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)

Reply Brief of Defendant-Appellant

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INTRODUCTION

The district court concluded that Arkansas's requirement that groups seeking across-the-board ballot access collect signatures equal to just 1.5% of registered voters was a severe burden. Unable to square that conclusion with precedent, the district court declined to conduct the required eligible-pool analysis and declared that Arkansas's electoral timetable rendered that requirement unconstitutional. Yet the district court declined to tailor an injunction addressing that supposedly problematic timeline; instead, it imposed a half-a-percent signature requirement. Those errors warrant reversal.

Nothing the Libertarian Party of Arkansas says changes this. To the contrary, LPAR does not even attempt to justify the district court's failure to conduct an eligible-pool analysis, leaps directly to claiming that Arkansas's laws fail compelling-interest review, and ultimately rests its claims on the allegedly problematic nature of Arkansas's decision to move its electoral timeline to participate in Super Tuesday. As such, LPAR's briefing merely underscores why reversal is warranted.

ARGUMENT

I. Because LPAR makes no effort to show that Arkansas's ballot-access laws impose a severe burden, it is not likely to succeed on the merits.

LPAR "proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). Consequently, it does not discuss whether Arkan-

sas's ballot-access laws are severely burdensome and ignores the rule that absent evidence those laws "severely burden [LPAR], the State need not assert a compelling interest." *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 458 (2008). Nor does it otherwise grapple with precedent upholding similar regulations or undisputed evidence that a reasonably diligent party could comply. Those errors further underscore why this Court should reverse.

A. LPAR applies the wrong legal standards.

LPAR's misapplication of the legal standard is twofold. *First*, LPAR misapprehends the preliminary-injunction standard. As the movant, LPAR was required to make a "clear showing" that it was likely to succeed on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In fact, because it sought "to enjoin enforcement of a validly enacted statute," LPAR needed to make "a more rigorous threshold showing" than usual. *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053-54 (8th Cir. 2014). But like the district court, LPAR inverts that burden and argues that Arkansas is required to demonstrate that an injunction is not warranted. *Compare* LPAR Br. 21 (arguing Arkansas "is not likely to succeed on the merits of [t]his appeal"), *and id.* 25 (same), *with* ADD41 (treating lack of evidence as affirmative evidence of severe burden). That error highlights how weak LPAR's claims are, and it underscores that the district court misapplied the preliminary-injunction standard.

Second, LPAR ignores the rule that only laws that "severely burden" a challenger are subject to the compelling-interest standard. *Wash. State Grange*, 552 U.S. at 458; *see* Christopher Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 318 (2007) (synthesizing precedent as applying "strict scrutiny" only to "[l]aws that effect a 'severe' burden"). "Lesser burdens . . . trigger less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Yet LPAR never addresses whether Arkansas's laws impose a severe burden. *See* LPAR Br. 4 (jumping immediately to "whether the Arkansas requirements in question are necessary to further a compelling state interest"); *see also id.* 13, 18, 20-22, 43 (omitting burdensomeness discussion). By skipping that inquiry, LPAR effectively concedes that it failed to make that showing and cannot prevail under the appropriate standard.

At best, LPAR suggests that *Moore v. Martin*, 854 F.3d 1021 (8th Cir. 2017), somehow supports its approach. *See* LPAR Br. 18-19. But *Moore* correctly recognized that courts must "first determin[e] whether the challenged statute causes a burden of some substance on a plaintiff's rights," and only "if so" ask whether that provision "is narrowly drawn to serve a compelling state interest." 854 F.3d at 1026 (quoting *Libertarian Party of N.D. v. Jaeger* (*LPND*), 659 F.3d 687, 693 (8th Cir. 2011)). Hence, as LPAR has not shown that Arkansas's ballot-access laws

"impose severe burdens," Arkansas need not show they are "narrowly tailored to serve a compelling state interest." *Clingman v. Beaver*, 544 U.S. 581, 587 (2005).

B. The modicum-of-support requirement is not severely burdensome, and LPAR does not demonstrate the contrary.

Arkansas's modicum-of-support requirement is not severely burdensome. Since *Jenness v. Fortson*, courts have generally found that signature requirements equal to or less than 5% of the pool of those eligible to sign do not impose a severe burden. *See* 403 U.S. 431, 432 (1971) (upholding requirement that "nominating petition [be] signed by at least 5% of the number of registered voters at the last general election for the office in question"). LPAR relegates decades of precedent to a single, three-page string cite. *See* LPAR Br. 28-31. It likewise does not grapple with undisputed evidence that a reasonably diligent group could collect signatures equal to 1.5% of registered voters.

1. Signature requirements equaling 5% or less of the eligible pool are generally not severely burdensome.

To determine burdensomeness, the district court was required to "determine[] the percentage of support" necessary to comply with Arkansas's modicum-of-support requirement "based on the 'eligible pool.'" *LPND*, 659 F.3d at 695 (quoting *Storer v. Brown*, 415 U.S. 724, 739 (1974)). Under Arkansas's modicum-of-support requirement, groups seeking across-the-board ballot access must collect signatures equal to 3% of the votes cast in the last gubernatorial election; here, that

equals 26,746 signatures. ADD4. Signatures can be from any registered voter, and there is no limit on how many petitions a voter may sign, no geographic limitations, nor any requirement that a signatory not participate in another party's primary. Ark. Code Ann. 7-7-205(a)(2); *see* JA271-73 (testifying to lack of such limitations); *see also Jenness*, 403 U.S. at 442 (discussing legal effect of lack of arbitrary restrictions). Thus, the eligible pool is all 1,750,077 registered Arkansas voters. *See* ADD19. That figure is roughly *double* the number of votes cast in the 2018 gubernatorial election, and it means that—properly expressed as a percentage of the eligible pool—Arkansas law requires groups to collect signatures from only 1.5% of eligible signatories.[1] *See* Appellant's Br. 31-33.

LPAR does not grapple with the eligible-pool question. Like the district court's order, the phrase "eligible pool" does not appear in LPAR's brief. Instead, echoing the district court's focus on the statutory 3% figure, LPAR argues that 26,746 signatures is just too much. *See, e.g.*, LPAR Br. 23-24. No case supports that approach. To the contrary, even the cases that LPAR relies upon underscore the importance of the eligible-pool analysis. *See* LPAR Br. 38-39. For instance, LPAR cites *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), but that case properly "converted" the challenged requirement "to a percentage of registered voters eligible to sign [a ballot-access] petition." 463 F.3d at 769. That analysis revealed

[1] 26,746 (signatures needed) ÷ 1,750,077 (eligible pool) ≈ 0.015

that—as here—the requirement was less demanding than it appeared. *See id.* (10% requirement equaled 5.7% of the eligible pool). And while *Lee* ultimately invalidated the provision at issue there, that conclusion rested on a comparison between that properly converted figure and requirements upheld elsewhere. *See id.* at 769-70.

Neither LPAR nor the district court conducted that analysis. That failure is critical because no Supreme Court or court of appeals decision has ever suggested that conditioning across-the-board ballot access on collecting signatures equal to just 1.5% of the eligible pool is severely burdensome. To the contrary, as the First Circuit has explained, "[n]either the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much." *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016); *see also Storer*, 415 U.S. at 738-39 (suggesting that 5% or less of the eligible pool does not impose a severe burden); Appellant's Br. 33-36 (discussing other decisions).

LPAR quibbles (LPAR Br. 28-31) with the details of the decisions that the First Circuit and Arkansas cited, but it cannot dispute that those cases highlight a broad consensus that signature requirements equal to 5% or less of the eligible pool fall "below the upper threshold of reasonable under Supreme Court precedent." *LPND*, 659 F.3d at 696. Indeed, at best, LPAR suggests that two cases striking

down Illinois's ballot-access regime undermine the First Circuit's conclusion. *See* LPAR Br. 27-28. But neither cited case suggests that a requirement of 5% or less is severely burdensome—let alone that a 1.5% requirement is severely burdensome or that 1.5% in combination with deadlines like Arkansas's are severely burdensome.

For instance, *Illinois Board of Elections v. Socialist Workers Party* held that requiring candidates or parties seeking local office in Chicago to meet a 5% signature requirement while requiring statewide parties or candidates to collect only 25,000 signatures violated equal protection. 440 U.S. 173, 175-77, 186-87 (1979). It did not conclude that the 5% requirement itself was problematic. It held that absent a compelling reason, Illinois could not require Chicago office seekers to obtain "substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office." *Id.* at 177. That holding has no bearing here.

Similarly, *Norman v. Reed* involved an Illinois law that incongruously required the plaintiffs "to gather twice as many signatures to field candidates in Cook County as they would need statewide." 502 U.S. 279, 293 (1992). Relying on *Socialist Workers Party*, the Court found that requirement problematic. *See id.* More importantly for this case, however, *Norman* also *rejected a challenge* to a requirement that suburban candidates collect 25,000 signatures or an amount equal to

"slightly more than 2% of suburban voters" because *Jenness* had upheld a "considerably more" demanding 5% requirement. *Id.* at 295. Thus, *Norman* underscores the consensus that requirements like Arkansas's modest signature threshold are not severely burdensome.

LPAR's reliance on *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) (*McLain I*), is equally misplaced. *See* LPAR Br. 28, 37-38. To start, that case appears to rest on the same outdated standard of review that LPAR seeks here. *See McLain I*, 637 F.2d at 1163 ("because voting is of the most fundamental significance," ballot-access laws almost always receive strict scrutiny (quotation marks omitted)). That problem aside, *McLain I* did not conclude that the 15,000-signature requirement in that case, which equaled roughly 3.3% of the eligible pool, is a severe burden warranting invalidation. *See id.* at 1162. Indeed, *McLain I* acknowledged that *Jenness* upheld a more demanding requirement. *See id.* at 1163 ("Admittedly, argument can be made that North Dakota's 3.3% signature requirement is valid."). Instead, despite "the facial validity of [that] signature requirement," *McLain I* ultimately held that North Dakota's *filing deadlines* made its law unconstitutional. *Id.* at 1164.

This Court's subsequent decision in a second *McLain v. Meier* case also further underscores the weakness of LPAR's position. 851 F.2d 1045 (8th Cir. 1988) (*McLain II*). There, North Dakota had moved its primary earlier, which resulted in

an even *earlier* signature-filing deadline than in *McLain I*. *Id.* at 1047. But it had simultaneously reduced the signature requirement by more than half to 7,000. *See id.* Because voters could sign any number of petitions, the new requirement meant that those seeking access needed to collect signatures from approximately 1.5% of the eligible pool. *See id.* at 1047, 1049; *see also McLain I*, 637 F.2d at 1162. That lower requirement meant that the "earlier filing deadline [wa]s considerably less burdensome," and this Court upheld North Dakota's ballot-access regime. *McLain II*, 851 F.2d at 1050. Applying those principles here, Arkansas's regime (which similarly imposes no arbitrary restrictions on who can sign petitions and requires signatures from just 1.5% of voters) does not impose a severe burden and survives. And nothing in the district court's order—since it neither analyzed the eligible pool nor considered Arkansas's deadlines in conjunction with the resulting eligible-pool figure—suggests otherwise. Indeed, the district court's failure to consider the eligible pool undermines its entire order.

Even less meritorious is LPAR's suggestion that *Green Party of Arkansas v. Martin,* 649 F.3d 675, 684 (8th Cir. 2011) (*GPAR*) precludes requiring more than 10,000 signatures. *See* LPAR Br. 24. In upholding Arkansas's 3% retention requirement, *Martin* noted "the many alternative paths Arkansas provides to the ballot," including the 10,000-signature requirement. *GPAR*, 649 F.3d at 684, 687. It did not find that *any* more demanding signature requirement would impose a se-

vere burden, be unconstitutional, or undermine Arkansas's 3% retention requirement. In fact, *GPAR* expressly recognized that courts have long upheld "far more burdensome ballot access schemes." *Id.* at 686-87; *see also Swanson v. Worley*, 490 F.3d 894, 896 (11th Cir. 2007) (upholding 3% signature requirement with 20% retention requirement). Moreover, Arkansas's signature requirement remains less burdensome than the retention requirement since it is easier to collect 26,746 signatures than to win the same number of actual votes.

Recognizing the district court's opinion cannot be squared with precedent, LPAR repeatedly falls back on two decisions by the same district court. *See* LPAR Br. 2, 5, 12, 21, 23-25, 33, 36 (citing *Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006)); *id.* ii, 2, 12, 19, 21, 23-26, 34-37 (citing *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996)). Those decisions are far from persuasive.[2] Most importantly, neither case conducted any sort of eligible-pool analysis. Thus, like the decision below, they failed to consider the broad consensus—that existed even then—upholding laws requiring signatures equal to or less than 5% of the eligible pool. *See Libertarian Party of*

[2] In a cursory footnote, LPAR vaguely suggests that *Priest* somehow "has implications under the law of the case doctrine, *res judicata*, and collateral estoppel." LPAR Br. 36 n.5. While it is not clear what LPAR means, this Court generally "refuse[s] to address" issues "mentioned in [a] brief only by way of a footnote." *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.4 (8th Cir. 2011); *accord Koehler v. Brody*, 483 F.3d 590, 599 (8th Cir. 2007).

Fla. v. Florida, 710 F.2d 790, 792 (11th Cir. 1983) ("[a]pplying what appear[ed] to be rather settled law" to uphold 3% requirement).

Decades of settled precedent establish that Arkansas's modicum-of-support requirement does not impose a severe burden, and the district court erred in failing to conduct the eligible-pool analysis or consider that precedent. Nothing LPAR cites changes that.

2. LPAR offers no evidence that the modicum-of-support requirement imposes a severe burden.

LPAR does not point to any evidence that justifies the district court's break from consistent precedent. To the contrary, the record establishes that "a reasonably diligent third party candidate [could] be expected to satisfy" Arkansas's modicum-of-support requirement. *McLain II*, 851 F.2d at 1050 (brackets and quotation marks omitted). In particular, Meghan Cox gave expert testimony that a group could collect the required number of signatures for about $55,000 using nine full-time canvassers (40% paid and 60% volunteer) in a 75-day petition drive. JA334-35, 342-43; *see* Appellant's Br. 16-17, 38-41. LPAR did not present any evidence disputing that testimony or show that it lacked those resources. And as the First Circuit concluded when confronted with a similar scenario, "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." *Gardner*, 843 F.3d at 30.

Yet the district court rejected Cox's testimony based on a handful of unsupported *sua sponte* calculations. *See* ADD39-41; *see* Appellant's Br. 38-40. LPAR tellingly does not defend those calculations. Instead, it simply takes misguided swipes at Cox's experience, wrongly implying that she has worked only on "initiative drives." LPAR Br. 42. But even the district court acknowledged her immense ballot-access experience. ADD19; *see* JA308 ("I specialize as a national political consultant. I specialize in ballot access. I've worked in 50 states, and I've qualified candidates, issues and measures in 34 states.").

Beyond that, LPAR scarcely tries to fill the evidentiary holes in the district court's reasoning. The closest it comes is claiming that the district court "took extensive testimony as to costs and past and present efforts." LPAR Br. 15. Yet the district court's findings on this point amount to little more than a single sentence, noting "that each of the LPAR's past petition drives has required at least $30,000 in cash plus a considerable volunteer effort." ADD10. That hardly demonstrates that LPAR—let alone a reasonably diligent party—could not meet Cox's projections. The district court, moreover, conceded as much by erroneously relying on an evidentiary void to establish a lack of resources. *See* ADD41. And despite quibbling over the importance of that finding, LPAR does not dispute the error. *See* LPAR Br. 40.

Nor does LPAR dispute that the district court erred in focusing—not on whether a reasonably diligent party could be expected to satisfy Arkansas's requirement but—on its view that "LPAR would not be able to meet the 26,746 signature requirement." LPAR Br. 15; *cf. id.* 40 ("the District Court based its order to a significant degree on the history of the 3% requirement"). That concession is unsurprising given this Court's holding that constitutionality depends not on whether a particular group could meet Arkansas's requirement, but whether a "reasonably diligent third party candidate" could. *McLain II*, 851 F.2d at 1050 (brackets and quotation marks omitted).

To defend the district court's order, LPAR instead falls back on what it wrongly claims is Arkansas's history of denying ballot access. *See, e.g.*, LPAR Br. 26-27, 32-33. In fact—illustrating just how fundamental this point is to its argument—LPAR dedicates multiple pages to disputing the district court's finding that the Reform Party met the 3% requirement in 1996. *See* LPAR Br. 33-35 & nn.3-4 (declaring *sans* evidentiary citation that the district court relied on an erroneous stipulation). But history is never decisive in ballot-access cases. *See Storer*, 415 U.S. at 742 ("[p]ast experience" does not "unerring[ly]" resolve constitutionality of ballot-access law).

Instead, history will, at best, corroborate what other evidence has demonstrated. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582, 588-89

(6th Cir. 2006) (concluding that Ohio's election deadlines severely burdened minor parties before corroborating that suggestion with history). Thus, as *Swanson v. Worley* explained, a party challenging a modicum-of-support requirement cannot "sidestep the clear precedent in *Jenness*, by pointing to evidence that few independent and minor party candidates have been able to obtain access." 490 F.3d at 909-10. Indeed, applying that rule, *Swanson* went on to uphold Alabama's 3% signature requirement "[b]ased on [the] long line of precedent" sustaining more demanding requirements. *Id.* at 904. And while LPAR tries to distinguish that case based on Alabama's failure to cap the number of days for signature collection (LPAR Br. 32), that claim merely underscores that—at best—the district court enjoined the wrong provision.

Further, LPAR does not point to evidence that third parties have regularly *tried and failed* to comply with Arkansas law. It relies instead on the mere absence of additional third parties on the ballot and the fact that (except for the Reform Party) third parties have not collected signatures equal to 3% of the vote. *See* LPAR Br. 3, 11, 26-27, 32-33. But the absence of additional third parties could just as easily be due to "a lack of interest" in the relevant elections and does not demonstrate that parties tried and failed to comply. *Parker v. Duran,* 180 F. Supp. 3d 851, 859 (D.N.M. 2015), *aff'd sub nom. Parker v. Winter*, 645 F. App'x 632, 635 (10th Cir. 2016) (absent evidence of how many candidates tried and failed to com-

ply, mere absence means nothing); *see also LPND*, 659 F.3d at 696 (absent evidence of trying and failing, "[t]here is no historical evidence"); *Swanson*, 490 F.3d at 910 (similar). In fact, the only contrary example that LPAR cites is the Green Party's haphazard 2006 petition drive where it set a goal well below 3%, submitted signatures in advance of the deadline, and held its resources "for court activity." *Daniels*, 445 F. Supp. 2d at 1059. Like LPAR's slapdash efforts here, that does not demonstrate that a reasonably diligent party could not comply.

Finally, LPAR erroneously claims that Arkansas's modicum-of-support requirement is unconstitutional because it is more demanding than requirements elsewhere. *See* LPAR Br. 27. Relying on an affidavit from newsletter editor Richard Winger, LPAR suggests that Utah's lower signature requirement shows that Arkansas's requirement is unnecessary. *See id.* The *Swanson* plaintiffs made a similar argument with testimony from the same witness, "point[ing] to Winger's testimony that Alabama had the second toughest ballot access restrictions among all states" and claiming that testimony demonstrated Alabama's signature requirement was unconstitutional. 490 F.3d at 910. But as *Swanson* explained, "the legislative choices of other states are irrelevant," and constitutionality does not depend on "whether Alabama's scheme is the best relative to other states." *Id.* To the contrary, "the Supreme Court has upheld a broad array of election schemes," and "a court is 'no more free to impose the legislative judgments of other states on a

sister state than it is free to substitute its own judgment for that of the state legislature." *Id.* (quoting *Libertarian Party of Fla.*, 710 F.2d at 794).

In the end, LPAR does not cite anything supporting the district court's decision to depart from the well-established consensus that regulations like Arkansas's requirement do not impose a severe burden. Consequently, this Court should reverse because the district court applied the wrong legal standard.

C. LPAR does not explain why the timing provisions are severely burdensome.

To defend the district court's timing-provisions analysis, LPAR mischaracterizes Arkansas's electoral calendar and argues the timing provision uniquely disadvantage third parties. *See* LPAR Br. 5-6, 10-12, 25, 39, 45. In particular, LPAR complains that the deadline for groups to turn in party petitions disadvantages it because that deadline "makes them select the parties' final candidates at a time when the major parties' elections process is still months away." *Id.* 11-12.

But the filing deadline for candidates—major party, minor party, independent, or write-in—is the same. *See* Ark. Code Ann. 7-7-203(c) (establishing deadline); *see also id.* 7-5-205(3) (applying deadline to write-in candidates); *id.* 7-6-102(a)(1) (same, existing-party candidates); *id.* 7-7-103(a)(1) (same, independent candidates); *id.* 7-7-205(c)(3) (same, new-party candidates); *id.* 7-10-103(b)(2) (same, nonpartisan-office candidates). The party-petition deadline is set—as it has long been—about two months before that filing period to ensure that potential can-

didates know in advance whether a party has qualified for the ballot or they will need to run with another party or independently. *See* Appellant's Br. 9 (detailing petitioning deadline's long history).

Moreover, the requirement that new parties hold a convention rather than a primary to choose their candidates does not change the analysis because they may hold that convention as late as the day of the primary. *See* Ark. Code Ann. 7-7-205(c)(2)(B); *see LPAR v. Martin*, 876 F.3d 948, 950-52 (8th Cir. 2017). Indeed, requiring LPAR's candidates to file and seek nomination at the same time as *everyone else* hardly imposes a unique or severe burden. *See Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184-86 (5th Cir. 1996); *see also Swanson*, 490 F.3d at 908 ("Although the Constitution bars states from discriminating against independent and minor party candidates, it does not mandate that states give independent and minor party candidates preferential treatment over major party candidates.").

To claim the opposite, LPAR relies on language derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), suggesting that earlier deadlines can particularly impact third-party candidates. *See* LPAR Br. 19-20. But "*Anderson* is different" because that case "involved a presidential election where the Supreme Court noted that 'the State has a less important interest in regulating Presidential elections than statewide or local elections.'" *Swanson*, 490 F.3d at 907 (quoting *Anderson*, 460 U.S. at 795). Recognizing that difference, Arkansas law treats presidential races

differently, and this case is not about presidential elections. *See* Ark. Code Ann. 7-8-302.

Further, *Anderson*'s language about later developments generating interest is largely about *candidates*—not parties seeking across-the-board access. *See Anderson*, 460 U.S. at 792. Neither LPAR nor the district court points to anything suggesting that voters' willingness to sign a party petition (that does not bind them to do anything) depends on the identity of the major party's nominees. To the contrary, the record demonstrates that while some people wondered why LPAR was petitioning when it was, "people [we]re still willing to sign the petition." JA205. And that's not surprising since, as Cox explained, unlike even "ten years ago," the "24/7 news cycle" has increased voters' political engagement and "[p]olitics are everywhere." JA328-29; *see also id.* (explaining that well in advance of Arkansas's petitioning deadline, voters "[we]re engaged and paying attention" and that the Democratic presidential primary was already "in full swing").

The record similarly does not support any suggestion that the 90-day signature-collection window imposes a severe burden. *See* LPAR Br. 40-43. LPAR does not dispute Cox's testimony that it could satisfy Arkansas law by running a 90-, 75-, or 60-day signature-collection drive. JA320-21; *see* JA333-43. "[W]hen you are asking to get on the ballot as a party," such a collection drive is "a relatively easy ask," because "there's not a lot of controversy in that." JA333. Hence,

LPAR failed to show that Arkansas's timing provisions imposed a severe burden, let alone a uniquely severe burden on it, and the district court erred as a matter of law in concluding the contrary.

D. LPAR ignores the important regulatory interests that justify Arkansas's ballot-access laws.

Because Arkansas's ballot-access laws do not impose a severe burden, Arkansas "need not assert a compelling interest." *GPAR*, 649 F.3d at 685 (quoting *Wash. State Grange*, 552 U.S. at 458). Instead, Arkansas's "important regulatory interests" suffice. *Id.* (quoting *Clingman*, 544 U.S. at 593); *see* Elmendorf, *supra*, 156 U. Pa. L. Rev. at 330 (explaining that review "in nonsevere-burden cases," like here, is "something like rational basis review"). The challenged provisions easily survive that standard, and LPAR makes little effort to demonstrate otherwise.

Like the district court, LPAR mischaracterizes the relevant standard and Arkansas's interests. *See* LPAR Br. 22, 41; ADD48-52. In particular, LPAR suggests that Arkansas has no interest in requiring more than 10,000 signatures because that figure already ensured parties enjoy a modicum of support. *See* LPAR Br. 22. But "the mere identification of a less burdensome alternative is not dispositive in election cases" because a challenger could always identify another threshold that might accomplish similar goals. *LPND*, 659 F.3d at 698; *accord McLain II*, 851 F.2d at 1050 ("any percentage or numerical requirement . . . is to some extent necessarily arbitrary," and "[a] litigant could always point to a . . .

slightly" lower requirement that "would not significantly alter a state's interests" (quotation marks omitted)). Instead, to survive, Arkansas's requirement only needs to be rationally related to an important state interest, and Arkansas's requirement is related to its interest in preventing frivolous candidacies. *See Swanson*, 490 F.3d at 912 (States do not need to make a particularized showing or history of overcrowding and frivolous candidacies because legislatures "should be permitted to respond to potential deficiencies" (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986))); *see also* Appellant's Br. 11 & n.1 (discussing LPAR's practice of placing frivolous candidates on ballot).

With respect to the timing provisions, LPAR ignores Arkansas's important interest in "ensur[ing] elections are fair, honest, and orderly." *LPND*, 659 F.3d at 693. Those provisions ensure that Arkansas has adequate time to police petition fraud and that all candidates file in an orderly manner regardless of party affiliation. *See* Appellant's Br. 45-46. The earliness of Arkansas's deadlines flows from Arkansas's desire to participate in Super Tuesday, and Arkansas undoubtedly has a "legitimate and compelling" interest in moving its filing deadlines to account for that rescheduled primary. *McLain II*, 851 F.2d at 1050.

Finally, in a last ditch effort to justify greater scrutiny, LPAR claims that the challenged provisions are the product of a secret desire to harm it. *See* LPAR Br. 43. LPAR does not point to any evidence supporting that claim. Instead, it just

announces that because Republicans currently control the Arkansas General Assembly, recent changes in Arkansas's election laws must be designed to keep LPAR off the ballot. Such unsupported "speculation" cannot justify the application of greater scrutiny. *GPAR*, 649 F.3d at 684 (rejecting similar unsupported claim that Arkansas's then-Democratic controlled legislature adopted the retention requirement for discriminatory reasons). And in any event, as discussed above, far from singling out LPAR, Arkansas's ballot-access laws apply equally to all parties and, at worst, "in practice" might permissibly "favor the established Republican and Democratic parties." *Id.* LPAR fails to establish that greater scrutiny applies or that the challenged provisions are irrational and unconstitutional.

II. Alternatively, LPAR ignores the compelling interests to which Arkansas's ballot-access laws are narrowly tailored.

Even if the compelling-interest standard applies, LPAR is not likely to prevail on the merits. The district court only concluded otherwise by taking an erroneously crabbed view of the sorts of compelling interests that justify ballot-access regulations. *See* Appellant's Br. 47-49. The district court, for instance, erroneously refused to credit Arkansas's "interest in eliminating frivolous candidates." *LPND*, 659 F.3d at 697. Instead, it was only willing to consider whether Arkansas's modicum-of-support requirement prevented overcrowding. *See* ADD51; Appellant's Br. 47-48.

To defend the district court's conclusion, LPAR highlights another error in the district court's reasoning, its conclusion that Arkansas had not adequately justified its decision to *change* its legal requirements. *See* ADD51; LPAR Br. 28. Indeed, LPAR repeatedly contends that Arkansas does not point any "change in circumstances" that justifies its decision to change its ballot-access laws and that renders those changes unconstitutional. LPAR Br. 2; *see id.* 14. But no case imposes such a requirement.

Certainly nothing in *Lee v. Keith*—the case LPAR relies upon for its approach—supports such a requirement. *See* LPAR Br. 38-39. The problem in that case was that Illinois had both the highest signature requirement *and* the earliest filing deadline in the country. 463 F.3d at 769. By contrast, Arkansas's modicum-of-support requirement, requiring only 1.5% of the eligible pool, falls "well below the upper threshold of reasonable." *LPND*, 659 F.3d at 696; *see Lee*, 463 F.3d at 770 (noting that "early filing deadline coupled with a less burdensome signature requirement may well pass constitutional muster").

Instead, as long as Arkansas's modified requirements themselves are narrowly tailored to a compelling state interest, they are constitutional. It makes no difference that, for the 2020 election cycle, the modicum-of-support requirement is equal to "2.6 times" (LPAR Br. 4) the defunct 10,000-signature requirement. "[A]ny other result would create an unacceptable constitutional ratchet." *Hall v.*

Simcox, 766 F.2d 1171, 1175 (7th Cir. 1985). "States that had always had high requirements could retain them; states like [Arkansas] that had experimented with lower ones might, depending on the results of the experiments, be frozen into them." *Id.*; *accord Graham v. Tamburri*, 377 P.3d 323, 328 (Ariz. 2016); *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (refusing to create "a 'one-way ratchet'" that would bar States from reducing number of early-voting days).

That said, the record establishes that the increase in the modicum-of-support requirement is narrowly tailored to Arkansas's "compelling interest in 'protecting the integrity of [its] political processes from frivolous or fraudulent candidacies." *LPND*, 659 F.3d at 697 (quotation marks omitted). LPAR admits that it has never satisfied the retention requirement, thus losing its across-the-board ballot access each election. LPAR Br. 42 & n.6. Yet each election cycle, LPAR has avoided the effect of losing that access by using the 10,000-signature requirement as a loophole to reacquire it. *Id.* 36. And then each election cycle, LPAR has used its newly re-acquired across-the-board access to field frivolous candidates—like a professional Elvis impersonator. *See* JA55; Appellant's Br. 10-11 & n.1. That history underscores Arkansas's compelling interest in adopting a more demanding signature requirement that is *still* well below those upheld elsewhere.

The same is true of Arkansas's electoral deadlines. Arkansas—like its sister States—has a compelling interest in ensuring its citizens play a role in selecting major presidential nominees, and Arkansas's decision to move its primary to Super Tuesday is certainly tailored to that end. Having moved its primary forward, Arkansas likewise has a "legitimate and compelling" interest in moving its filing deadlines to account for that rescheduled primary. *McLain II*, 851 F.2d at 1050. Thus, the challenged provisions are narrowly tailored to achieve governmental interest and the district court erred in concluding the contrary.

III. LPAR's briefing underscores that the district court's findings do not match its remedy.

The district court acknowledged that Arkansas's ballot-access regime is identical to regimes upheld elsewhere except for its timing provisions. *See* ADD45-47. Yet having suggested that the only potentially problematic aspect of Arkansas's ballot-access regime is the timing provisions, the district court left those provisions untouched. Instead, it enjoined the—even on its analysis—otherwise valid modicum-of-support requirement. Thus, in the most basic sense, the district court erroneously failed to "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 Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (injunction "must directly address and relate to the constitutional violation itself").

LPAR does not deny that error. *See* LPAR Br. 28-31. In fact, its briefing emphasizes that it too believes—insofar as there is any constitutional violation—that its injury derives from the timing provisions. *See id.* 12, 37, 41 (focusing on timing provisions).

To defend the district court's injunction, LPAR instead claims that it was "conservative and narrowly tailored" because it "only restored the 10,000 petition signature requirement." LPAR Br. 46; *see id.* 9. But it is hard to see how adopting a signature requirement that the Arkansas General Assembly determined was "insufficient to reflect the will of the voters of Arkansas" was conservative or narrowly tailored. Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 2 (Feb. 18, 2019). Indeed, the district court's conclusion that "[t]he enjoinment of any *one* of these elements"—the modicum-of-support requirement or the timing provisions—"would somewhat reduce the burdens placed upon plaintiffs' constitutional rights" (ADD58) leaves no doubt that it failed to tailor its injunction. Instead, the district court chose the one remedy that the Arkansas General Assembly had made expressly clear would not serve its interests.

Far from "carefully craft[ing] injunctive relief" to avoid "nullify[ing] more of a legislature's work than is necessary," the district court "chose the most blunt remedy" possible—an injunction requiring Arkansas to do the one thing it had stated the clearest intention against doing. *Ayotte v. Planned Parenthood N. New*

England, 546 U.S. 320, 329-31 (2006). Especially in light of the district court's acknowledgment that an injunction more narrowly tailored to the timing provisions would have remedied any supposed constitutional injury, *see* ADD58, this Court must at least vacate the preliminary injunction because it is not narrowly tailored, *see St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022-23 (8th Cir. 2015) ("a preliminary 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" (alterations and quotation marks omitted)).

IV. Like the district court, LPAR incorrectly applies the remaining preliminary-injunction factors.

The district court also erred as a matter of law in applying the remaining preliminary-injunction factors, and LPAR does not demonstrate the contrary.

Like the district court, LPAR ignores the harm that the preliminary injunction is currently causing Arkansas and its citizens. For its part, the district court wrongly claimed that replacing Arkansas's democratically enacted modicum-of-support requirement with a requirement that groups receive across-the-board ballot access by collecting signatures from just half-a-percent of registered voters "would [not] do any harm." ADD55. LPAR goes even further, contending that allowing Arkansas to enforce duly enacted legislation pending final adjudication itself causes "harm to the Arkansas public interest." LPAR Br. 48. But the Supreme Court has consistently warned that "the inability to enforce its duly enacted plans clearly

inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). That harm exists irrespective of who is most likely to succeed on the merits and, even if final judgment alters the laws at issue. *See Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (explaining that State "would be harmed if it could not apply its own laws . . . now, even if it might later be able to" apply altered version of law). Indeed, any other approach would make the likelihood-of-success inquiry decisive of irreparable harm whenever anyone challenges a statute. And that cannot be the law.

LPAR also urges this Court to ignore the self-inflicted nature of its supposed injury. *See* LPAR Br. 22. But it does not dispute that it ended its petition drive on June 28, 2019—more than *two months* before the deadline it claims was unconstitutionally early. *See* ADD4, 61-63; Ark. Code Ann. 7-7-205(a)(6). It also does not dispute that it did not use the entire (again, supposedly problematically short) 90-day collection period. Nor does LPAR dispute that it declined to roll that period forward to account for its concededly even more haphazard collection efforts during the first two weeks. *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); JA232-33 (Pakko testimony that LPAR considered rolling its compliance period forward); *see also* JA258-61, 263-64 (two other high-ranking LPAR leaders testifying to their own lack of work). And LPAR does not dispute

that it ended its petition drive just before Independence Day, which undisputed evidence established is "a game changer in ballot access," during which a group might collect "9- and 10,000 signatures on a single day." JA323-24 (Cox).

Those actions—and their impact on LPAR's claimed inability to meet Arkansas's requirements—are not "pure speculation." LPAR Br. 22. Nor are they actions that "a reasonably diligent third party . . . [would] be expected to [take] to satisfy" the modicum-of-support requirement. *McLain II*, 851 F.2d at 1050 (brackets and quotation marks omitted). They are "self-inflicted wounds," and that is "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's failure to consider them is an error of law requiring reversal.

CONCLUSION

For these reasons and those in Arkansas's opening brief, this Court should reverse the preliminary injunction.

Respectfully submitted,

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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 6,493 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Nicholas J. Bronni
Nicholas J. Bronni

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I certify that on November 12, 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
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