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

LIBERTARIAN PARTY OF ARKANSAS, SANDRA CHANEY RICHTER, MICHAEL PAKKO, RICKY HARRINGTON, JR, CHRISTOPHER OLSON, and MICHAEL KALAGIAS, ...Plaintiffs	)	
v.	)	Case No. 4:19-cv-214-KGB
JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas, ...Defendant.	)	

PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

JAMES C. LINGER, OBA#5441
1710 South Boston Avenue
Tulsa, OK 74119-4810
Telephone (918) 585-2797
Facsimile (918) 583-8283
E-mail: bostonbarristers@tulsacoxmail.com

W. Whitfield Hyman, AB No. 2013-237
King Law Group
300 North 6th Street
Fort Smith, Arkansas 72901
Telephone (479) 782-1125
Facsimile (479) 316-2252
E-mail: william.hyman@gmail.com

Counsel for Plaintiffs

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PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE AND ISSUES IN QUESTION WHICH JUSTIFY THE GRANT OF RELIEF SOUGHT

The instant case is an election law and ballot access case on behalf of five registered Arkansas 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, rather than primary elections, under Arkansas law in order to nominate candidates for elective office. The Plaintiffs ask that the laws in question herein be declared unconstitutional and that the LPAR be permitted to conduct petition drives for political party recognition with a petition signature requirement of 10,000 valid petition signatures of registered Arkansas voters along with a later petition signature deadline closer to the general election, and a longer petitioning period than 90 days. Previously to the current

law going into effect by way of an emergency clause in February of 2019 (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d 882, at 893, ¶¶ 23-24 (E.D. Ark. 2019)), 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, December 24, 2021, for political party formation for the 2021-2022 election cycle, and September 7, 2023, for political party formation for the 2023-2024 election cycle. (Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, p. 4, ¶ 7).

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 petition submission deadlines (e.g., September 5, 2019 or December 24, 2021, or September 7, 2023) 319 or 425 days before the general election and more than five and a half months or five months before the major parties select their nominees (unless they are subject to a runoff at the general primary election) at a preferential primary election, and with a limit of a 90-day petitioning period. 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 2022, 2024, and subsequent Arkansas general election

cycles 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).

The preliminary injunction order entered by the District Court (Dkt. No. 31), *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d 882 (E.D. Ark. 2019) and affirmed by the U.S. Court of Appeals for the Eighth Circuit in *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390 (8th Cir. 2020), settled for the 2020 election year the Plaintiffs' ability to qualify the LPAR as a recognized political party in Arkansas, while the preliminary injunction order and subsequent Joint Stipulations of the Parties on February 4, 2021 (Dkt. No. 60, ¶ 1) has allowed the preliminary injunction order to have continuing effect for the 2021-2022 election cycle, although the 90-day petitioning period continues to be problematic (Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, pp. 7-9, ¶¶ 15-16). However, still of concern are presidential and gubernatorial election cycles as to petition deadlines which will fall sometime in September or December of the year before the general election, respectively; the number of petition signatures required, the limited 90-day petitioning period, the application of the party filing period to receive candidate papers for a newly recognized political party which nominates its candidates by convention rather than in primary elections, and the continued application of the retention requirement of 3% of the total vote in either the gubernatorial election or presidential election.

The District Court, after a hearing on Plaintiffs' Motion for Preliminary Injunction, granted the preliminary injunction and allowed the 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 14,779 petition signatures were eventually found to be valid (see Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, pp. 5-6, ¶ 11; Plaintiffs' Exhibit 7, Ltr. of Secretary Thurston to Dr. Pakko dated December 10, 2019). The District Court in granting the Preliminary Injunction Order noted that the State had failed to clearly articulate 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. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 915-916.

The District Court analyzed the challenged election statutes as to the number of petition signatures required, the 90-day time period allowed for petitioning, and the petitioning deadline. 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 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. The District Court in its preliminary injunction order concluded that Arkansas's entire ballot access scheme, as recently amended in 2019, imposed a severe burden upon the associational rights of the plaintiffs under the First and Fourteenth Amendments. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 909. Therefore, 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). This decision was affirmed by the Eighth Circuit, *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 405.

CONCISE STATEMENT OF MATERIAL FACTS TO WHICH NO GENUINE ISSUE EXISTS

Pursuant to Local Rule 56.1(a), the material facts to which the Plaintiffs contend no genuine issue exists are set out in a separate pleading filed contemporaneously with Plaintiffs' motion for summary judgment as Plaintiffs' Statement of the Material Facts which they contend there is no genuine dispute to be tried.

STANDARD OF REVIEW

The U.S. Supreme Court has 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.

In a ballot access case, the standard of review required weighs the effects of the election laws challenged. The United States Supreme Court has held what standard is to be used in determining whether election laws are unconstitutionally oppressive of potential voters' rights. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1968). In a three-prong balancing test, the U.S. Supreme Court stated that the trial court must

> . . . first consider the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forth by the state as justifications for the burden imposed by its rules. In passing judgment, the court must not only determine legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson, Id.*

Thus, 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); *Moore v. Martin*, 854 F.3d 1021, at 1025-1026 (8th Cir. 2017); and *Libertarian Party of Arkansas v. Thurston,* 962, F.3d at 397, 402.

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).

Since the injury to the Plaintiffs' rights impacts 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).

Arkansas' challenged election laws for political party formation and their supporters' burden "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. at 30-31.

As to Plaintiffs' instant motion for summary judgment, the appropriate standard for the District Court to apply in deciding a motion for summary judgment requires the District Court to ". . . grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Nelson v. City of McGehee*, 876 F.2d 56 (8th Cir. 1989), and Fed. R. Civ. P. 56(c). In essence, the inquiry for the District Court is ". . . whether there is the need for a trial . . .." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250.

The Eighth Circuit has set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

> [T]he burden on the moving party for summary judgment is only to demonstrate, i.e., '[to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted. *Id.* at 1339. (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted) (brackets in original)).

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248.

ARGUMENT AND AUTHORITIES

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 new, earlier petition deadline has been moved three times in recent years and requires new political parties to conduct a petition drive well 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 somewhat of a throwback to what has previously been declared unconstitutional. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ark. 1996); and *Green Party of Arkansas v. Daniels*, 445 F.Supp.2d 1056 (E.D. Ark., W.D. 2006). In fact, the new deadlines for petition signatures in the last and next two election cycles of September 5, 2019, December 24, 2021, and September 7, 2023, are 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 has resulted in a deadline which was 425 days before the general election in 2020, 319 days before the general election in 2022, and again 425 days before the general election in 2024 (Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, p. 5, ¶ 9, p. 6, ¶ 12, p. 7, ¶ 14). 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 September 5, 2019 or December 24, 2021 or September 7, 2023, deadlines 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*); also see *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 400. 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).

Since the parties have agreed and stipulated that the Court may consider the transcript of the preliminary hearing and the exhibits thereto in reaching a decision on any motions for summary judgment (Dkt. No. 60, ¶ 29), it is important to look at the particular facts, witnesses, and exhibits at the hearing on Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 32, Transcript of Preliminary Injunction Hr., June 4, 2019, Plaintiffs' Exhibits 1-5) 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 was fourteen months (specifically, 425 days) 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, Id.*, 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 (Dkt. No. 32, 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 (Dkt. No. 32, 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 (Dkt. No. 32, 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 number of venues, and the expenses involved (Dkt. No. 32, 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 (Dkt. No. 32, Tr. PI hr., p. 21, line 11—p.22, line14).

Dr. Pakko then went on to testify as to the 2019 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 (Dkt. No. 32, 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 (Dkt. No. 32, 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 during a later time because of voter interest (Dkt. No. 32, 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 (Dkt. No. 32, 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 (Dkt. No. 32, 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 (Dkt. No. 32, Tr. PI hr., p.69, line 20—p.76, line 10), it was also shown that when the petition requirement for political party formation was previously 3% of the total vote for 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 (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 892, ¶ 14).

The District Court based its preliminary injunction 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*, 649 F.3d 675 (8th Cir. 2011), 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. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 905-917. 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 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 as occurred at the

preliminary injunction hearing on June 4, 2019, Secretary Thurston nowhere explained why it was 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. *Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 915-916.

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. (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 893, 902, ¶¶ 20 and 85). 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 (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 895, ¶ 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 (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 892, 899, ¶¶ 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] (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 903, ¶ 93).

I. ARKANSAS' BALLOT ACCESS LAWS AS CHALLENGED DO IMPOSE A SEVERE BURDEN.

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.

Dr. 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 (PI order, ¶ 28). Because the petitioning time before September 5, 2019 or December 24, 2021, or September 7, 2023, are so far removed from the general elections in November of 2020 or 2022 or 2024, none of the dates from April 1 through September

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[1] In the last three general elections, 57% of the state house districts in 2020, 54% of the state house districts in 2018, and 66% of the state house districts in 2016 had no general election for state representative even with the LPAR on the ballot. (Plaintiffs' Exhibit "5" admitted at the PI hearing on June 4, 2019, and Plaintiffs' Exhibit "6", Affidavit of Michael Pakko, p. 11, ¶ 8). 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.

5, 2019, or December 24, 2021, or September 7, 2023, are particularly good considering that all the months involved are at times when people have lessened political interest. The LPAR simply has a choice as to what is least bad in petitioning dates. For further elaboration on these points and the problems in the current petition drive in 2021, the petition deadlines far removed from the general election, the effects of decreased voter interest in the year before the general election, the burdens caused by weather and Covid-19, the consequential effect on a 90-day petitioning period of bad weather and pandemics, and the problems created by linking the requirements for a new political party in petitioning and nominating candidates with the preferential primary and general primary elections which new parties do not participate in, see Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, pp. 2-4, 6-10, ¶¶ 4, 7, 12, 13, 15, 16, and 18. 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 deadlines, the previously mentioned cases of *Citizens to Establish a Reform Party in Arkansas v. Priest* and *Green Party of Arkansas v. Daniels* favor Plaintiffs' position because the new deadlines in December or September of the year before the general elections are much earlier in the relevant election cycles 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.

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 Circuit 2011). 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 deadlines.

II. THE HISTORY OF BALLOT ACCESS LAWS, CASES, AND PAST ELECTION EXPERIENCE IS UNFAVORABLE TO THE LAWS AT ISSUE.

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). 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).

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); *Storer v. Brown*, 415 U.S. 724, 742 (1974) (which sets forth a usage test); and *Libertarian Party of Arkansas v. Thurston*, 962 F.3d, at 399. 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 Eighth Circuit said in the *McLain I* case, ". . . our decision is influenced by the experience of other third party groups, which have not been 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, when the petition deadline was not anywhere near as early as it is now, 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. (Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, p. 3, ¶ 6).

While a number of cases 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 in the year before the general election, and the ballot access requirements for new political parties in these other states had actually been complied with. 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 or early winter of the year before the general election, no political party was successful in complying with Arkansas's 3% petition signature requirement.

III. 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 also think it is important for the Court to note that, while this 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 (*Libertarian Party of Arkansas v. Thurston*, 394 F.Supp.3d at 909, ¶ 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 agreed to an incorrect stipulation (unless they were thinking about the 3% vote retention requirement).[2] A close

[2] 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.

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 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 the 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.[3]

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,[4] it is not hard to imagine how any Court would have felt about a deadline in the year before the general election, let alone more than six or nine months earlier than the petition deadline of late June of the general election year in *Green Party of Arkansas v. Daniels, Id.*

> 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

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[3] 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 (Dkt. No. 21-1, ¶ 6), a third independent candidate in 2010 was able to meet the 10,000 petition signature requirement. (Also see, Dkt. No. 31, PI order, ¶¶ 15 and 64).

[4] *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) (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.

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.

As the Eighth Circuit said in *McLain II* in analyzing a new ballot access law for third parties 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 425 days before the general election and/or increased the petition signature requirement by a factor of 2.6.

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

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. One of 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 based partly 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's 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, but rather as the Eighth Circuit said in affirming the District Court, was an equitable remedy that was ". . . a special lend of what is necessary, what is fair, and what is workable." *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 405 (quoting *Lemon v. Kurtzman*, 415 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (plurality opinion) (footnote omitted)). 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. Even assuming the State has a compelling interest,

> A regime containing (1) a substantial signature requirement, (2) a limited rolling window for obtaining signatures, and (3) a deadline 425 days removed from the general election is not narrowly tailored to a generalized interest in regulating the integrity of elections. This outcome is clear when the unprecedented time between the deadline and the election is not based on anything particular to petitioning parties, but instead is a date adopted by reference to other deadlines as applicable only to established parties. *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 403.

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 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).

CONCLUSION

"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.

The challenged ballot access laws, when looked at collectively and without using any litmus paper test, impose a severe burden on Plaintiffs and are 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 2019-2020 election cycle and which balanced the interest of the parties and the public. This preliminary injunction was affirmed by the Eighth Circuit. *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 405. Thereafter, the parties agreed to a joint stipulation as to the continuing effect of the District Court's preliminary injunction which is applicable to the current election cycle for 2021-2022 and all subsequent election cycles unless modified by the District Court (Dkt. No. 60, ¶ 1). As to future election cycles, the District Court should grant Plaintiffs' motion for summary judgment, declare the laws in question unconstitutional because of the combined effect of the early petition deadline, fixed 90-day petitioning period, the never complied with 3% petition requirement, the requirement that new party candidates declare before the major party candidates are selected, and the fact new parties select their candidates at a party convention and not at a primary or runoff election, enjoin their enforcement, and leave to the Arkansas General Assembly the opportunity to amend the laws in question in conformity and response to this Court's

decision. It may well be that the Arkansas General Assembly will not address the issues raised in this case before a decision by this Court as indicated by Dr. Pakko's failed efforts to try to get the General Assembly this year to amend the laws in question. (Plaintiffs' Exhibit 6, Affidavit of Dr. Pakko, pp. 9-10, ¶¶ 17-18).

Specifically, what the Plaintiffs ask for in affirmative relief at this time is 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 is 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 (and further commented on in Plaintiffs' Exhibit 6, Dr. Pakko's Affidavit), 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 (Plaintiffs' Exhibit 6 Dr. Pakko's Affidavit, p. 6, ¶ 12). Secretary Thurston has shown no necessity for the increased petition signature requirement, or the petition deadlines of 425 days, 319 days, or 425 days before the general elections in 2020, 2022, and 2024, respectively, 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 (Dkt. No. 31, PI order, p.32), the Eighth Circuit in *Green Party of Arkansas v. Martin,* 649 F.3d at 678, 683-685, and the Eighth Circuit in *Libertarian Party of Arkansas v. Thurston*, 962 F.3d at 399-404.

WHEREFORE, premises considered, Plaintiffs request that the District Court grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 27th day of May, 2021.

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

JAMES C. LINGER, OBA#5441
1710 South Boston Avenue
Tulsa, OK 74119-4810
Telephone (918) 585-2797
Facsimile (918) 583-8283
E-mail: bostonbarristers@tulsacoxmail.com

W. Whitfield Hyman, AB No. 2013-237
King Law Group
300 North 6th Street
Fort Smith, Arkansas 72901
Telephone (479) 782-1125
Facsimile (479) 316-2252
E-mail: william.hyman@gmail.com

Counsel for Plaintiffs