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

LIBERTARIAN PARTY OF ARKANSAS, *et al.*,

PLAINTIFFS,

v. **Case No. 4:19-cv-00214-KGB**

JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas,

DEFENDANT.

MOTION FOR SUMMARY JUDGMENT

Defendant John Thurston, in his official capacity as Secretary of State for the State of Arkansas, respectfully requests that the Court enter summary judgment against Plaintiffs' claims.

Plaintiffs, the Libertarian Party of Arkansas and associated individuals, bring this action under the First and Fourteenth Amendments of the U.S. Constitution, alleging violations of their rights to freedom of political association, to vote, to petition, and to equal protection. They cannot meet their burden of showing that Arkansas's ballot-access regime violates the First and Fourteenth Amendments. Even viewing the evidence in the light most favorable to Plaintiffs, there is no remaining dispute of material fact, and the Secretary is entitled to judgment as a matter of law.

In support of this motion, the Secretary relies on the brief in support and statement of undisputed material facts being filed with this motion. The Secretary reserves the right to plead further, to assert other defenses, or to move for dismissal or summary judgment on other grounds.

For these reasons and those explained in the accompanying brief and statement of undisputed material facts, the Secretary respectfully requests that the Court grant this motion for summary judgment.

Dated: August 12, 2021

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

VINCENT M. WAGNER (2019071)
Deputy Solicitor General
DYLAN L. JACOBS (2016167)
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
vincent.wagner@arkansasag.gov

Counsel for Defendant

JOHN THURSTON

ARKANSAS SECRETARY OF STATE

July 20, 2021

Libertarian Party of Arkansas
Attn: Dr. Michael Pakko
P.O. Box 46730
Little Rock, AR 72214

RE: New Political Party Petition – Libertarian Party of Arkansas

Dear Dr. Pakko,

In accordance with Arkansas Code § 7-7-205, the Office of the Secretary of State hereby notifies you that the new political party petition submitted to our office on June 28, 2021, is sufficient. The total number of signatures submitted was 14,593. After checking each submitted signature, 11,886 were determined to be valid.

To recognize the Libertarians as a new political party in Arkansas; Arkansas law requires the officers of the party to submit under oath an affidavit that complies with Arkansas Code § 7-3-108(b). Please submit the original signed and notarized affidavit to the following address:

Arkansas Secretary of State
Attn: Leslie Bellamy
Director of Elections
500 Woodlane Ave., Suite 026
Little Rock, AR 72201

We look forward to receiving your affidavit. Should you have any questions, you may contact the Elections Division at (501)-682-5070.

Yours Very Truly,

John Thurston

John Thurston
Secretary of State

EXHIBIT 1

State Capitol • Suite 256 • 500 Woodlane Street • Little Rock, Arkansas 72201-1094
501-682-1010 • Fax 501-682-3510
e-mail: arsos@sos.arkansas.gov • www.sos.arkansas.gov

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JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas,

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DEFENDANT'S COMBINED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

To obtain across-the-board ballot access, Arkansas requires groups to demonstrate they have a sufficient modicum of support among Arkansas voters. Courts at all levels of the federal and state judiciaries have upheld laws similar to this modicum-of-support requirement against constitutional challenge. This Court's preliminary injunction to the contrary and the Eighth Circuit's decision affirming it rested in part on the timing of the deadlines in Arkansas's election calendar in years where the office of U.S. President appears on the ballot. *See, e.g.*, *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 394-95 (8th Cir. 2020) (*LPAR*). But Plaintiffs here—the Libertarian Party of Arkansas (LPAR) and some of its members—do not seek relief limited to those years. They also seek relief for years like 2022, "in which the office of Governor will appear on the ballot"—years when the various deadlines are months closer to the general election. *See* Ark. Code Ann. 7-7-203(a) through (c); *see also* Pls.' MSJ Br. at 28, ECF No. 64 (asking the Court to permanently change Arkansas's modicum-of-support requirement). Because the record does not support Plaintiffs' requested relief—an injunction that applies to *all future elections*, under both the presidential and midterm election calendars—this Court should deny their motion for summary judgment, and grant the Secretary's own motion for summary judgment.

BACKGROUND

A. Ballot Access in Arkansas

Plaintiffs challenge Arkansas's modicum-of-support requirement. According to this requirement, a group of Arkansans may qualify as a "political party" and obtain across-the-board ballot access by acquiring "signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor in the immediately preceding general election." Ark. Code Ann. 7-7-205(a)(2). LPAR has never obtained ballot access this way. Response Pls.' Statement of Undisputed Material Facts and Def.'s Statement of Undisputed Material Facts (Def.'s SUMF) ¶¶ 78-79. But this is not the only route to ballot access for Arkansas elections.

Arkansas law also provides individualized routes to ballot access for particular offices. What individual candidates must do varies depending on which office they seek. *See id.* ¶¶ 60-64; Joint Stip. Facts (Joint Stip.) ¶ 15, ECF No. 60. Any group may nominate presidential and vice presidential candidates by collecting just 1,000 signatures from registered voters. *See* Ark. Code Ann. 7-8-302(5)(B). Those nominees appear on the ballot along with the group's name, and if a group's nominees win 3% of the vote, it will become a political party entitled to across-the-board ballot access. *Id.* 7-1-101(27)(A). Individuals may likewise qualify for the presidential ballot by collecting a mere 1,000 signatures. *Id.* 7-8-302(6)(A).

Separately, groups can obtain across-the-board ballot access by qualifying as a "political party." Def.'s SUMF ¶ 62. Along with the presidential route just mentioned, a group can so qualify by "poll[ing] for its candidate for Governor in the state . . . at least three percent (3%) of the entire vote cast for the office." Ark. Code Ann. 7-1-101(27)(A). Once established, political parties must continue to meet this three-percent, electoral-support cutoff to retain their power to nominate a full slate of candidates for each general election. Def.'s SUMF ¶ 63; Joint Stip. ¶ 6.

Otherwise, they cease to qualify as political parties and lose across-the-board ballot access. Although LPAR obtained across-the-board ballot access for the 2020 general election by dint of this Court's preliminary injunction, it failed to retain political party status this way. *See* Joint Stip. ¶¶ 1, 6-9.

Whether a group loses its political-party status by failing to meet the retention cutoff or never had political-party status to begin with, it has another option for qualifying as a political party. By satisfying a modicum-of-support requirement, it may obtain the power to automatically nominate a slate of candidates across the State in the next general election. Def.'s SUMF ¶ 64. This modicum-of-support requirement is even less burdensome than it appears, and is certainly less burdensome than the retention requirement. *See id.* ¶ 68. Unlike many other States, Arkansas allows any registered voter to sign a ballot-access petition regardless of party affiliation, and regardless of whether the voter has already signed another ballot-access petition. *Id.* ¶ 65. Thus the *eligible pool* of voters who may sign any ballot-access petition is the larger group of all registered voters in Arkansas, not the more limited group of voters who participated in the most recent gubernatorial election.

In 2019, which is the most recent year in the record, there were 1,750,077 registered voters in Arkansas. *Id.* And for the 2022 midterm elections, Arkansas's modicum-of-support requirement equals 26,746 signatures (which is 3% of the votes cast for Governor in the 2018 election). Joint Stip. ¶¶ 14, 16. As a result, Arkansas's modicum-of-support requirement amounts to about 1.5% of the pool of voters eligible to sign a ballot-access petition. *See* Def.'s SUMF ¶ 65 (26,746 signatures ÷ 1,750,077 registered voters ≈ 0.0153).

B. Arkansas's Electoral Deadlines

Arkansas has a decade-old provision requiring that signatures be no more than 90 days old when submitted. Def.'s SUMF ¶ 69. And since 2013, groups seeking across-the-board ballot access have been required to submit signatures to the Secretary of State no later than 60 days before the "party filing period." *Id.* ¶ 70.

In 2019, the Arkansas General Assembly moved the *entire* election calendar forward in presidential election cycles so that—starting with the 2020 election—Arkansas's preferential primary election takes place in presidential cycles on Super Tuesday. *Id.* ¶ 71. In the 2020 presidential-election year, the signature-submission deadline moved forward to September 5, 2019, *id.* ¶ 72, and the party filing period was a week in early- to mid-November, Joint Stip. ¶ 28.

In midterm election cycles, the primary remains in the second half of May prior to the general election, Def.'s SUMF ¶ 73, and the party filing period falls on the last week of February, *id.* ¶ 74. The next preferential primary election and non-partisan general election in Arkansas will be held on May 24, 2022. Joint Stip. ¶ 18. The party filing period is keyed to the preferential primary election and, for the 2021-2022 election cycle, is a one-week period beginning at noon on February 22, 2022, and ending at noon on March 1, 2022. *Id.* ¶ 26. The deadline for filing new-political-party petitions, which is based on the start of the party filing period, falls on December 24, 2021. *Id.* ¶ 14. This deadline is three months closer to the general election than the deadline would be if this were a presidential election cycle.

C. Procedural History

Soon after the modicum-of-support requirement took effect, Plaintiffs brought this lawsuit. *See* Compl., ECF No. 1. Plaintiffs alleged that Arkansas's modicum-of-support requirement and the timing provisions combined severely burden their First and Fourteenth Amendment

rights. *Id.* ¶ 10. They requested that this Court preliminarily and permanently enjoin the Secretary from enforcing the laws at issue "as applied to the Plaintiffs herein for the 2019-2020 Arkansas general election cycle, and for all subsequent Arkansas general election cycles," as well as "a preliminary and permanent injunction allowing the Plaintiffs, particularly the LPAR, to submit 10,000 petition signatures at a later petition deadline date closer to the preferential primary election in Arkansas for the general election cycle of 2019-2020." *Id.* at Prayer for Relief ¶¶ 3-4. Plaintiffs later filed a preliminary-injunction motion. Mot. Prelim. Inj., ECF No. 12.

At this Court's hearing on that motion, Plaintiffs declined to present any evidence about what they would need to do to meet the modicum-of-support requirement, any expert testimony concerning the difficulty of meeting that requirement, or even any testimony about LPAR's financial and logistical resources or its ability to hire professional signature gatherers. Indeed, Plaintiffs continue to fail to present any evidence related to these topics. *See* Aff. of Michael Pakko ¶¶ 14-18, ECF No. 62-6 (continuing to assert a severe burden on LPAR without any evidence of LPAR's resources). Instead, they rely exclusively on the testimony of the individual plaintiffs. Def.s' SUMF ¶¶ 80-84. And far from demonstrating that LPAR could not comply with Arkansas's modicum-of-support requirement, that testimony highlighted how little LPAR had done—and planned to do—to collect signatures. *See id.* In response, Arkansas offered unrebutted testimony demonstrating that Arkansas's modicum-of-support requirement does not impose a severe burden. *Id.* ¶¶ 32, 45-46, 49-53, 85-89.

Three-and-a-half weeks after the preliminary-injunction hearing, on June 28, 2019, Plaintiffs ended LPAR's signature-collection effort and turned in just 18,667 signatures. *Id.* ¶ 90. This means that Plaintiffs submitted their signatures *over two months* before the September 5,

2019 deadline for ballot-access petitions. *Id.* They subsequently notified this court that they had submitted fewer signatures than Arkansas statutorily requires. *Id.* ¶ 91.

This Court then preliminarily enjoined Arkansas's modicum-of-support requirement. *See* Prelim. Inj. Order at 59-60, ECF No. 31. In its place, the Court substituted a requirement that LPAR collect just 10,000 signatures. *Id.* at 59. This Court declined to "alter the deadlines for submitting new party petitions or the party filing deadline." *Id.* at 59-60. The Secretary appealed, and the Eighth Circuit subsequently affirmed the preliminary injunction. *See generally LPAR*, 962 F.3d 390.

At the parties' request, this Court entered a schedule for briefing cross motions for summary judgment. *See* Order, ECF No. 61. Accordingly, Plaintiffs filed their summary-judgment motion asking "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." Pls.' MSJ Br. at 1. This Court subsequently granted the Secretary's motion to extend his deadline to respond with his own summary-judgment motion. *See* Order, ECF No. 69.

STANDARD OF REVIEW

Applying Federal Rule of Civil Procedure 56, this Court should render summary judgment for the Secretary. He has carried his initial burden of demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). And Plaintiffs' own summary-judgment motion demonstrates that they will be unable to come forward with additional evidence that raises a genuine dispute of material fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Even viewing the evidence in the light most favorable to Plaintiffs,

see Spencer v. Jackson Cnty., Mo., 738 F.3d 907, 911 (8th Cir. 2013), they have failed to present evidence sufficient to establish the essential elements of their claims, thus entitling the Secretary to judgment as a matter of law, *see Celotex Corp.*, 477 U.S. at 322-23.

Relatedly, the Court must consider whether Plaintiffs have met the standard for a permanent injunction. The only difference between this standard and the preliminary-injunction standard is that, for a permanent injunction, Plaintiffs must show "actual success" on the merits of their claims. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). Because Plaintiffs, as a matter of law, have not actually succeeded on their claims, this Court need not consider the other injunction factors: irreparable harm, the balance of the harms, and the public interest. *See Miller v. Thurston*, 967 F.3d 727, 735-36 (8th Cir. 2020).

ARGUMENT

"Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This Court must engage in a "case-by-case assessment of the burdens and interests affected by a disputed statute, focusing on the statute as part of a ballot access scheme in its totality." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (*LPND*). The standard that this Court must apply when considering Plaintiffs' claims varies "depend[ing] upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434.

The undisputed material facts show that none of the provisions challenged by Plaintiffs impose a severe burden. Because Arkansas's ballot-access regime imposes "only modest burdens," it is constitutional as long as it comprises "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (quotation marks omitted). The record demonstrates that these law do just that. Even if this Court finds that Arkansas's ballot-access

regime "impose[s] a severe burden," the challenged provisions "are narrowly tailored to serve a compelling state interest." *Id.* at 451 (quotation marks omitted).

This Court should find, as a matter of law, that no part of Arkansas's ballot-access regime violates the First Amendment. For the same reasons, this Court should also find for the Secretary on Plaintiffs' claim under the Equal Protection Clause. *See LPND*, 659 F.3d at 702 (applying same standard to equal-protection claim as applied to First Amendment claim). Because Plaintiffs, as a matter of law, have not shown actual success on the merits of either of their claims, this Court should not permanently enjoin the laws at issue, and instead render summary judgment for the Secretary.

I. Because Arkansas's ballot-access laws do not impose a severe burden, the Secretary must demonstrate only an important regulatory interest to justify them, which he has done.

The undisputed material facts show that these laws' "burden is slight," and for that reason "the State need not establish a compelling interest to tip the constitutional scales in its direction." *Burdick*, 504 U.S. at 439. Because the laws do not impose a severe burden, the Secretary need only show "important regulatory interests," which are "enough to justify [Arkansas's] reasonable, nondiscriminatory restrictions." *Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (quotation marks omitted); *see Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding law that conditioned ballot access on a five-percent cutoff similar to Arkansas's modicum-of-support requirement). And the undisputed facts support Arkansas's important regulatory interests in these laws. Therefore, the Secretary is entitled to judgment as a matter of law against Plaintiffs' claims.

A. The challenged laws do not impose a severe burden.

The election laws that Plaintiffs challenge fall in two categories: (1) the modicum-of-support requirement, and (2) the deadlines for complying with it and other requirements. Neither

category of law, either standing alone or in concert, imposes a severe burden. As the Eighth Circuit said of the record at the preliminary-injunction stage, "Plaintiffs did not make an overwhelming showing as to the actual burdensomeness of the current regime or their own particular ability or inability to comply." *LPAR*, 962 F.3d at 404. That might have been enough to demonstrate that they were likely to succeed on the merits. But those same facts do not suffice to show *actual* success on the merits—particularly because nothing in the record addresses the alleged burdensomeness of complying with Arkansas's ballot-access regime during midterm elections, when the relevant deadlines are months closer to the general election. As a matter of law, the challenged Arkansas laws impose no severe burden.

1. Arkansas's modicum-of-support requirement does not impose a severe burden.

When considering whether Plaintiffs have actually succeeded on their claims, this Court must properly assess the burdensomeness of the modicum-of-support requirement. Under precedent that the Eighth Circuit acknowledged on appeal, this requirement does not impose a severe burden—at least not in midterm election years. And in any event, the Eighth Circuit acknowledged the weakness of Plaintiffs' evidence of burden. That evidence looks weaker still in light of the midterm election deadlines, which fall closer to the general election.

i. In *Jenness*, the Supreme Court upheld a law that conditioned ballot access on a five-percent cutoff similar to Arkansas's modicum-of-support requirement. 403 U.S. at 442. The Supreme Court described that signature cutoff as requiring a number of signatures equal to at least five percent "of the total number of electors eligible to vote in the last election." *Id.* at 433. Since *Jenness*, the Eighth Circuit has emphasized that the burden imposed by a signature-gathering requirement is determined based on the "eligible pool"—*i.e.*, the percentage of voters who are eligible to sign a petition. *See LPND*, 659 F.3d at 695 ("[T]he Supreme Court does not

merely consider the percentage stated in a challenged law. Rather, it determines the percentage of support based on the 'eligible pool.'").

This Court must in turn consider the "eligible pool" of voters who can sign a petition seeking across-the-board ballot access. Under Arkansas law, any registered voter may sign a petition (or multiple petitions). Def.'s SUMF ¶ 65. The eligible-pool analysis demonstrates that Arkansas's modicum-of-support requirement is even *less burdensome* than it would appear on the face of the statute. In the 2018 gubernatorial race, there were 891,545 votes cast. *Id.* ¶ 68. But there are 1,750,077 registered voters in Arkansas. *Id.* Thus, the eligible pool from which Plaintiffs may collect signatures this election cycle (all registered voters) is almost *twice* the gubernatorial turnout used to calculate the modicum-of-support requirement. That means that what the statutory language expresses as a 3% threshold actually only requires Plaintiffs to collect signatures from approximately 1.5% of those eligible to sign the petition. *See id.* ¶ 65.

Over the entire course of this lawsuit, Plaintiffs have not once addressed the eligible-pool analysis and have instead clung to the surface 3% threshold. Their latest filing is no exception. *See, e.g.*, Pls.' MSJ Br. at 12 (referring to "the 3% requirement" but making no mention of the pool of voters eligible to sign a petition). Based on the eligible pool, Arkansas's modicum-of-support requirement is better conceived of as a *1.5% requirement*, not a 3% requirement.

This requirement falls "well below the upper threshold of reasonable under Supreme Court precedent." *LPND*, 659 F.3d at 696. The Eighth Circuit acknowledged as much on appeal in this very case, even as it affirmed this Court's preliminary injunction. *See LPAR*, 962 F.3d at 404 ("Here, the 3% requirement from the last election translates into about 1.5% of registered voters, numbers clearly below the figures at issue in the State's cases."). The line of precedent upholding requirements more stringent than Arkansas's stretches back at least to the Supreme

Court's 1971 decision in *Jenness*, where it upheld a requirement that a candidate submit "a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." 403 U.S. at 432.

As a result, the Eighth Circuit and other courts generally treat 5% as a benchmark for reasonable ballot-access requirements. *See, e.g.*, *LPND*, 659 F.3d at 695-96; *Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984); *see also Green Party of Ark. v. Martin*, 649 F.3d 675, 686-87 (8th Cir. 2011) (*GPAR*) (collecting cases from the Supreme Court and other courts of appeals that have upheld "far more burdensome ballot access schemes" than Arkansas's requirement). Beyond *Jenness*, there have been many other decisions upholding modicum-of-support requirements that equal or exceed Arkansas's in burdensomeness. For example:

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

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

- The Eleventh Circuit upheld Alabama's similar but more stringent requirements. That State also has a nominal 3% requirement for new parties but a 20% retention requirement—*i.e.*, one that is *over six times* more difficult to meet than Arkansas's retention requirement. *Swanson v. Worley*, 490 F.3d 894, 896-97 (11th Cir. 2007).

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

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

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

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

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

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

The Eighth Circuit acknowledged the thrust of this precedent. It noted that in *Jenness* and "several cases from other circuits and states" courts had "refused to strike petitioning regimes with similar or higher signature requirements" than Arkansas. *LPAR*, 962 F.3d at 403; *see Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016) ("Neither the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much."). The Eighth Circuit distinguished these other cases, however, on the basis of Arkansas's election deadlines during *presidential* election cycles. *See LPAR*, 962 F.3d at 400 (suggesting that the petitioning deadline, "425 days prior to the election," truly created the problem—not the modicum-of-support requirement itself). But the deadline this year, and in other midterm election cycles, is three months closer to the general election than it is in presidential election cycles. *See* Joint Stip. ¶ 14.

ii. Plaintiffs have offered no evidence demonstrating that the modicum-of-support requirement imposes a severe burden under the midterm election calendar. This is notable because the Eighth Circuit thought even their evidence under the more demanding presidential election

calendar was weak. *See LPAR*, 962 F.3d at 404 ("Plaintiffs did not make an overwhelming showing as to the actual burdensomeness of the current regime on their own particular ability or inability to comply."). The weakness of Plaintiffs' evidence is on clearest display in their failure to offer any evidence that they lack the resources to comply with Arkansas's ballot-access regime. The only evidence of the projected compliance costs demonstrates the opposite. That evidence projects compliance costs for Plaintiffs that are only marginally higher than what Plaintiffs have spent in the past, and that are in line with what other courts of appeals have held does not amount to a severe burden. The undisputed material facts demonstrate no severe burden.

The undisputed expert testimony of Meghan Cox established that satisfying the modicum-of-support requirement would require only seven to nine full-time canvassers for a 75-day petition drive, Def.'s SUMF ¶¶ 32, 49-51, and that a well-organized group could pull off such a petition drive for about $55,000 by using 40% paid and 60% volunteer canvassers, *id.* Plaintiffs offered no evidence to contradict Ms. Cox's projections. And they still don't. In fact, the scant evidence that Plaintiffs offered about LPAR's resources underscores that these projections are within LPAR's reach. *See id.* ¶ 81 (describing Dr. Pakko's testimony that LPAR has always spent "*at least* $30,000" to obtain ballot access (emphasis added)); *id.* ¶ 80 (same, that LPAR had five paid canvassers in 2019, along with volunteers). These projections do not require "unrealistic" volunteer participation. *Compare* Prelim. Inj. Order at 40 (concluding that 35,000 signatures in 90 days is unrealistic), *with Storer v. Brown*, 415 U.S. 724, 740 (1974) ("Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day.").

Further, Ms. Cox's projection that Plaintiffs would have to spend $55,000 to obtain statewide ballot-access does not show that they face a severe burden. Def.'s SUMF ¶¶ 32, 49-51. The Eleventh Circuit in *Swanson* noted that the Alabama Libertarian Party had to spend $100,000 to comply with that State's identical modicum-of-support requirement. 490 F.3d at 898. Yet that court held that Alabama's requirement "does not impose a severe burden." *Id.* at 905. If $100,000 is not a severe burden on a minor party, it is hard to imagine how $55,000 is. *Cf. Gardner*, 843 F.3d at 33 ("Are there examples of parties or candidates that cannot raise $50,000 statewide, yet can still mount viable campaigns?"). And as the First Circuit explained in rejecting a challenge to New Hampshire's timing provisions, "it would be strange to say that a viable statewide political party cannot be expected to shoulder a $50,000 burden for statewide ballot access for its nominees." *Id.* at 30.

It is no answer that Plaintiffs have failed to offer evidence of their ability to amass marginally more money than they have collected for past petition drives. *See* Prelim. Inj. Order at 41. Plaintiffs' failure to offer evidence of LPAR's current financial resources does not establish that it could not afford to run an efficient ballot-access petition drive. A *lack of evidence* on this point cannot create a factual dispute sufficient to defeat the Secretary's summary-judgment motion. *See Matsushita Elec. Indus.*, 475 U.S. at 587; *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

There is no support in the record for Plaintiffs' conclusion that Arkansas's modicum-of-support requirement imposes a severe burden—particularly in the context of midterm elections, like the 2022 election. There is, however, a nationwide judicial consensus that modicum-of-sup-

port requirements like Arkansas's do not impose a severe burden. Because the undisputed material facts show that Plaintiffs do not face a severe burden, this Court should grant summary judgment to the Secretary.

2. Arkansas's compliance deadlines do not impose a severe burden.

The undisputed material facts in this case show that the compliance deadlines impose no severe burden—not the 90-day period, not the presidential election cycle deadlines, and not the midterm election cycle deadlines.

As an initial matter, the evidence does not support Plaintiffs' blanket attack that none of the deadlines "are particularly good considering that all the months involved are at times when people have lessened political interest." Pls.' MSJ Br. at 16-17. Ms. Cox provided undisputed testimony that she conducts ballot initiatives year-round. According to her, people saying that they "are just not interested in politics right now and they are unwilling to sign ballot petitions" is "not something that you hear." Def.'s SUMF ¶¶ 45, 52-53. She explained commonsensically that, with the 24/7 news cycle, people are engaged, and simple explanations to voters that their petition signatures help get parties or people on a ballot get the job done on signature collection. *Id.* Dr. Pakko himself testified that people were willing to sign petitions when LPAR conducted its efforts in 2019, and that Plaintiffs were *not* "unable to collect signatures during th[is] time frame." *Id.* ¶ 82. Indeed, he even conceded that the earlier deadline had benefits. *See id.*

Regarding each specific compliance deadline, there is no dispute of material fact about whether they impose severe burdens. They do not. First off, the requirement that signatures be no more than 90 days old when submitted has been in place for a decade. *Id.* ¶ 69. To comply with it, putative political parties like LPAR are afforded even greater flexibility than independent candidates. *Id.* Whereas independent candidates have a particular, fixed 90-day window during which they must collect signatures, groups seeking political-party status can choose which 90-

day window prior to the deadline suits them best. *See id.* And LPAR has chosen, in each of the last two election cycles, to submit its petition signatures to the Secretary in late June. *Id.* ¶¶ 90, 92; *see* Ex. 1 to Def.'s MSJ, July 20, 2021 Letter from Sec'y Thurston. Yet Ms. Cox offered unrefuted testimony that summer is generally the best time to collect signatures. *See* Def.'s SUMF ¶ 52. Thus it was difficult to understand why LPAR ended its 2019 signature drive on June 28, more than two months before the deadline, after collecting signatures for less than 90 days. *See id.* ¶ 90. Plaintiffs have never explained that decision. *See id.* ¶ 91.

This year's decision to again submit signatures on June 28 is even more puzzling. *See* Ex. 1. LPAR's deadline is not until December 24—around *six months from now*. Joint Stip. ¶ 14. So nothing forced LPAR and its supporters to stop collecting signatures in the middle of the summer, which is the best time for signature collection, according to Ms. Cox's undisputed testimony. Just like in 2019, any burden Plaintiffs face from the 90-day collection window is self-imposed. This compliance deadline imposes no severe burden.

Next, the deadline for submitting signatures in presidential election cycles imposes no severe burden. This deadline, like the rest of Arkansas's election calendar, moved when Arkansas moved its presidential primary to participate in Super Tuesday. *See* Def.'s SUMF ¶ 71. The "nominating process . . . naturally involves a series of deadlines." *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 180 (5th Cir. 1996). And "[t]hese deadlines emanate from the date of the primary election." *Id.* Plaintiffs do not claim that moving the preferential primary election forward to Super Tuesday violated the Constitution but that somehow moving forward the many other deadlines that must precede Super Tuesday does violate the Constitution. The Fifth Circuit rejected such a claim in *Texas Independent Party*. In fact, it held that moving forward the deadline to

comply with otherwise constitutional requirements was not even a severe burden on those plaintiffs. *See id.* at 186 ("Requiring minor parties and independent candidates to meet constitutional petitioning requirements at an earlier stage is not a severe burden."). The same is true here. The deadline for filing petition signatures in presidential election cycles does not impose a severe burden.

Finally, then, is the deadline for submitting petition signatures in midterm election cycles. When Arkansas chose to participate in Super Tuesday, it made this choice only for presidential election cycles. In midterm election cycles, the primary date remained unchanged. Def.'s SUMF ¶¶ 73-74. Plaintiffs have presented no evidence to demonstrate any sort of burden imposed by the non-presidential election cycle deadlines.

Even more critically, Arkansas's deadlines for midterm elections are not "the earliest of any deadline reviewed by a federal court." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 591 (6th Cir. 2006). Far from being that, Arkansas's deadlines are either later than or on-par with many other States' deadlines. First, Arkansas's 2022 primary will be held on May 24, Joint Stip. ¶ 18, and the party filing deadline is March 1, *id.* ¶ 26, 84 days before the primary. All of the following States have filing deadlines for their 2022 primary elections that are as many days before their primary elections as Arkansas's deadline is before its' primary: Alabama, Arizona, California, Colorado, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Tennessee, Utah, and West Virginia. Def.'s SUMF ¶ 75. Arkansas and 23 States have comparable party filing deadlines.

As for Arkansas's December 24, 2021 deadline for filing petition signatures, Joint Stip. ¶¶ 14, 27; Def.'s SUMF ¶¶ 31, 43, a litany of States have new party deadlines for the 2022 election cycle that are earlier than Arkansas's date. Most notably, Arizona has a new party petition filing deadline of November 25, 2021, if the new party seeks to be recognized for Arizona's August 2, 2022 primary election. Def.'s SUMF ¶ 76. To put a finer point on it, Arizona's deadline is almost a *month* earlier than Arkansas's, its primary election is over *two months* later, and its petition filing deadline is *two hundred and fifty* days before its primary election. Texas has a candidate filing deadline of December 13, 2021, for the 2022 election cycle; so, a new political party hoping to put forth candidates in the primary must be formed prior to that date. *Id.* South Carolina requires a new party to obtain certification by December 14, 2021, if it seeks to nominate candidates for the 2022 primary election. *Id.* And Maine requires a new party to file a declaration of intent to form a party by December 16, 2021, for the 2022 election cycle. *Id.*

Other States have new party petition filing or registration deadlines that are around the same time as Arkansas's December 24, 2021 deadline. In Delaware, for a political party to be recognized as a "major political party" in the 2022 election, it must, as of December 31, 2021, have registered in its name voters equal to 5% of the total number of voters registered in the State. *Id.* ¶ 77. Rhode Island has a petition filing deadline of January 1, 2022. *Id.* In California, to qualify a new political party by voter registration, completed affidavits of registration must be submitted to county election officials by January 4, 2022, in order for the new party to participate in the 2022 primary election. *Id.* To qualify by petition, the deadline is January 23, 2022. *Id.* Colorado has a petition filing deadline of January 14, 2022. *Id.* And Nebraska has a petition filing deadline of January 15, 2022. *Id.*

Nothing in the record here supports the notion that Arkansas's midterm election deadlines impose a severe burden. Any burdens the September deadlines imposed on Plaintiffs in presidential election years simply do not translate to midterm election years. Plaintiffs claimed that they conducted their 2019 petition drive in April of that year "to avoid the hot summer months and at a time when students were still in school." Pls.' MSJ Br. at 16. Plaintiffs cannot make the same excuses for not meeting the midterm deadline in late December. Since the 2022 election cycle petition deadline is on December 24, 2021, the 90-day period for petition signature collection could begin as late as late September. Plaintiffs cannot claim any sort of burden arising from a hot summer or lack of students in school then.

Plaintiffs also launch an attack on the December 24, 2021 deadline (and presumably other future midterm election cycle deadlines in late-December) claiming that, if they began their 90-day petitioning period during the late-September timeframe, the holidays would be occupying people's minds and get in their way of signature collection. Def.'s SUMF ¶ 53. But, as stated earlier, Ms. Cox provided undisputed testimony that she conducts ballot initiatives year-round and that this concern is "not something that you hear." *Id.* ¶¶ 45, 52-53.

Plaintiffs present yet more obstacles they claim are burdens imposed by the deadlines, such as inclement weather and COVID-19. First, as to inclement weather, Ms. Cox offered unrebutted testimony that LPAR could run a 75-day petition drive that would satisfy Arkansas's modicum-of-support requirement, with the condensed 75-day period accounting for "weather challenges . . . to allow for more than enough time to have that day off when there's bad weather." Def.'s SUMF ¶¶ 32, 49-50. Ms. Cox's undisputed testimony as to how Plaintiffs could satisfy Arkansas's modicum-of-support requirement accounting for severe weather also shows how Plaintiffs' signature-collection efforts could overcome the effects of COVID-19. *Id.*

¶ 49. Further, the Eighth Circuit's findings in *Miller v. Thurston* are at odds with Plaintiffs' arguments that acquiring signatures during the COVID-19 pandemic "imposes severe burdens." 967 F.3d at 740. In *Miller*, the Eighth Circuit found that "one can imagine relatively simple ways for individuals . . . to safely [sign a petition]," including that groups circulating petitions "can advertise its petition using traditional and social media" or "bring the sterilized petition to [individuals'] homes." *Id.*; *see Whitfield v. Thurston*, 468 F. Supp. 3d 1064, 1093 (E.D. Ark. 2020) ("declin[ing] to characterize th[e] burden" of COVID-19 upon independent candidate's ballot-access drive "as substantial").

Just like with the other challenged compliance deadlines, there is no dispute of material fact that Arkansas's deadlines in midterm election years do not impose a severe burden. As a matter of law, Plaintiffs have not demonstrated that any part of Arkansas's ballot-access regime imposes a severe burden.

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

Whatever burdens Arkansas's ballot-access laws allegedly impose, they "are not severe." *GPAR*, 649 F.3d at 685. Therefore, "Arkansas's 'asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights.'" *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)) (some quotation marks omitted). The Eighth Circuit has never required "empirical evidence attempting to establish what may happen absent" a challenged ballot-access regulation. *GPAR*, 649 F.3d at 686. The record need not show, for example, what facts led Arkansas to increase the signatures required for a new political party to gain ballot access.

Instead, Arkansas needs to assert only sufficient regulatory interests to justify its laws that impose no severe burden. The Eighth Circuit has found that Arkansas has a "significant" regulatory interests in preventing "frivolous candidacies" and reducing "voter confusion." *Id.* at

686 (upholding Arkansas's 3% retention requirement). Arkansas's modicum-of-support requirement furthers those interests. Like the retention requirement, it "tie[s] the test for a political party's support to the race[] for governor," which is traditionally one of "the two races in Arkansas that have garnered the most overall votes, thus furthering Arkansas's interests by providing the broadest basis on which to test a party's support." *Id.* Thus, as with the retention requirement, whatever burdens imposed by the modicum-of-support requirement, "they are significantly outweighed by Arkansas's important regulatory interests." *Id.* at 687.

The challenged compliance deadlines also further Arkansas's interest—indeed, its duty—to "ensure elections are fair, honest, and orderly." *LPND*, 659 F.3d at 693. Requiring putative new parties to file their petitions 60 days before the party filing period, Joint Stip. ¶ 27, serves Arkansas's interest in promoting orderly elections. It ensures there will be enough time to verify the signatures before the party filing period, when all candidates must file paperwork with the Secretary's office, whether they come from new or established parties. And the 90-day window, Def.'s SUMF ¶ 69, keeps the petitioning process honest. Without confining petitioning to a limited time period, fraudulent petitioning activity would be much more difficult for Arkansas to police.

In considering whether a permanent injunction of the compliance deadlines is appropriate, this Court must consider Arkansas's interest in the dates set in the laws at issue. Admittedly, the precise date of the compliance deadline or the choice of a 90-day window instead of a window of some other length "is to some extent 'necessarily arbitrary.'" *McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974)). In other words, "[a] litigant could always point to a day slightly later that would not significantly alter a state's interests until the point at which primary elections"—or in this case, compliance

deadlines—would cease to exist. *McLain*, 851 F.2d at 1050. Nothing in the record, and indeed no case law, suggests that Arkansas's interest in electoral fairness does not extend to applying its election calendar uniformly as between new and established parties, or LPAR specifically.

Because neither the modicum-of-support requirement nor the timing provisions severely burden LPAR, these interests are sufficient to justify Arkansas's ballot-access regime. As a result, this Court should deny Plaintiffs' summary-judgment motion and grant the Secretary's.

II. Alternatively, Arkansas's ballot-access laws are narrowly tailored to further compelling state interests.

The undisputed material facts do not show that any of the challenged provisions—the modicum-of-support requirement or the compliance deadlines—imposes a severe burden. But even if the compelling-interest standard applies, both provisions are narrowly drawn to serve compelling state interests.

Regarding the modicum-of-support requirement, the Supreme Court has recognized that a State's interest in keeping "frivolous candidates" off the ballot gives it "the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983). Similarly, the Eighth Circuit has recognized a "state's interest in *eliminating frivolous candidates*." *LPND*, 659 F.3d at 697 (emphasis added). The relevant case law clearly establishes Arkansas's compelling interest in ensuring that only viable candidates appear on the ballot.

Whether Arkansas narrowly tailored its modicum-of-support requirement to serve this compelling interest does not depend on a demonstrated necessity for *increasing* the signature threshold from 10,000 to 3% of the votes cast in the last gubernatorial election (or approximately 1.5% of the eligible pool). That "is really an argument about the number of [signatures] required," *LPND*, 659 F.3d at 698, and a suggestion that Arkansas's selection was not sufficiently

precise. But anytime a State sets a signature threshold it will be "necessarily arbitrary," *id.*, and that is why the relevant inquiry is whether the requirement is *reasonable*. Indeed, the Supreme Court has never "required a State seeking to impose reasonable ballot access restrictions to make a particularized showing that voter confusion in fact existed before those restrictions were imposed." *Munro v. Socialist Workers Party*, 479 U.S. 189, 204 (1986) (Marshall, J., dissenting).

Arkansas also has a compelling interest in the 90-day window, which prevents fraud in the petitioning process. The Supreme Court's discussion of compelling state interests in other election contexts underscores that that interest is compelling and justifies Arkansas's 90-day collection window. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (noting "the State's compelling interest in preventing voter fraud").

Arkansas has a compelling state interest in both its presidential election cycle deadlines and midterm election cycle deadlines, the latter of which have been unchanged for a decade. The Eighth Circuit in *McLain* acknowledged the State's interest in giving itself time "to verify the signatures on the petitions and to print absentee ballots," and upheld a petition-filing deadline 200 days before the general election because it was a consequence of rescheduling the primary. *See* 851 F.2d at 1050. Plaintiffs urge this Court to grant LPAR "a later petition signature deadline closer to the general election, and a longer petitioning period than 90 days," Pls.' MSJ Br. at 1, but Plaintiffs offer no alternative dates for deadlines that they would consider permissible, for either presidential election cycles or midterm election cycles.

Even if they had, "the mere identification of a less burdensome alternative is not dispositive in election cases such as this one." *LPND*, 659 F.3d at 698. It does not suffice for Plaintiffs to argue that some unspecified later deadline would protect Arkansas's interests to the same extent as the current deadlines. *See McLain*, 851 F.2d at 1050 ("A litigant could always point to a

day slightly later that would not significantly alter a state's interests until the point at which primary elections could not be held at all."). To overcome Arkansas's compelling interest in maintaining the current deadlines, Plaintiffs must have "presented evidence that would enable a court to prescribe a shorter period." *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004). That they have not done.

Based on the undisputed facts, as a matter of law, Arkansas's ballot-access regime is narrowly tailored to the compelling interests that justify it under whatever standard the Court chooses to apply. Therefore, it should grant the Secretary's summary-judgment motion.

III. Converting the preliminary injunction to a permanent injunction would not be appropriately tailored to Plaintiffs' alleged harms.

The preliminary injunction should not be converted to a permanent injunction because it does not address the burden allegedly imposed by the ballot-access regime. This Court has acknowledged that Arkansas's ballot-access regime is identical to those consistently upheld elsewhere except for its compliance deadlines. *See* Prelim. Inj. Order at 45-46 (distinguishing *Jenness* and other cases solely on timing grounds). And the Eighth Circuit agreed. *See LPAR*, 962 F.3d at 403-04. If Arkansas's compliance deadlines are the only things to distinguish its ballot-access regime from the regimes upheld in *Jenness* and many other cases, then Plaintiffs' only conceivable constitutional harm is rooted in the compliance deadlines. Accepting this Court's prior conclusions, its remedy (enjoining the modicum-of-support requirement) is completely divorced from LPAR's supposed harm (timing).

Moreover, the Eighth Circuit's discussion of Arkansas's ballot-access regime—like the evidence presented by Plaintiffs—was premised on the allegedly severe burden imposed by Arkansas's compliance deadlines in *presidential* election cycles. *See id.* at 394, 400, 402-03 (focusing on the earliness of Arkansas's compliance deadline in presidential election cycles). Even

assuming the preliminary injunction was appropriate for those election cycles, the same rationale does not apply to Arkansas's compliance deadlines for *non-presidential* election cycles.

Arkansas's deadlines in midterm election cycles are in the middle of the pack when compared to other States' same deadlines. Arkansas and 23 States have comparable party filing deadlines, Def.'s SUMF ¶ 75; five States have petition signature deadlines earlier than Arkansas's deadline, *id.* ¶ 76; and five States have petition signature deadlines that are within three weeks of Arkansas's deadline, *id.* ¶ 77. Nothing in the record, nor the relevant case law, supports finding that any constitutional harm to Plaintiffs is rooted in these deadlines. *Cf. Blackwell*, 462 F.3d at 591 (focusing on fact that Ohio's presidential-cycle petition signature deadline was the earliest of any deadline reviewed by a federal court). A permanent injunction of Arkansas's midterm compliance deadlines on the basis of the preliminary-injunction record would be an abuse of discretion.

An injunction "must directly address and relate to the constitutional violation itself.'" *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977)). Put differently, courts must "tailor injunctive relief to the scope of the violation found." *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (quotation marks omitted); *see also Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) ("While district courts have broad discretion when fashioning injunctive relief, their powers are not boundless."). And where there is "no Constitutional violation . . . the use of an injunction is unnecessary." *Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992) (reversing an injunction on tailoring grounds).

St. Louis Effort for AIDS v. Huff, 782 F.3d 1016 (8th Cir. 2015), illustrates the point. There the district court concluded that the plaintiffs were likely to succeed on their claim that the

Affordable Care Act preempted three provisions of Missouri law. *Id.* at 1021. Instead of preliminarily enjoining only those three provisions, however, the district court preliminarily enjoined the entire Missouri act that contained them. *Id.* Although the Eighth Circuit agreed with the district court's preemption analysis, it affirmed the preliminary injunction only insofar as it applied to the three preempted provisions. *Id.* at 1024-28. That is because an injunction "must be *narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs*, rather than to enjoin all possible breaches of the law." *Id.* at 1022-23 (quotation marks omitted) (emphasis added) (ellipsis in original). The Eighth Circuit "vacate[d] the remainder of the preliminary injunction." *Id.* at 1028.

Here, this Court should decline to extend the preliminary injunction to a permanent injunction. This Court's preliminary-injunction analysis ultimately rested on the supposed harm from the challenged deadlines. Yet the preliminary injunction did not affect those timing provisions. *See* Prelim. Inj. Order at 58-59. That means that the preliminary injunction was not tailored to the harms it found. *See Graves v. Romney*, 502 F.2d 1062, 1065 (8th Cir. 1974) (because "the district court failed to tailor a remedy for the specific harms shown," it "must be remanded for the drawing of a narrower and more useful remedy"). Any permanent injunction mirroring the preliminary injunction will suffer the same fatal flaw.

Further, the preliminary-injunction order is also not tailored because no case suggests that the half-a-percent signature requirement (10,000 signatures ÷ 1,750,077 registered voters ≈ 0.005) that it imposed is the maximum constitutionally permissible signature limit. Instead, that threshold was selected merely because this Court thought it would be the most likely signature requirement LPAR could meet. Prelim. Inj. Order at 58. But the constitutionality of Arkansas's

ballot-access laws does not hinge on whether LPAR can get on the ballot under them. In tailoring its permanent injunction, this Court is required to consider whether a less-dramatic remedy—including a higher signature requirement—is sufficient to remedy Plaintiffs' alleged harms. The upshot is that it would be an abuse of discretion simply to convert the preliminary injunction into a permanent injunction.

IV. The remaining permanent-injunction factors weigh against permanently enjoining Arkansas's ballot-access regime.

A permanent injunction would inflict harm upon Arkansas and its voters while simultaneously ignoring the self-inflicted nature of Plaintiffs' alleged injury. LPAR's alleged harm of "not be[ing] able to run candidates down the ballot" absent an injunction, Prelim. Inj. Order at 55, is a problem entirely of Plaintiffs' own making. This self-inflicted harm is becoming a pattern.

In the 2019 election cycle, Plaintiffs chose to submit a facially insufficient number of signatures on June 28, 2019—more than *two months* before the September 5, 2019 statutory deadline. Def.'s SUMF ¶ 90. They likewise chose to end their signature-collection effort less than 90 days after they started collecting signatures and despite their recognition that their collection efforts the first two weeks were particularly haphazard. *Id.* ¶ 91. They also stopped collecting signatures just before Independence Day, which undisputed expert testimony established was the best single day all summer to collect signatures. *Id.* ¶ 90.

For the upcoming election cycle, Plaintiffs again brought on this self-inflicted harm, having submitted 11,886 valid signatures (instead of the requisite 26,746) on June 28, 2021 (*six months* ahead of the December 24, 2021 deadline). Ex. 1; *see* Joint Stip. ¶ 14. Such "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106

(10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). This Court should not consider such self-inflicted wounds again when considering whether a permanent injunction should be granted.

Furthermore, it is not true that, absent a permanent injunction, LPAR would lose the ability to compete up-and-down the ballot. Even without across-the-board ballot access, *any* LPAR member who wishes to run for office may still run as an independent. An individual LPAR candidate for "district, county, or township office" must satisfy an even less demanding modicum-of-support requirement by collecting signatures from "not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event . . . more than two thousand (2,000) signatures." Ark. Code Ann. 7-7-103(b)(1)(A). LPAR members may also run for statewide office by collecting 10,000 signatures. Joint Stip. ¶ 15. LPAR members have until May 1, 2022, to collect signatures to run for individual offices. Def.'s SUMF ¶ 87. And "[t]here's no difference for nonmajor party candidates in terms of the share of the vote they get whether they have a third-party label or they are just listed as an independent on the ballot." *Id.*

On balance, the injunction factors favor denying Plaintiffs' request for injunctive relief, most importantly because whatever harm they face, they have brought it on themselves.

CONCLUSION

For these reasons, the Secretary respectfully requests that the Court deny Plaintiffs' motion for summary judgment and grant his motion for summary judgment.

Dated: August 12, 2021

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

VINCENT M. WAGNER (2019071)
Deputy Solicitor General
DYLAN L. JACOBS (2016167)
Assistant Solicitor General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
vincent.wagner@arkansasag.gov

Counsel for Defendant

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

LIBERTARIAN PARTY OF ARKANSAS, *et al.*,

PLAINTIFFS,

v. Case No. 4:19-cv-00214-KGB

JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas,

DEFENDANT.

DEFENDANT'S COMBINED RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS; AND STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, Defendant offers this combined statement of facts. First, Defendant responds to Plaintiffs' statement of undisputed material facts, ECF No. 63; and second, he offers his own statement of undisputed material facts in support of his contemporaneously filed motion for summary judgment.

I. Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts

Pursuant to Local Rule 56.1(b), Defendant provides the following "short and concise statement of the material facts as to which [he] contends a genuine dispute exists."

1. The Libertarian Party of Arkansas is a formerly recognized political party under the laws of Arkansas pursuant to Ark. Code Ann. 7-3-101 and 7-7-205. Joint Stip. Cont. Effect District Ct.'s Prelim. Inj. Order July 3, 2019 & Joint Stips. Fact ("Joint Stip.") ¶ 3, ECF No. 60.

RESPONSE: *Undisputed.*

2. Sandra Chaney Richter, Michael Pakko, Ricky Harrington, Jr., Christopher Olsen, and Michael Kalagias are residents of the State of Arkansas, registered voters in the State of Arkansas, and citizens of the State of Arkansas and the United States of America. Joint Stip. ¶ 4.

RESPONSE: *Undisputed.*

3. Defendant John Thurston is the Secretary of State for the State of Arkansas and is charged by statute with the certification of candidates and political parties. Defendant John Thurston was at all times herein relevant acting, both personally and through the conduct of agents and/or employees of the State of Arkansas, under the color of state law and the authority of his office as a state official. Defendant John Thurston is sued in his official capacity only. Joint Stip. ¶ 5.

RESPONSE: *Undisputed.*

4. Pursuant to Ark. Code Ann. 7-7-205(c)(4), in order to remain a political party in the State of Arkansas after the 2020 Arkansas general election, the Libertarian Party of Arkansas needed to receive 3% of the total votes cast for nominees for presidential electors in Arkansas. Joint Stip. ¶ 6.

RESPONSE: *Undisputed.*

5. In the 2020 general election in Arkansas, the Libertarian candidate for U.S. Senator, Ricky Harrington, Jr., received 399,390 votes for 33.5% of the total votes cast for U.S. Senator in Arkansas. Joint Stip. ¶ 7.

RESPONSE: *Undisputed.*

6. In the 2020 general election in Arkansas, the Libertarian candidates for President and Vice President of the United States received 13,133 votes for 1.1% of the total votes cast for the 13 pairs of candidates for President and Vice President in Arkansas. Joint Stip. ¶ 8.

RESPONSE: *Undisputed.*

7. The Libertarian Party of Arkansas failed to receive 3% of the total votes cast for nominees for presidential electors in Arkansas in the 2020 general election and, therefore, ceased to be recognized as a political party in Arkansas. Joint Stip. ¶ 9.

RESPONSE: *Undisputed.*

8. The Libertarian Party of Arkansas has previously conducted successful petition drives for political party recognition in Arkansas, pursuant to Ark. Code Ann. 7-7-205(a), for the elections which were held in 2012, 2014, 2016, and 2018, when the number of required valid petition signatures of registered Arkansas voters was 10,000 valid petition signatures. Joint Stip. ¶ 10.

RESPONSE: *Undisputed.*

9. The Libertarian Party of Arkansas, its supporters, and the individual plaintiffs named in this lawsuit, were, as of February 4, 2021, preparing to conduct a petition drive for political party recognition in Arkansas in 2021, for the general election to be held in Arkansas on November 8, 2022. Joint Stip. ¶ 11.

RESPONSE: *Undisputed.*

10. Ark. Code Ann. 7-7-205(a) sets forth the procedure by which an unrecognized party can obtain official recognition by the Arkansas Secretary of State. Joint Stip. ¶ 12.

RESPONSE: *Undisputed.*

11. Official recognition not only gives a political party's candidates access to the ballot but is also the only way for a political party to be listed on the ballot alongside its candidate. Joint Stip. ¶ 13.

RESPONSE: *Undisputed.*

12. Pursuant to Ark. Code Ann. 7-7-205(a)(2), 7-7-205(a)(4)(B), 7-7-203(c)(1)(A), and 7-7-205(a)(6), a new political party in order to be recognized in the State of Arkansas for the election cycle of 2021-2022 must turn in 26,746 valid petition signatures of registered Arkansas

voters collected over no more than a ninety-day period and filed with the Arkansas Secretary of State no later than December 24, 2021. Joint Stip. ¶ 14.

RESPONSE: *Undisputed.*

13. Pursuant to Ark. Code Ann. 7-7-103(b)(1)(B), if a person wishes to be an independent candidate for State office or for United States Senator in which a statewide race is required, the person shall file petitions signed by not less than 3% of the qualified electors of the State or which contain 10,000 signatures of qualified electors, whichever is the lesser. Joint Stip. ¶ 15.

RESPONSE: *Undisputed.*

14. Three percent of the total vote cast for Governor of Arkansas in the November 2018 general election is 26,746 votes. Joint Stip. ¶ 16.

RESPONSE: *Undisputed.*

15. The parties are in agreement that the text of the preliminary injunction entered by this Court on July 3, 2019 [Dkt. No. 31], does not limit its application to the 2020 election cycle. Specifically,

> [Defendant John] Thurston, in his official capacity as Arkansas Secretary of State, together with his agents, servants, and employees, and all persons in active concert or participation with him, are preliminarily enjoined from enforcing Arkansas Code Annotated 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) to the extent that these statutes impose the three percent requirement as to the LPAR. Specifically, the same parties are enjoined from failing to recognize the LPAR as a new political party and are enjoined from restricting ballot access to the LPAR as a new political party if the LPAR petitions for the certification of a new political party containing, at the time of filing, the signatures of at least 10,000 registered voters in Arkansas and otherwise complies with the remaining requirements of Arkansas law, save and except for the enjoined three percent requirement. *Libertarian Party of Ark. v. Thurston*, 394 F. Supp. 3d 882, 922 (E.D. Ark. 2019).

Defendant continues to disagree that the preliminary injunction order is correct. Joint Stip. ¶ 1.

RESPONSE: *Undisputed.*

16. For the elections that were conducted in Arkansas in 2020, all political party candidates were required to file a Political Practices Pledge, Party Certificate of Candidacy, and Candidate Information Form during the party filing period: 12:00 noon, November 4, 2019, to 12:00 noon on November 11, 2019. Joint Stip. ¶ 28.

RESPONSE: *Undisputed.*

17. The party filing period for the 2021-2022 election cycle is a one-week period beginning at noon on February 22, 2022, and ending at noon on March 1, 2022. Joint Stip. ¶ 26.

RESPONSE: *Undisputed.*

18. Pursuant to Ark. Code Ann. 7-7-203(c)(1)(A), Libertarian candidates will have to submit their Political Practices Pledges, Candidate Information Form, and Party Certificate of Candidacy during the party filing period for the 2021-2022 election cycle of 12:00 noon, February 22, 2022, to 12:00 noon on March 1, 2022. Joint Stip. ¶ 17.

RESPONSE: *Undisputed.*

19. Pursuant to Ark. Code Ann. 7-7-203(b)(1), the next preferential primary election and nonpartisan general election in Arkansas will be held on May 24, 2022. Joint Stip. ¶ 18.

RESPONSE: *Undisputed.*

20. Pursuant to Ark. Code Ann. 7-7-203(a)(1), the next general primary election in Arkansas will be held on June 21, 2022. Joint Stip. ¶ 19.

RESPONSE: *Undisputed.*

21. Arkansas only holds general elections in even numbered years, Ark. Code Ann. 7-5-102, and the next general election and non-partisan runoff election in Arkansas will be held on November 8, 2022. Joint Stip. ¶ 20.

RESPONSE: *Undisputed.*

22. For elections to be conducted in Arkansas for 2022, the ballots for the general election on November 8, 2022, whether for early voting, overseas and military ballots, or for the date of the general election on November 8, 2022, have not yet been printed. Joint Stip. ¶ 21.

RESPONSE: *Undisputed.*

23. An independent candidate for statewide office in Arkansas may achieve ballot status by filing a petition signed by at least 10,000 valid Arkansas voters. Joint Stip. ¶ 22.

RESPONSE: *Undisputed.*

24. Plaintiff, Ricky Harrington, Jr., who received nearly 400,000 votes as the Libertarian candidate for United States Senator in Arkansas in 2020, plans to be the Libertarian candidate for governor of Arkansas in the 2022 general election. Pls.' Mot. Summ. J., Ex. 6 ("Pakko Affidavit") ¶ 10, ECF No. 62-6.

RESPONSE: *Partly disputed.* It is undisputed that Harrington received 399,390 votes as the Libertarian candidate for U.S. Senator in Arkansas in the 2020 general election. Joint Stip. ¶ 7.

25. Prior to the 3% of the last total vote cast for Governor of Arkansas petitioning requirement being held unconstitutional in two separate published decisions by the United States District Court for the Eastern District of Arkansas, *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. 2006), no new political parties successfully petitioned and were recognized in Arkansas from 1977 (when a petitioning requirement was first put in place) through 2007 (when the 10,000 petition signature requirement was put into the law). Therefore, no new political party had ever successfully petitioned in Arkansas for political party status prior to the establishment of a 10,000 petition signature requirement. Pakko Affidavit ¶¶ 5-6.

RESPONSE: *Undisputed but immaterial.* "Past experience" does not "unerring[ly]" resolve the constitutionality of a State's ballot-access laws. *Storer v. Brown*, 415 U.S. 724, 742 (1974).

26. Before 2019, and since 2007, when the requirement for new political party formation in Arkansas became 10,000 valid petition signatures or 3% of the last gubernatorial vote, only two minor political parties have ever successfully petitioned for new party recognition in Arkansas (viz.: the Green Party in 2008, 2010, 2012, and 2014; and the Libertarian Party in 2012, 2014, 2016, and 2018). Joint Stip. ¶ 23.

RESPONSE: *Undisputed.*

27. The Libertarian Party of Arkansas was the only minor political party to obtain political party recognition and ballot status in Arkansas by petitioning for the general elections which were held in Arkansas in November of 2016 and November of 2018. Joint Stip. ¶ 24.

RESPONSE: *Undisputed.*

28. The Libertarian Party of Arkansas was the only minor political party to obtain recognition for ballot status in Arkansas by petitioning for the election cycle for 2019-2020. Pakko Affidavit ¶ 6.

RESPONSE: *Undisputed.*

29. Pursuant to Ark. Code Ann. 7-7-205(c)(2), any new political party which achieves recognition in Arkansas by successfully petitioning does not nominate its candidates for the general election at a preferential primary election, but rather nominates its candidates at a party convention. Joint Stip. ¶ 25.

RESPONSE: *Undisputed.*

30. Pursuant to Ark. Code Ann. 7-7-205(a)(6), the current petition signature deadline for political party recognition in Arkansas is December 24, 2021, which is 60 days before the party filing period. Joint Stip. ¶ 27.

RESPONSE: *Undisputed.*

31. The current petition signature deadline for recognition of new political parties in Arkansas is December 24, 2021—which is 60 days before the party filing period, 319 days before the date of the general election in Arkansas on November 8, 2022, approximately five months before the Republicans and Democrats will hold their preferential primary election to select their candidates on May 24, 2022, and approximately six months before the Republicans and Democrats will hold their general primary election—to decide any runoffs from the preferential primary elections—on June 21, 2022, for the November 8, 2022, general election. Pakko Affidavit ¶ 9.

RESPONSE: *Undisputed.*

32. Severe weather and pandemic outbreaks can have a negative effect on approaching people to sign petitions for the recognition of new political parties. It is rare in any 90-day period from the experience of Dr. Pakko to not lose a certain number of days because of bad weather or pandemic outbreaks. Pakko Affidavit ¶¶ 15-16.

RESPONSE: *Disputed.* The Secretary disputes that severe weather and pandemic outbreaks would prevent Plaintiffs from acquiring the requisite number of petition signatures. As an initial matter, the Eighth Circuit and this Court have suggested that events like these do not amount to a severe burden. *See, e.g.*, *Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020) (holding that in-person signature requirement for ballot initiatives did not impose a severe burden in the early stages of the COVID-19 pandemic in late spring,

early summer 2020); *Whitfield v. Thurston*, 468 F. Supp. 3d 1064, 1089-94 (E.D. Ark. 2020) (same, regarding independent candidates' petitioning requirements for ballot access). Separately, at the June 4, 2019, preliminary-injunction hearing, political consultant and ballot-access expert Meghan Cox testified as to how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. Tr. Prelim. Inj. Hr'g, 141-42, 150-59, 161-64, ECF No. 32. As one example, she offered unrebutted testimony that LPAR could run a 75-day petition drive using 7-9 canvassers—40% paid and 60% volunteer—that would satisfy Arkansas's modicum-of-support requirement for approximately $55,000. *Id.* at 141-42, 163-164. Ms. Cox's condensed 75-day period accounts for "weather challenges . . . to allow for more than enough time to have that day off when there's bad weather." *Id.* at 153. She acknowledged that a petition drive like this would require "a high degree of organization." *Id.* at 136. But she stressed that compliance would be "a relatively easy logistical job." *Id.* at 161; *see id.* at 141 (ballot-access drive would not be "complicated").

33. For the 2023-2024 election cycle in Arkansas, the party filing period is set for a one-week period beginning at 12:00 noon, November 6, 2023, and ending at 12:00 noon on the seventh day thereafter on November 13, 2023. Pakko Affidavit ¶ 7.

RESPONSE: *Undisputed.*

34. Pursuant to Ark. Code Ann. 7-7-203(b)(2), the preferential primary election and non-partisan general election in Arkansas for the 2023-2024 election cycle will be held on March 5, 2024. Pakko Affidavit ¶ 14.

RESPONSE: *Undisputed.*

35. Pursuant to Ark. Code Ann. 7-7-203(a)(2), the general primary election in Arkansas for the 2023-2024 election cycle will be held on April 2, 2024. Pakko Affidavit ¶ 14.

RESPONSE: *Undisputed.*

36. Arkansas only holds elections in even numbered years, Ark. Code Ann. 7-5-102, and the general election and non-partisan runoff elections in Arkansas for the 2023-2024 election cycle will be held on November 5, 2024. Pakko Affidavit ¶ 14.

RESPONSE: *Undisputed.*

37. Pursuant to Ark. Code Ann. 7-7-205(a)(6), the petition signature deadline for political party recognition in Arkansas for the 2023-2024 election cycle is September 7, 2023, which is 60 days before the party filing period and 425 days before the date of the General Election in Arkansas on November 5, 2024, and approximately six to seven months before the Republicans and Democrats would hold their preferential primary election to select their candidates on March 4, 2024, and their general primary election on April 2, 2024. Pakko Affidavit ¶¶ 3, 14.

RESPONSE: *Undisputed.*

38. The Libertarian Party of Arkansas, its supporters, and the individual Plaintiffs herein, are currently conducting a petition drive for political party recognition in Arkansas in 2021, for the general election to be held in Arkansas on November 8, 2022. Pakko Affidavit ¶ 4.

RESPONSE: *Disputed.* On July 20, 2021, the Secretary sent Plaintiffs a letter notifying Plaintiffs that "the new political party petition submitted to our office on June 28, 2021, is sufficient." Ex. 1 to Def.'s Mot. for Summ. J., July 20, 2021 Letter from Sec'y Thurston. The letter also stated that, "[t]he total number of signatures submitted was 14,593. After checking each submitted signature, 11,886 were determined to be valid." Ex. 1.

39. The 3% requirement has been previously declared unconstitutional twice in published decisions by this Court in the cases of *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. 2006). Pakko Affidavit ¶ 5.

RESPONSE: *Disputed.* The Secretary disputes that Arkansas's current ballot-access regime is identical to the laws at issue in those prior cases, which considered "the combined effect of the statutes." *Priest*, 970 F. Supp. at 696; *see Daniels*, 445 F. Supp. 2d at 1062 (considering combined effect of various ballot-access laws).

40. The Reform Party unsuccessfully petitioned for political party recognition in Arkansas in 1996 because it failed to get the needed petition signatures by the petition signature deadline of January 2, 1996, but was ordered to be recognized as a political party and placed on the Arkansas ballot by this Court when the law was declared unconstitutional in the case of *Citizens To Establish a Reform Party in Arkansas v. Priest.* While the American Party was recognized as a political party in Arkansas in 1968 and 1970, that was because at that time Arkansas did not require any petition signatures to be submitted for political party recognition. The current petition deadlines for the last and current election cycles are earlier than the petition deadline of January 2 of the 1996 General Election year because the deadline for the 2020 General Election year was September 5 of 2019, while the deadline for the 2022 General Election year is December 24, 2021, and the deadline for the 2024 General Election year is September 7, 2023. Pakko Affidavit ¶ 7.

RESPONSE: *Undisputed.*

41. There has been no showing that the general election ballot in Arkansas has been cluttered in recent elections by new party and independent candidates. In fact, in the 2020 General Election in Arkansas, only 43 of the 100 seats up for election on November 3, 2020, in the State House races were contested on the General Election ballot. The Arkansas elections in 2012 and 2014, were the only election years in which two minor political parties (Libertarian Party and Green Party) achieved political party recognition by petitioning and were placed on the Arkansas ballot. Pakko Affidavit ¶ 8.

RESPONSE: *Undisputed but immaterial.* The Eighth Circuit has acknowledge that, along with "ballot overcrowding," the prevention of "frivolous candidacies" and "voter confusion" are "significant" "regulatory interests." *Green Party of Ark. v. Martin*, 649 F.3d 675, 686 (8th Cir. 2011) (*GPAR*). "Arkansas is not compelled to provide empirical evidence attempting to establish what may happen absent" the current ballot-access regime. *Id.* Yet there is evidence that implicates these interest in Arkansas. LPAR has previously used its across-the-board ballot access to nominate a professional Elvis impersonator that it listed on the ballot as Elvis Presley. Resp. Pls.' Mot. Prelim. Inj. Ex. 1, 23, 87, ECF No. 17-1 (2014 and 2018 election results).

42. Because the Libertarian Party of Arkansas would be a new political party in Arkansas if it were successful in its petition drive this year, it would not nominate its candidates for the general election at a preferential primary election (with a runoff election being conducted about a month later, if necessary, and designated a general primary election, as do the Republican and Democratic Parties) but would nominate its candidates by convention. Ark. Code Ann. 7-7-205(c); Pakko Affidavit ¶ 9.

RESPONSE: *Undisputed.*

43. The party filing period (*i.e.*, for the Republican and Democratic parties) is set for the 2021-2022 election cycle for a one-week period beginning at 12:00 noon, February 22, 2022, and ending at 12:00 noon on the seventh day thereafter (viz.: March 1, 2022). Therefore, the current petition signature deadline for political party recognition in Arkansas of December 24, 2021—which is 60 days before the party filing period pursuant to Pursuant to Ark. Code Ann. 7-7-205(a)(6), is 319 days before the date of the general election in Arkansas on November 8, 2022, and approximately five to six months before the Republicans and Democrats would hold their preferential primary elections to select their candidates on May 24, 2022, and their general primary election on June 21, 2022, for the same November 8, 2022 general election. Pakko Affidavit ¶ 9.

RESPONSE: *Undisputed.*

44. On June 28, 2019, the Libertarian Party of Arkansas turned in 18,702 petition signatures for political party recognition to the Arkansas Secretary of State, of which the Secretary of State originally claimed 12,749 petition signatures were found to be valid. Several months thereafter in a letter dated December 10, 2019, and shortly before oral argument in the appeal case before the U.S. Court of Appeals for the Eighth Circuit, the Secretary of State informed Dr. Pakko that the correct number of valid signatures was 14,779 petition signatures. There was no explanation as to why the mistake had occurred—although Dr. Pakko noticed that the previous incorrect figure of 12,749 matched a previous valid petition signature figure from a previous petition drive the Libertarian Party had conducted in Arkansas. This mistake by the Arkansas Secretary of State's office causes concern to the Libertarian Party of Arkansas about possible future carelessness and inattention to detail by the Secretary of State's office. Pakko Affidavit ¶ 6; Pls.' Mot. Summ. J., Ex. 7 ("SOS Dec. 10, 2019 Letter"), ECF No. 62-7.

RESPONSE: *Partly disputed.* The Secretary does not dispute that on June 28, 2019, the Libertarian Party of Arkansas turned in 18,702 petition signatures for political party recognition to the Arkansas Secretary of State, of which the Secretary originally claimed 12,749 petition signatures were found to be valid. The Secretary does not dispute that several months thereafter in a letter dated December 10, 2019, the Secretary informed Dr. Pakko that the correct number of valid signatures was 14,779 petition signatures. The Secretary disputes that there was no explanation as to why the mistake had occurred; the Secretary's letter states: "Our office inadvertently included the wrong count of valid signatures in the original letter." SOS Dec. 10, 2019 Letter at 2.

45. The movement of the petition signature deadline for new party petitions in Arkansas requires the ninety day petitioning time to be conducted at least 14 to 17 months before the Arkansas general election for presidential election years and at least 10 ½ to 13 ½ months before the Arkansas General Election for gubernatorial election years, at a time far removed from Arkansas elections and at a time when voter interest is less, election issues are not yet as well defined as they will be later, and before many voters have become disillusioned with the choices available to them for candidates from the Republican and Democratic parties. Pakko Affidavit ¶ 12.

RESPONSE: *Partly disputed.* The Secretary does not dispute that the movement of the petition signature deadline for new party petitions in Arkansas requires the ninety day petitioning time to be conducted at least 14 to 17 months before the Arkansas general election for Presidential election years and at least 10 ½ to 13 ½ months before the Arkansas General Election for midterm election years. The Secretary disputes that the petition signature deadlines are moved to times far removed from Arkansas elections and at a time

when voter interest is less, election issues are not yet as well defined as they will be later, and before many voters have become disillusioned with the choices available to them for candidates from the Republican and Democratic parties. Meghan Cox testified that she conducts ballot initiatives year-round and that Plaintiffs' witnesses' testimony that "people are just not interested in politics right now and they are unwilling to sign ballot petitions" is "not something that you hear." Tr. Prelim. Inj. Hr'g at 149. She testified that she prepares her signature collectors to answer questions such as "[w]hy are you collecting now?" with the simple explanation "so we can get on the ballot so we can have our candidates elected." *Id.* More generally, Ms. Cox gave expert testimony that political awareness has changed over the last decade. For instance, she explained that unlike "ten years ago" when "it was a different story," today "we have a 24/7 news cycle" and "[p]eople are engaged and paying attention." *Id.* at 149-50. And underscoring the point, Ms. Cox explained that on June 4, 2019—well over a year before the 2020 election—"the Democratic primary [was] in full swing," and "[p]olitics [were] everywhere." *Id.* at 149.

46. Because the Libertarian Party of Arkansas usually expects a validity rate of around 74-75% of signatures gathered, they try in their petition drives to be cautious and anticipate it will be necessary to submit approximately 14,000 petition signatures in order to have at least 10,000 valid petition signatures. Pakko Affidavit ¶ 13.

RESPONSE: *Disputed.* Meghan Cox testified as to a "conservative validity rate" of "between 75 and 78%" for LPAR based on the validity rates provided by the Secretary's office. Tr. Prelim. Inj. Hr'g at 142-43.

47. Currently, the Libertarian Party of Arkansas has started a new petition drive to regain political party recognition for the 2021-2022 election cycle. While the Libertarian Party of

Arkansas expects to collect a sufficient number of valid signatures to comply with the 10,000 petition signature requirement allowed by this Court's preliminary injunction order filed on July 3, 2019 (Dkt. No. 31) and the joint stipulation as to the continuing effect of the District Court's preliminary injunction order filed in this case on February 4, 2021 (Dkt. No. 60), the Libertarian Party of Arkansas anticipates in the future that the party may not always be successful in receiving 3% of the vote for Governor or 3% of the vote for President in Arkansas so as to meet Arkansas's retention requirement, and, thus, expects it will probably have to petition in the future to regain political party recognition in Arkansas. Pakko Affidavit ¶ 13.

RESPONSE: *Partly disputed*. On July 20, 2021, the Secretary sent Plaintiffs a letter notifying Plaintiffs that "the new political party petition submitted to our office on June 28, 2021 is sufficient." Ex. 1. The letter also stated that, "[t]he total number of signatures submitted was 14,593. After checking each submitted signature, 11,886 were determined to be valid." *Id.* The Secretary does not dispute that if LPAR does not meet the 3%-of-the-vote retention requirement, it will have to petition in the future to regain political party recognition.

48. In any gubernatorial or presidential election in which Libertarian Party of Arkansas's candidate for Governor or President does not obtain at least 3% of the vote cast will require them to petition again for party recognition. The party filing period (*i.e.*, for the Republican and Democratic parties) is set for the 2023-2024 election cycle for a one-week period beginning at 12:00 noon, November 6, 2023, and ending at 12:00 noon on the seventh day thereafter (viz.: November 13, 2023). Therefore, the petition signature deadline for political party recognition in Arkansas for the 2023-2024 election cycle will be September 7, 2023—which is 60 days before the party filing period pursuant to Ark. Code Ann. 7-7-205(a)(6), is 425 days before the date of

the general election in Arkansas on November 5, 2024, and approximately six to seven months before the Republicans and Democrats would hold their preferential primary elections to select their candidates on March 5, 2024, and their general primary election on April 2, 2024, for the same November 5, 2024 general election. Pakko Affidavit ¶ 14.

RESPONSE: *Undisputed.*

49. According to Dr. Pakko, the 90-day petitioning period is a severe burden on the Libertarian Party of Arkansas and its supporters in petitioning because severe weather and pandemic outbreaks have a negative effect on approaching people to sign petitions. It is rare in any 90-day period from Dr. Pakko's experience to not lose a certain number of days because of bad weather or outbreaks of something like COVID-19. Compared to the past petition drive in 2019, Dr. Pakko has found that COVID-19 has made the Libertarian Party of Arkansas's efforts more difficult this year in a number of ways, which Dr. Pakko says are: (1) our petitioners have noticed that many government offices have made online payment/registration more easily done online. Fewer people visiting those offices in person; (2) college and university campuses have been deserted. Online classes mean no students are there in person; (3) festivals and events all over the state have been cancelled (including the Conway Toad-Suck Festival that came up in Dr. Pakko's testimony in this case in the 2019 preliminary injunction hearing). Pakko Affidavit ¶ 15.

RESPONSE: *Disputed.* The Secretary disputes that such circumstances amount to a severe burden. Meghan Cox testified how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. Tr. Prelim. Inj. Hr'g at 141-42, 150-59, 161-64. As one example, she offered unrebutted testimony that LPAR could run a 75-day petition drive using 7-9 canvassers—40% paid and 60% volunteer—

that would satisfy Arkansas's modicum-of-support requirement for approximately $55,000. *Id.* at 141-42, 163-164. Ms. Cox's condensed 75-day period accounts for "weather challenges . . . to allow for more than enough time to have that day off when there's bad weather." *Id.* at 153. She acknowledged that a petition drive like this would require "a high degree of organization." *Id.* at 136. But she stressed that compliance would be "a relatively easy logistical job." *Id.* at 161; *see id.* at 141 (ballot-access drive would not be "complicated"). The Secretary further disputes Plaintiffs' implication that the effects of the COVID-19 pandemic would prevent them from acquiring the requisite number of petition signatures. Ms. Cox's unrefuted testimony as to how LPAR could satisfy Arkansas's modicum-of-support requirement accounting for severe weather also show how LPAR's signature collection efforts could overcome the effects of COVID-19, as Plaintiffs stated effects—diminished crowds at government offices, colleges and universities, and festivals and events—are comparable to the effects of severe weather. Further, the Eighth Circuit's findings in *Miller* are at odds with Plaintiffs' arguments that acquiring signatures during the COVID-19 pandemic "imposes severe burdens." 967 F.3d at 740. In *Miller*, the Eighth Circuit found that "one can imagine relatively simple ways for individuals . . . to safely [sign a petition]," including that groups circulating petitions "can advertise its petition using traditional and social media" or "bring the sterilized petition to [individuals'] homes." *Id.* Finally, this Court's holding in *Whitfield* undermines Plaintiffs' attempt to rely on COVID-19 to create a severe burden. *See* 468 F. Supp. 3d at 1089-94.

50. Dr. Pakko, as he testified on June 4, 2019, stated: "I track a running average of the number of signatures we are receiving per day. And it clearly goes up and down with the

weather. There are other special factors, but that's one consideration." Then, when asked when we only have 90 days as opposed to a year to petition and whether that is a bigger factor, Dr. Pakko said, "Well, yes. With a longer period of time, one day missed is one-ninetieth of a petition period in the 90-day limit. It's a smaller fraction in a longer period of time." Pakko Affidavit ¶ 16.

RESPONSE: *Disputed.* The Secretary disputes that the effects of severe weather would prevent Plaintiffs from acquiring the requisite number of petition signatures. Meghan Cox testified how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. Tr. Prelim. Inj. Hr'g at 141-42, 150-59, 161-64. As one example, she offered unrebutted testimony that LPAR could run a 75-day petition drive using 7-9 canvassers—40% paid and 60% volunteer—that would satisfy Arkansas's modicum-of-support requirement for approximately $55,000. *Id.* at 141-42, 163-164. Ms. Cox's condensed 75-day period accounts for "weather challenges . . . to allow for more than enough time to have that day off when there's bad weather." *Id.* at 153. She acknowledged that a petition drive like this would require "a high degree of organization." *Id.* at 136. But she stressed that compliance would be "a relatively easy logistical job." *Id.* at 161; *see id.* at 141 (ballot-access drive would not be "complicated").

51. Dr. Pakko believes, if not for the 90-day limitation, such drawbacks would have a lesser percentage negative effect on the petitioning period—particularly if the Libertarians had a year or more to petition as in initiative petitions—along with the fact that if initiative petitions do not have sufficient valid petition signatures, they can have additional time to petition of around 30 days to make up the deficit along with having a deadline which falls around July of the general election year. Pakko Affidavit ¶ 16.

RESPONSE: *Disputed.* The Secretary disputes that the 90-day signature-collection window burdens Plaintiffs. Meghan Cox testified how LPAR could collect signatures, how many canvassers would be required, and how much collection would cost. Tr. Prelim. Inj. Hr'g at 141-42, 150-59, 161-64. As one example, she offered unrebutted testimony that LPAR could run a 75-day petition drive using 7-9 canvassers—40% paid and 60% volunteer—that would satisfy Arkansas's modicum-of-support requirement for approximately $55,000. *Id.* at 141-42, 163-164.

52. Because of the fact that, whether in a presidential cycle or a gubernatorial election cycle in Arkansas, the petition deadline will fall somewhere in September or December of the year before the election, Dr. Pakko and the Libertarians have found that there is no particular time when interest of the voting public is high at a time when the election is far in the future. Since there is no particular good time to petition in the year before an election, the Libertarian Party of Arkansas has chosen to petition in a time before it gets too hot in the summer or people are on vacation and their children are out of school. Pakko Affidavit ¶ 16.

RESPONSE: *Disputed.* The Secretary disputes that there is no particular time when interest of the voting public is high at a time when the election is far in the future, and that there is no particular good time to petition in the year before an election. Meghan Cox testified that she conducts ballot initiatives year-round and that Plaintiffs' witnesses' testimony that "people are just not interested in politics right now and they are unwilling to sign ballot petitions" is "not something that you hear." Tr. Prelim. Inj. Hr'g at 149. She testified that she prepares her signature collectors to answer questions such as "[w]hy are you collecting now?" with the simple explanation "so that we can get on the ballot so we can have our candidates elected." *Id.* More generally, Ms. Cox gave expert testimony

that political awareness has changed over the last decade. For instance, she explained that unlike "ten years ago" when "it was a different story," today "we have a 24/7 news cycle" and "[p]eople are engaged and paying attention." *Id.* at 149-50. And underscoring the point, Ms. Cox explained that on June 4, 2019—well over a year before the 2020 election—"the Democratic primary [was] in full swing," and "[p]olitics [were] everywhere." *Id.* at 149. The Secretary also disputes Pakko's characterization of the summer as a "bad time" to collect petition signatures. Ms. Cox testified that, based on her extensive experience, it is easier to collect signatures over the summer because "people have their kids out of school" and "[t]hey are looking for activities and fun events and things to do." *Id.* at 144. She added that means large crowds at "concerts, games, baseball, football games in August, farmers markets," and that those kinds of events or "any type of event that attracts pedestrian traffic" are good opportunities to collect a significant number of signatures. *Id.* Ms. Cox also explained that the "4th of July is a game changer in ballot access because so many people have basically dead time," during which "they are waiting around for parades," "fireworks," or are "picnicking." *Id.* at 144-45.

53. Dr. Pakko and the Libertarian Party of Arkansas think there would be problems this year with the 90-day petitioning period if they decide to turn in the petition signatures on the deadline of December 24, 2021, because having a deadline of Christmas Eve would result in much of the petitioning toward the end being done in competition with the Thanksgiving and Christmas holidays when most people's thoughts are on something else besides politics. Pakko Affidavit ¶ 16.

RESPONSE: *Disputed*. The Secretary disputes that there would be problems this year with the 90-day petitioning period if they decide to turn in the petition signatures on the

deadline of December 24, 2021. Meghan Cox testified that she conducts ballot initiatives year-round and that Plaintiffs' witnesses' testimony that "people are just not interested in politics right now and they are unwilling to sign ballot petitions" is "not something that you hear." Tr. Prelim. Inj. Hr'g at 149. She testified that she prepares her signature collectors to answer questions such as "[w]hy are you collecting now?" with the simple explanation "so that we can get on the ballot so we can have our candidates elected." *Id.* Separately, Ms. Cox testified that other holidays, like the Fourth of July, were ideal times to collect petition signatures. *See id.* 144-45. More generally, Ms. Cox gave expert testimony that political awareness has changed over the last decade. For instance, she explained that unlike "ten years ago" when "it was a different story," today "we have a 24/7 news cycle" and "[p]eople are engaged and paying attention." *Id.* at 149-50. And underscoring the point, Ms. Cox explained that on June 4, 2019—well over a year before the 2020 election—"the Democratic primary [was] in full swing," and "[p]olitics [were] everywhere." *Id.* at 149.

54. As Chair of the Libertarian Party of Arkansas, Dr. Pakko has kept track of recent developments in the Arkansas General Assembly as to ballot access and election bills. Dr. Pakko contacted a number of Arkansas legislators in regard to this case before the Court and the decision of the U.S. Court of Appeals for the Eighth Circuit affirming this Court's decision granting Plaintiffs a preliminary injunction. Dr. Pakko made specific suggestions to correct the laws at issue in this case, but none of the legislators he contacted responded to his legislative proposal, although Dr. Pakko found them clearly aware of the situation. Therefore, the Arkansas General Assembly at this time has not addressed the issues raised in the instant case. Pakko Affidavit ¶ 17.

RESPONSE: *Undisputed but immaterial.* Plaintiffs have cited no authority to suggest that Dr. Pakko's communications with the Arkansas General Assembly are relevant to the issues in this case.

55. Because a political party in Arkansas which is successful in petitioning for ballot status does not nominate its candidates at the preferential primary or general primary elections for the current election cycle for 2022, Dr. Pakko sees no reason that the petition signature deadline for the new political party and the submission date for the candidates of the new political party for political pledges, candidate information forms, and party certificate of candidacy should be submitted from February 22, 2022, to March 1, 2022, well before the preferential primary election on May 24, 2022, and the general primary election on June 21, 2022, since the new political party does not have its candidates chosen at the elections in May and June of the General Election year, but rather at the new political party's nominating convention which must be held no later than the date of the preferential primary election. Pakko Affidavit ¶ 18.

RESPONSE: *Undisputed but immaterial.* The Eighth Circuit does not "compel[]" Arkansas "to provide empirical evidence" related to its ballot-access regime. *GPAR*, 649 F.3d at 686.

56. The Libertarian Party of Arkansas can only select its candidates at the nominating convention if they have filed the political practices pledge, party certificate of candidacy, and candidate information form during the party filing period at noon on February 22 through noon on March 1, 2022. Pakko Affidavit ¶ 18.

RESPONSE: *Undisputed.*

57. Prior to 2013, the dates for a new political party to submit petitions, nominate candidates, and have those candidates file a political practices pledge were tied to the preferential

primary election. Act 1356 of 2013 changed those dates to connect them with the party filing period. Pakko Affidavit ¶ 18; Pls.' Mot. Summ. J., Ex. 8, ECF No. 62-8.

RESPONSE: *Undisputed.*

58. In Dr. Pakko's proposed legislative fix this year, he specified the general primary election (as opposed to the preferential primary election) as a more appropriate date of reference because the general primary election is a runoff election, if necessary, for the major political party candidates for each elective office if no one receives a majority of the vote in the preferential primary election the month before. Pakko Affidavit ¶ 18.

RESPONSE: *Undisputed but immaterial.* Plaintiffs have cited no authority to suggest that Dr. Pakko's suggested legislation is relevant to the issues in this case.

59. The transcript of the preliminary injunction hearing held on June 4, 2019, and all exhibits and affidavits received therein may be considered by the District Court in deciding and reaching a final decision of any motions for summary judgment filed by the Plaintiffs or Defendants. Joint Stip. ¶ 29.

RESPONSE: *Undisputed.*

II. Defendant's Statement of Undisputed Material Facts

Additionally, in support of Defendant's motion for summary judgment, he provides the following "short and concise statement of the material facts as to which [he] contends there is no genuine dispute to be tried." Local R. 56.1(a).

60. LPAR has "a number of paths" for ballot access, beyond meeting the modicum-of-support requirement. *GPAR*, 649 F.3d at 677-79 (describing "a number of alternative paths" that allow "access to Arkansas's ballot as a candidate for elected office"). Any group may nominate presidential and vice presidential candidates by collecting just 1,000 signatures from registered voters. *See* Ark. Code Ann. 7-8-302(5)(B). Those nominees appear on the ballot along

with the group's name, and if a group's nominees win 3% of the vote, it will become a political party entitled to across-the-board ballot access. *Id.* 7-1-101(27)(A). Individuals may likewise qualify for the presidential ballot by collecting a mere 1,000 signatures. *Id.* 7-8-302(6)(A). Those requirements reflect the Supreme Court's conclusion that States have "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

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

62. Alternatively, a group may become a "political party" and secure the ability to nominate candidates for every partisan office on the ballot. *See id.* 7-7-102. A group may do that by winning at least 3% of the votes cast in the previous gubernatorial or presidential election. *Id.* 7-1-101(27)(A).

63. If a group's gubernatorial and presidential candidates continue to win at least 3% of the vote, that group will retain the ability to nominate candidates for every partisan office. *See id.* 7-1-101(27)(C). Both major parties retain across-the-board access based on that retention requirement, which this Court has previously upheld. *See GPAR*, 649 F.3d at 687.

64. Groups that fail to win 3% of the vote (or that are seeking ballot access for the first time) may also obtain across-the-board access by meeting the "petition requirements for

new political parties." Ark. Code Ann. 7-7-205. To do so, groups must demonstrate a modicum of support by collecting "signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor." *Id.* 7-7-205(a)(2). Having satisfied that modicum-of-support requirement, a group may nominate candidates for every partisan office. *Id.* 7-7-102(b). And as noted above, so long as that group's gubernatorial and presidential and vice presidential nominees win at least 3% of the vote, the group will retain across-the-board ballot access. *Id.* 7-1-101(27)(C).

65. Unlike in many States, "[a]ny [Arkansas] registered voter" can sign a petition regardless of whether he or she voted in the last election, and there is no limit to the number of petitions that a voter can sign. Tr. Prelim. Inj. Hr'g at 92 (testimony of Secretary of State's representative); *see id.* at 91-96 (same, describing lack of restrictions on who can sign ballot-access petitions). As of June 2019, there were 1,750,077 registered voters in Arkansas. *Id.* at 116. Thus, compared to the *eligible pool* of potential signatories, Arkansas's modicum-of-support requirement only requires groups to collect signatures from slightly more than 1.5% of that pool. (26,746 signatures ÷ 1,750,077 registered voters ≈ 0.0153.)

66. Before 2019, Arkansas allowed groups to obtain across-the-board access with just 10,000 signatures—or, approximately half-a-percent of eligible voters (10,000 signatures ÷ 1,750,077 registered voters ≈ 0.0057.). *See* Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 1 (amending Ark. Code Ann. 7-7-205(a)(2)). Unsurprisingly, groups regularly met that half-a-percent requirement and then failed to satisfy the 3% ballot-retention requirement. *See* Pls.' Mot. Summ. J. Ex. 5, ECF No. 62-5 (chart of Libertarian participation in Arkansas elections, 2016 and 2018).

67. That experience led Arkansas to conclude that 10,000 signatures were "insufficient to reflect the will of the voters" and ensure that only groups enjoying a significant modicum of support gain across-the-board ballot access. Act 164, 92d Arkansas General Assembly, 2019 Regular Session, sec. 2. In response, Arkansas adopted a modicum-of-support requirement more in line with the retention requirement.

68. While both Arkansas's modicum-of-support requirement and retention requirement involve a 3% threshold, it is far more difficult to win 26,746 actual votes out of 891,545 votes cast (like in the last gubernatorial election) than it is to collect 26,746 signatures from 1,750,077 registered voters. *See* Resp. Pls.' Mot. Prelim. Inj. Ex. 1, 89-91 (2018 election results). Indeed, even aside from the size of the eligible pool, voting—unlike signature gathering—is a zero-sum game that requires groups to convince voters to pick-and-choose and ultimately support one candidate over another. *Cf.* Tr. Prelim. Inj. Hr'g at 91-96 (describing lack of restrictions on who can sign ballot-access petitions, including ability to sign multiple petitions).

69. As for Arkansas's electoral deadlines, signatures cannot be more than 90 days old when submitted, but groups may begin collecting signatures at any time. Ark. Code Ann. 7-7-205(a)(4)(B). The decade-old provision requiring that signatures be no more than 90 days old when submitted, affords groups the flexibility to begin collecting early, so that if it appears they will be unable to collect sufficient signatures within 90 days of their start date, they may continue collecting on a rolling 90-day basis until the deadline. *See* Act 188, 87th Arkansas General Assembly, 2009 Regular Session, sec. 2 (enacting 90-day window). That flexibility also contrasts with the provision governing independent candidates, which limits signature collection to no more than 90 days before the independent-candidate filing deadline. *See* Ark. Code Ann. 7-7-

103(b)(3)(B). Thus, as particularly relevant here, unlike an independent candidate, if a group began collecting on April 1, and on June 28 it appeared the group would not meet the 26,746-signature threshold, it could redouble its efforts and continue collecting until successful.

70. Since 2013, groups seeking across-the-board ballot access have been required to submit signatures to the Secretary of State no later than 60 days before the "party filing period." *See* Act 1356, 89th Arkansas General Assembly, 2013 Regular Session, sec. 2 (amending Ark. Code Ann. 7-7-205(a)(6)).

71. The Arkansas General Assembly moved the *entire* election calendar forward in presidential election cycles so that—starting with the 2020 election—Arkansas's preferential primary election will take place in presidential cycles on Super Tuesday. Act 545, 92d Arkansas General Assembly, 2019 Regular Session, sec. 2 (creating Ark. Code Ann. 7-7-203(b)(2)).

72. In the 2020 election cycle, the signature submission deadline moved forward to September 5, 2019. *See* Ark. Code Ann. 7-7-205(a)(6).

73. In midterm election cycles, the primary will remain in the second half of May prior to the general election. *See id.* 7-7-203(a)(1), (b)(1) (setting it "four (4) weeks before the general primary election," which occurs "on the third Tuesday in June").

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

75. All of the following States have candidate filing deadlines for 2022 elections that are as many days before their primary elections as Arkansas's party filing period is before its primary[1]:

[1] For a complete listing of other States' election deadlines, see Nat'l Conf. of State Legislatures, *2022 State Primary Election Dates and Filing Deadlines* (Jul. 20, 2021), https://www.ncsl.org/research/elections-and-campaigns/2022-state-primary-election-dates-and-filing-deadlines.aspx.

State	Deadline	Citation
Alabama	116 days before primary	Ala. Code 17-13-5
Arizona	120 days before primary	Ariz. Rev. Stat. Ann. 16-311
California	88 days before primary	Cal. Elec. Code 8020
Colorado	105 days before primary	Colo. Rev. Stat. Ann. 1-4-801
Illinois	106 days before primary	10 Ill. Comp. Stat 5/8-9
Indiana	88 days before primary	Ind. Code Ann. 3-8-2-4
Kentucky	130 days before primary	Ky. Rev. Stat. Ann. 118.165
Louisiana	109 days before primary	La. Stat. Ann. 18:468
Maine	91 days before primary	Me. Rev. Stat. Ann. tit. 21-A, sec. 335
Maryland	126 days before primary	Md. Code Ann., Elec. Law 5-303
Massachusetts	112 days before primary	Mass. Gen. Laws Ann. ch. 53, sec. 10
Michigan	105 days before primary	Mich. Comp. Laws Ann. 168.551
Mississippi	98 days before primary	Miss. Code Ann. 23-15-299
Missouri	126 days before primary	Mo. Ann. Stat. 115.349
Montana	85 days before primary	Mont. Code Ann. 13-10-201
Nebraska	84 days before primary	Neb. Rev. Stat. Ann. 32-606
Nevada	88 days before primary	Nev. Rev. Stat. Ann. 293.177
New Hampshire	95 days before primary	N.H. Rev. Stat. Ann. 655:14
New Mexico	126 days before primary	N.M. Stat. Ann. 1-8-26
Ohio	90 days before primary	Ohio Rev. Code Ann. 3513.05
Tennessee	119 days before primary	Tenn. Code Ann. 2-5-101
Utah	103 days before primary	Utah Code Ann. 20A-9-408
West Virginia	101 days before primary	W. Va. Rev. Code Ann. 3-5-7

76. As for Arkansas's December 24, 2021 deadline for filing new party petitions, a litany of States have new party deadlines for the 2022 election cycle that are earlier than Arkansas's date:

- Arizona has a new party petition filing deadline of November 25, 2021, if the new party seeks to be recognized for the August 2, 2022 primary election. Ariz. Rev. Stat. Ann. 16-803A.

- Texas has a candidate filing deadline of December 13, 2021, for the 2022 election cycle; so, a new political party hoping to put forth candidates in the primary must be formed prior to that date. *See* Tex. Elec. Code 172.023, 181.033.

- South Carolina requires a new party to obtain certification by December 14, 2022, if it seeks to nominate candidates for the 2022 primary election. S.C. Code Ann. 7-9-10.

- Maine requires a new party to file a declaration of intent to form a party by December 16, 2021, for the 2022 election cycle. Me. Rev. Stat. Ann. Tit. 21-A, sec. 302.

77. Other States have new party registration deadlines that are around the same time as Arkansas's petition filing deadline:

- In Delaware, for a political party to be recognized as a "major political party" in the 2022 election, it must, as of December 31, 2021, have registered in its name voters equal to 5% of the total number of voters registered in the State. Del. Code Ann. tit. 15, sec. 101.

- Rhode Island has a petition filing deadline of January 1, 2022, for the 2022 election cycle. 17 R.I. Gen. Laws Ann. 17-1-2(9).

- In California, to qualify a new political party by voter registration, completed affidavits of registration must be submitted to county election officials by January 4, 2022, in order for the new party to participate in the 2022 primary election. Cal. Elec. Code 5100(b); 2187(c)(1). To qualify by petition, the deadline is January 23, 2022, to participate in the 2022 primary election. *Id.* 5100(c).

- Colorado has a new party petition filing deadline of January 14, 2022, for the 2022 election cycle. Colo. Rev. Stat. Ann. 1-4-1302.

- Nebraska has a new party petition filing deadline of January 15, 2022, for the 2022 election cycle. Neb. Rev. Stat. 32-716.

78. LPAR has never won 3% of the gubernatorial or presidential and vice presidential vote. Instead, between 2012 and 2018, it obtained across-the-board ballot access by satisfying the old 10,000-signature requirement. Prelim. Inj. Order at 8, ECF No. 31. It used that easily obtained across-the-board access to regularly nominate candidates (largely in already contested races) who failed to win even a minimal share of the actual vote. *See* Pls.' Mot. Summ. J. Ex. 5 (chart of Libertarian participation in Arkansas elections, 2016 and 2018). It also used that across-the-board access to nominate a professional Elvis impersonator that it listed on the ballot

as Elvis Presley. Resp. Pls.' Mot. Prelim. Inj. Ex. 1 at 23, 87 (2014 and 2018 election results). And year after year, it promptly failed to meet the retention requirement and lost across-the-board access. Prelim. Inj. Order at 8.

79. In fact, the closest LPAR ever came to meeting the ballot-retention requirement was in the 2018 gubernatorial election. *Id.* Yet even then, LPAR's candidate was far from competitive, let alone viable. Its candidate that year won just 25,885 votes. Resp. Pls.' Mot. Prelim. Inj. Ex. 1 at 89-91 (2018 election results). That is over *ten* times less than the more than 280,000 votes that the *losing* major party candidate received. It is also more than *twenty* times less than the 580,000 votes that the winning candidate received. *Id.*

80. At the June 4, 2019, preliminary-injunction hearing, Dr. Pakko, the LPAR Chairman, testified that although LPAR "kicked . . . off" its signature gathering campaign on April 1, it "did not" even bother to "get all of [its] canvassers in town on the job really until about mid-April, on April 15th." Tr. Prelim. Inj. Hr'g at 24. Dr. Pakko also explained that LPAR had hired just five canvassers and was largely relying on volunteers who just "ask[ed] their spouse[s] and neighbors to sign." *Id.* at 47. Indeed, at best, Dr. Pakko conceded that LPAR had lined up only "maybe a dozen" more committed volunteers. *Id.* And although Dr. Pakko testified that LPAR's canvassers sometimes received questions about why they are petitioning so far in advance of the election, he acknowledged that "people are still willing to sign a petition." *Id.* at 26.

81. Dr. Pakko also testified that he believed the previous 10,000-signature requirement was "challenging" and "expensive." *Id.* at 20. He based that claim on LPAR's past petition drives, which "required *at least* $30,000 in cash to accomplish plus a considerable volunteer effort." *Id.* at 36 (emphasis added). He did not suggest that LPAR struggled to come up with those funds in the past, and he did not give any details about LPAR's current finances. Instead,

he merely explained that LPAR had raised money this year "with some professional help and professional fundraisers." *Id.* And far from facing a tight market for paid help, Dr. Pakko testified that as a result of the earlier presidential year compliance deadlines, "the market for petition canvassers is a little bit easier to work with." *Id.* at 24.

82. Speaking on the compliance deadlines, Dr. Pakko testified that even "petitioning so far in advance" of the 2020 election, "people are still willing to sign a petition." Tr. Prelim. Inj. Hr'g at 26. And he agreed that Plaintiffs were *not* "unable to collect signatures during th[is] time frame." *Id.* at 64. Indeed, he even conceded that the earlier deadline had benefits. *See id.* at 24 (testifying that the "market for petition canvassers is a little bit easier to work with earlier on in the process").

83. Michael Kalagias, a perennial LPAR candidate and the chair of the Benton County Libertarian Party, also testified about how little LPAR had done to collect signatures. *Id.* at 72. Despite leading the LPAR chapter in the second-most populous county in Arkansas, Kalagias testified that as of the time of the preliminary-injunction hearing—some *two months* after LPAR had kicked off its petition drive—he had collected just 30-40 signatures. *Id.* at 79. He then added that he had "no set plans" to collect additional signatures. *Id.* at 80-81. And despite his previous runs for elected office, he conceded that he had only reached out to *three* people from those campaigns "to see if they would assist in gathering signatures." *Id.* at 81-82.

84. Lastly, Christopher Olson, LPAR's vice chair and chair of its elections committee, testified that he had done little to collect signatures during the two months leading up to the preliminary-injunction hearing. *Id.* at 83-84. In fact, he conceded that despite his leadership role, he had "collected just a handful of signatures." *Id.* And though he generally "plan[ned] on

collecting more," Olson testified that he had no "specific plans" about how he might do that. *Id.* at 85.

85. Peyton Murphy, the former assistant director of the elections division of the Secretary of State's office, testified about the lack of restrictions on who can sign group ballot-access petitions. *Id.* at 87-88. As Murphy explained, "[a]ny registered voter in the state of Arkansas could sign" LPAR's petition. *Id.* at 92. He further explained that with ballot-access petitions there is no limit to the number of petitions that a voter can sign, there are no restrictions on who can collect signatures, and there are no special geographic requirements. *See id.* at 91-96. He contrasted those lax requirements with the stringent regulations governing the collection of signatures for state ballot initiatives and referenda. *See id.* Yet he noted that—despite those more onerous signature-collection requirements and the fact that ballot initiative and referenda require far more signatures—they regularly appear on the ballot in Arkansas. *See id.* at 119; *see also* Ark. Const. art. 5, sec. 1 (requiring signatures numbering 6-10% of those who voted in last gubernatorial election for ballot initiatives and referenda).

86. Dr. Trey Hood, a political scientist at the University of Georgia, offered expert testimony that Arkansas's modicum-of-support requirement does not impose a severe burden. *See* Tr. Prelim. Inj. Hr'g at 183-84. Based on his extensive experience studying ballot-access laws around the country, Dr. Hood testified that neither Arkansas's modicum-of-support requirement nor the timing provisions would freeze the political status quo in Arkansas. *Id.* at 185-86, 202. Dr. Hood also stressed that the challenged provisions are similar to those in other States. *See id.* at 196-97, 202. In particular, Dr. Hood discussed Alabama's ballot-access regime; he explained that Alabama law requires political groups to turn in signatures equal to "3 percent of the gubernatorial vote" and is "identical in that respect to Arkansas's requirement." *Id.* at 196. He

also noted that courts had already upheld Alabama's modicum-of-support requirement. *Id.* at 195.

87. Additionally, based on his research, Dr. Hood testified that there is no difference between running as an independent candidate endorsed by a political group and running as a candidate with that group's label. *See id.* at 195 ("There's no difference for nonmajor party candidates in terms of the share of the vote they get whether they have a third-party label or they are just listed as an independent on the ballot."). Thus, as relevant here, Dr. Hood's testimony demonstrated that even if LPAR were to fail to obtain across-the-board ballot access and a candidate had to run as an independent without a "Libertarian" label, it would not impact that LPAR-backed candidate's vote total. *Cf.* Ark. Code Ann. 7-7-103(b)(1)(A) (setting May 1, 2022 deadline for independent candidates). LPAR did not rebut Dr. Hood's testimony.

88. Lastly, political consultant and ballot-access expert Meghan Cox testified that LPAR could comply with Arkansas's modicum-of-support requirement. She based that expert opinion on her extensive experience running petition drives throughout the country, including in Arkansas. Tr. Prelim. Inj. Hr'g at 161-62; *see* 129-30 (describing her experience). She explained that, in contrast to other States, Arkansas's restrictions on signature collection are "very lax and pretty easy." *Id.* at 140; *see id.* at 139-42. Indeed, drawing on her experience, when asked for her bottom-line conclusion about Arkansas's modicum-of-support requirement and the timing provisions, Ms. Cox stated: "I do not think it's burdensome." *Id.* at 156.

89. Ms. Cox further explained that the challenged timing provisions are not burdensome. She agreed with Pakko's testimony that it is cheaper to hire canvassers earlier in an election cycle—*i.e.*, before September 5—than later. *Id.* at 147-48; *see id.* at 24 (Pakko testifying to this point). LPAR did not rebut Ms. Cox's testimony.

90. Three-and-a-half weeks after the preliminary-injunction hearing, on June 28, 2019, LPAR ended its signature-collection effort and turned in just 18,667 signatures. Prelim. Inj. Order at 61-63. That submission was more than *two months* before the September 5, 2019 deadline and less than 90 days after LPAR claimed to have begun its collection drive without even having all of its canvassers in place. It was also before Independence Day, which Ms. Cox had explained was one of the best opportunities all year to collect signatures.

91. LPAR subsequently notified the district court that it had turned in less than 26,746 signatures. *Id.* It did not explain why it had opted to turn in a facially invalid number of signatures months in advance of the deadline or explain why it had opted not to—as Dr. Pakko suggested it might during his preliminary-injunction testimony—roll the 90-day compliance period forward to account for its even more lackadaisical collection efforts between April 1 and 15, 2019. *See id.*; Tr. Prelim. Inj. Hr'g at 53-54 (Dr. Pakko's concession that LPAR had known it could "move [its] rolling 90-day window" and considered doing that).

92. On July 20, 2021, the Secretary sent Plaintiffs a letter notifying Plaintiffs that "the new political party petition submitted to our office on June 28, 2021 is sufficient." Ex. 1 to Def.'s Mot. for Summ. J., July 20, 2021 Letter from Sec'y Thurston. The letter also stated: "The total number of signatures submitted was 14,593. After checking each submitted signature, 11,886 were determined to be valid." *Id.*

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Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

VINCENT M. WAGNER (2019071)
Deputy Solicitor General
DYLAN L. JACOBS (2016167)
Assistant Solicitor General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
vincent.wagner@arkansasag.gov

Counsel for Defendant