to the only harm alleged by the plaintiffs—which relates entirely to Arkansas's electoral calendar?

> **Apposite Authority:** *Missouri v. Jenkins*, 515 U.S. 70 (1995); *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015).

3. Did the district court properly consider the remaining preliminary-injunction factors when it disregarded Arkansas's interest in seeing its laws enforced, ignored potential voter confusion, and declined to consider the self-inflicted nature of plaintiffs' alleged harm?

> **Apposite Authority:** *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846 (7th Cir. 2003).

STATEMENT OF THE CASE

The district court's decision preliminarily enjoining Arkansas's modest modicum-of-support requirement is internally inconsistent, ignores clear precedent, and rests on clearly erroneous factual assumptions.

A. Statutory Framework

The Libertarian Party of Arkansas and a handful of its members (collectively, LPAR) challenge two sets of Arkansas election requirements: Arkansas's modicum-of-support requirement, Ark. Code Ann. 7-7-205(a)(2); and certain provisions setting compliance deadlines for the collection of signatures, *id.* 7-7-203(c)(1), -205(a)(6) (together setting compliance deadline); *id.* 7-7-205(a)(4)(B) (creating 90-day window to collect signatures). Both sets of regulations are carefully crafted to "ensure elections are fair, honest, and orderly," a duty of every State that "necessarily requires 'substantial regulation.'" *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (*LPND*) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

1. *Arkansas's Modicum-of Support Requirement*

LPAR challenges 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 significant 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 just 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 a mere 1,000 signatures. *Id.* 7-8-302(6)(A). Those requirements reflect the Supreme Court's conclusion that States have "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

Individual candidates may also qualify for down-ballot contests by collecting a specified number of signatures. Ark. Code Ann. 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 candidate of the Green, Libertarian, Reform, Socialist, or any other political party.

Alternatively, a group may become a "political party" and secure the ability to nominate candidates for every partisan office on the ballot. *See id.* 7-7-102. A group may do that by winning at least 3% of the votes cast 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. *See id.* 7-1-101(27)(C). Both major parties retain across-the-board access based on that retention requirement, which this Court has previously upheld. *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. To do so, 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 group may nominate candidates for every partisan office.

Id. 7-7-102(b). And as noted above, so long as that group's gubernatorial and presidential and vice presidential nominees win at least 3% of the vote, the group will retain across-the-board ballot access. *Id.* 7-1-101(27)(C).

Although Arkansas's modicum-of-support requirement is framed as just 3% of the votes cast in the previous gubernatorial election, it is even less demanding than it may appear. For the 2020 election, Arkansas's modicum-of-support requirement equals 26,746 signatures. *See* ADD4 (3% of the votes cast in the last gubernatorial election). But, unlike in many states, "[a]ny [Arkansas] registered voter" can sign a petition regardless of whether he or she voted in the last election, and there is no limit to the number of petitions that a voter can sign. JA271 (testimony of Secretary of State's representative); *see* JA270-75 (same, describing lack of restrictions on who can sign ballot-access petitions). And there are 1,750,077 registered voters in Arkansas. JA295. Thus, compared to the *eligible pool* of potential signatories, Arkansas's modicum-of-support requirement only requires groups to collect signatures from slightly more than 1.5% of that pool. (26,746 signatures ÷ 1,750,077 registered voters ≈ 0.0153.)

That recently enacted modicum-of-support requirement is based on experience demonstrating that Arkansas's previous modicum-of-support requirement was insufficient to ensure new political groups actually enjoyed a significant modicum of support before gaining across-the-board ballot access. Before 2019, Arkansas

allowed groups to obtain across-the-board access with just 10,000 signatures—or, approximately half-a-percent of eligible voters. (10,000 signatures ÷ 1,750,077 registered voters ≈ 0.0057.). *See* Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 1 (amending Ark. Code Ann. 7-7-205(a)(2)). Unsurprisingly, groups regularly met that half-a-percent requirement and then failed to satisfy the 3% ballot-retention requirement. *See infra* Background B.1. That experience led Arkansas to conclude that 10,000 signatures were "insufficient to reflect the will of the voters" and ensure that only groups enjoying a significant modicum of support gain across-the-board ballot access. Act 164 of 2019, sec. 2. In response, Arkansas adopted a modicum-of-support requirement more in line with the retention requirement.

While that change brings the two requirements closer together, Arkansas's modicum-of-support requirement remains significantly less demanding than the retention requirement. While both involve a 3% threshold, it is far more difficult to win 26,746 actual votes out of 891,545 votes cast (like in the last gubernatorial election) than it is to collect 26,746 signatures from 1,750,077 registered voters. *See* JA72-74 (2018 election results). Indeed, even aside from the size of the eligible pool, voting—unlike signature gathering—is a zero-sum game that requires groups to convince voters to pick-and-choose and ultimately support one candidate over another.

2. *Arkansas Electoral Deadlines*

LPAR also challenges Arkansas's decision to move certain electoral deadlines forward. For the 2020 election cycle, groups seeking across-the-board ballot access and to become a new political party must submit their petitions *no later* than September 5, 2019. ADD4 (citing Ark. Code Ann. 7-7-205(a)(6)).

Signatures cannot be more than 90 days old when submitted, but groups may begin collecting signatures at any time. Ark. Code Ann. 7-7- 205(a)(4)(B). That decade-old provision affords groups the flexibility to begin collecting early, so that if it appears they will be 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. *See id.*; Act 188, 87th Arkansas General Assembly, 2009 Regular Session, sec. 2 (enacting 90-day window). That flexibility also contrasts with the provision governing independent candidates, which limits signatures collection to no more than 90 days before the independent-candidate filing deadline. *See* Ark. Code Ann. 7-7-103(b)(3)(B). Thus, as particularly relevant here, unlike an independent candidate, if a group began collecting on April 1, and on June 28 it appeared the group would not meet the 26,746-signature threshold, it could redouble its efforts and continue collecting until successful.

The only meaningful difference between the 2020 election cycle and the prior cycle is that the signature submission deadline moved forward to September

5, 2019. That deadline moved—as similar deadlines have moved in other states—due to Arkansas's "desire to participate in the nationwide 'Super Tuesday' presidential primary." *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 180 (5th Cir. 1996). Indeed, any time a primary date moves, it will inevitably lead, as in Arkansas, to "a corresponding shift in a variety of other deadlines." *Id.*

Since 2013, groups seeking across-the-board ballot access have been required to submit signatures to the Secretary of State no later than 60 days before the "party filing period." *See* Act 1356, 89th Arkansas General Assembly, 2013 Regular Session, sec. 2 (amending Ark. Code Ann. 7-7-205(a)(6)). That remains true today. But the Arkansas General Assembly moved the *entire* election calendar forward in presidential election cycles so that—starting with the 2020 election—Arkansas's preferential primary election will take place in presidential cycles on Super Tuesday. Act 545, 92d Arkansas General Assembly, 2019 Regular Session, sec. 2 (creating Ark. Code Ann. 7-7-203(b)(2)). In nonpresidential election cycles, the primary will remain in the second half of May prior to the general election. *See* Ark. Code Ann. 7-7-203(a)(1), (b)(1) (setting it "four (4) weeks before the general primary election," which occurs "on the third Tuesday in June").

As a result, in non-presidential years, the party filing period falls on the last week of February—about three months before the late-May primary. *Id.* 7-7-203(c)(1)(A). In presidential elections, the party filing period will now fall during

the first full work week of November. *Id.* 7-7-203(c)(1)(B). That is about four months before Super Tuesday, and that slightly longer period reflects the need to accommodate multiple major federal and state holidays in November, December, and January. Those changes reflect the Arkansas General Assembly's policy judgment about how best to make its elections "fair, honest, and orderly." *LPND*, 659 F.3d at 693.

B. Factual & Procedural Background

LPAR is a perennial third party. Its electoral history underscores Arkansas's interest in requiring groups to demonstrate a significant modicum of support to obtain across-the-board ballot access, and that Arkansas's previous requirement failed to further Arkansas's undisputed interest in keeping "frivolous candidates" and groups off the ballot. *Anderson*, 460 U.S. at 789 n.9.

1. *LPAR*

LPAR has never won 3% of the gubernatorial or presidential and vice presidential vote. Instead, between 2012 and 2018, it obtained across-the-board ballot access by satisfying the old 10,000-signature requirement. ADD8. It used that easily obtained across-the-board access to regularly nominate candidates (largely in already contested races) who failed to win even a minimal share of the actual vote. *See* JA456 (LPAR's Ex. 5, "Libertarian Participation in Arkansas Elections"). It also used that across-the-board access to nominate a professional Elvis

impersonator that it listed on the ballot as Elvis Presley. JA55, 70 (election results).[1] And year after year, it promptly failed to meet the retention requirement and lost across-the-board access. ADD8.

In fact, the closest LPAR ever came to meeting the ballot-retention requirement was in the 2018 gubernatorial election. *Id.* Yet even then, LPAR's candidate was far from competitive, let alone viable. Its candidate that year won just 25,885 votes. JA72-74 (2018 election results). That is over *ten* times less than the more than 280,000 votes that the *losing* major party candidate received. It is also more than *twenty* times less than the 580,000 votes that the winning candidate received. *Id.*

2. *Proceedings Below*

On March 28, 2019, about five weeks after the modicum-of-support requirement took effect, LPAR and five of its members brought this lawsuit. *See* JA1-15 (complaint). LPAR alleged that in some unexplained way Arkansas's modicum-of-support requirement and the timing provisions combined to severely burden its First Amendment rights. JA4-5. It requested "a preliminary and permanent injunction allowing the Plaintiffs, particularly the LPAR, to submit 10,000 petition

[1] *See also* Elvis Presley – U.S. Congress District 1, Libertarian Party of Ark. (accessed Sept. 9, 2019), https://lpar.org/2018-candidates/elvis-presley/; AETN Debate: District 1 Congress (Oct. 8, 2018; accessed Sept. 9, 2019), https://youtu.be/t5b21yiN-G4.

signatures at a later petition deadline date closer to the preferential primary election in Arkansas for the general election cycle of 2019-2020." JA14. More than a month later, LPAR filed a preliminary-injunction motion. JA22-24.

On June 4, 2019, the district court held a preliminary-injunction hearing. *See* JA31-32 (order setting hearing). At that hearing, LPAR declined to present any evidence about what it would need to do to meet the modicum-of-support requirement or any expert testimony concerning the difficulty of meeting that requirement. Nor did it present any testimony about its financial and logistical resources or its ability to hire professional signature gatherers. Instead, it relied exclusively on the testimony of the individual plaintiffs. And far from demonstrating that LPAR could not comply with Arkansas's modicum-of-support requirement, that testimony highlighted how little LPAR had done—and planned to do—to collect signatures.

LPAR Chairman Michael Pakko's testimony demonstrated as much. He testified that although LPAR "kicked . . . off" its signature gathering campaign on April 1, it "did not" even bother to "get all of [its] canvassers in town on the job really until about mid-April, on April 15th." JA203. Pakko also explained that LPAR had hired just five canvassers and was largely relying on volunteers who just "ask[ed] their spouse[s] and neighbors to sign." JA226. Indeed, at best, Pakko

conceded that LPAR had lined up only "maybe a dozen" more committed volunteers. *Id.* And although Pakko testified that LPAR's canvassers sometimes received questions about why they are petitioning so far in advance of the election, he acknowledged that "people are still willing to sign a petition." JA205.

Pakko also testified that he believed the previous 10,000-signature requirement was "challenging" and "expensive." JA199. He based that claim on LPAR's past petition drives, which "required *at least* $30,000 in cash to accomplish plus a considerable volunteer effort." JA215 (emphasis added). He did not suggest that LPAR struggled to come up with those funds in the past, and he did not give any details about LPAR's current finances. Instead, he merely explained that LPAR had raised money this year "with some professional help and professional fundraisers." *Id.* And far from facing a tight market for paid help, Pakko testified that as a result of the earlier presidential year compliance deadlines, "the market for petition canvassers is a little bit easier to work with." JA203.

Michael Kalagias, a perennial LPAR candidate and the chair of the Benton County Libertarian Party, also testified about how little LPAR had done to collect signatures. JA251. Despite leading the LPAR chapter in the second-most populous county in Arkansas, Kalagias testified that as of the time of the preliminary-injunction hearing—some *two months* after LPAR had kicked off its petition drive—he had collected just 30-40 signatures. JA258. He then added that he had

"no set plans" to collect additional signatures. JA259-60. And despite his previous runs for elected office, he conceded that he had only reached out to *three* people from those campaigns "to see if they would assist in gathering signatures." JA260-61.

Lastly, Christopher Olson, LPAR's vice chair and chair of its elections committee, testified that he had done little to collect signatures during the two months leading up to the preliminary-injunction hearing. In fact, he conceded that despite his leadership role, he had "collected just a handful of signatures." JA262-63. And though he generally "plan[ned] on collecting more," Olson testified that he had no "specific plans" about how he might do that. JA264.

In response, Arkansas offered unrebutted testimony demonstrating that Arkansas's modicum-of-support requirement does not impose a severe burden. For instance, Peyton Murphy (until recently the assistant director of the elections division of the Secretary of State's office) testified about the lack of restrictions on who can sign group ballot-access petitions. *See* JA266-67. As Murphy explained, "[a]ny registered voter in the state of Arkansas could sign" LPAR's petition. JA271. He further explained that with ballot-access petitions there is no limit to the number of petitions that a voter can sign, there are no restrictions on who can collect signatures, and there are no special geographic requirements. *See* JA270-75. He contrasted those lax requirements with the stringent regulations governing

the collection of signatures for state ballot initiatives and referenda. *See id.* Yet he noted that—despite those more onerous signature-collection requirements and the fact that ballot initiative and referenda require far more signatures—they regularly appear on the ballot in Arkansas. *See* JA298; *see also* Ark. Const. art. 5, sec. 1 (requiring signatures numbering 6-10% of those who voted in last gubernatorial election for ballot initiatives and referenda).

Dr. Trey Hood, a political scientist at the University of Georgia, offered expert testimony that Arkansas's modicum-of-support requirement does not impose a severe burden. *See* JA362-63. Based on his extensive experience studying ballot-access laws around the country, Dr. Hood testified that neither Arkansas's modicum-of-support requirement nor the timing provisions would freeze the political status quo in Arkansas. JA364-65, 381. Dr. Hood also stressed that the challenged provisions are similar to those in other States. *See* JA375-76, 381. In particular, Dr. Hood discussed Alabama's ballot-access regime; he explained that Alabama law requires political groups to turn in signatures equal to "3 percent of the gubernatorial vote" and is "identical in that respect to Arkansas's requirement." JA375. He also noted that courts had already upheld Alabama's modicum-of-support requirement. JA376.

Additionally, based on his research, Dr. Hood testified that there is no difference between running as an independent candidate endorsed by a political group

and running as a candidate with that group's label. *See* JA374 ("There's no difference for nonmajor party candidates in terms of the share of the vote they get whether they have a third-party label or they are just listed as an independent on the ballot."). Thus, as relevant here, Dr. Hood's testimony demonstrated that even if LPAR were to fail to obtain across-the-board ballot access and a candidate had to run as an independent without a "Libertarian" label, it would not impact that LPAR-backed candidate's vote total. *Cf.* Ark. Code Ann. 7-7-103(b)(1) (setting May 1, 2020 deadline for independent candidates).

Lastly, political consultant and ballot-access expert Meghan Cox testified that LPAR could comply with Arkansas's modicum-of-support requirement. She based that expert opinion on her extensive experience running petition drives throughout the country, including in Arkansas. JA340-41; *see* JA308-09 (describing her experience). She explained that, in contrast to other States, Arkansas's restrictions on signature collection are "very lax and pretty easy." JA319; *see* JA318-21. Indeed, drawing on her experience, when asked for her bottom-line conclusion about Arkansas's modicum-of-support requirement and the timing provisions, Cox stated: "I do not think it's burdensome." JA335.

To illustrate why she believed neither set of requirements is burdensome, Cox detailed how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. JA320-21, 329-38, 340-43. 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 modicum-of-support requirement for approximately $55,000. JA320-21, 342-43. She acknowledged that a petition drive like this would require "a high degree of organization." JA315. But she stressed that compliance would be "a relatively easy logistical job." JA340; *see* JA320 (ballot-access drive would not be "complicated").

Cox further explained that the challenged timing provisions are not burdensome. Indeed, as a preliminary point, she agreed with Pakko's testimony that it is cheaper to hire canvassers earlier in an election cycle—*i.e.*, before September 5—than later. JA326-27; *see* JA203 (Pakko testifying to this point). Cox then testified that, based on her extensive experience, it is easier to collect signatures over the summer because "people have their kids out of school" and "[t]hey are looking for activities and fun events and things to do." JA323. She added that means large crowds at "concerts, games, baseball, football games in August, farmers markets," and that those kinds of events or "any type of event that attracts pedestrian traffic" are good opportunities to collect a significant number of signatures. *Id.* Cox also explained that the "4th of July is a game changer in ballot access because so many

people have basically dead time," during which "they are waiting around for parades," "fireworks," or are "picnicking." JA323-24. LPAR did not rebut either Dr. Hood's or Cox's testimony.

Three-and-a-half weeks after the preliminary-injunction hearing, on June 28, 2019, LPAR ended its signature-collection effort and turned in just 18,667 signatures. ADD61-63. That submission was more than *two months* before the September 5, 2019 deadline and less than 90 days after LPAR claimed to have begun its collection drive without even having all of its canvassers in place. It was also before Independence Day, which Cox had explained was one of the best opportunities all year to collect signatures.

LPAR subsequently notified the district court that it had turned in less than 26,746 signatures. *Id.* It did not explain why it had opted to turn in a facially invalid number of signatures months in advance of the deadline or explain why it had opted not to—as Pakko suggested it might during his preliminary-injunction testimony—roll the 90-day compliance period forward to account for its even more lackadaisical collection efforts between April 1 and 15, 2019. *See id.*; JA232-33 (Pakko's concession that LPAR had known it could "move [its] rolling 90-day window" and considered doing that). Arkansas sought—but was denied—an opportunity to respond to LPAR's notice. ADD62.

C. Decision Below

On July 3, 2019, the district court preliminarily enjoined Arkansas's modicum-of-support requirement. ADD59-60. In its place, the district court substituted a requirement that LPAR collect just 10,000 signatures. ADD59. In so doing, it disregarded controlling precedent, paradoxically suggested the timing provisions were the problem yet enjoined the modicum-of-support requirement, substituted its own unsupported *sua sponte* calculations for uncontradicted expert testimony, declined to consider whether an injunction would irreparably harm candidates and Arkansas voters, and did not consider narrower remedies.

The district court's reasoning was legally flawed from the outset because it failed to conduct any eligible-pool analysis. It used the 3% statutory threshold figure without considering that, in terms of the eligible pool of signatories, that requirement only requires groups to collect signatures from 1.5% of registered voters. *See* ADD4 (referring to "three percent requirement"). That caused it to overstate the burden imposed by the modicum-of-support requirement in particular and Arkansas's ballot-access regime generally.

That error also caused the district court to disregard decades of precedent upholding more demanding modicum-of-support requirements. ADD44-47. The district court, for example, acknowledged that in 1971, the Supreme Court had upheld Georgia's requirement that a candidate "file[] 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 v. Fortson*, 403 U.S. 431, 432 (1971); *see* ADD45. Yet it declined to follow that and other similar cases—not because it believed Arkansas's actual signature requirement was any more burdensome than Georgia's, but because Georgia law contained later compliance deadlines. ADD45. Thus, in other words, to justify ignoring *Jenness* and other cases upholding signature requirements greater than Arkansas's modicum-of-support requirement, the district court focused *not* on the modicum-of-support requirement but the timing provisions. *See* ADD42-47. It did not explain how that justified enjoining Arkansas's modicum-of-support requirement—and leaving the timing provisions unchanged.

Next, having decided to ignore decades of controlling precedent, the district court declared that Arkansas's requirement imposed a severe burden. It rested that conclusion entirely on its unsupported declaration that "even with additional petitioning efforts, the LPAR will be unable to meet the three percent requirement by June 28, 2019." ADD37. It did not explain why it had selected LPAR's self-imposed June 28 deadline, rather than the actual September 5 deadline. *See* Ark. Code Ann. 7-7-205(a)(6). But even aside from that, the district court did not point to any evidence demonstrating that LPAR lacked the resources to comply with Arkansas law. *See* ADD36-48; *see also* ADD7-16 (summarizing testimony of LPAR's witnesses, none of whom gave any specifics about LPAR's resources).

Instead, it simply credited LPAR's unsupported, self-serving representation that it "would require more resources to meet the three percent requirement within 90 days." ADD41. It likewise declined to consider whether LPAR's supposed inability to comply might have more to do with its own lackadaisical compliance efforts—including its decision to submit a facially insufficient number of signatures months before the deadline—than Arkansas law. *See* ADD16, 61-63.

The district court also refused to consider Cox's *unrebutted* testimony detailing how LPAR could comply. *See* ADD38-41. For instance, the district court refused to credit Cox's unrebutted expert testimony that LPAR could collect the required number of signatures by using 7-9 canvassers (40% paid, 60% volunteer) at a cost of approximately $55,000 on the grounds that there was no evidence LPAR had the financial resources to run such a drive. ADD41. But the district court did not explain why it believed it was Arkansas's burden to prove that LPAR had such resources, rather than LPAR's burden to show that it lacked them and the ability to obtain them.

Nor did the district court acknowledge Pakko's testimony that LPAR had been raising money and that it had always spent *at least* $30,000 to comply with the 10,000-signature requirement. *See* JA215. Indeed, directly contradicting Pakko's testimony, the district court wrongly concluded that the record demon-

strated that LPAR could spend *no more than* $30,000. *Compare id.* (Pakko testimony), *with* ADD41. And the district court refused to consider analogous case law stressing that $55,000 is hardly a shocking figure given the cost of modern political campaigns. *See Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 30 (1st Cir. 2016) ("[I]t 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.").

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. *See* ADD39-41. Those calculations ultimately 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. ADD39. Yet Pakko testified that far from being a reliable figure, the 150-volunteer figure that the district court's analysis rested on was just a random number off the top of his head and not based on anything. *See* JA227 ("I just pulled that number out of the air as a number."). Underscoring just how unreliable that figure was, Pakko also testified that at the time of the preliminary-injunction 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." JA226 (emphasis added).

Having thus found a severe burden, the district court next turned to Arkansas's interests. *See* ADD48-52. Finding no evidence of ballot overcrowding, the district court simply declared Arkansas had no interest whatsoever. ADD51. It did not address Arkansas's interest in keeping "frivolous candidates" off ballot. *Anderson*, 460 U.S. at 788 n.9. And applying strict scrutiny, it faulted Arkansas for failing to justify the precise number of signatures it has chosen to require. ADD48-51. As a result, the district court concluded Arkansas had failed to demonstrate a compelling interest that would justify LPAR's ostensibly severe burden and declared LPAR was likely to succeed on the merits.

The district court next turned to the other preliminary-injunction factors and simply declared Arkansas's interest in seeing its laws enforced was outweighed by LPAR's interest in obtaining across-the-board ballot access. ADD54-56. Indeed, it shockingly declared that Arkansas had *no* interest in seeing its laws enforced. *See* ADD55 (finding "no record evidence" that a preliminary injunction "would do any harm to either Mr. Thurston, the State of Arkansas, or the public"). It declined to consider whether LPAR's own haphazard signature-collection efforts or its decision to turn in a facially invalid number of signatures well before the statutory deadline demonstrated bad faith.

Finally, despite its heavy reliance on the supposed burdensomeness of the timing provisions, the district court left those provisions untouched and instead enjoined Arkansas's modicum-of-support requirement. *See* ADD44-47. It did not explain that decision. To the contrary, the district court does not even appear to have considered whether the more appropriate step would have been to enjoin what it believed were the problematic timing provisions while leaving the otherwise valid modicum-of-support requirement in place. Nor did the district court explain why it believed the Constitution barred Arkansas from requiring LPAR to collect more than 10,000 signatures—or, as noted above, signatures from just over half-a-percent of registered Arkansas voters.

D. Appellate Proceedings

Shortly after filing a notice of appeal, Arkansas asked this Court to stay the preliminary injunction pending this appeal, to expedite this matter, or both. This Court denied the stay motion but agreed to expedite Arkansas's appeal.

STANDARD OF REVIEW

Issuance of a preliminary injunction generally depends upon: 1) "irreparable harm"; 2) the "balance between this harm and the injury that granting the injunction will inflict"; 3) "the probability that movant will succeed on the merits"; and 4) "the public interest." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). But where an injunction prevents "implementation of a duly enacted state statute," a movant must first make a "*more rigorous* showing" than usual "that it is 'likely to prevail on the merits.'" *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (emphasis added) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). That requirement guards against attempts to "thwart a state's presumptively reasonable democratic processes." *Rounds*, 530 F.3d at 733.

Preliminary-injunction orders are typically reviewed for abuse of discretion. *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). "That is not true, however, where the question presented is purely one of law," like the burdensomeness of Arkansas's ballot-access regime. *Bell v. Sellevold*, 713 F.2d 1396, 1399 (8th Cir. 1983) (R. Arnold, J.); *see Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (reviewing burdensomeness *de novo*). And "a court of appeals must reverse [a preliminary injunction] if the district court

has proceeded on the basis of an erroneous view of the applicable law." *Donovan v. Bierwith*, 680 F.2d 263, 269 (2d Cir. 1982) (Friendly, J.).

Moreover, even under the normal abuse-of-discretion standard, this Court will vacate a preliminary injunction based on clearly erroneous factual findings. *Rounds*, 530 F.3d at 733.

SUMMARY OF THE ARGUMENT

The district court's preliminary injunction began with an erroneous assumption that Arkansas's ballot-access regime imposed a severe burden and, therefore, was subject to the compelling-interest standard. That assumption rested on two fundamental legal errors—both of which warrant reversal.

First, in analyzing Arkansas's modicum-of-support requirement, the district court failed to conduct the required eligible-pool analysis. If it had conducted that analysis, the district court could not have concluded that Arkansas's modicum-of-support requirement or ballot-access regime writ large imposed any significant burden. Indeed, when the eligible pool of signatories is considered, Arkansas's requirement is far less burdensome than similar requirements that have been upheld for decades. And Arkansas's interests in preventing frivolous candidacies and ensuring orderly elections easily justify any burdens imposed by the challenged provisions.

Second, the district court's preliminary injunction is completely divorced from the harm that allegedly justified an injunction. The district court concluded that the challenged timing provisions rendered Arkansas's ballot-access regime severely burdensome and distinguished this case from decades of precedent. Yet even if the timing provisions imposed a severe burden (and they do not), that could

not possibly justify leaving those supposedly problematic provisions in place and instead enjoining the otherwise constitutional modicum-of-support requirement.

ARGUMENT

I. Because Arkansas's ballot-access laws do not impose a severe burden, LPAR is not likely to succeed on the merits.

The district court exaggerated the supposed burdensomeness of Arkansas's ballot-access regime and, consequently, applied an incorrect legal standard. It likewise undervalued Arkansas's compelling interest in ensuring that only nonfrivolous candidates appear on the ballot. Both errors require reversal.

Voting is of "fundamental significance" to American government, but "[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) (quotation marks omitted). 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, 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. Where a State's ballot-access regime "imposes only modest burdens," the State's "important regulatory interests" in managing "election procedures" suffice to justify it. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (quotation marks omitted). Alternatively, a more exacting standard—requiring a compelling governmental interest and narrow tailoring—applies to *severely* burdensome regulations. *See GPAR*, 649 F.3d at 680.

The district court applied the latter standard here, assuming, from the outset, that Arkansas had "the burden of showing that the challenged statutes are narrowly drawn to serve the State's compelling interest." ADD29 (citing *Moore v. Martin*, 854 F.3d 1021, 1026 (8th Cir. 2017)). But Arkansas "need not assert a compelling interest" unless LPAR first establishes that Arkansas's ballot-access regime imposes a severe burden. *Wash. State Grange*, 552 U.S. at 458.

LPAR has not shown such a burden. To the contrary, decades of precedent forecloses the district court's conclusion that Arkansas's modicum-of-support requirement is severely burdensome. Indeed, even granting the district court's observation that many of the States whose modicum-of-support requirements were upheld by that precedent had different timing provisions, that does not suggest that Arkansas's modicum-of-support requirement itself is burdensome.

Yet in any event, LPAR offered no evidence that either the modicum-of-support requirement or timing provisions severely burden it in particular. As a result,

the district court erred as a matter of law when it applied the compelling-interest standard. And if the district court had applied the proper standard, it could not have concluded that Arkansas's regulatory interests—here, in preventing frivolous candidacies and in ensuring orderly elections—were insufficient to justify the challenged laws. Therefore, this Court should reverse the district court's preliminary-injunction order.

A. Arkansas's modicum-of-support requirement falls well below the upper threshold for reasonable ballot-access requirements.

The district court erred from the outset by failing to consider the eligible pool of voters who can sign a petition seeking across-the-board ballot access. Under Arkansas law, any registered voter may sign a petition (or multiple petitions), and that means that LPAR needs to gather signatures from approximately 1.5% of the eligible pool to obtain across-the-board ballot access. That requirement falls "well below the upper threshold of reasonable under Supreme Court precedent." *LPND*, 659 F.3d at 696. But the district court failed to conduct any eligible-pool analysis, and that failure caused it to overstate the modicum-of-support requirement's burdensomeness and Arkansas's ballot-access regime generally. It also made the district court too quick to dismiss the long line of precedent—stretching back at least to the Supreme Court's 1971 decision in *Jenness*—upholding laws that impose greater burdens than Arkansas's modicum-of-support requirement.

That fundamental legal error undermines the district court's likelihood-of-success analysis and requires reversal.

Properly assessing burdensomeness requires determining the "eligible pool" of those who can sign ballot-access petitions—a determination the district court never made. Under the eligible-pool analysis, a court must "not merely consider the percentage stated in a challenged law" but must consider the number as a percentage of those available to sign a petition. *LPND*, 659 F.3d at 695. In *Storer v. Brown*, for instance, California law required "a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election," which on its face did "not appear to be excessive." 415 U.S. 724, 738 (1974). But California did not allow signatures from "registered voters who voted in the primary." *Id.* at 739. "[A]fter eliminating the total primary vote," *Storer* explained, the eligible pool would "be substantially smaller than the total vote in the last general election." *Id.* California's law thus would "require substantially more than 5% of the eligible pool." *Id.*; *cf. LPND*, 659 F.3d at 696 (conducting eligible-pool analysis and holding that since not everyone votes, a "vote requirement of 1% of the general population" was more demanding than it appeared and actually imposed a 1.33% threshold).

By contrast, the eligible-pool analysis here demonstrates that Arkansas's modicum-of-support requirement is even *less burdensome* than it would appear on

the face of the statute. In the 2018 gubernatorial race, there were 891,545 votes cast. JA72-74. But there are 1,750,077 registered voters in Arkansas. ADD19. Thus, the eligible pool from which LPAR may collect signatures this election cycle (all registered voters) is almost *twice* the gubernatorial turnout used to calculate the modicum-of-support requirement. That means that what the statutory language expresses as a 3% threshold actually only requires LPAR to collect signatures from approximately 1.5% of those eligible to sign the petition. And the district court's exclusive, out-of-context focus on the 3% statutory figure underscores that it failed to consider the eligible pool—let alone conduct that required analysis. *See* ADD4. Indeed, the phrase "eligible pool" does not appear even once in the district court's 60-page preliminary-injunction order.

The district court did not cite a decision by the Supreme Court, this Court, any other court of appeals, or state appellate court that struck down a ballot-access law requiring signatures from 1.5% of the eligible pool. *See* ADD30-35, 44-47. Nor for that matter did the district court cite any decision striking down, as the district court called it, a "three percent requirement." ADD4. That is because Arkansas's modicum-of-support requirement would easily satisfy decades of precedent.

In 1971, 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. Based

on *Jenness*'s holding, this Court has called "5% of the number of votes cast in the previous gubernatorial election" the "upper threshold of reasonable" ballot-access requirements. *LPND*, 659 F.3d at 695-96. And other courts of appeals have long agreed. *See, e.g.*, *Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984). The modicum-of-support requirement falls "well below" that threshold of reasonableness. *LPND*, 659 F.3d at 696; *see GPAR*, 649 F.3d at 686-87 (collecting cases from the Supreme Court and other courts of appeals that have upheld "far more burdensome ballot access schemes" than Arkansas's requirement).

The Eleventh Circuit's decision upholding Alabama's similar ballot-access regime further underscores the reasonableness of Arkansas's modicum-of-support requirement. *See Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). Alabama's modicum-of-support requirement is materially identical to the provision that the district court enjoined here. It requires that "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's 20% retention requirement is much tougher than Arkansas's 3% retention requirement. *Id.* at 896-97. Thus, although Alabama's and Arkansas's modicum-of-support requirements are materially identical, Alabama's retention requirement is *over six times* more difficult to meet.

Notwithstanding that considerably more burdensome retention requirement, the Eleventh Circuit rejected a challenge to Alabama's ballot-access regime. Indeed, the Eleventh Circuit unanimously concluded that Alabama's identical modicum-of-support requirement was not severely burdensome and was not subject to strict scrutiny. Very much to the contrary, it 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." *Id.* at 904 (emphasis added).

And that line of precedent is indeed long. Beyond *Jenness* and *Swanson*, many other decisions have upheld modicum-of-support requirements that equal or exceed Arkansas's in burdensomeness. For example:

- On the same day it issued *Jenness*, the Supreme Court affirmed the decision of a three-judge district court that upheld a requirement "that a minority party might obtain ballot position for its nominees provided that it obtain the signatures of three percent *of the registered voters* of the State." *Beller v. Kirk*, 328 F. Supp. 485, 486 (S.D. Fla. 1970) (three-judge district court) (emphasis added), *aff'd without opinion sub nom. Beller v. Askew*, 403 U.S. 925 (1971).

- The Seventh Circuit upheld a 5% requirement based on the number of voters in the relevant district who voted in the previous election, with the additional requirement that signatures be collected in a 90-day window. *Tripp v. Scholz*, 872 F.3d 857, 860, 864-66 (7th Cir. 2017).

- The New Hampshire Supreme Court upheld a requirement that a minor party submit a petition with "the names of registered voters equaling 3 percent of the total votes cast at the previous state general." *Libertarian Party N.H. v. State*, 910 A.2d 1276, 1279, 1281-82 (N.H. 2006).

- The Alaska Supreme Court upheld a requirement that political parties *have registered voters* equal in number to 3% of the votes cast in the last gubernatorial race. *Green Party of Alaska v. State*, 147 P.3d 728, 730, 733-35 (Alaska 2006).

- The First Circuit upheld a 5% requirement based on the number of votes cast in the preceding gubernatorial election. *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 367 (1st Cir. 1993).

- The Tenth Circuit upheld a 5% requirement based on the number of votes cast in the last general election. *Rainbow Coal. v. Okla. State Election Bd.*, 844 F.2d 740, 741, 744 (10th Cir. 1988); *accord Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982).

- The Oregon Supreme Court upheld a requirement that minor parties acquire ballot access on a district-by-district basis through signatures equaling 5% of the district's last general-election turnout for Congress. *Libertarian Party of Ore. v. Roberts*, 750 P.2d 1147, 1149, 1154-55 (Ore. 1988).

- "Applying what appear[ed] to be rather settled law" even in 1983, the Eleventh Circuit upheld Florida's petition regulations that required minor political parties to obtain signatures equal to 3% of the State's registered voters. *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 792 (11th Cir. 1983).

Moreover, as the First Circuit recently explained in summarizing that case law: "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." *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016).

The district court did not address that unbroken line of precedent. Rather, as a result of its baseline refusal to consider the eligible pool, it simply ignored those decisions. Nor has LPAR has ever explained why that precedent did not require the district court to uphold Arkansas's modicum-of-support requirement. Instead,

LPAR has single-mindedly focused on two decisions by the Eastern District of Arkansas concerning past iterations of Arkansas's ballot-access requirements. *See, e.g.*, JA8-9 (asserting in the complaint itself that two district-court decisions conclusively determined the validity of Arkansas's current modicum-of-support requirement) (citing *Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006); *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996)). But of course those decisions are "not binding precedent . . . even upon the same judge in a different case"—much less upon this Court. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 *Moore's Federal Practice* § 134.02[1][d] (3d ed. 2011)).

Those district court decisions are also not persuasive. Although both reviewed requirements that groups collect signatures equal to 3% of the votes cast in the previous gubernatorial election, neither grappled with the overwhelming precedent discussed above or attempted to distinguish *Jenness*, which *decades earlier* had upheld a 5% requirement. *See Jenness*, 403 U.S. at 432. Indeed, both cite *Jenness* only once, and then only for the general notion that States may require political parties to demonstrate a modicum of public support. *See Daniels*, 445 F. Supp. 2d at 1062; *Priest*, 970 F. Supp. at 699. And just like the district court below, both *Priest* and *Daniels* failed entirely to engage in the necessary eligible-pool

analysis. This failure caused the district court in each instance—including the district court below—to overestimate the burdensomeness of the modicum-of-support requirement in question. Thus, like the district court's decision here, those cases rest on a fundamental legal error. And where, like here, a likelihood-of-success inquiry rests on a fundamental legal error, reversal is required.

B. LPAR failed to demonstrate that Arkansas's modicum-of-support requirement severely burdens it.

LPAR likewise failed to demonstrate a likelihood of success because it did not offer any evidence that it lacks the resources to comply with Arkansas's ballot-access regime. Therefore, nothing in the record proves that the modicum-of-support requirement severely burdens LPAR in particular. In fact, the only evidence of the projected costs to comply with Arkansas's ballot-access regime demonstrates the opposite. That evidence projects compliance costs for LPAR that are only marginally higher than what LPAR has spent in the past, and in line with what other courts of appeals have held does not amount to a severe burden.

As detailed above, *see supra* Background, Section B, undisputed expert testimony established that satisfying the modicum-of-support requirement would require only about nine full-time canvassers for a 75-day petition drive. JA334-35 (Cox testimony). Undisputed expert testimony also established that a well-organized group could pull off such a petition drive for about $55,000 by using 40% paid and 60% volunteer canvassers. JA342-43 (Cox testimony). LPAR offered no

evidence to contradict these expert projections. In fact, the scant evidence that LPAR offered about its own resources underscores that these projections are within LPAR's reach. *See* JA215 (Pakko testifying that LPAR has always spent "*at least* $30,000" to obtain ballot access (emphasis added)); JA226 (Pakko testifying that LPAR had five paid canvassers this year, along with volunteers).

The district court disregarded this evidence that LPAR could comply with Arkansas's ballot-access regime. It first quibbled with Cox's undisputed expert projections about the resources required for a successful petition drive. *See* ADD40. Yet rather than point to contrary evidence, the district court simply declared *sans* evidence or citation that those projections required "unrealistic" volunteer participation. *Compare* ADD40 (concluding that 35,000 signatures in 90 days is unrealistic), *with Storer*, 415 U.S. at 740 ("Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day."). At best, the district court appears to have relied on a gross misreading of Pakko's testimony when it suggested that LPAR was "utilizing 150 volunteers." ADD40. But as Pakko himself explained, he "just pulled that number out of the air." JA227.

The district court also suggested that LPAR's failure to offer evidence of its current financial resources *somehow* established that LPAR could not afford to run

an efficient ballot-access petition drive. *See* ADD41 ("There is no record evidence that the LPAR has additional financial resources that would allow it to pay to collect even 40% of the signatures required to meet the three percent requirement."). But *a lack of evidence* on this point cannot amount to the "clear showing" that LPAR must make of its likelihood of success to obtain a preliminary injunction. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *accord Jegley*, 864 F.3d at 957-58 (preliminary injunction requires "rigorous [likelihood-of-success] showing"). In fact, the only explanation that the district court offered for its conclusion that a lack of evidence somehow amounted to a clear showing was a suggestion that *Arkansas* bore the burden of demonstrating LPAR's financial resources. It did not explain why it believed Arkansas bore the burden of proof on that issue, and the district court's inversion of that burden further underscores the weakness of LPAR's showing.

In addition to improperly inverting the burden of proof, the district court failed to cite any support for its claim that spending $55,000 to obtain statewide ballot-access amounts to a severe burden. Nor could it have done so. As a case in point, the Eleventh Circuit in *Swanson* noted that the Alabama Libertarian Party had to spend $100,000 to comply with that State's identical modicum-of-support requirement. 490 F.3d at 898. Yet that court held that Alabama's requirement "does not impose a severe burden." *Id.* at 905. If $100,000 is not a severe burden

on a minor party, it is hard to imagine how $55,000 is. *Cf. Gardner*, 843 F.3d at 33 ("Are there examples of parties or candidates that cannot raise $50,000 statewide, yet can still mount viable campaigns?"). And as the First Circuit explained in rejecting a challenge to New Hampshire's timing provisions, "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." *Id.* at 30.

There is no support for the district court's conclusion that Arkansas's modicum-of-support requirement imposes a severe burden. The district court's contrary conclusion rests on little more than conjecture and speculation and is directly contradicted by consistent case law. Moreover, as explained below, to the extent the district court suggested the timing provisions that LPAR also challenged rendered the modicum-of-support requirement unconstitutional (*see* ADD42-47, 59-60), that did not justify upending a nationwide judicial consensus that modicum-of-support requirements like Arkansas's do not impose a severe burden. Rather, at most, it might have theoretically justified a dramatically narrower injunction focused on the challenged compliance deadlines. *See infra* Part III. This Court should reverse the preliminary-injunction order.

C. Arkansas's compliance deadlines are not severely burdensome.

The challenged timing provisions are neither severely burdensome nor unconstitutional. The district court's reasoning suggesting they are comprises just over one page in a 60-page order. *See* ADD42-43.

That page cites a single case—*Williams v. Rhodes*, 393 U.S. 23 (1968)—striking down a ballot-access law. ADD42. But *Williams* struck down a far more burdensome law that "require[d] a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election." 393 U.S. at 24-25. And though *Jenness* suggested in dicta that the deadline in *Williams* was troublesome, *Jenness* did not ultimately rely on that fact to uphold the 5% requirement in that case. Instead, *Jenness* focused on the eligible-pool analysis; an analysis that, as noted above, the district court entirely omitted here. *See Jenness*, 403 U.S. at 442 (holding that 5% requirement's burden was outweighed "by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes").

Contrary to the district court's characterization, the record also does not support finding the compliance deadline severely burdensome. The district court suggested that because of the compliance deadline, "LPAR has had some difficulty canvassing in certain public places" and that "certain people are not interested in

signing petitions." ADD42-43. But even these vague references to difficulties squarely conflict with the record. For instance, Pakko agreed that LPAR was *not* "unable to collect signatures during th[is] time frame." JA243. He also testified that, even "petitioning so far in advance" of the 2020 election, "people are still willing to sign a petition." JA205. Indeed, Pakko even conceded that the earlier deadline had benefits. *See* JA203 (testifying that "market for petition canvassers is a little bit easier to work with earlier on in the process").

And more generally, Cox gave expert testimony that political awareness has changed over the last decade. For instance, she explained that unlike "ten years ago" when "it was a different story," today "we have a 24/7 news cycle" and "[p]eople are engaged and paying attention." JA328-29. And underscoring the point, Cox explained that on June 4, 2019—well over a year before the 2020 election—"the Democratic primary [was] in full swing," and "[p]olitics [were] everywhere." JA328. That evidence directly contradicts the district court's unsupported declaration that Arkansas's timing provisions are severely burdensome.

Given that, the district court was also not entitled to conclude the timing provisions *somehow* rendered Arkansas's modicum-of-support requirement severely burdensome. Indeed, the district court's sole justification for distinguishing Arkansas's modicum-of-support requirement from similar laws upheld in *Jenness*—and many decisions since *Jenness*—was the challenged compliance deadlines. *See*

ADD45-46. But as those deadlines do not impose a severe burden, that distinction falls apart, and the district court was required to follow decades of consistent precedent upholding similar (and more demanding) modicum-of-support requirements. Reversal is therefore required.

D. Arkansas's important regulatory interests justify its ballot-access regime.

Whatever burdens Arkansas's ballot-access laws allegedly impose, they "are not severe." *GPAR*, 649 F.3d at 685. Therefore, "Arkansas's 'asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights.'" *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)) (some quotation marks omitted).

When this Court upheld Arkansas's 3% retention requirement, it cited Arkansas's "significant" regulatory interests in preventing "frivolous candidacies" and reducing "voter confusion." *Id.* at 686. Arkansas's modicum-of-support requirement likewise furthers those interests. 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 those interests because it thought the defunct 10,000-signature requirement was sufficient. *See* ADD51 ("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.

The challenged timing provisions also further Arkansas's interest—indeed, its duty—to "ensure elections are fair, honest, and orderly." *LPND*, 659 F.3d at 693. Requiring putative new parties to file their petitions 60 days before the party filing period serves Arkansas's interest in promoting orderly elections. *See* Ark. Code Ann. 7-7-205(a)(6). It ensures there will be enough time to verify the signatures before the party filing period, when all candidates must file paperwork with the Secretary of State's office, whether they come from new or established parties. *See id.* 7-7-205(c)(3), -301(a). And the 90-day window keeps the petitioning process honest. Without confining petitioning to a limited time period, fraudulent petitioning activity would be much more difficult for Arkansas to police.

Similar to its treatment of the interests served by the modicum-of-support requirement, the district court rejected Arkansas's interests in the timing provisions because it thought a later deadline would be sufficient. *See* ADD49-50. But the precise date of the compliance deadline or the choice of a 90-day window instead of a window of some other length "is to some extent 'necessarily arbitrary.'" *McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974)). "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"—or in this case, compliance deadlines—would cease to exist. *Id.* The district court also suggested that Arkansas should not hold new parties to the same timeline as established parties. *See* ADD50. Yet it cited nothing to suggest that Arkansas's interest in electoral fairness does not extend to applying its election calendar uniformly as between new and established parties.

Because neither the modicum-of-support requirement nor the timing provisions severely burden LPAR, these interests are sufficient to justify Arkansas's ballot-access regime. As a result, the district court was wrong to preliminarily enjoin the modicum-of-support requirement, and this Court should reverse that preliminary injunction.

II. Alternatively, because Arkansas's ballot-access laws are narrowly tailored to further compelling state interests, LPAR is not likely to succeed on the merits.

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 needed to cite only an important regulatory interest. The district court's contrary finding warrants reversal. *See* ADD48-52. Yet even if the compelling-interest standard applies, LPAR is not likely to prevail.

Erroneously ignoring Arkansas's compelling interests, the district court took a crabbed view of the sorts of compelling interests that justify regulations like the modicum-of-support requirement. The only potentially compelling interest that it acknowledged is preventing ballot overcrowding. ADD51. 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 788-89 n.9. Similarly, this Court has recognized a "state's interest in *eliminating frivolous candidates*." *LPND*, 659 F.3d at 697 (emphasis added). Thus, in other words, case law establishes Arkansas's compelling interest in ensuring that only viable candidates appear on the ballot. And while that interest is undoubtedly related to Arkansas's interest in preventing overcrowding, the

two are not coextensive. Yet the district court entirely ignored Arkansas's interest in eliminating frivolous candidates, and that undisputed failure requires reversal.

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 the necessity for *increasing* the signature threshold from 10,000 to 3% of the votes cast in the last gubernatorial election (or again, approximately 1.5% of the eligible pool). ADD51. That "is really an argument about the number of [signatures] required," *LPND*, 659 F.3d at 698, and a suggestion that 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. 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 as a matter of law when it demanded a much more precise showing and reversal is required.

The district court also underestimated the strength of Arkansas's interest in moving its presidential primary to Super Tuesday. It did acknowledge that the September 5 compliance deadline took effect this year due to Arkansas's desire to

participate in the Super Tuesday primary. ADD49. But the district court faulted Arkansas for failing to carve out separate deadlines in presidential election cycles for new political parties. In fact, the district court strongly implied that Arkansas had no compelling interest whatsoever in *any compliance deadline before the primary*. *See* ADD50 (suggesting that Arkansas should not peg new parties' compliance deadline to the deadlines for established parties). Like the early filing deadline challenged in *McLain*, however, the compliance deadline in this case "is primarily the consequence of rescheduling the primary." 851 F.2d at 1050. And contrary to the district court's conclusion, that means that—as was true in *McLain*—Arkansas's compliance deadline satisfies the compelling-interest standard. *Id.*

Finally, the district court did not separately address Arkansas's compelling interests in the 90-day window. *See* ADD49-52. As already discussed, that provision prevents fraud in the petitioning process. And the Supreme Court's discussion of compelling state interests in other election contexts underscores that interest is compelling and justifies Arkansas's 90-day collection window. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (noting "the State's compelling interest in preventing voter fraud").

Arkansas's challenged ballot-access laws are narrowly tailored to further Arkansas's compelling interests. As a result, regardless of whether the challenged

laws severely burden LPAR, they are not unconstitutional. Therefore, this Court should reverse the preliminary injunction.

III. The district court's preliminary injunction is not narrowly tailored.

Ultimately, the district court concluded that Arkansas's ballot-access regime imposed a severe burden because it believed the challenged timing provisions imposed a severe and unjustified burden. *See* ADD42-47, ADD59-60. That conclusion lacks any basis in law or fact. But even if that conclusion were correct, the injunction could not stand because it does not address that supposed harm.

The district court acknowledged that Arkansas's ballot-access regime is identical to those consistently upheld elsewhere except for its timing provisions. *See* ADD45-46 (distinguishing *Jenness* and other cases solely on timing grounds). But if the only aspects of Arkansas's ballot-access regime that distinguish it from the regimes upheld in *Jenness*, *Swanson*, and many other cases are the timing provisions, then LPAR's only conceivable constitutional harm is rooted in the timing provisions. Thus, even accepting the district court's conclusions, its remedy (enjoining the modicum-of-support requirement) is completely divorced from LPAR's supposed harm (timing), and that is yet another reason to reverse.

Indeed, a preliminary injunction, like other federal-court decrees, "must directly address and relate to the constitutional violation itself.'" *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 281-82

(1977)). Put differently, courts must "tailor injunctive relief to the scope of the violation found." *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (quotation marks omitted); *see also Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) ("While district courts have broad discretion when fashioning injunctive relief, their powers are not boundless."). And where there is "no Constitutional violation . . . the use of an injunction is unnecessary." *Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992) (reversing an injunction on tailoring grounds).

This Court's decision in *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015), illustrates the point. There the district court concluded that the plaintiffs were likely to succeed on their claim that the Affordable Care Act preempted three provisions of Missouri law. *Id.* at 1021. Instead of preliminarily enjoining only those three provisions, however, the district court preliminarily enjoined the entire Missouri act that contained them. *Id.* Although this Court agreed with the district court's preemption analysis, it affirmed the preliminary injunction only insofar as it applied to the three preempted provisions. *Id.* at 1024-28. That is because an injunction "must be *narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs*, rather than to enjoin all possible breaches of the law." *Id.* at 1022-23 (quotation marks omitted) (emphasis added) (ellipsis in original). Thus, this Court "vacate[d] the remainder of the preliminary injunction." *Id.* at 1028.

Applying that standard, this Court should—at a minimum—vacate the preliminary injunction because the district court's analysis ultimately rested on the supposed harm from the challenged deadlines. Yet the district court paradoxically fashioned its injunction with the express purpose of *not* affecting those timing provisions. *See* ADD58-59. That means that the district court failed to tailor its preliminary injunction to the harms it found, and the injunction cannot stand. *See Graves v. Romney*, 502 F.2d 1062, 1065 (8th Cir. 1974) (because "the district court failed to tailor a remedy for the specific harms shown," it "must be remanded for the drawing of a narrower and more useful remedy").

Further, the district court's preliminary-injunction order is also not tailored because no case suggests that the half-a-percent signature requirement that it imposed is the maximum constitutionally permissible signature limit. Nor did the district court suggest that threshold was supported by any case law. Instead, the district court apparently selected that threshold merely because it thought "that plaintiffs likely would be able to" meet it. ADD58 (declaring without citation that "the 10,000-signature requirement is the narrowest form of relief that would grant relief to the irreparable harm facing plaintiffs"). But the constitutionality of Arkansas's ballot-access laws does not hinge on whether LPAR can qualify under them, and the district court was required to consider whether a less dramatic remedy—including a higher signature requirement—was sufficient to remedy the

harms it found. The district court's failure to do so demonstrates that its preliminary injunction was not "narrowly tailored . . . to remedy only the specific harms shown." *Huff*, 782 F.3d at 1022 (ellipses in original) (quoting *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (per curiam)). Therefore, at a minimum, this Court should vacate the district court's preliminary injunction because it is not properly tailored.

IV. The district court failed to properly consider the remaining preliminary-injunction factors.

The district court likewise erred in applying the remaining preliminary-injunction factors. That too requires reversal.

The district court improperly disregarded the harm its preliminary injunction would inflict upon Arkansas and voters while simultaneously ignoring the self-inflicted nature of LPAR's alleged injury. The district court declared that substituting a half-a-percent signature requirement for Arkansas's democratically enacted modicum-of-support requirement imposed no harm. *See* ADD55 (claiming substitution would not "do any harm"). But just last year, the Supreme Court reminded lower courts that—contrary to the district court's conclusion—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). Beyond that, the district court also failed to weigh "considerations specific to election cases." *Purcell*, 549 U.S. at 4. For

example, it failed to consider whether its injunction would "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. And preventing such confusion is undoubtedly in the public interest.

In contrast, LPAR's supposed harm is entirely self-inflicted. The district court found "that the LPAR will not be able to run candidates down the ballot unless a preliminary injunction is entered." ADD55. That is a problem entirely of LPAR's own making. LPAR chose to submit a facially insufficient number of signatures on June 28, 2019—more than *two months* before the September 5, 2019 statutory deadline. *See* ADD4, ADD61-63; Ark. Code Ann. 7-7-205(a)(6). LPAR likewise chose to end its signature-collection effort less than 90 days after it started collecting signatures and despite its recognition that its collection efforts the first two weeks were particularly haphazard. *See* JA203 (Pakko testifying that LPAR "did not" even have "all of [its] canvassers in town on the job really until about" two weeks after petition drive started); *see also* JA258-61, 263-64 (two other high-ranking LPAR leaders testifying to their own lack of work). It also stopped collecting signatures just before the Independence Day holiday that undisputed expert testimony established was the best single day all summer to collect signatures. *See* JA323-24 (describing that holiday as "a game changer in ballot access" and explaining that it is possible to collect "9- and 10,000 signatures on a single day in a state like Arkansas").

Such "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). And the district court erred as a matter of law in concluding otherwise.

Furthermore, the district court erred when it concluded that absent a preliminary injunction LPAR would lose the ability to compete up-and-down the ballot. Even without across-the-board ballot party access, *any* LPAR member who wishes to run for office may still run as an independent. An individual LPAR candidate for "district, county, or township office" must satisfy an even less demanding modicum-of-support requirement by collecting signatures from "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 . . . more than two thousand (2,000) signatures." Ark. Code Ann. 7-7-103(b)(1)(A). LPAR members may also run for statewide office by collecting 10,000 signatures. *Id.* 7-7-103(b)(1)(B). LPAR members have until May 1, 2020, to collect signatures. *Id.* 7-7-103(b)(1)(A). And "[t]here's no difference for nonmajor party candidates in terms of the share of the vote they get whether they have a third-party label or they are just listed as an independent on the ballot." JA374 (Dr. Hood); *see* JA375 (same). Therefore, this Court should reverse the district court's preliminary injunction.

CONCLUSION

For these reasons, this Court should reverse the district court's order issuing a preliminary injunction.

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 brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,845 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) and 8th Cir. R. 28A(c) because it has been prepared in a 14-point, proportionally spaced typeface.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Nicholas J. Bronni
Nicholas J. Bronni

CERTIFICATE OF SERVICE

I certify that on September 9, 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