No. 19-2503

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Honorable Kristine G. Baker, District Judge
D.C. No. 4:19-cv-00214-KGB

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The District Court in the case below, after a hearing on Plaintiffs' Motion for Preliminary Injunction, correctly granted the preliminary injunction and allowed the Libertarian Party of Arkansas (LPAR) to obtain ballot access if 10,000 valid petition signatures of Arkansas registered voters were submitted to Secretary of State John Thurston. The LPAR successfully complied with the District Court's Order by turning in 18,702 petition signatures on June 28, 2019, of which 12,749 petition signatures were found to be valid. Secretary Thurston, after filing a Notice of Appeal to the Preliminary Injunction Order, also filed a Motion for a Stay Pending Appeal in the District Court, which the District Court denied on August 12, 2019. Secretary Thurston had previously filed a Motion to Stay Preliminary Injunction Pending Appeal in the Eighth Circuit on August 8, 2019, which the Eighth Circuit denied on August 21, 2019. The District Court in granting the Preliminary Injunction Order noted that the State had failed to articulate clearly a compelling state interest and had failed to meet its burden of showing that the challenged statutes were narrowly drawn to serve a compelling interest.

Counsel for Appellees feels that due to the record in the case below and the Appellant's misunderstanding of the applicable law and facts, it would be advantageous to the Court of Appeals to be able to ask questions at oral argument. Counsel for Appellees requests oral argument of 15 minutes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, the Libertarian Party of Arkansas, Sandra Chaney Richter, Michael Pakko, Ricky Harrington, Jr., Christopher Olson, and Michael Kalagias, who are the Plaintiffs-Appellees, are a political party and individuals. The Libertarian Party of Arkansas is not a publicly held corporation or other publicly held entity or trade association, there are no other publicly held corporations or other publicly held entities, not a party to the appeal, that have a financial interest in the outcome of the litigation, and this case does not arise out of a bankruptcy proceeding. However, the Libertarian Party of Arkansas does have a parent corporation under the name of Arkansas Libertarian Party, Inc., which is a domestic nonprofit corporation. Further, the Libertarian Party of Arkansas is registered as a "fictitious name" (d/b/a) for the Arkansas Libertarian Party, Inc. The officers of the Arkansas Libertarian Party, Inc. are Michael Pakko, Chairman; Casey D. Copeland, Secretary and Director; Christopher Olson, Director; and Stephen Wait, Director.

PRIOR OR RELATED APPEALS

There are no prior appeals, but there is a related appeal, viz.: *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ark., 1996), *appeal dismissed with conditions*, 8th Cir. Case No. 96-3238, June 19, 1997 (see Joint Appendix, vol. II, pp. 449-454, Plaintiffs' Exhibit "3").

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STATEMENT OF JURISDICTION

The Plaintiffs-Appellees agree with the Statement of Jurisdiction on page 1 of the Brief of Defendant-Appellant filed September 10, 2019, except as to that part which states that the District Court on July 3, 2019, ". . . 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." Actually, the election laws challenged herein, viz.: Ark. Code Ann., §§ 7-7-101, 7-7-203(c)(1), 7-7-205(a)(2), 7-7-205(a)(4)(B), 7-7-205(a)(6), and 7-7-205(c)(3), specifically require groups seeking political party recognition and ballot access to collect petition signatures of at least 3% of the total vote cast for governor in the last gubernatorial election in Arkansas. Further, the deadline for the petition signatures for new political party recognition for the 2020 Arkansas general election was September 5, 2019, with the petitioning period allowed limited to 90 days.

STATEMENT OF ISSUES

Besides the issues set forth on page 2 of the Brief of Defendant-Appellant filed in this appeal, this appeal also presents issues concerning:

Issue 1: Whether there has been a sufficient change in circumstances so that the Court should disregard previous Court decisions of the Eastern District of Arkansas and the Eighth Circuit in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ark. 1996) (appeal dismissed with conditions, 8th Cir. Case No. 96-3238, June 19, 1997, (J.A., 449-454, Plaintiffs' Exhibit "3"; and J.A. 462-463, 8th Cir. Judgment); *Green Party of Arkansas v. Daniels*, 445 F.Supp.2d 1056 (E.D. Ark. 2006); and Green Party of Arkansas v. Martin, 649 F.3d 675 (8th Cir. 2011).

Issue 2: Whether there was a difference in the 10,000 petition signature requirement allowed by the District Court below in its preliminary injunction order as opposed to the 10,000 petition signature requirement referenced in the Eighth Circuit's decision in *Green Party of Arkansas v. Martin,* 649 F.3d at 678, 683-685—particularly when considering the petition signature deadlines.

Issue No. 3: Whether the District Court for the Eastern District of Arkansas erred in stating in 2006 that the Reform Party had successfully petitioned for the 1996 general election. *Green Party of Arkansas v. Daniels,445 F.Supp.2d* at 1058, ¶ 6, as noted in preliminary injunction order, ¶3(a), (J.A. 135, ADD 37).

STATEMENT OF THE CASE

The instant appeal is an election law and ballot access case on behalf of five registered voters and supporters of the Libertarian Party of Arkansas (hereinafter referred to as "LPAR"), which, unlike the two major political parties, must successfully complete a petition drive for political party recognition and then, if successful, conduct a political party convention under Arkansas law in order to nominate candidates for elective office. The LPAR was the only minor political party to obtain recognition for Arkansas ballot status for the 2015-2016 and 2017-2018 election cycles. The Plaintiffs asked in the case below that the LPAR be permitted to conduct a petition drive for political party recognition with a constitutional petition signature requirement of 10,000 valid petition signatures of registered Arkansas voters along with a later constitutional petition signature deadline for the general election to be conducted on November 3, 2020. Previously to the current law going into effect by way of an emergency clause in February of 2019 (J.A. 107, ADD 9, PI order, ¶¶23-24), the petition signature requirement for recognition of a new political party required either 3% of the last total vote for governor in Arkansas or a maximum petition signature requirement of 10,000 signatures of Arkansas registered voters with a petition signature deadline in the year of the general election. Under the new laws challenged herein, the alternative of 10,000 petition signatures was deleted and the petition signature deadline was moved

to September 5, 2019, for political party formation for the 2019-2020 election cycle for the November 3, 2020, Arkansas general election.

This case concerns the important question of whether Arkansas may require a minor political party to submit petition signatures for party recognition which are at least 2.6 times what was previously required and in effect for almost twelve years and with a submission deadline (September 5, 2019) fourteen months before the general election and more than five and a half months before the major parties select their nominees at a preferential primary election. This question poses the constitutional issue of whether the Arkansas requirements in question are necessary to further a compelling state interest. The laws in question effective for the 2020 Arkansas general election cycle are Ark. Code Ann. §§ 7-7-101, 7-7-203(c)(1), 7-7-205(a)(2), 7-7-205 (a)(4)(B), 7-7- 205 (a)(6), and 7-7-205 (c)(3).

A. Statement of the Facts relative to the issues presented for review.

The individual Plaintiffs-Appellees and the LPAR filed their complaint on March 28, 2019 (J.A. 1-15). After Arkansas Secretary of State John Thurston (hereinafter sometimes referred to as "Secretary Thurston") filed his answer on April 18, 2019 (J.A. 16-21), the Plaintiffs then filed a motion for preliminary injunction with affidavit on May 3, 2019 (J.A. 22-30). An order and notice of hearing for June 4, 2019, was filed by the District Court on May 10, 2019, which set forth certain requirements and deadlines for the parties to meet (J.A. 31-32). A

hearing was held before the District Court on June 4, 2019, on Plaintiffs' Motion for Preliminary Injunction (J.A. 180-430). On July 3, 2019, the District Court granted Plaintiffs' motion for preliminary injunction and allowed the LPAR to obtain ballot access if 10,000 valid petition signatures of Arkansas registered voters were submitted to Secretary Thurston (J.A. 99-161, ADD 1-63).

The particular facts, witnesses, and exhibits at the hearing on Plaintiffs' Motion for Preliminary Injunction (J.A. 180-430, Transcript of Hr., June 4, 2019, Exhibits, J.A. 431-463) showed the effects on the LPAR of requiring an excessive and unnecessary requirement of 26,746 valid petition signatures of registered Arkansas voters (3% of the total vote cast for governor in Arkansas in the last gubernatorial election) collected during no more than a ninety day period, and with a petition signature deadline of no later than September 5, 2019, which is fourteen months before the November 3, 2020, general election. Dr. Pakko, Chair of the LPAR, spoke of his efforts in February of 2019, when he heard about the proposed legislation in the General Assembly to change the law back to the petition requirement that had previously been held unconstitutional in *Green Party of Arkansas v. Daniels*, as well as pointing out that the new law was "almost a targeted action against the Libertarian Party" considering that the LPAR was the only party that had made the ballot in the two previous election cycles and the only party that

had made any announcement that it was planning to achieve ballot access again for 2020 (J.A. 196-197, Tr. PI hr., p. 17, line 7—p. 18, line 12).

Not only did Dr. Pakko speak of the overwhelming support for the new law by Republicans and opposition by Democrats, but he also noted that it took a second attempt to get an emergency clause passed so that the law would take effect immediately rather than 90 days after the legislature adjourned (J.A. 198-199, Tr. PI hr., p. 19, line 2-p.20, line 3). He also pointed out to the General Assembly the thirty years in which the 3% requirement was in place and never complied with (J.A. 213, Tr. PI hr., p. 34, lines 11-18). When the LPAR's attempts to persuade the General Assembly not to pass the law failed, Dr. Pakko directly managed the LPAR petition drive, as he had in the election cycles for 2014, 2016, and 2018. He testified as to what a challenging endeavor it had been, how you have to identify registered voters, find places where you won't be kicked out for trespassing, the limited amount of venues, and the expenses involved (J.A. 199, Tr. PI hr., p. 20, lines 4-24). Dr. Pakko also noted his contacts with the Green Party of Arkansas and how it had run out of resources, funding, and manpower to obtain the 10,000 signatures to be on the ballot in 2016 or 2018 (J.A. 200-201, Tr. PI hr., p. 21, line 11—p.22, line14).

Dr. Pakko then went on to testify as to the current petition drive that had begun on April 1, 2019, the need to collect a greater number of signatures than required in order to have enough valid signatures, the 90-day limitation on petitioning, the need

to get started early in order to avoid the very hot summer months because of the intense heat in Arkansas in July and August, the availability of college campuses to petition on, and the fact that more people are on vacations during the summer than earlier (J.A. 201-204, 206, Tr. PI hr., p. 22, line 15—p.25, line 2, p. 27, lines 13-19). A further problem involved tornadoes, flooding, rains, and the effect that it had considering the 90-day petitioning period (J.A. 204, 206, Tr. PI hr., p. 25, lines 4-23, p. 27, lines 1-12). Additional problems were the result of the petitioning being done so far in advance of the general election in 2020 that petitioning early was not as good as it would have been had it been at a later time because of voter interest (J.A. 204-205, Tr. PI hr., p.25, line 24—p.26, line 25). Dr. Pakko noted that since a newly recognized party nominated its candidates by party convention rather than in a primary election, he saw no reason why a new party would need to participate in a primary election or why the election deadlines for new parties should be so early (J.A. 206-207, Tr. PI hr., p. 27, line 20—p. 28, line 7). Dr. Pakko also testified in detail about the petition signatures gathered, the progress made, the effects of weather on petitioning, problems with people going on vacation, and what events and areas were good or problematic for petitioning (J.A. 218-219, 233-236, 246-247, Tr. PI hr., p.39, line 9—p.40, line 17, p.54, line 1—p.57, line 10, p. 67, line 22—p.68, line 23).

After other witnesses testified as to petitioning (J.A. 248-255, Tr. PI hr., p.69, line 20—p.76, line 10), it was additionally shown that when the petition requirement for political party formation was previously 3% of the total vote for Arkansas Governor in the last gubernatorial general election, no unrecognized political party was ever successful in meeting that requirement and only achieved ballot access by having the law declared unconstitutional and being placed on the ballot by court order (J.A. 105, ADD 7, preliminary injunction order (hereinafter sometimes referred to as "PI order"), p.7, ¶ 14).

In its preliminary injunction order the District Court found, *inter alia*, that the Arkansas election statutes challenged, Ark. Code Ann., §§ 7-7-101, 7-7-203(c)(1), 7-7-205(a)(2), 7-7-205(a)(4)(B), 7-7-205(a)(6), and 7-7-205(c)(3) were likely to be proved by the Plaintiffs to place a severe burden upon Plaintiffs' associational rights under the First and Fourteenth Amendments so that the District Court should apply strict scrutiny to the challenged ballot access statutes, the state had failed to articulate clearly a compelling state interest to be examined, and leaving the District Court to speculate as to what the state's interest may be (J.A. 134-142, 146-150, ADD 36-44, PI order, p. 36-44, 48-52). The District Court then reviewed various possible state interests and found that the state had failed to meet its burden of showing that the challenged statutes are narrowly drawn to serve the state's compelling interest. The District Court analyzed the challenged election statutes as to the number of petition

signatures required and the 90-day time period allowed for petitioning and the petitioning deadline (J.A. 135-140, ADD 37-42, 140-141, ADD 42-43, PI order). Because the challenged statutes are likely to be found unconstitutional, the District Court found that the enforcement of the law would cause irreparable harm and prevent the LPAR from achieving ballot access and running candidates unless the 10,000 petition signature requirement was restored, while this would not harm Secretary Thurston, the State, or the public (J.A. 152-154, ADD 54-56, PI order). The District Court reasoned that if the LPAR was allowed to meet the 10,000 petition signature requirement which was in effect for the last several election cycles (2008-2018), election dates and timelines would not be interfered with and, therefore, the balance of equities and the public interest weigh in favor of a preliminary injunction. While the 3% requirement, the 90-day signature gathering window, and the fact that the petition signatures must be collected and turned in more than a year before the general election, the District Court reasoned that reinstating the previous 10,000 petition signature requirement was the narrowest form of relief that would grant relief to the irreparable harm facing Plaintiffs (J.A. 154-157, ADD 56-59, PI order).

The LPAR successfully complied with the District Court's order by turning in 18,702 petition signatures on Friday, June 28, 2019, of which 12,749 petition signatures were found to be valid (letter of July 29, 2019, from Secretary Thurston to Michael Pakko, Plaintiffs-Appellants' Exhibit "6" to their response brief in

opposition to Appellant's motion for a stay of a preliminary injunction pending appeal filed with the Eighth Circuit on August 19, 2019). Interestingly, the 12,749 LPAR valid petition signature number in the letter of July 29, 2019, is the exact same number as the 12,749 valid petition signatures validated from the 15,108 petition signatures the LPAR submitted in 2017 (J.A. 455, Plaintiffs' Exhibit "4").

Secretary Thurston filed a Notice of Appeal on July 12, 2019 (J.A. 162-163) to the preliminary injunction order (J.A. 99-161, ADD 1-63, PI order) and a motion in the District Court for a stay pending appeal and to shorten Plaintiffs' response time (J.A. 164-165). On July 17, 2019, the District Court entered an order partly granting Secretary Thurston's request to shorten Plaintiffs' time to respond. (J.A. 167-168). On July 24, 2019, the Plaintiffs filed a response in opposition to the motion for a stay pending appeal. (Record, Dkt. No. 42). On July 25, 2019, Secretary Thurston filed a motion for leave to file a reply with an exhibit of the proposed reply. (Record, Dkt. No. 43). The District Court granted the motion for leave to file a reply, considered the reply, and entered an order denying the motion to stay preliminary injunction pending appeal on August 12, 2019 (J.A. 169-176). Secretary Thurston had previously filed a motion for stay of a preliminary injunction pending appeal in the Eighth Circuit on August 8, 2019, and a Fed. R. App. P. 28(j) citation letter on August 12, 2019. After the Plaintiffs-Appellees filed a response to the Fed. R. App. P. 28(j) citation letter on August 13, 2019, and a response brief in opposition to

Appellant's motion on August 19, 2019, Secretary Thurston's motion for a stay of a preliminary injunction pending appeal was denied by the Eighth Circuit on August 21, 2019. The Brief of Defendant-Appellant and Addendum were filed on September 10, 2019. The Joint Appendix in two volumes (J.A., 1-463) was filed with the Eighth Circuit on September 18, 2019. Plaintiffs now submit the Brief of Plaintiffs-Appellees.

SUMMMARY OF THE ARGUMENT

The LPAR is the only minor political party to recently obtain recognition for Arkansas ballot status. Because the LPAR would be a new Arkansas political party, it would nominate its candidates for the general election by convention, rather than by preferential primary election. Ark. Code Ann., § 7-7-205(c)(2). Candidates nominated by a convention are required to file a political practice pledge with the Secretary of State or County Clerk during the party filing period. Ark. Code Ann., § 7-7-205(c)(3). The party filing period is currently set for a one-week period beginning at noon on the first Monday in November (November 4, 2019) preceding the general primary election and ending at noon on the 7th day thereafter (November 11, 2019). The new, earlier petition deadline has been moved three times in recent years and requires new political parties to conduct a petition drive in 2019, at least fourteen to seventeen months before the general election, and makes them select the

parties' final candidates at a time when the major parties' selection process is still many months away.

The new political party recognition requirements are simply a throwback to what has previously been declared unconstitutional. *Citizens to Establish a Reform Party in Arkansas v. Priest*, *Id.*; and *Green Party of Arkansas v. Daniels*, *Id.* In fact, the new deadline for petition signatures of September 5, 2019, is far worse than the January 2, 1996 deadline declared unconstitutional in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 692-693, 698, ¶ 17, and the 26,746 signatures required by the new law challenged herein is also worse than the 21,505 signatures condemned in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 691, ¶ 2, 698-699, or the 24,171 condemned in *Green Party of Arkansas v. Daniels*, 445 F.Supp. 2d, at 1059-1060, 1061-1063, when 150 days was allowed for the petitioning period and the petition deadline was in June of the general election year.

The Arkansas election scheme for the recognition of new political parties results in a deadline which is 424 days before the general election. In *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988) (*McLain II*), the Eighth Circuit was troubled by a third-party filing deadline "more than 200 days before the November election." Arkansas has now far exceeded with the new September 5, 2019, deadline the 200 days which troubled the Eighth Circuit in *McLain II*. As the Eighth Circuit

said in an earlier *McLain* case, the ". . . Constitution requires that the access requirements as to both party-backed and independent candidates be reasonable." *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980) (*McLain I*). Restrictions on ballot access "may not go beyond what the state's compelling interests actually require," *McLain v. Meier*, 637 F.2d at 1163, and must be "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d at 1049). "In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest." *Moore v. Martin*, 854 F.3d 1021, 1026 (8th Cir. 2017), *cert. denied*, *Martin v. Moore*, 583 U.S. __, 138 S. Ct. 321, 199 L.Ed.2d 210 (2017).

Specifically, what the Plaintiffs asked for in affirmative relief was that they be allowed to conduct a petition drive pursuant to the 10,000 petition signature requirement that existed for the previous six general election cycles and before the election laws were changed in February of 2019. This remedy was necessary because of the unnecessarily early petition signature deadline, limitation of petitioning time to ninety days, and 3% petition signature requirement based on the total vote in the last gubernatorial election—which has never been successfully complied with, even with a much later petitioning deadline and up to 150 days for petitioning. Testimony as to the LPAR petition drive was presented at the hearing

for preliminary injunction which demonstrated there is harm in having a petition drive well before the Arkansas preferential primary and general elections when many of the political issues for the next election are not yet well formed or known. Secretary Thurston has shown no necessity for the increased petition signature requirement, or the petition deadline 424 days before the general election in 2020, or the ninety-day petitioning period, and no credible compelling state interest that could not be served by less drastic means (e.g., the 10,000 petition signature requirement in existence for new political parties from 2008 election cycle to February 2019, and commented on by the District Court below (J.A. 130, ADD 32, PI order, p.32) and the Eighth Circuit in *Green Party of Arkansas v. Martin,* 649 F.3d at 678, 683-685.

The District Court's preliminary injunction order specifically found the LPAR had been able to meet the 10,000 petition signature requirement in 2012, 2014, 2016, and 2018, and had obtained 2.9% of the total vote for Governor in 2018, just short of the 3% retention requirement that would have continued political party recognition status and required the LPAR to nominate its candidates in a preferential primary election. (J.A. 106, 122, ADD 8, 24, PI order, ¶¶ 20 and 85). The District Court further found that prior to the law passing in late February, and raising the 10,000 signature requirement to 3% of the previous vote for Governor (26,746), the LPAR had started fundraising and announced an intent to

become a new political party once again before 2020. (J.A. 105, ADD 7, PI order, ¶ 18). The District Court noted the difficulty of petitioning so far removed from the general election and took extensive testimony as to costs and past and present efforts. The District Court further noted that the LPAR would not be able to meet the 26,746 signature requirement in 2019 because Michael Pakko had testified that he thought the most the LPAR and its supporters could collect would be 22,000 or 23,000 unverified signatures within the 90-day period (J.A. 110-111, ADD 12-13, PI order, ¶ 39). After hearing other testimony, including the fact that from 1977 to the present only three independent candidates had gotten on the statewide ballot by meeting the 10,000 petition signature requirement (J.A. 105, 117, ADD 7, 19, PI order, ¶¶ 15 and 64), the District Court found that Secretary Thurston had not shown any compelling state interest that would justify the laws in question. In fact, even the state's own expert witness admitted that the Arkansas ballot was not overcrowded under the old law[1] (J.A. 124, ADD 26, PI order, ¶ 93).

The District Court was correct in granting the motion for preliminary injunction, enjoining enforcement of the three percent new political party petition

[1] In the last two general elections, 54% of the state house districts in 2018 and 66% of the state house districts in 2016 had no general election even with the LPAR on the ballot. (J.A. 456, Plaintiffs' Exhibit "5" admitted at the PI hearing on June 4, 2019). In 2016, with LPAR candidates for all four U.S. House Districts, the Democratic Party ran a candidate in only one of the districts. Such facts show not only an uncrowded ballot, but a significant absence of election choice for Arkansas voters and a diminished political debate at the time of the general election.

signature requirement as to the LPAR, allowing the LPAR to be recognized as a new political party if it turned in 10,000 petition signatures of registered Arkansas voters and otherwise complied with the remaining requirements of Arkansas law, but not at this stage of the litigation to alter any deadlines for submitting new political party petitions or the party filing deadline because ". . . such changes might unintentionally affect the complex primary calendar in the State of Arkansas." (J.A. 157-158, ADD 59-60, PI order, p. 31-32). The aforesaid decision is somewhat similar to a recent decision in Michigan, and as reviewed in a stay request before the U. S. Court of Appeals for the Sixth Circuit wherein a District Court denial of a stay was upheld which had preliminarily enjoined a 30,000 petition signature requirement in a ballot access case, which is less than 1% of the last Michigan gubernatorial vote, and ordered Michigan to accept candidate Graveline's filing as complete and determine the validity of the signatures in time to place Graveline on the ballot if he had at least 5,000 sufficient valid signatures and at least 100 valid signatures from registered voters in each of at least half of the 14 Michigan congressional districts. *Graveline v. Johnson*, 336 F.Supp. 3d 801, 816-817 (E.D. Mich. 2018), *stay denied*, 747 Fed. App'x. 408 (6th Cir. 2018).

ARGUMENT

STANDARD OF REVIEW

In reviewing a district court's decision in granting a motion for preliminary injunction, the Eighth Circuit Court of Appeals has stated that: "A district court has broad discretion in ruling on requests for preliminary injunctions; 'we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion.'" *Kroupa v.Nielsen*, 731 F.3d 831, 818 (8th Cir. 2013) (quoting *Medicine Shoppe Int'l., Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 803 (8th Cir. 2003). As to the standard which the District Court should apply when determining whether to grant a motion for preliminary injunction, the District Court should consider: (1) the threat of irreparable harm to the movant; (2) the movant's likelihood of success on the merits; (3) the balance between the harm to the movant and the injury that granting an injunction would cause other interested parties; and (4) the public interest. *Kroupa v. Neilsen*, 731 F.3d at 818 (quoting *Dataphase Sys. Inc. v. CL Sys.*, 640 F.2d 109, 114 (8th Cir. 1981)). Under the *Dataphase* case, no one factor is determinative. *Id.* at 113. The focus is on "whether the balance of the equities so favor the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). After the Eighth Circuit revised the *Dataphase* test when applied to challenges to laws passed through the

democratic process, it was determined that those laws are entitled to a "higher degree of deference" and the moving party must meet a threshold of showing that the movant is "likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 725, 732 (8th Cir. 2008). Only if the movants have demonstrated that they are likely to prevail on the merits should the Court consider the remaining factors set forth in the *Dataphase* case. *Id.*

As to the standard of review in a ballot access case, the analytical test applied by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1968), is appropriate. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by litmus-paper tests that will separate valid from invalid restrictions, but rather that the trial court " ... must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze*, 406 U.S., at 789. In doing so, the Supreme Court has set forth a three-pronged test, *Id.*, to which the Eighth Circuit has stated:

> [W]e review the statute under a form of strict scrutiny referred to as the "compelling state interest test" by first determining whether the challenged statute causes a burden of some substance on a plaintiff's rights, and if so, upholding the statute only if it is "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988)). In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest. See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); and *Moore v. Martin*, 854 F.3d at 1025-1026.

In fact, " . . . because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny." *Anderson v. Celebrezze*, 460 U.S., at 793, n.16. After all, "the State may not be a 'wholly independent or neutral arbiter' as it is controlled by the political parties in power, 'which presumably have an incentive to shape the rules of the electoral game to their own benefit.'" *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, at 587 (6th Cir. 2006) (quoting from *Clingman v. Beaver*, 544 U.S. 581 (2005) (O'Conner, J., concurring).

The U.S. Supreme Court has also noted that the First and Fourteenth Amendments establish "[t]he right of citizens to create and develop new political parties." *Norman v. Reed*, 502 U.S. 279, 288 (1992). See also *Green Party of Arkansas v. Priest*, 159 F.Supp.2d 1140, at 1144 (E.D. Ark. 2001). "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams v. Rhodes*, 393 U.S. 23, at 32 (1968).

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties [citations omitted]. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity in competition in the marketplace of

> ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many other challenges to the status quo have in time made their way into the political mainstream [citations omitted]. In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)—are served when election campaigns are not monopolized by the existing political parties. *Anderson v. Celebrezze*, 460 U.S. at 793-794.

Since the injury to the Plaintiffs' rights impacted the LPAR and its supporters in their petitioning for Arkansas ballot access, there can be no dispute that the damage would be substantial and of a fundamental nature. Appellate Courts have noted that when election deadlines are far in advance of an election, they force minor parties to recruit candidates at a time when major party candidates are not known and when voters are not politically engaged. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 594 and *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3rd Cir. 1997).

In identifying and evaluating the precise interests put forth by the State as justifications for the burden imposed by the laws in question, while Arkansas does have a right to properly supervise elections, election restrictions which impact minor political parties and their supporters must be necessary to serve a compelling state interest so that:

> "even when pursuing a legitimate interest, a state may not choose means that **unnecessarily restrict** constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that states adopt the **least drastic means** to achieve their ends. *Lubin v. Panish*, 415 U.S. 709, 716 . . .;

> *Williams v. Rhodes*, 393 U.S. at 31-33 . . .. **This requirement is particularly important where restrictions on access to the ballot are involved**. The states' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the development of the nation. [emphasis added]. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 185 (1979).

I. SECRETARY THURSTON IS NOT LIKELY TO SUCCEED ON THE MERITS OF HIS APPEAL BECAUSE ARKANSAS'S BALLOT ACCESS LAW AS CHALLENGED DOES IMPOSE A SEVERE BURDEN.

A. Secretary Thurston's brief fails to fully discuss the Eighth Circuit decisions in McLain I, McLain II, and Green Party of Arkansas v. Martin, as well as the District Court decisions in Citizens to Establish a Reform Party in Arkansas v. Priest and Green Party of Arkansas v. Daniels.

In the 56 pages of Secretary Thurston's brief there is no mention of the Eighth Circuit case of *McLain I*, immaterial commentary on pages 46 and 49 of the *McLain II* case, misunderstanding of the implications to the instant case of the Eighth Circuit's decision in *Green Party of Arkansas v. Martin*, and only limited commentary on page 37 of the two cases wherein the 3% petition signature requirement was previously declared unconstitutional—even with petition deadlines from four to over nine months later than the present law, *Citizens to Establish a Reform Party in Arkansas v. Priest, Id.*; and *Green Party of Arkansas v. Daniels, Id., as* compared to the current Arkansas election scheme for the recognition of new political parties with a petition deadline which is 424 days before the general election.

Restrictions on ballot access "may not go beyond what the state's compelling interests actually require," *McLain v. Meier*, 637 F.2d at 1163, and must be "narrowly drawn to serve a compelling state interest." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, at 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d at 1049). "In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest." *Moore v. Martin*, 854 F.3d at 1026. Other than mentioning a modicum of support, Secretary Thurston presents no compelling state interest in his brief which could not be served by less drastic means—i.e., the 10,000 petition signature requirement with a deadline, at least, during the general election year as was in effect from the 2008 general election cycle till February of 2019.

Secretary Thurston suggests that it would have been better for the LPAR to have turned in their petitions later than June 28, 2019, because they could have given up petitioning done in early April for petitioning done after June 28 and into early July. However, as the District Court noted, Mr. Pakko was clear that the LPAR had begun its petition drive in April of 2019 because they wanted to avoid the hot summer months and at a time when students were still in school and on college campuses, rather than when people were out of town and on vacation (J.A. 108, ADD 10, PI order, ¶ 28). It is pure speculation that giving up part of April for part of July would have brought in more signatures. Because the petitioning time before

September 5, 2019, is so far removed from the general election in November of 2020, none of the dates from April 1 through early September of 2019, are particularly good considering that all the months involved are at times when people have lessened political interest. The LPAR simply had a choice as to what was least bad in petitioning dates. As the Eighth Circuit has stated:

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

Besides the problem with the September 5, 2019, deadline, the previously mentioned cases of *Citizens to Establish a Reform Party in Arkansas v. Priest* and *Green Party of Arkansas v. Daniels* present additional reasons why Secretary Thurston's appeal is not likely to succeed. This is partly because the new deadline for petition signatures of September 5, 2019, is much earlier in the relevant election cycle than the January 2, 1996 deadline declared unconstitutional in *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. at 692-693, 698, ¶ 17, or the deadline in late June of 2006 (and with the petitions actually turned in 30 days early on the last of May in 2006) in *Green Party of Arkansas v. Daniels*, 445 F. Supp. at 1060, ¶ 25, and the 26,746 signatures required by the new law challenged herein is also higher than the 21,505 signatures in *Citizens to Establish a Reform Party in*

Arkansas v. Priest, 970 F. Supp. at 691, ¶ 2, 698-699, or the 24,171 signatures in *Green Party of Arkansas v. Daniels*, 445 F.Supp. 2d, at 1059-1060, 1061-1063, when 150 days was allowed for petitioning and the petition deadline was in late June of the general election year. Unfortunately, the LPAR in 2019, had no choice but to begin its petition drive well more than a year before the 2020 general election.

More importantly, while the Eighth Circuit has upheld the retention requirement of 3% of the vote for Governor for continued political party recognition in Arkansas and nomination by the political party for its party candidates by preferential primary election rather than nominating convention, it did so by noting that the Green Party could petition again under the 10,000 petition signature requirement. *Green Party of Arkansas v. Martin*, 649 F.3d 675, at 678, 683, n.8, 684, 684, n.10, 685 (8th Cir. 2011) (J.A. 109, ADD 11, PI order, p. 32). As the Eighth Circuit stated: "Achieving ballot access is a task that can be, and has been, accomplished with regularity. The petition process permits the Green Party to secure ballot access by submitting 10,000 signatures from any registered Arkansas voters, including those that later choose to vote in another party's primary election." *Green Party of Arkansas v. Martin*, 649 F.3d at 684. Now, however, Arkansas has eliminated the 10,000 signature law ". . . that can be, and has been, accomplished with regularity" for the pre-2007 law that was never complied with—even when the petition deadlines were much closer to the primary and general elections than the

current deadline. Of course, Arkansas, in exercising an abundance of caution for the 2019-2020 election cycle—and just to be sure—increased the petition signatures required to a percentage previously declared unconstitutional and never successfully complied with and moved the petition deadline to the aforesaid September 5, 2019, date by way of an emergency clause so that it would go into effect right away before the LPAR could complete a new petition drive.

B. The history of ballot access laws and cases is unfavorable to Secretary Thurston's argument and is largely ignored in his brief.

None of the foregoing bodes well for Secretary Thurston's contention that he is likely to succeed on the merits, particularly considering that the Arkansas General Assembly has a history of ignoring cases declaring laws unconstitutional in later legislation for both Independents—see case history discussion in *Moore v. Martin*, 854 F.3d at 1026; and *Moore v. Thurston,* 928 F.3d 753, 758-759 (8th Cir. 2019), and new political parties—*American Party v. Jernigan*, 424 F.Supp. 943, 949 (E.D. Ark., W.D. 1977); *Citizens to Establish a Reform Party v. Priest, Id., Green Party of Arkansas v. Daniels, Id.*, and *Libertarian Party of Arkansas v. Martin*, 876 F.3d 948, 949-950 (8th Cir. 2017).

As the Eighth Circuit stated in considering the relationship of petition signatures required to the petition deadline:

> Admittedly, argument can be made that North Dakota's 3.3% signature requirement is valid. *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (upholding 5% signature requirement); *Rock v. Bryant*,

> 459 F.Supp. 64 (E.D. Ark.), aff'd mem., 590 F.2d 340 (8th Cir. 1978) (upholding signature requirement of 3% of qualified electors or 10,000, whichever is less). However, the number of signatures required by North Dakota is significantly higher than that required in most states [citations omitted]. The Supreme Court has spoken on at least one occasion of 1% of the vote for governor as "within the outer boundaries of support the State may require before according political parties ballot position." *American Party of Texas v. White, supra*, 415 U.S. [767], at 783, 94 S.Ct. at 1307 (1974). *McLain v. Meier*, 637 F.2d at 1163-1164.

In the 2006 *Green Party* case, at a time when the Arkansas General Assembly had still not amended the 3% petition requirement to 10,000 petition signatures, the 3% petition requirement had still not been complied with and was unconstitutional. Other than the equal protection problem addressed in the case of *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 695, ¶ 32, 698, ¶ 18--699, ¶ 21, it should also be considered that the independent alternative is not a substitute for reasonable minor party ballot access.

> A candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process. As the Supreme Court has recognized, "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown,* [415 U.S. 724, 745 (1974)]. The Constitution requires that the access requirements as to both party-backed and independent candidates be reasonable. *McLain v. Meier*, 637 F.2d at 1165.

C. Many of the cases cited by Secretary Thurston are not on point and are distinguishable from the instant case.

While Secretary Thurston cites a number of cases which have upheld or commented on petition signature requirements of 3% or more, in each of those cases

the number or percentage of petition signatures required had not been increased back to a former requirement that had never been complied with, the petitioning time in many of the cases allowed seven months, one year, or an unlimited amount of time, the petition signature deadline was well into the year of the general election rather than 424 days before the general election, and the ballot access requirements for new political parties in these other states had actually been complied with. As a point of comparison, another state which also has a petition signature deadline for new political parties in the year before the general election is Utah. Plaintiffs' Exhibit "1" admitted at the PI hearing (J.A. 431-442, Affidavit of Richard Winger, ¶ 10), concerns the recognition of new political parties in Arkansas and Utah and a comparison of the number of signatures required (26,746 versus 2,000), the petition deadline (September 5, 2019, versus November 30, 2019), the amount of time to collect the signatures (90 days versus slightly over one year), and the fact that Arkansas and Utah are about the same population (Utah has approximately 147,280 more people than Arkansas). See, Utah Code Ann., §§ 28A-4-306(1)(a)(i) and 28A-8-103(2).

While Secretary Thurston asserts in his brief that no U.S. Supreme Court decision or decision of a Court of Appeals has ever struck down a petition requirement easier than 5%, the U.S. Supreme Court did so on equal protection grounds (and without having to deal with 90 day petitioning periods and petition

deadlines more than a year before the general election) in its decisions in *Illinois State Board of Elections v. Socialist Workers Party*, *Id.* and *Norman v. Reed, Id.* More importantly, the Eighth Circuit did so in the *McLain I* case, which Secretary Thurston's brief totally fails to mention. Additionally, the Sixth Circuit recently declined a stay request as to a district court which enjoined a 30,000 petition signature requirement in Michigan which amounted to a percentage requirement of around 1%. *Graveline v. Johnson, Id.* Further, Secretary Thurston in his brief misstates or ignores the basis of petition signature requirements where petition signature requirements of 5% or 3% have been upheld by failing to take into account the U.S. Supreme Court's strictures against "litmus-paper tests" as to ballot access laws, the combined effects of various aspects of the ballot access laws, whether the petition signature requirement had been significantly increased from the former requirement, the petition signature deadline, the extent that the requirement has been complied with in the past, whether the petition signature requirement was even at issue in the case, and/or the period of time allowed for petitioning.

The cases relied upon by Secretary Thurston can be distinguished as follows: *Jenness v. Fortson*, 403 U.S. 401, 433-434 (1971) (180 day petitioning period with a petition signature deadline of the second Wednesday in June of the general election year—the same deadline as that a candidate filing in a party primary must meet); *Beller v. Kirk*, 328 F.Supp 485, 486 (S.D. Fla. 1970) (three judge district court, *per*

curiam) (no petitioning attempted and two page decision dismissing complaint with prejudice because complaint failed to state a claim upon which relief may be granted), *aff'd.* without opinion sub nom. *Beller v. Askew*, 403 U.S. 925 (1971); *Tripp v. Scholz*, 872 F.3d 857, 860, 864-866 (7th Cir. 2017) (involved petitioning to obtain ballot access in two state House districts, a petition deadline of June 23 of the general election year, and with Illinois third party political candidates having successfully petitioned previously in "multiple districts across multiple elections"); *Libertarian Party of New Hampshire v. State*, 910 A.2d 1276, 1279, 1281-1282 (N.H. 2006) (petition deadline in second Tuesday in August of general election year and up to approximately twenty-one months of petitioning time); *Green Party of Alaska v. State*, 147 P.3d 728, 730, n.1, 733-735 (Alaska 2006) (three different options to achieve or continue political party recognition using 3% of last vote cast for retention, 3% of last vote cast for voter registration to stay on ballot, or petitioning—which was not at issue in the case as to a 1% of last vote cast requirement to obtain ballot access); *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 367 (1st Cir. 1993) (options of organizing around prior candidate for Governor or President with his or her permission if not affiliated with another party and received 5% of total vote or petition signature deadline of April 1 of general election year); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740, 741-747 (10th Cir. 1988) (where one year was allowed for petitioning,

the requirement had been complied with in the past, and the petition deadline was May 31 of the general election year—which the Tenth Circuit still noted was "troublesomely early"); *Libertarian Party of Oregon v. Roberts*, 750 P.2d 1147, 1149, 1154-1155 (Ore. 1988) (law had recently been complied with by plaintiffs in 1980 and 1982, there was no petition deadline in the year before the general election, there was no 90 day limitation on petitioning, and candidates could alternatively be nominated by a plurality of an assembly of electors numbering between 250 and 1,000 at a convention); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792-794 (11th Cir. 1983) (188 day petitioning period with a petition signature deadline of September 7, 1982, in the general election year, and with a petition signature requirement that had been complied with previously in 1974 and 1976); *Populist Party v. Herschler*, 746 F.2d 656, 657-661 (10th Cir. 1984) (concerning a late challenge to a 5% petition signature requirement which normally allowed one year for petitioning with a June 1 deadline in the general election year—but which had been reduced for the 1984 election by a court approved compromise from 8,000 to 1,333 petition signatures for new political party formation with a June 1 deadline, or a requirement of 7,964 signatures for an independent candidate with a deadline of 45 to 90 days before the general election, see *Blomquist v. Thomson*, 739 F.2d, 525, 528 (10th Cir. 1984), with the compromise being because of a new law passed that had substantially reduced the petition period time, and which involved missing the

June 1 filing deadline by over three months, turning in—at best--only 1,233 petition signatures so as to be 100 less than the compromise number of 1,333, and the plaintiffs being guilty of laches)[2]; *Libertarian Party of N.D. v. Jaeger, 659 F.3d at 691-692* (which was not a challenge to the number of petition signatures required, but concerned a challenge to the requirement that a political party candidate who wins the party's primary for a legislative office must also obtain a vote in the primary equal to at least 1% of the population of the legislative district or at least 300 votes, whichever is less, in order to be on the general election ballot); and *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 22-26 (1st Cir. 2016) (a "facial challenge" with petitioning put on hold and not attempted after the petitioning time was reduced from approximately twenty-one months to a bit more than seven months so as to start on January 1 and end on the petition deadline of the second Tuesday in August of the general election year, and was not a challenge to a 3% petition signature requirement and in a state where there was a second alternative for new political parties to have their candidates on the ballot by an individual nominating process).

In addition to the foregoing cases cited in Secretary Thurston's brief, consider *Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007)* as an illustration of

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[2] It is interesting to note that the Tenth Circuit in *Populist Party v. Herschler*, 746 F.2d at 661, commented *in dicta* that the June 1 petition deadline was subject to challenge and runs counter to the views in *Anderson v. Celebrezze, Id.* and *Blomquist v. Thomson, Id.* and then cites to *McLain v. Meier*, 637 F.2d at 1164.

what Secretary Thurston misses in his argument on pages 2, 34, 35, and 40 of his brief suggesting that the fact that the Eleventh Circuit upheld a 3% petition requirement for ballot access for Alabama new political parties suggests that the District Court hereinbelow was wrong in its findings. In the *Swanson* case, the signature petition deadline was the first primary election date, which at that time was on the first Tuesday in June of the election year. *Swanson v. Worley*, 490 F.3d 804, at 896. Of equal significance is the distinction in Alabama of an ". . . unlimited time to conduct the petitioning effort" and the recent success of the Libertarian Party in getting on the Alabama ballot. "The ability of minor party candidates in Alabama to qualify for the ballot in the past also bolsters the reasonableness of Alabama's three-percent signature requirement." *Swanson v. Worley*, 490 F.3d at 904-905.

In contrast, when Arkansas had a 3% petition requirement for new political party recognition, even though there was sometimes a longer period of time to collect signatures (up to 150 days in 2006), and the petition signature deadline was not in the late summer of the year before the general election, no political party was successful in complying with Arkansas's 3% petition signature requirement. Circumstantial evidence and a knowledge of how political parties use legislative power suggests that this was a reason why the Arkansas General Assembly earlier

this year reinstated the never complied with 3% petition signature requirement with an emergency clause putting it into effect right away.

D. The three percent petition signature requirement for either new political party recognition in Arkansas or statewide independent candidates in Arkansas was never successfully complied with without court intervention.

Plaintiffs-Appellees also think it is important for the Eighth Circuit to note that, while the District Court found that another court in the Eastern District of Arkansas had noted that the Reform Party in 1996 was the only party to ever have successfully petitioned for party formation in Arkansas under the old 3% petition requirement (J.A. 135, ADD 37, PI order, ¶ 3(a)), this finding was based on a citation to an incorrect 2006 stipulation in *Green Party of Arkansas v. Daniels*, 445 F.Supp. 2d, at 1058, ¶ 6. It is a mystery why the Green Party and the Secretary of State in 2006 entered into an incorrect stipulation (unless they were thinking about the 3% vote retention requirement).[3] A close look at *Citizens to Establish a Reform Party in Arkansas* makes clear that the Reform Party did not comply in 1996 with the 3% petition requirement. As the District Court in 1996 noted in its decision, by the then petition deadline of January 2, 1996, ". . . the Reform Party representatives were required to file the Petition in the office of the Secretary of State, containing at least 21,505 signatures of qualified Arkansas electors. [A Petition] containing 28,546

[3] Ross Perot received 7.9% of the Arkansas vote for President in 1996, which would have more than met the 3% retention requirement in Arkansas for 1996.

signatures was filed with the Secretary of State by representatives of the Reform Party on January 2, 1996." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 693, ¶¶ 19 and 20. However, after the Secretary of State finished verifying the petitions the Reform Party had turned in, the Secretary of State on February 16, 1996, rejected the Reform Party petitions to qualify as a new political party because ". . . the Petition contained 17,262 valid signatures, which was 4,243 signatures short of the required 21,505." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 691, ¶ 2. Thus, the Reform Party did not qualify under the law then in place requiring valid petition signatures of 3% of the previous vote for governor, but was recognized and put on the Arkansas ballot in 1996 by court order because the District Court enjoined enforcement of the Arkansas law ". . . and Plaintiffs are deemed to have qualified as a new political party in view of the 17,262 signatures validated by Secretary of State Priest on February 16, 1996." *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 699, ¶ 21. Additionally, the District Court issued a permanent injunction order against Secretary of State to the effect that Plaintiffs were allowed ballot access for the November 1996 General Election and that the Reform Party could select its candidates for office by convention. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 701, ¶ 28(d). The foregoing is important because

the 3% requirement has never been complied with by any new political party or even an independent candidate.[4]

Past election experience has been found to be a guide as to the constitutionality of an election law, particularly if a party has qualified with some regularity as opposed to if it has not. *McLain v. Meier*, 637 F.2d at 1165 (which struck down an election law in reliance on evidence that only one political party had complied with the law since 1939 until 1980); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589-590 (which struck down an election law in reliance on evidence that no political party since the year 2000 had complied with the law); and *Storer v. Brown*, 415 U.S. 724, 742 (1974) (which sets forth a usage test). In judging the constitutionality of ballot access laws, a court should consider the historical election experiences and data in question. *American Party of Texas v. White*, 415 U.S. at 780-781; *Storer v. Brown*, 415 U.S. at 730; *Williams v. Rhodes*, *Id.*; and *McLain I*. As the the Eighth Circuit said in the *McLain I* case, ". . . our decision is influenced by the experience of other third party groups, which have not been

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[4] In *Citizens to Establish a Reform Party in Arkansas v. Priest, Id.*, the District Court found that statewide independent candidates were allowed under Arkansas law to appear on the ballot by submitting either 3% of the previous vote for governor in petition signatures or 10,000 petition signatures. However, it was noted that only two independent candidates had submitted the 10,000 petition signatures successfully, but none had met the 3% requirement. As noted in Plaintiffs' Exhibit "1" on pages 4-5 of Mr. Winger's affidavit (J.A. 434-435, ¶ 6), a third independent candidate in 2010 was able to meet the 10,000 petition signature requirement. (Also see, J.A. 105, 117, PI order, ¶¶ 15 and 64).

particularly happy in North Dakota . . . . Here, the record shows that third parties have not qualified for ballot positions in North Dakota with regularity, or even occasionally. The American Party is apparently the only third party to field party candidates in the past three decades." *McLain v. Meier*, 637 F.2d at 1165. Of course, in Arkansas both the Green Party (in 2008-2014 by petitioning) and the LPAR (in 2012-2018 by petitioning) have been able to gain political party recognition and ballot access while the party petition requirement was 10,000 petition signatures, but not when the party petition requirement was 3% of the total vote for governor in the last general election.

If the District Court found in 1996 that a 3% petition signature requirement along with a January 2 petition deadline in the general election year was unconstitutional and unnecessarily difficult to comply with, *Citizens to Establish a Reform Party in Arkansas v. Priest, Id.*,[5] it is not hard to imagine how any Court would have felt about a deadline four months earlier on September 5 of the year before the general election, let alone more than nine months earlier than the petition deadline of late June of the general election year in *Green Party of Arkansas v. Daniels, Id.*

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[5] *Citizens to Establish a Reform Party in Arkansas v. Priest, Id.* (appeal dismissed with conditions, 8th Cir. Case No. 96-3238, 8th Cir. Judgment entered on June 19, 1997) (J.A. 453, 462-463, Plaintiffs' Exhibit "3" and Defendant's Exhibit "11"). The aforesaid judgment of the Eighth Circuit has implications under the law of the case doctrine, *res judicata,* and collateral estoppel.

> Only in the election year itself do issues begin to coalesce such that minority parties with opposing or different views may emerge. At such an early point in the election year, it is often difficult to get volunteers from the voting public to become involved in the petition collection process. As noted by the court in *American Party v. Jernigan*, 424 F.Supp. 943, 949 (E.D. Ark. 1977), the filing dates of either March or April in a general election year "would normally pass before any real political activity or interest therein could be expected." See also, *New Alliance Party v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (early deadline places significant burden on minor political parties because voters are disinterested any length of time before an election). It is also more difficult to get volunteers for the minor parties, to attract media coverage, and to attract financial support early in the process, which impacts the petition process, and, therefore, ballot access, as well. See *Anderson v. Celebrezze*, 460 U.S. at 780, 792, 103 S.Ct. at 1565, 1572. Even the influence of increment weather is recognized as a rationale for finding early petition filing deadlines unconstitutional. E.g., *Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118, 121-122 (W.D. Okla. 1984) (inclement weather a hindrance to petition signature gathering, resulting in deprivation of constitutional rights). *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. at 698, ¶16.

Despite the foregoing cases, Secretary Thurston seems to believe a much earlier petition deadline is going to be upheld as necessary.

As the Eighth Circuit said in *McLain II* in analyzing a new ballot access law for third parties in North Dakota after the number of petition signatures had been greatly reduced:

> We have discussed above the burden on McLain's rights flowing from the difficulty of a third party to demonstrate its support over 200 days before the general election. Indeed, in McLain I we found unduly burdensome a filing deadline only 150 days before the general election when coupled with a requirement of 15,000 signatures. Having reduced the signature requirement to only 7,000 signatures, however, North Dakota's earlier filing deadline is considerably less burdensome on putative third party candidates than before. *McLain v. Meier*, 851 F.2d

at 1050.

It is also important to contrast the situation discussed above with the Arkansas ballot access law challenged herein as to the increase of more than 2.6 times in the number of petition signatures required from the previous requirement of 10,000 (and back to a percentage previously declared unconstitutional), rather than a decrease of more than 50% in the petition signature requirement as in the *McLain II* case. Further, the *McLain II* petition signature decrease of more than 50% was not coupled with a new and much earlier filing deadline set in the year before the primary and general elections as was done by Arkansas in February of 2019. It is not hard to imagine what the Eighth Circuit would have done in *McLain II* if North Dakota had moved the petition deadline to 424 days before the general election and/or increased the petition signature requirement by a factor of 2.6.

For an example of what would have happened as to the above question, it is instructive to consider what the Seventh Circuit did in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) in evaluating an Illinois ballot access law, wherein the deadline for independent nominating petitions was moved from 92 days before the November general election to 323 days before the November general election and 92 days before the March primary along with a doubling of the percentage of petition signatures required. Of course, the new law was held unconstitutional, with the Seventh Circuit noting that before ". . . 1975, independent candidates for the state

legislature qualified for the ballot occasionally, though not frequently[, but since] 1980, however—the year following the second of these changes—not a single independent candidate for state legislative office has qualified for ballot access." *Lee v. Keith*, 463 F.3d at 765. The result of the new more difficult law in Illinois in *Lee v. Keith* is similar to the result of the quasi-new 2019 law in Arkansas at issue, which was based on an earlier law in Arkansas held unconstitutional in 1996 and 2006—although then with less unreasonable petition deadlines as compared to now. Indeed, Arkansas has attempted to do in reverse what was condemned in *Lee v. Keith*, i.e., making a new law more difficult so as to eliminate a certain class of candidates. Arkansas has gone back to an old law, made it even more difficult with an unnecessarily early petition deadline, and, thus, returned to a time when no new political parties complied with the law for political party recognition and ballot access. As the Seventh Circuit stated: "The Supreme Court has held that ballot access history is an important factor in determining whether restrictions impermissibly burden the freedom of political association. . . ." *Lee v. Keith*, 463 F.3d at 769. At least in Illinois the effects of the new laws were not known for sure in advance, while in the Arkansas of 2019, there was an excellent view as to what would happen. Therefore, the District Court below did not erroneously declare that the Arkansas ballot access laws in question impose a severe burden.

E. Secretary Thurston's brief contains unsupported conclusions and misstatements—particularly in his interpretation of what the District Court held in its preliminary injunction order.

Perhaps the most significant, unsupported conclusion and misstatement is his assertion that the District Court preliminarily enjoined the modicum of support requirement on the basis of the LPAR's supposed lack of resources to comply with that requirement. In fact, the District Court based its order to a significant extent on the history of the 3% modicum of support petition requirement and the failure of other political parties to comply with it, the Eighth Circuit's decision in *Green Party of Arkansas v. Martin*, *Id.* upholding a 3% retention requirement for a political party (which would then require the party to nominate its candidates in the next election by preferential primary election rather than by nominating convention) and which recognized for a political party not getting 3% of the vote retention requirement the workability and prior compliance with a 10,000 petition signature ballot access requirement, the changes in the petition filing deadline, the 90-day petitioning period, the distance between the deadline and periods of time which are closer to the general election when interest in politics is greater, the total lack of ballot overcrowding in Arkansas, and the extent that the LPAR had partially completed its 2019 petition drive. No legal case exists where a political party petition deadline more than a year before the general election, and with a petition signature requirement that has been increased to a higher requirement never complied with,

has ever been held not to constitute a severe burden, let-alone being held constitutional.

The problems the LPAR was having with complying with the law were not the only reason the District Court granted the preliminary injunction. The District Court concentrated on the unnecessarily early petition deadline, the 90-day petitioning period, a general election more than a year away from the deadline, and the reinstated 3% petition signature requirement. Further, it should be noted--just as occurred at the preliminary injunction hearing on June 4, 2019, Secretary Thurston nowhere in his brief explains why it is necessary to put back in place a requirement that was never complied with and twice held unconstitutional. Thus, the District Court was left to speculate as to what the compelling state interest was by running through a list of possibilities.

The District Court also considered witnesses for Secretary Thurston, Peyton Murphy and Meghan Cox, who both admitted that complying with the Arkansas requirements as to a referendum on newly passed laws by petitioning, which only allows a 90-day petitioning period, although with a petition deadline much milder than we are concerned with here, had never been successful. Additionally, Ms. Cox from Arizona, a highly paid national political consultant for special interest groups that hire her and Lincoln Strategy Group to conduct petition drives for initiatives, measures, and candidates, indicated that she thought she could run a petition drive

for the LPAR that would be successful if they could pay her group $100,000 or under different scenarios somewhere between $55,000 and $98,000 (J.A. 337, 342-343, 345, PI Hr. Tr., p.158, lines 5-23, p.p. 163, line 7-p.164, line 24, P. 166, lines 11-21). This opinion was based on her work in initiative drives even though Arkansas initiatives are not limited to 90 days, have a 30-day cure period, and have no petition deadline more than a year away from the next general election. Ms. Cox did admit that she had never run a petition drive for a minor party or petitioned herself to get a political party on the ballot, didn't recall if any other states had 90 day petitioning limitations for political party status, and didn't know of a petition deadline more than a year before the general election or a signature requirement above 1% of the population (J.A. 360-361, PI Hr. Tr., p. 181, line 24-p.183, line 15).

Of further significance, Secretary Thurston's expert, Professor Hood, noted that the LPAR's candidates at the top of the ticket had received 1.52% of the total statewide vote in Arkansas in 2012, 2.03% in 2014, 2.64% in 2016, and 2.9% in 2018[6] (J.A. 122, ADD 24, PI order, ¶ 85), thus, showing an increasing progression toward the 3% retention requirement approved by the Eighth Circuit in *Green Party of Arkansas v. Martin, Id.* Faced with the probability that the LPAR would

[6] In other recent statewide races, the LPAR candidate has done better than 3%. The 2006 LPAR U.S. Senate candidate, Frank Gilbert, received 3.96% of the total vote. In 2018, the LPAR State Treasurer candidate, Ashley Ewald, received 29.1% of the total vote (J.A. 33, 62-64, 82-84, Declaration of Peyton Murphy, Exhibit "C", pp. 57-59, Exhibit "D", pp. 99-101).

successfully obtain the 10,000 petition signatures required for recognition once again, the General Assembly passed a law restoring the 3% petition requirement for new party recognition, passed another new law which required a petition signature deadline of September 5, 2019, and, after failing to pass an emergency clause on a first attempt, then approved an emergency clause on a second attempt so that the new ballot access laws would go into effect immediately rather than 90 days after the close of the current legislative session (J.A. 107, ADD 9, PI order, ¶ 24; J.A. 198-199, PI Hr. Tr., p. 19, line 5-p. 20, line 3). All the foregoing had the overwhelming support of Republican legislators against overwhelming opposition by Democratic legislators (J.A. 107, ADD 9, PI order, ¶23). As to the motivation for the new law, one can draw one's own conclusions. However, Secretary Thurston's argument that the District Court erroneously found the burden severe is not credible.

II. ARKANSAS'S BALLOT ACCESS REGIME IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST.

Recently, the Eighth Circuit held in an Arkansas case that ". . . the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State's compelling interest. *Moore v. Martin*, 854 F.3d at 1026. In no way has Secretary Thurston done this in his brief. The problem Secretary Thurston has is that when the Eighth Circuit upheld the 3% retention requirement as to a new party

obtaining at least 3% of the vote for governor, they did so partly based on the fact that a new political party could then petition again for ballot access by turning in 10,000 petition signatures of Arkansas registered voters by a deadline that was at least at that time set during the general election year. *Green Party of Arkansas v. Martin, Id.* The 10,000 petition signature requirement for new political party ballot access and recognition was a constitutional least drastic means to serve Arkansas' compelling state interests. The District Court's use of the 10,000 petition signature requirement in its preliminary injunction order was not based on speculation as to what would be necessary and a least drastic means to achieve a compelling state interest, nor was it something new by the District Court as stated in Secretary Thurston's brief. The election laws challenged herein are not narrowly tailored to serve a compelling governmental interest. There was no necessity for the petition signature requirement being amended back to what had never been complied with.

There is a recurring problem in Arkansas of new attempts to reinstitute previously declared unconstitutional election laws. In a second appeal from a District Court decision which declared a March 1 deadline during the general election year to be unconstitutional for independent candidates, the Eighth Circuit recently dismissed an appeal because it had become moot because the General Assembly had amended the deadline by moving it back to May 1. However, the Eighth Circuit declined to vacate the District Court judgment and let it stand because

of the General Assembly having previously changed the law in the past, then having the law successfully challenged as unconstitutional, and despite then amending the law and mooting the appeal, the District Court judgment was not vacated and let to stand because the public interest was at stake. *Moore v. Thurston*, 928 F.3d 753, 757-758 (8th Cir. 2019). The election laws challenged herein are not narrowly tailored to serve a compelling governmental interest. They are rather tailored to serve the interest of keeping the LPAR off the 2020 Arkansas ballot.

"As our past decisions have made clear, the significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest [citations omitted]. If the state has open to it a least drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental liberties. *Shelton v. Tucker*, 364 U.S. 479 [1960]." *Kusper v. Pontikes*, 414 U.S. at 58-59. In deciding what the "least drastic or restrictive means," is, it is necessary for the Court to "...consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classifications." *Storer v. Brown*, 415 U.S. at 730, citing *Williams v. Rhodes, Id.*, and *Dunn v. Blumstein*, 405 U.S. 330 (1974).

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER WAS NARROWLY TAILORED TO ADDRESS THE UNCONSTITUTIONAL EFFECTS OF THE CHALLENGED ARKANSAS BALLOT ACCESS LAW WHICH REQUIRED VALID PETITION SIGNATURES FROM ARKANSAS REGISTERED VOTERS OF AT LEAST 3% OF THE TOTAL VOTE CAST FOR GOVERNOR IN THE LAST ELECTION, ALL OF WHICH WERE TO BE COLLECTED IN NO MORE THAN NINETY DAYS AND TURNED IN FOR THE 2020 ARKANSAS GENERAL ELECTION CYCLE NO LATER THAN SEPTEMBER 5, 2019.

The District Court's relief granted in its preliminary injunction order is both conservative and narrowly tailored in only restoring the 10,000 petition signature requirement that was in effect for the general elections from 2008 through 2018 and as of the time of the Eighth Circuit's decision in 2011 in *Green Party of Arkansas v. Martin, Id.,* rather than also at this time changing the petition signature deadline or 90 day gathering period, as well as not disturbing any Arkansas election dates (J.A. 157-158, ADD 59-60). The District Court in its preliminary injunction order concluded that Arkansas's entire ballot access scheme, as recently amended this year, imposed a severe burden upon the associational rights of the plaintiffs under the First and Fourteenth Amendments. The District Court then fashioned a remedy that went "no further than necessary to address the constitutional wrong supported" by the record. *Gerlich v. Leath*, 152 F.Supp.3rd 1152, 1180 (S.D. Iowa 2016) (citations omitted). As the District Court on August 12, 2019, said in its order denying a stay request pending appeal, ". . . the narrowest form of relief to remedy the burdens imposed by Arkansas's entire ballot-access scheme upon plaintiffs was

to enjoin the three percent requirement, rather than adjusting the election calendar (J.A. 175, Order at p.7). Actually, it was the new law challenged herein that restored an old ballot access requirement never complied with and also interjected other requirements that made matters worse and caused disruption of the LPAR's already planned endeavor to once again satisfy Arkansas' ballot access scheme for recognition of minor parties as was considered by this Court in 2011. *Green Part of Arkansas v. Martin, Id.*

IV. THE DISTRICT COURT PROPERLY CONSIDERED ALL FACTORS IN GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION BECAUSE THERE IS NO HARM TO THE STATE OR THE PUBLIC INTEREST WHICH WOULD OUTWEIGH THE HARM TO THE LIBERTARIAN PARTY OF ARKANSAS AND ITS SUPPORTERS AND POTENTIAL VOTERS.

While Secretary Thurston argues that the District Court's preliminary injunction order would result in harm to Arkansas and the public interest which would outweigh the harm to the LPAR, in fact, the result would be the opposite. What would happen as a result of the preliminary injunction order being upheld and affirmed by this Court is the same as happened in 2018 and 2016, when the LPAR successfully petitioned for the 10,000 valid petition signatures needed, or in 2006, when the Green Party, or in 1996, when the Reform Party failed to meet the 3% petition requirement and were put on the ballot by the Court. Because the LPAR will be a new political party under Arkansas law, the State will not provide the LPAR with preferential primary elections because, as a new political party, the

LPAR will nominate candidates by nominating convention without any expense to Arkansas.

In contrast, the harm to the LPAR and thousands of Arkansas petition signers would be the negation of Secretary Thurston's now completed obligation to validate for sufficiency the 18,702 petition signatures of Arkansas voters turned in on June 28, 2019 (J.A. 160-161). Validating these signatures determined that there were more than 10,000 valid signatures of Arkansas voters on the LPAR petitions. Thus, there are more than enough valid signatures under a law that has been complied with by new political parties, rather than the challenged 3% petition signature requirement which has never been complied with without a court order. Not only would there be harm to the LPAR, but there would be harm to the Arkansas public interest and all Arkansas voters who would be denied a further choice in the 2020 general election. The evidence below was very clear that the Arkansas ballot was not overcrowded, while lacking in many general election offices a choice for voters. (J.A. 456, Plaintiffs' Exhibit "5"). As noted above, the interest of the Arkansas public has recently been a factor considered by the Eighth Circuit in dismissing the Secretary of State's appeal as moot, while letting stand a District Court decision.

> [T]he public interest weights in favor of allowing the district court's judgment to stand. As we previously observed in Moore, 854 F.3d at 1026, independent candidates and voters have repeatedly—and successfully—challenged Arkansas's ballot-access requirements. We thus conclude that the

> public interest is best served by a substantial body of judicial precedence limiting the burden that those requirements may place on candidates' and voters' First and Fourteenth Amendment rights. *Moore v. Thurston*, 928 F.3d at 757.

"The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" (internal citations omitted). "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. at 787-788.

CONCLUSION

The District Court correctly found that the challenged ballot access laws, when looked at collectively and without using any litmus paper test, imposed a severe burden on Plaintiffs and were not narrowly tailored to serve a compelling governmental interest. In response, the District Court entered a preliminary injunction order which was narrowly tailored to address the effects of the challenged ballot access laws in a manner that was least disruptive for the current election cycle and which balanced the interest of the parties and the public.

WHEREFORE, premises considered, Plaintiffs-Appellees request that the Court of Appeals affirm the decision of the District Court in granting Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this 21st day of October, 2019.

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Pursuant to Fed. R. App. P. 28(a)(10) and 28(b), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B).

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s/ James C. Linger
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