No. _____

In the Supreme Court of the United States

THE LIBERTARIAN PARTY OF KENTUCKY, *et al.*,
Petitioners,

v.

ALISON LUNDERGAN GRIMES,
SECRETARY OF STATE OF THE
COMMONWEALTH OF KENTUCKY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas B. Bruns
Bruns, Connell,
Vollmer, Armstrong
4750 Ashwood Dr., Ste. 200
Cincinnati, OH 45241
(513) 326-0274
tbruns@bcvalaw.com

Robert A. Winter, Jr.
Counsel of Record
Law Office of Robert A. Winter, Jr.
P.O. Box 175883
Fort Mitchell, KY 41017-5883
(859) 250-3337
robertawinterjr@gmail.com

Oliver B. Hall
Center for Competitive Democracy
1835 16th Street NW #5
Washington, D.C. 20009
(202) 248-9294
oliverbhall@gmail.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the equal protection analysis in ballot access cases, including *Anderson v. Celebrezze,* 460 U.S. 790 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), incorporates a non-discrimination principle, separate and apart from the *Anderson-Burdick* burden analysis, as held by the Second, Third, Tenth, and Eleventh Circuits, or whether the *Anderson-Burdick* burden analysis is the sole test for ballot access, as held by the Sixth Circuit here?

2. Whether a minor party must show its "exclusion or virtual exclusion" from the ballot to demonstrate a "severe burden" under *Anderson-Burdick* before strict scrutiny analysis is triggered, or whether a demonstration of significant roadblocks that extend beyond the merely inconvenient, as suggested by Justice Scalia and the Seventh Circuit, are sufficient to trigger a "severe burden" and strict scrutiny analysis?

3. Whether the "flexible analysis" framework of *Anderson-Burdick* allows a ballot access scheme that significantly impairs minor parties, when less burdensome alternatives exist but are not employed, as held by the Sixth Circuit, or whether, under a "flexible analysis" requires the least burdensome alternative that meets legitimate state interests, as held by the Second and Eleventh Circuits?

PARTIES TO THE PROCEEDING

Petitioners are the following individuals and entities who were Plaintiffs before the trial court and Appellants in the Sixth Circuit: The Libertarian Party of Kentucky, Libertarian National Committee, Inc., Constitution Party of Kentucky, and Ken Moellman, Jr.

Respondents are the following individuals who were Defendants before the trial court and Appellees in the Sixth Circuit: Alison Lundergan Grimes, Secretary Of State of the Commonwealth of Kentucky and Chair of the State Boards of Elections; Joshua G. Branscum, Member State Board of Elections; John Hampton, Member State Board of Elections; Stephen Huffman, Member State Board of Elections; Donald Blevins, Jr., Member State Board of Elections; Albert B. Chandler, III, Member State Board of Elections; George Russell, Member State Board of Elections; and Maryellen B. Allen, Executive Director, Kentucky State Board of Elections. Respondents are sued in their official capacities that correspond to their respective offices.

Respondent Andrew G. Beshear, the Kentucky Attorney General, was also a Defendant before the trial court and an Appellee in the Sixth Circuit. The trial court dismissed Mr. Beshear by an Order, entered February 22, 2016, and the dismissal was affirmed on appeal. Petitioners do not seek review of that decision.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, the undersigned counsel state that none of the Petitioners are publically traded companies or have parent entities that are publically traded companies.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Plaintiffs The Libertarian Party of Kentucky, Libertarian National Committee, Inc., the Constitution Party of Kentucky, and Ken Moellman, Jr. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The subject of this petition for a writ of certiorari is the *Opinion* and *Judgment,* entered August 26, 2016, by the United States Court of Appeals for the Sixth Circuit in Case No. 16-6107 (App.1–App.18), and is reported at *Libertarian Party of Kentucky v. Grimes,* 835 F.3d 570 (6th Cir. 2016). Petitioners' petition for rehearing en banc was denied by the Sixth Circuit Court of Appeal's *Order*, entered September 27, 2016 (App.43), which is unreported.

The *Opinion & Order and Judgment* in the United States District Court, Eastern District of Kentucky, entered July 8, 2016, granting Respondents' motion for summary judgment and denying Petitioners summary judgment (App.19-App.42), is presently not reported in *Federal Supplement*, but is available at 2016 WL 3749095.

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c). This Petition was timely filed under the terms of Supreme Court Rule 13(1) and (3).

The Opinion and Judgment of the Sixth Circuit Court of Appeals was entered on August 26, 2016. (App.1). A timely petition for rehearing en banc was filed with the Sixth Circuit on September 8, 2016. On September 27, 2016, the Sixth Circuit entered its order denying the petition for rehearing en banc. (App.43).

On November 11, 2016, Petitioners filed an Application (No. 16A494) to extend the time to file a petition for a writ of certiorari from December 26, 2016, to February 24, 2017. On November 16, 2016, Circuit Justice Elena Kagan entered an Order granting the Application and extending the time for Petitioners to file a petition for writ of certiorari until February 24, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are set forth in the appendix.

A. U.S. Const., Amend I.

B. U.S. Const., Amend XIV, Section 1.

C. Ky. Rev. Stat. Section 118.015.

D. Ky. Rev. Stat. Section 118.305.

E. Ky. Rev. Stat. Section 118.315.

STATEMENT OF THE CASE

A. INTRODUCTION

As the Sixth Circuit Court of Appeals noted in *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 539 (6th Cir. 2014) ("*Hargett II*"), "this case does not involve … rules regarding when a particular *candidate* may appear on the ballot; it involves only the requirements a political *party* must meet." Unlike placing a single candidate on the ballot, Kentucky law has *no mechanism* for a minor political party or group[1] to achieve blanket or general ballot access, the way major parties are permitted to do, except once every four years, measured only by its candidate's performance in the most recent Presidential race.

Plaintiffs below and Petitioners here have increasingly run – or tried to run – more and more candidates for federal, state, and local office. In doing so, they achieved ever increasing levels of success – breaking 3% and then 4% in statewide state and federal races, and actually electing candidates in partisan races for county officers. The onerous ballot access scheme in Kentucky, insofar as restrictions on

---

[1] Petitioners use the term "political party" and "minor party" interchangeably to refer to the term as it is commonly understood, to include groups such as Petitioners Libertarian Party of Kentucky and Constitution Party of Kentucky, and their national committees, to comprise a group of persons who have formed a political group. Where statutory terms are referred to, Petitioners use capitals for clarity (*i.e.*, Political Party to refer to a political party whose candidate for president achieved 20% or more in the last presidential race, or Political Organization to refer to a political party whose candidate for president achieved 2% or more in the last presidential race).

political groups are concerned, has inhibited them and does not measure a modicum of support, but instead creates an ever-increasing barrier to prevent electoral competition. A writ of certiorari is sought to correct the Sixth Circuit Court of Appeals' entrenchment of the unconstitutional electoral oligopoly within Kentucky.

B. BACKGROUND OF KENTUCKY'S BALLOT ACCESS LAWS

Kentucky law does not permit "general" ballot access for a political party unless that party receives over 2% of the vote in the most recent Presidential race. Ky. Rev. Stat. §118.015, Ky. Rev. Stat. §118.305. If a political party's candidate receives more than that percentage vote, that party may nominate its candidates and place them on the general election ballot for the following four years, with no further steps being necessary insofar as Kentucky is concerned. *Id.* Significantly, there is no other way for a political party to receive blanket ballot access – even if it runs candidates in other statewide races. *Id.*

Kentucky utilizes a three-tiered system for political groups and ballot access. A "Political Party" is a group whose candidate received at least 20% of the vote in the last election for President. Ky. Rev. Stat. §118.015(1). A "Political Organization" is a group whose candidate received at least 2% of the vote in the last election for President. Ky. Rev. Stat. §118.015(8). A "Political Group" is a political group that is not a Political Party or Political Organization. Ky. Rev. Stat. §118.015(9).

Pursuant to Ky. Rev. Stat. §118.305(1)(a), (b), (c), and (d), candidates for Political Parties and Political Organizations automatically earn state wide ballot

access, and do so for a four-year period following the Presidential election.

The Kentucky Board of Elections has determined that third party candidates, such as those of the Libertarian and Constitution parties, are to be treated as "independent candidates" under Ky. Rev. Stat. §118.305(1)(e), and thus may qualify for ballot access on an individual race-by-race basis by obtaining the number of signatures required in Ky. Rev. Stat. §118.315(2). For statewide office, 5,000 signatures are required; for a Congressional district, 400 signatures are required; and for a state house or senate district, 100 signatures are required. *Id.* A voter can sign only one petition per office. *Id.*

A separate petition is required for each candidate and there is no method for a political group to become ballot qualified state wide, except through obtaining the requisite votes during the most recent Presidential election.[2]

C. THE PLAINTIFFS/PETITIONERS IN THIS MATTER

Petitioners are the Libertarian National Committee, Inc. ("LNC"), the Libertarian Party of Kentucky ("LPKY") (the LNC and LPKY are collectively referred to as the "Libertarians"), the Constitution Party of

---

[2] Without statutory authority, the Kentucky Board of Elections has permitted a single petition to be submitted for two federal offices statewide (*i.e.*, U.S. Senator and U.S. President). That practice demonstrates the workability of permitting a single petition to be submitted with the requisite number of signatures for all races in a particular election year.

Kentucky ("CPKY"), and Mr. Ken Moellman, Jr., an individual voter.

LPKY is the Kentucky state affiliate of the national party, which has been harmed by Kentucky's ballot access regime since "it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise." [Decl.Eckenberg, RE#16-2, PAGEID#184-188]. "The LPKY typically fields candidates for local, state, and national elections." *Id.* LPKY has just under 5,000 voters registered as Libertarians in Kentucky.[3] *Id.*

The LNC is the national arm of the Libertarian Party. The LNC is significantly impaired in running its candidates for office under the restrictive ballot access laws that are the subject of this suit. *Id.*

The Libertarians have engaged in systemic and repeated political activities in Kentucky, including fielding candidates for Presidential and other races. *Id.* For instance, the Libertarians have each participated in signature drives placing their candidates on the ballot for President every Presidential election year since 1988. *Id.*

The Libertarians have a significant modicum of support from Kentucky voters. *Id.*; [Decl.Winger, RE#16-6, PAGEID#212-235]. The Libertarians' candidate in the 2014 U.S. Senate election, David Patterson, received 44,240 votes (3.1% of the votes

---

[3] During the pendency of the litigation LPKY exceeded 7,700 voters, even though the Libertarian party is not identified in Kentucky voter registration cards, and a Libertarian voter must write in the party.

cast), despite his exclusion from statewide televised debates that would have boosted his election results. *Id.* In 2011, Mr. Moellman ran as LPKY's nominee for State Treasurer, receiving 37,261 votes (4.61% of the votes cast). *Id.* The Libertarians fare even better in local and county races, and have actually elected Libertarian candidates to partisan county and local offices. *Id.*

It is ordinary for other state Libertarian Parties to run multiple candidates for statewide office. [Decl. Winger, RE#16-6, PAGEID#212-235]. Just looking at 2014, the Libertarian Party ran numerous statewide partisan candidates around the country: Alaska-3, Arkansas-8, Colorado-5, Delaware-2, DC-5, Florida-2, Georgia-5, Hawaii-2, Illinois-6, Indiana-3, Iowa-4, Kansas-2, Maryland-2, Michigan-13, Minnesota-4, Montana-2, Nebraska-3, New York-3, North Dakota-3, Ohio-2, Oregon-2, South Carolina-2, South Dakota-6, Tennessee-2, Texas-15, Wisconsin-4, and Wyoming-4. *Id.*

Mr. Moellman is a registered Libertarian voter whose rights have been impaired. [Decl.Moellman, RE#16-3, PAGEID#188-199]. Mr. Moellman has been active in politics in Kentucky as both a voter and member of the LPKY. *Id.*

Similarly, CPKY "is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise." [Decl.Krogdahl, RE#16-4, PAGEID#200-205]. CPKY typically fields, or attempts to field, candidates for certain state and national elections. *Id.*

CPKY has a modicum of support from Kentucky voters, though not as much as LPKY. CPKY qualified

its candidate for President of the United States in 2008 by petition. *Id.*; [Decl.Winger, RE#16-6, PAGEID#212-235]. In 2010, CPKY ran a candidate for the 79th Kentucky House District who secured 27.4% of the vote. *Id.*

Kentucky law applies a 2% vote test for President to qualify as a Political Organization. Ky. Rev. Stat. §118.015; Ky. Rev. Stat. §118.305. Prior to the 2016 presidential race, the last presidential race in Kentucky was in 2012. In that race, 1,797,212 voters voted.[4] Taking 2% of the votes cast in that race, 35,944 voters would need to support Libertarians to meet the statutory Political Organization criteria. [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460].

In 2011, 37,261 Kentucky voters supported Ken Moellman, Jr. when he ran statewide for Treasurer. [Decl.Winger, RE#16-6, PAGEID#212-235]. In 2014, 44,240 Kentucky voters supported David Patterson when he ran statewide for United States Senate in 2014. *Id.* In two separate recent statewide races, Kentucky voters exceeding 2% of the votes cast in the last election for President have supported Libertarian candidates. *Id.*

It should be noted that the number of Petitioners' registered voters are substantially lower than actual support at the ballot box. [Supp.Decl.Winger, RE#37-4, PAGEID#471-474]. Mr. Patterson, the 2014

---

[4] http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2012/2012genresults.pdf (last visited 4/14/16); *Hall v. Sepanek*, 2015 WL 106065, n. 1 (E.D. Ky.) (judicial notice of government website appropriate), *aff'd*., No. 15-5043 (6th Cir. 2015) (unreported).

Libertarian Candidate for U.S. Senate, is a prime example. *Id.* Despite having less than 5,000 LPKY registered voters in 2014, Mr. Patterson received 44,240 votes – over 9 times the number of registered LPKY voters at that time. *Id.*; [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460].

D. HISTORICAL THIRD PARTY ELECTORAL RESULTS IN KENTUCKY

With only five exceptions, for at least the past 100 years, the only parties qualifying for automatic ballot access in Kentucky were the Democrat and Republican Parties. [Decl.Winger, RE#16-6, PAGEID#212-235]. Those exceptions occurred in 1924, 1968, 1980, 1996, and 2016. *Id.* These five instances of past candidates (other than Republicans and Democrats) achieving over 2% of the vote do not make Kentucky's ballot access scheme reasonable or constitutional.

Moreover, as further evidence of the burden of Kentucky's ballot access scheme, Kentucky is one of only 5 states that have not had any ballot-qualified *parties*, other than from the Democrat or Republican parties, in the last 15 years. *Id.* The others are New Jersey, Pennsylvania, Virginia and New Hampshire. *Id.* It is "virtually impossible" in the modern political landscape for minor parties to qualify for general ballot access under Kentucky's regime. *Id.*

E. FACTS REGARDING THE KENTUCKY BALLOT ACCESS SCHEME'S SEVERE BURDEN ON MINOR POLITICAL PARTIES LIKE PETITIONERS

1. The Vast Majority Of States – But Not Kentucky -- Permit a Minor Party to Obtain Ballot Qualification Before Any Particular Election, Usually Through Petition

Thirty-eight states permit a political group to transform itself into a ballot qualified party before any particular election, and before it has chosen any nominees. [Decl.Winger, RE#16-6, PAGEID#212-235]. This is critical for groups that wish to become qualified parties, who do not yet have any nominees. *Id.*

Of the remaining 12 states, in ten of those states, even though a group must choose nominees before it can begin to get itself and its nominees on the ballot, at least the group can become a qualified party by polling a certain share of the vote in a midterm year, typically looking at one of several races. *Id.* But Kentucky does not even allow that. *Id.* Washington and Kentucky are the only states in which it is impossible for a group to become a ballot qualified party at any time except in November of a presidential election year. *Id.*

Moreover, it is "virtually impossible for a political party, other than the Democratic or Republican Party, to achieve general or automatic ballot access in Kentucky, by obtaining 2% or more in a Presidential race, in view of the modern political environment." *Id.*

2. Kentucky's Ballot Access Laws Burden Associational Rights

Some of the most important new political parties in U.S. history were formed in midterm years. [Decl.Winger, RE#16-6, PAGEID#212-235]. If Kentucky's ballot access scheme was in force in 1854, it would have prevented the mid-term rise of the Republican Party. *Id.* Mr. Richard Winger, a recognized national expert at ballot access issues, opined that Kentucky's policy of not permitting a group to become a qualified party except through polling 2% or more for President raises significant associational rights issues. The Kentucky scheme makes it impossible for any party to be ballot qualified if that party is only interested in state political issues, even though there are many one-state parties in the United States and even though many of them have been successful. *Id.* The Progressive Party, in Vermont has eight state legislators, and yet never runs anyone for President. *Id.*

3. Using a Presidential Election As The Sole Barometer For Ballot Access For a Political Party Is Far Too Restrictive, And Is Not Rooted In Any Legitimate State Interest

Kentucky's ballot access laws are too restrictive. [Decl.Winger, RE#16-6, PAGEID#212-235]. Minor parties typically do far better for all partisan offices than they do for President. *Id.* The Libertarian Party has elected state legislators in Alaska, New Hampshire, and Vermont, and has an additional state legislator in Nevada. *Id.* But the Libertarian Party has never polled nationally as much as 2% for President. *Id*.

In fact, while many states look at a Governor's race, Kentucky does not even permit that, which would be a lower burden. *Id.* Nevertheless, the Libertarian Party has been a ballot qualified party in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Florida, Georgia (for statewide office only), Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming (41 states and D.C.). *Id.* If every state had the Kentucky definition of a ballot-qualified party, the Libertarian Party would almost never have been a qualified party in any state. *Id.*

Even if a state were to provide that the only way for a political group or party to achieve automatic ballot access was by means of results in a single race, the most burdensome race in which to poll is the Presidential election. *Id.* In all other states, except for Kentucky and Washington, there are other elections (particularly mid-term elections), or a petition mechanism, in which to put a party generally on the ballot. *Id.* Prior to 2009, the State of Washington permitted a party to obtain ballot access generally by obtaining 5% of the vote in *any* statewide election. *Id.* In 2009, Washington changed its law, to look solely to the results of the Presidential race, and since that time has had no minor parties achieving statewide ballot access. *Id.*

Minor parties are not like independent candidates who can simply begin gathering signatures immediately after the statutory window opens. [Supp.Decl. Eckenburg, RE#37-1, PAGEID#453-460; Supp.Decl.Krogdahl, RE#37-3, PAGEID#467-470]. Until Libertarian candidates are nominated at convention, they cannot under party rules appear on the ballot. [Supp.Decl.Eckenburg, RE#37-1, PAGEID#453-460]. In 2016, LPKY ran a candidate for the State House of Representatives and at least one local candidate for office, and, with LNC, ran a Presidential slate. *Id.* The district and local candidates for the Libertarian Party were nominated in March, at convention.[5] *Id.*

The Presidential candidate for the Libertarian Party was nominated in late May 2016, at the Libertarian National Committee's convention. *Id.* That is not surprising, since the Republican and Democratic parties nominated their candidates in the summer of 2016. Until nomination occurs, the Libertarians cannot circulate petitions because Kentucky – unlike other states – has no legal process for "substitution" – the practice of circulating signatures without a nominee, such as a petition for the party itself or for the party's nominee for President. *Id.*; [Supp.Decl.Moellman, RE#36-2, PAGEID#465-466]. Instead, because Kentucky does not permit

---

[5] As Mr. Eckenberg testified, these nominations occurred with a view towards the present ballot access scheme; additional and other candidates would have been nominated had the restrictive scheme not been in place, and the State's executive committee will nominate additional candidates if the current scheme is enjoined. [Supp.Decl. Eckenburg, RE#37-1, PAGEID#453-460].

substitution, the Libertarians had to wait until its Presidential candidate was nominated on May 31, 2016, to begin the signature process. *Id.*

4. The Requirement of Separate Petitions for Each Candidate with Many Signatures for Political Parties Desiring to Field Multiple Candidates Is Not Feasible, Far Too Costly, and Practically Impossible for Major Parties, Much Less Minor Parties Such as the Petitioners

The cost, both monetary and in time, of Kentucky's ballot access laws generally results in the Libertarians only being able to undertake one or two petition drives per year for one or two of their candidates, foreclosing them and their candidates from other opportunities. [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. But for the challenged ballot access laws, the Libertarians would field more than one or two candidates, per year, for statewide and national office. [Decl.Eckenberg, RE#16-2, PAGEID#184-188].

For CPKY, Kentucky's ballot access regime has kept them off the ballot in every statewide race but Presidential races in the last several decades. [Decl. Winger, RE#16-6, PAGEID#212-235].

Kentucky's ballot access regime constitutes a severe burden on minor political parties' fundamental functions as a political party – namely the ability to field candidates for office. *Id.*

Petitioners' expert, Richard Winger, explains that 5,000 signatures may be "an acceptable alternative for an 'independent' candidate, but it is an extremely poor

threshold and a significant burden for a political party to field a slate of candidates, or even more than one or two candidates per election cycle." *Id.* This burden is why Petitioners have never fielded more than two candidates in any Kentucky statewide election per election cycle – Kentucky's laws and ballot access regime make it impossible as a practical matter to do so. *Id.*

Of course, it is not enough to gather 5,000 signatures – sometimes non-registered voters sign petitions, sometimes voters sign more than one, and for these, and other reasons, typically 1.5 to 1.75 times the required number is what is required as a practical matter to ensure the petition counts. [Decl.Eckenberg, RE#16-2, PAGEID #184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. As a practical matter, between 7,500 and 8,750 signatures need to be obtained to ensure that a valid petition is submitted. *Id.*

Ms. Christina Tobin, an expert in petition gathering and circulation, indicates that professional petitioners are generally engaged to collect these signatures. [Decl. Tobin, RE#16-5, PAGEID#206-211]. The only practical way to gather a single petition with 5,000 or more signatures is either with (1) an extremely organized, and typically large, group of volunteers; or (2) through the use of a professional paid petitioner. *Id.* Petitioners can find volunteers and have the organization to obtain some of the required signatures in a statewide race, *for a single race*, in a *single election cycle* (and would need to pay a professional signature gathering organization for the rest of the signatures). [Decl.Eckenberg, RE#16-2, PAGEID#184-188;

Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. As a practical matter, it is impossible to gain access for more than two candidates in a statewide race given the signature threshold (and would be a difficult task even for one of the major political parties). *Id.*

For paid petitioners, lowest market rate has been $2.00 per signature for reputable firms, and is charged regardless of whether the signature is a "good" signature, or is subsequently identified as invalid. [Decl.Tobin, RE#16-5, PAGEID #206-211]. This $2.00 per signature amount is for a single petition – it becomes exponentially more difficult (and expensive) to have a voter sign more than one petition at a time. *Id.* The law of diminishing returns applies on petition gathering, and it is far easier to obtain 5,000 signatures for a single petition that places multiple candidates on the ballot than it is to gather separate petitions at the same time. *Id.*

It is therefore impossible for a minor party to field a slate of candidates for Kentucky's Constitutional office holders, because "the cost alone is more than a minor party can afford, and it is not possible to engage in one single petition drive to put that many candidates on the ballot." *Id.* For these same reasons, it would be unusual for petitioning companies to take an engagement where they needed to circulate three or more petitions in the same area in the same election cycle. *Id.*

The cost to place a slate on the ballot for Kentucky's Constitutional Office holders is $73,500 to $105,000 per election year. [Decl.Winger, RE#16-6, PAGEID#212-235]. These costs are prohibitive for minor parties, and,

to some extent, even for the major parties. *Id.* The Republican Party of Kentucky would have trouble raising these sorts of funds for ballot access. *Id.*

Libertarian Party candidates can raise slightly over $100,000 in a major race, but those would be for the candidate and not the party, and the LPKY could perhaps raise, at most $50,000 in a particular election cycle. [Decl.Eckenberg, RE#16-2, PAGEID#184-188; Decl.Moellman, RE#16-3, PAGEID#188-199; Decl.Winger, RE#16-6, PAGEID#212-235]. Obviously, that does not include normal party functioning and costs of operation.

CPKY lacks financial resources to pay professional petitioners, circulates petitions themselves, and has never fielded more than one candidate in a single ballot cycle due to Kentucky's ballot access provisions. [Decl.Krogdahl, RE#16-4, PAGEID#200-205]. It is not that CPKY lacks voter support to field candidates – but rather that voters are reluctant to sign more than one petition at a time. *Id.*

Minor parties typically lack significant financial resources. [Decl.Winger, RE#16-6, PAGEID#212-235]. Furthermore, in states requiring 5,000 signatures or more, for a candidate or party, when one considers the burden of gathering *more than one petition*, the cost of signature collection alone is a significant burden when one considers the revenue available to the party and effectively prevents that from obtaining ballot access. *Id.* Moreover, even where the party or candidate has sufficient resources to collect the requisite number of signatures to obtain ballot access on *more than one petition*, the cost of signature collection represents such

a burden that they rarely have sufficient funds to conduct an effective campaign. *Id.*

In terms of the purported state interest in avoiding a crowded or confusing ballots, expert research has shown that "if a state requires at least 5,000 signatures, even if the state allowed a party petition or multiple candidates on the same petition, it will never have a crowded ballot, if 'crowded ballot' is defined as a ballot with more than 9 candidates for a single office." *Id.*

Moreover, "[n]ationally, where as many as six (or even more) candidates have appeared on the general election ballot as candidates for statewide or federal office, which has occurred on at least 50 occasions since the principle of 'avoiding voter confusion' was first enunciated by this Court, there is and has been no evidence that there was any voter confusion in those elections." *Id.*

The impact of these ballot access provisions constitutes a severe burden on minor political parties since there is no way, other than obtaining signatures for each and every race, or receiving over 2% of the vote in a Presidential election, to establish ballot access in Kentucky for a political group. [Decl.Moellman, RE#16-3, PAGEID#188-199; Decl. Winger, RE#16-6, PAGEID#212-235]. To field candidates for each partisan race in a given four-year election cycle in the entire Commonwealth of Kentucky, the major parties receive automatic ballot access, while minor parties

must gather approximately 209,808 signatures.[6] *Id.* Further adjusting these numbers to ensure an acceptable margin of safety outlined above of 1.5 to 1.75 times the signature minimum, 314,712 signatures are required, or 367,164 signatures using the 1.75 factor. *Id.* Thus, the cost for a minor party to achieve this feat, using paid petitioners, is *between $629,424 and $734,328*. *Id.* That is more money than the Republican Party of Kentucky – a major party, that now holds the majority of Kentucky's constitutional offices, and a majority in the Kentucky Senate – has raised in recent state-wide Constitutional office years. *Id.*

While the Libertarians gathered signatures to place their Presidential slate on the 2016 general election ballot, without some change in the *status quo*, under Kentucky's scheme they cannot *also* nominate and ballot-qualify a candidate for U.S. Senate, despite the fact that a Libertarian Candidate has filed with the FEC, cannot run multiple statewide or Congressional District petition drives at the same time, and cannot run any additional county or legislative candidates. *Id.*

That is the very point of this lawsuit: there is no way for Petitioners to run multiple petition drives for multiple candidates for a political party, which thereby restricts them to one or two candidates per cycle.

Given the total cost and burden to field candidates for every partisan race, over a four-year election cycle, *367,164 signatures, at a cost of $734,328,* results in an

---

[6] These numbers do not include partisan city offices; rather they include partisan offices at the county and state level.

average 122,388 signatures per year, at a cost of $244,776 (elections are held three of every four years in Kentucky). [Decl.Winger, RE#16-6, PAGEID#212-235; Decl.Moellman, RE#16-3, PAGEID#188-199].

The signatures become the most burdensome on one particular year out of four: 2018 is the next extremely onerous year, requiring 155,500 actual valid signatures, and utilizing a safety factor of 1.75, a total of 272,125 signatures. *Id.* The total cost for this effort in 2018 is a staggering $544,250. As Petitioners' unrebutted evidence make clear, these costs and burdens are difficult, if not impossible, for the major parties to achieve, much less minor parties like the Libertarians. *Id.* This 2018 effort, incidentally, requires signatures equal to *15.14% of the votes cast in Kentucky's last election for President*. *Id.* Or, if one prefers the last race for Governor, *signatures equal to 27.9% of the votes cast in Kentucky's last election for Governor*.[7] *Id.* This Court has struck significantly less onerous requirements for access to the ballot. *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking ballot access law on its face with a signature requirement equal to 15% of the votes cast in the last election for governor). But *Rhodes* involved a single petition, not the more onerous multiple petitions required in Kentucky.

[7] http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2010-2019/2015/2015%20General%20Election%20Results.pdf (last visited 4/14/2016).

5. Significant Additional Evidence Establishes the Severe Burden of Kentucky's Ballot Access Scheme When Applied to Minor Parties that Desire to Field More Than One Candidate Per Election Cycle, Particularly Where Kentucky Has Less Restrictive Alternatives That Are Equal, If Not Better, at Meeting Any Legitimate State Interests

Kentucky is one of only twelve states that do not permit a political party to submit a single petition for across-the-board ballot access for every partisan office in the state on a general election ballot. [Decl.Winger, RE#16-6, PAGEID#212-235].

Mr. Winger further notes that "[f]or Governor, the median state in the United States had 1.33 independent and minor party candidates on the ballot (on the average for each election) over the period 1990-2013." *Id.* The average number of such candidates was 2.01. *Id.* But Kentucky only had 0.33 such candidates during that period. *Id.* Kentucky had the fewest of any state, except for Alabama, Washington, and New Mexico. *Id.* So it was the 4th worst in the country. *Id.*

Kentucky does not treat independents and minor parties differently – rather, Kentucky does not give a minor party any reliable, practical or realistic means to achieve ballot access except in one or two elections across the state per cycle. *Id.*

Kentucky's ballot access laws are not tailored towards measuring a modicum of support – they instead typically keep candidates other than the Democrat and Republican candidates off the ballot, and appear designed to cause that result. [Decl.Winger,

RE#16-6, PAGEID#212-235; Decl.Tobin, RE#16-5, PAGEID#206-211]. If Kentucky were interested in measuring public support for a candidate, group of candidates, or a political party, while preventing voter confusion or crowded ballot, it could: (a) permit the circulation of a single petition to place multiple candidates of the same party on the ballot or (b) permit a petition to be submitted to place the party on the ballot for a four-year election cycle or (c) look at other races for qualification. *Id.*

Based on all of the foregoing, Kentucky's ballot access regime, applied to non-Democratic and non-Republican parties, makes it impossible to systemically place candidates on the ballot, and constitutes a severe undue burden on minor parties, such as the Petitioners in this case. *Id.*

Voters are significantly more likely to sign a single petition than more than one, regardless of the content of the petition. *Id.* Other than suppressing minor parties, there is no reason not to permit the circulation of a single petition to place multiple candidates on the ballot cycle. *Id.* Or, as an alternative to that, a single petition to place an entire party on the ballot for a four year, or even one-year election cycle would measure public support for the party, while not unduly and unnecessarily burdening minor parties. *Id.*

6. Kentucky's Ballot Access Scheme Is Not Equal Among the Parties

Respondents argued below that the burdens under Kentucky law for the major and minor parties were equal, since a minor party has to "nominate their candidates at convention." [Brief, RE#33-1,

PAGEID#323-368]. But Petitioners hold nominating conventions every election cycle anyways under their party rules. [Supp.Decl. Eckenburg, RE#37-1, PAGEID#453-460; Supp.Decl. Krogdahl, RE#37-5, PAGEID#467-470].

Holding a convention for Political Organizations, or receiving a taxpayer funded primary for Political Parties (when it is contested, which it usually is not) is not burdensome. And, for the Libertarians, because of their size and organization and level of participation and public support, they conduct conventions just as the major parties do: first at congressional district levels, and then at the state level, every election cycle. [Supp.Decl.Eckenburg, RE#37-3, PAGEID#467-470].

Major parties receive four years of automatic ballot access; minor parties must petition to place their candidates on the ballot for each race. This scheme is not equal.

F. THE PROCEEDINGS BELOW

Petitioners filed this ballot access case on December 4, 2015. [Verified Complaint, RE#1, PAGEID#1-37]. Subject matter jurisdiction over Petitioners' claims are grounded upon 28 U.S.C. §1331, 28 U.S.C. §1343, and 42 U.S.C. §1983. [*Id.*, PAGEID #7].

On July 8, 2016, the District Court entered its final judgment and opinion and order granting summary judgment for Respondents and denying Petitioners' summary judgment. [App.19-42].

On July 8, 2016, Petitioners filed their Notice of Appeal from the trial court's final judgment to the Sixth Circuit Court of Appeals. [NoticeAppeal, RE #47,

PAGEID #566-567]. The Sixth Circuit had jurisdiction over Petitioners' appeal under 28 U.S.C. §1292(a)(1).

On August 26, 2016, the Sixth Circuit issued its *Opinion* and *Judgment* affirming the judgment of the trial court. *Libertarian Party v. Grimes,* 835 F.3d 570 (6th Cir. 2016)(App.1-18). On September 27, 2016, the Sixth Circuit entered an *Order* denying Petitioners' petition for rehearing en banc. (App.43).

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit's Decision Both Contradicts Those Decisions in Sister Circuits That Recognize That this Court's *Anderson/Burdick* Analysis Incorporates a Non-Discrimination Principle and Fails to Address This Issue, Which Was Presented in the Briefing Below

This Court first clearly stated a non-discrimination principle in its ballot access jurisprudence in *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), which invalidates draconian limitations on minor-party ballot access:

> It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause.

In *Anderson v. Celebrezze*, 460 U.S. 790, 793-794 (1983), this Court further explained: "A burden that falls *unequally* on new or small political parties or on independent candidates impinges, by its very nature,

on associational choices protected by the First Amendment. It *discriminates* against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." (Emphasis added).

In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), this Court further elaborated on its non-discrimination principle:

> when those rights are subjected to "severe" restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. (Citations omitted).

This same framework was described in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The *Anderson/Burdick* framework presumes "nondiscriminatory restrictions." Discriminatory restrictions violate the First and Fourteenth Amendments even though the same restrictions applied across-the-board to all political parties would not do so.

A political party, as a party, has a constitutional interest in coming into being. *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("[T]his Court has recognized the constitutional right of citizens to create and develop new political parties."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (same); *Storer v.*

Brown, 415 U.S. 724, 745 (1974) ("[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other"). Further, this Court has also observed that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So, also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams v. Rhodes*, 393 U.S. at 23, 31 (1968).

Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305 (3d Cir. 1999) (en banc), provides an example of an application of the non-discrimination principle to ballot access. There, the Third Circuit ruled that although Pennsylvania's anti-fusion law did not itself violate the First Amendment, Pennsylvania's denying fusion only to minor parties violated Equal Protection:

> *because of the discriminatory aspects* of the Pennsylvania statutes, the burdens imposed by them on voters and on political parties are more onerous than those involved in *Timmons [v. Twin Cities Area New Party*, 520 U.S. 351 (1997).] In *Timmons,* the asserted burdens existed in the context of an across-the-board ban on fusion. In the instant case, the burden is exacerbated because Pennsylvania has allowed the major parties to cross-nominate but has disallowed minor parties from doing the same. *Id.*, 174 F.3d at 315. (Emphasis added).

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), offers another example. There, Florida required that minor party candidates for President submit signatures to access the ballot and pay signature-verification fees. Neither requirement was unconstitutional and both had previously been upheld. *Id*. at 1540. The candidate's challenge was based on allowing major-party candidates to waive the fee while prohibiting minor candidates from doing so. Even though the burden imposed by the signature-verification fee was not "severe," *id*. at 1544, the discriminatory treatment was found unconstitutional under *Anderson/Burdick*.

Even the Sixth Court recognized this principle of non-discrimination in *Hargett III*, 791 F.3d 684 (6th Cir. 2015) (*Hargett III*). As in *Hargett III*, the Kentucky scheme denies "plaintiffs the same four calendar years afforded to statewide political parties to secure automatic ballot access." *Id.* at 691. The statute at issue was struck despite the fact that an individual candidate could have petitioned his or her way onto the ballot, or achieved ballot access through electoral results, like Kentucky. *Id.*

In *Hargett III*, the right to automatic ballot access and its denial was deemed a "severe burden," and subject to strict scrutiny. *Id.* at 693. In this case, other than securing at least 2% of the vote in the Presidential race, there is *no other automatic ballot access option in Kentucky*. In *Hargett III*, the threshold to be considered a major party was achieving 5% or more in the Governor's race, and other parties could petition their way to automatic ballot access by submitting a petition with signatures equal to at least 2.5% of the votes cast in the last governor's election. *Id.* at 689-

690. The minor parties then lost this automatic ballot access qualification if they failed to achieve at least 5% of the votes cast in a subsequent election (other than governor). *Id.* They would then have to *submit petitions again* to regain ballot access. *Id.* The *Hargett III* Court struck this ballot access scheme. Kentucky's scheme is even worse, because there is no petition ability for automatic blanket ballot access in Kentucky. *See Green Party of Ark. v. Daniels*, 445 F. Supp.2d 1056 (E.D. Ark. 2006) (three percent of the total vote cast for the office of Governor or presidential electors requirement to certify a new political party under Ark. Code Ann. § 7-7-205 violated associational rights guaranteed by the First and Fourteenth Amendments).

The Sixth Circuit *did not even address* this aspect of *Hargett III* and the application of Equal Protection to Petitioners' fundamental constitutional rights, even though it was separately set forth by Petitioners in their Merit Brief as a *separate assignment of error*. For this reason alone, this Court should grant a writ of certiorari to decide this compelling issue of ballot access jurisprudence. Sup. Ct. R. 10(c).

The Sixth Circuit failed to recognize the nondiscrimination principle of *Anderson/Burdick* and in doing so not only misapplied precedent from this Court, but also rendered a decision in conflict with decisions of the Third and Eleventh Circuit, and the Sixth Circuit's decision in *Hargett III*. Sup. Ct. R. 10(a). It ignored uncontested evidence that demonstrated multiple petitions had a diminishing return effect on minor parties. [Decl. Tobin, RE #16-5, PAGEID #206-211]. Indeed, this same unrefuted evidence demonstrated that it was impossible for *any*

party to gather separate petitions totaling the number of signatures at issue.[8] [Decl. Winger, RE#16-6, PAGEID #212-235].

The Sixth Circuit's sustaining Kentucky's discriminatory ballot access scheme conflicts with decisions of Sister Circuits and decisions of this Court. It held that Kentucky's ballot-access scheme falls "well short of 'severe'" because, it opined, in contravention of unrefuted evidence to the contrary, that while gaining 2% of the votes in a presidential election may impose some financial costs and required greater campaign efforts, those costs certainly do not constitute "exclusion or virtual exclusion from the ballot," the standard the Panel found had to be met to constitute a severe burden. *Libertarian Party v. Grimes,* 835 F.3d at 575-576 (App.9-10). This holding ignores the unrefuted evidence to the contrary and the decisions of Sister Circuits that have invalidated similar

---

[8] The Sixth Circuit took issue with Petitioner's failing to present evidence that they actually ran, or tried to run, candidates for each and every partisan race in Kentucky. *Grimes*, 835 F.3d at 576-577 (App.11-12). Petitioners' uncontested evidence showed they nominated candidates for office in view of Kentucky's scheme, nominated as many candidates as they could achieve ballot access for, and but for the scheme, would field candidates for each those offices. [Decl./Suppl. Decl. Eckenburg, RE#16-2, PAGEID#184-188, RE#37-1, PAGEID#453-460]. It is hard to understand the criticism that Petitioners had to accomplish, or try to accomplish, something they knew they could not do. Courts have struck down requirements by states that require parties to identify their candidates in advance of an election cycle. *Libertarian Party of Illinois v. Illinois State Bd. of Elections*, 164 F. Supp.3d 1023, 1029-1031 (N.D. Ill. 2016).

discriminatory and burdensome laws. Sup. Ct. R. 10(a).

The Second Circuit in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), found unconstitutional a New York membership law distinguishing between "political parties," which won at least 50,000 votes in the last gubernatorial election, and "political organizations," which had not. Both could run candidates, but "[a] number of unique benefits accrue[d] to a Party [that had won more than 50,000 votes]." *Id*. at 415. Among these benefits included automatic ballot access. *Id*. at 415-416.

In *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), the Tenth Circuit likewise invalidated a scheme that fell unequally on new or small political parties.

In *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970), the District Court, and this Court summarily affirming, concluded "that the effect of these provisions … is to deny independent or minority parties which have succeeded in gaining a position on the ballot but which have not polled 50,000 votes for governor … an equal opportunity to win the votes of the electorate." *Id*., 314 F. Supp. at 995.

The Second Circuit reached this same result in *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994). "It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate." *Id*. at 60 (citation omitted).

Because of the inter-circuit conflict created by the Sixth Circuit's decision, the decision's conflict with prior Sixth Circuit decisions, and its tension with this Court's precedent, it is appropriate to grant a writ of certiorari to review the decision.

B. The Sixth Circuit's Decision Requiring a Showing of "Exclusion or Virtual Exclusion" to Sustain a "Severe Burden," and the Other Justifications Noted in the "Burden" Analysis, Runs Contrary to Precedent from this Court, Sister Circuit Courts, and Even the Sixth Circuit.

The Sixth Circuit held that the burden imposed upon Petitioners by Kentucky's ballot-access restrictions is not "severe" because it believed that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party v. Grimes,* 835 F.3d at 574 (App.7). The Sixth Circuit then found that the 2% Presidential race requirement was not a severe burden based upon extremely sporadic ballot results that occurred only four times in the last 100 years, and equated election results in a Presidential race with petitioning requirements. *Id.*, 835 F.3d at 575-576 (App.9-11). This rationale runs afoul of clearly-established precedent from this Court, Sister Courts, and even Sixth Circuit precedent. This inter-circuit conflict warrants the grant of a writ of certiorari.

Under the U.S. Constitution, Kentucky must regulate elections "by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin*

v. Panish, 415 U.S. 709, 716 (1974). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group." *Anderson*, 460 U.S. at 793. "[B]allot access must be genuinely open to all, subject to reasonable requirements." *Lubin*, 415 U.S. at 719 (*citing Jenness v. Fortson*, 403 U.S. 431, 439 (1971)); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

Contrary to the Sixth Circuit's view, Justice Scalia, with Justices Alito and Thomas, suggested that a burden is "severe if it goes beyond the merely inconvenient." *Crawford*, 553 U.S. at 205.

In *Storer*, 415 U.S. at 742, this Court asked "could a reasonably diligent" candidate or group "be expected to satisfy" the provisions at issue. The *Williams* Court also found that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams*, 393 U.S. at 31. "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified *with some regularity* and quite a different matter if they have not." *Storer*, 415 U.S. at 742 (emphasis added). Some regularity is not, as the Sixth Circuit determined, four times in 100 years.

In *Hargett II*, 767 F.3d 533, the Sixth Circuit previously observed that "[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions." 767 F.3d at 547. The *Hargett II* Court also observed that restrictions affecting a party's primary functions raise questions of a severe burden. *Id*., citing *Libertarian Party of Ohio v.*

Blackwell, 462 F.3d 579, 586 (6th Cir. 2006). It explained the kind of evidence it wanted to see to determine the severity of the burden. *Id.* at 549, n. 4. Here, the unrefuted evidence established precisely that evidentiary basis. [Decl. Eckenberg, Moellman, Krogdahl, Tobin, Winger, RE #16-2, RE #16-3, RE #16-4, RE #16-5, RE #16-6; PAGEID#184-236; Supp. Decl. Eckenburg, Moellman, Krogdahl, Winger, RE#37-1, RE#37-2, RE#37-3, RE#37-4, PAGEID#453-474]. This unrefuted evidence established a significant limitation upon minor parties that limited them to a couple of elections per election cycle they could compete in, out of thousands. Instead, because they could appear on a couple of ballots per year, the "exclusion or virtual exclusion" from the ballot standard imposed by the Sixth Circuit here was not met.

The Sixth Circuit's apparent requirement of a showing of "exclusion or virtual exclusion" from the ballot to meet a "severe burden" was explicitly rejected by a prior decision of *Blackwell*, 462 F.3d at 592, when it noted "the fact that an election procedure can be met does not mean the burden imposed is not severe." *Id.*; *citing Anderson*, 460 U.S. at 791, n. 12. The Sixth Circuit's decision here sanctions a law passed by a state in this Circuit that would permit only the political party that prevailed in the last Presidential election to field candidates for more than three offices around the state. Such a law would not result in the "exclusion or virtual exclusion" of the other major party, or any minor party, since they can compete in at least two or three races, the precedent set by the Sixth Circuit would sustain it. Such a scheme is not only a severe burden, it would be a *threat to democracy.* The Sixth

Circuit's decision invites the enactment of just such a scheme.

The Sixth Circuit's decision equated achieving 2% in the Presidential race to a signature requirement of 2%. That notion, refuted by the only evidence of record that addressed the issue, was more importantly rejected by this Court in *Jenness*, 403 U.S. at 440, which suggested that the burden of vote achievement was greater than that of a petitioning requirement. *Jenness* likewise stands for the unremarkable proposition that burdens that freeze the *status quo* are impermissible. *Id.*, 402 U.S. at 438.

The Sixth Circuit decision also ignored the "chicken and egg" freezing of the *status quo* problem in its analysis on this score. *Libertarian Party v. Grimes,* 835 F.3d at 574-577 (App.29-34). The unrebutted evidence in this case established that down ticket races affects Presidential performance, and Presidential performance is affected by down ticket races. [Decl. Winger, RE #37-4, PAGEID #471-474]. There is no way to break the cycle without the ability to place the entire party and all of its nominees on the ballot. This is even more troublesome considering the uncontested evidence of record that demonstrated a diminishing return issue regarding multiple petition drives at the same time. [Decl. Tobin, RE #16-5, PAGEID #206-211]. The Sixth Circuit's decision, treating vote results and petitioning requirements as equivalents, runs afoul of the *Jenness* Court's observation that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness,* 403 U.S. at 441-442.

The *Hargett III* Court likewise found a severe burden, and an equal protection violation, even though the party could have achieved vote results for ballot access, and even though the party could likewise have submitted a petition to achieve ballot access. 791 F.3d 684. Thus, the decision in *Hargett III* conflicts with the Sixth Circuit's decision here.

In *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n,* 800 F.3d 913 (7th Cir. 2015), the Seventh Circuit was clear that "where the electoral scheme interferes with the marketplace by restricting the number of candidates a party may nominate, … the State has severely burdened the voter's ability to cast a meaningful and effective vote." *Id*., 800 F.3d at 921. Kentucky's scheme accomplishes precisely that. In addition to its other frailties, the Sixth Circuit's decision conflicts with *Common Cause*. Due to the conflicts created by the Sixth Circuit here, this Court should grant a writ of certiorari.

C. The "Flexible" Analysis Employed by the Sixth Circuit to Uphold Kentucky's Ballot Scheme Stands Against Clearly Established Precedent from this Court, Sister Circuit Courts, and Even the Sixth Circuit.

Assuming for the sake of discussion that the Sixth Circuit appropriately found that the "flexible analysis" of *Anderson*, 460 U.S. at 789 was applied, its decision conflicts with prior published decisions from this Court warranting review. As support, the Sixth Circuit cited to the 2000 Florida Presidential election in terms of the state interests in avoiding "voter confusion, ballot overcrowding, and frivolous candidacies." *Libertarian Party v. Grimes,* 835 F.3d at 578 (App.14-15).

But peer reviewed research by Petitioners' own expert (and others) refutes this notion.[9] The unrefuted record evidence demonstrated that significantly less burdensome measures would be effective at meeting those purported state interests. [Decl. Winger, RE #16-6, PAGEID #212-235; Supp. Decl. Eckenburg, RE #37-1, PAGEID #453-460; Supp. Decl. Krogdahl, RE #37-3, PAGEID #467-470].

The Sixth Circuit ignored the less burdensome, but equally effective means that would have vindicated the state's asserted interests, conflating them with "second-guess[ing] the legislative decisions of the Kentucky General Assembly." *Libertarian Party v. Grimes,* 835 F.3d at 578 (App.15). In the end, this ignores this Court's mandate that courts must determine "the extent to which those interests make it <u>necessary</u> to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789 (emphasis added). *Anderson* thus calls for a tailoring analysis that weights necessity and competing interests, not simply a rubber stamp of state statutes that burden rights where far less burdensome mechanisms exist.

That aspect of the Sixth Circuit's decision is in conflict with *Hargett II*, 767 F.3d 533 at 549, where the Court noted that Tennessee failed to support their requirements of 2.5%, versus something lower. *Id.*

---

[9] Richard Winger. *Election Law Journal: Rules, Politics, and Policy*. April 2006, 5(2): 170-200. *Green Party of Ark. v. Daniels*, 445 F. Supp.2d 1056, 1060 (E.D. Ark. 2006) (citing same). Petitioners had no opportunity to address the apparent concerns by the Sixth Circuit, but scholarly research is clear that the poor design of the "butterfly ballot," rather than the number of candidates, was the cause of the issues in Florida.

Here, Kentucky put forward no evidence supporting its chosen 2% scheme. The *Hargett II* Court questioned the asserted state interests because "Tennessee's supposed interest in avoiding 'voter confusion' is undermined by its rules that liberally grant ballot access to independent candidates," *Id.*, an element also present in Kentucky's scheme.

The Second Circuit likewise analyzed the "fit," or lack thereof, in *Lerman v. Board of Elections*, 232 F.3d 135, 146-149 (2d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001). In *Lerman*, the Second Circuit invalidated a ballot petition witness residency requirement on the ground that the requirement was not necessary to advance the interests put forth by the state. The same is true regarding Kentucky's requirements that do not allow for less burdensome alternatives.[10] *See also Green Party of Georgia v. Kemp*, 171 F. Supp.3d 1340, 1365-1367 (N.D. Ga. 2016) (Georgia ballot access statute requiring candidates from minor parties to obtain signatures of 1% of voters to be on ballot held unconstitutional as not narrowly tailored to further state's legitimate interests in limiting voter confusion and avoiding ballot overcrowding), *aff'd.,* 2017 WL 429257 (11th Cir. Feb. 1, 2017).

The Sixth Circuit's "flexible analysis," ostensibly conducted under *Anderson*, conflicts with *Hargett II*, *Lerman*, and *Kemp*. This conflict warrants the grant of a writ of certiorari to review the question of whether

---

[10] This includes permitting mid-term elections for the vote test; a single petition for all of a parties' candidates; or a petition to place the entire party on the ballot for a four-year cycle, even with a heightened signature requirement.

Kentucky may ignore less burdensome ballot access requirements for minor parties, which also effectively address Kentucky's purported interests, and instead adopt a scheme which, for all practical purposes, denies access. Is such a scheme constitutional under *Hargett II*, *Lerman*, and *Kemp*, let alone any new flexible analysis?

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition be granted and that a writ of certiorari issue for the three questions presented.

Respectfully submitted,

Robert A. Winter, Jr.
Counsel of Record
Law Office of Robert A. Winter, Jr.
P.O. Box 175883
Fort Mitchell, KY 41017-5883
(859) 250-3337
robertawinterjr@gmail.com

Oliver B. Hall
Center for Competitive Democracy
1835 16th Street NW #5
Washington, D.C. 20009
(202) 248-9294
oliverbhall@gmail.com

Thomas B. Bruns
Bruns, Connell, Vollmer, Armstrong
4750 Ashwood Dr., Ste. 200
Cincinnati, OH 45241
(513) 326-0274
tbruns@bcvalaw.com

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0212p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-6107

[Filed August 26, 2016]

LIBERTARIAN PARTY OF KENTUCKY; LIBERTARIAN NATIONAL COMMITTEE, INC.; KEN MOELLMAN, JR.; CONSTITUTION PARTY OF KENTUCKY, *Plaintiffs-Appellants*,

v.

ALISON LUNDERGAN GRIMES, Secretary of State of the Commonwealth of Kentucky; JOSHUA G. BRANSCUM, JOHN HAMPTON, STEPHEN HUFFMAN, DONALD BLEVINS, JR., ALBERT B. CHANDLER, III, and GEORGE RUSSELL, Members of the State Board of Elections; MARYELLEN B. ALLEN, Executive Director, Kentucky State Board of Elections; ANDREW G. BESHEAR, Attorney General, all in their official capacities, *Defendants-Appellees*.

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 3:15-cv-00086—Gregory F. Van Tatenhove,
District Judge.

Decided and Filed: August 26, 2016

Before: MERRITT, BOGGS, and McKEAGUE,
Circuit Judges.

COUNSEL

ON BRIEF: Christopher Wiest, Robert A. Winter, Jr., CHRIS WIEST, AAL, PLLC, Crestview Hills, Kentucky, for Appellants. Jonathan T. Salomon, Katherine Lacy Crosby, TACHAU MEEK PLC, Louisville, Kentucky, for Appellee Grimes and Board of Elections Appellees. S. Travis Mayo, Matt James, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee Beshear.

OPINION

BOGGS, Circuit Judge. Appellants are the Libertarian Party of Kentucky, the Libertarian National Committee, the Constitution Party of Kentucky, and Ken Moellman, Jr., an individual voter and former Libertarian Party candidate for Kentucky state office. The gravamen of appellants' complaint is that Kentucky law unconstitutionally burdens appellants' First and Fourteenth Amendment rights to freedom of political association and equal protection by categorizing the Libertarian Party and Constitution Party as "political groups," which must petition to list

their candidates for state and local office on election ballots, rather than as "political parties" or "political organizations," which enjoy "blanket" ballot access for all the candidates they nominate. The district court concluded that the Commonwealth of Kentucky's three-tiered ballot-access scheme was a constitutional means of exercising the Commonwealth's power to regulate elections. We affirm.

I

The Commonwealth of Kentucky classifies a political association as (1) a "political party" if it received at least twenty percent of the total vote cast in the last presidential election, (2) a "political organization" if it received at least two percent of the vote of the state in the last presidential election, or (3) a "political group" if it fails to qualify as a "political party" or a "political organization." Ky. Rev. Stat. § 118.015. Political candidates who are members of a political party or political organization may gain ballot access by winning their party's nomination at a convention or in a primary election. *Id.* §§ 118.305, .325, .105. Members of a political group, on the other hand, must obtain voters' signatures on a qualifying petition in order to gain ballot access. *Id.* § 118.305(1)(d). The signature requirement is 5,000 for a statewide office; 400 for the United States House of Representatives; 100 for a county officer, member of the Kentucky General Assembly, or Commonwealth's Attorney; and twenty-five or fewer for various other local offices. *Id.* § 118.315(2). Individuals may sign more than one petition for the same office only if each petition nominates a soil and water conservation district supervisor (of which seven are elected to

staggered terms for each of Kentucky's 120 counties); in all other cases, if an individual signs multiple petitions for the same office, only the signature on the first petition to be filed is counted. *Ibid.* Petitioning may begin approximately one year preceding the election for which a candidate seeks ballot access, and petitions must be filed with the Secretary of State or county clerk by the second Tuesday in August preceding the election, allowing approximately nine months for candidates to gather signatures. *Id.* § 118.365(5).

Appellants' argument is essentially this: the two-percent requirement for blanket party access to the general-election ballot is "impossible, or virtually impossible" to satisfy, and the alternative means of fielding candidates by petition is unconstitutionally burdensome—not as applied to any individual candidate for a specific office, but rather as applied to the Libertarian Party and Constitution Party as political associations, because these associations must incur high costs of gathering and filing petitions in order to field a slate of candidates for state and local office. Appellants' Br. 11. Appellants argue that by allowing political parties and organizations blanket ballot access without the need for petitioning, and by requiring groups like the Libertarian Party and Constitution Party to incur heavy burdens by filing petitions, the Commonwealth's ballot-access laws deny appellants equal protection and "appear designed" to "keep candidates other than the Democrat and Republican candidates off the ballot." *Id.* at 23. Appellants challenge the Commonwealth's laws "both facially and as applied," *id.* at 29, and appellants' arguments "have characteristics of as-applied and

facial challenges." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)).

We have previously held that the 5,000-signature requirement to petition for statewide-office ballot access is consistent with the Equal Protection Clause. *Anderson v. Mills*, 664 F.2d 600, 606–07 (6th Cir. 1981). The Eastern District of Kentucky has also upheld the 5,000-signature requirement in a challenge under the First and Fourteenth Amendments involving appellant Libertarian Party of Kentucky. *Libertarian Party v. Davis*, 601 F. Supp. 522, 523–25 (E.D. Ky. 1985). Both cases involved challenges arising from the denial of ballot access to specific candidates. We have not yet, however, evaluated the constitutionality of the two-percent requirement for *blanket* party access to the general-election ballot under either the First Amendment or the Fourteenth Amendment, nor have we evaluated the constitutionality of the petitioning requirements as applied to a political association as a whole.[1] We do so today, following the well-established

[1] Appellants challenge the effect on the Libertarian Party and the Constitution Party of the various petitioning requirements (and not only the 5,000-signature requirement to petition for a nominee to statewide office), including the requirement in most cases to file a separate petition with unique signatures for each nominee rather than filing a single petition per election year. Notably, the number of signatures required for each petition is both relatively modest and roughly congruent to the number of registered voters in the political unit represented by each corresponding political office: 5,000 signatures for statewide office, for instance, represents roughly 0.15% of the 3,261,183 voters registered in Kentucky as of August 2016, State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by district),

Anderson-Burdick framework, which "serves as 'a single standard for evaluating challenges to voting restrictions.'" *Green Party of Tenn. v. Hargett*, 791 F.3d at 692 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012)).

II

The United States Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), established a three-step framework for evaluating state restrictions on ballot access. The first step of *Anderson-Burdick* is to consider the "character and magnitude" of the restriction: "severe" restrictions are subject to heightened scrutiny, "minimally burdensome"

---

http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf; 400 signatures for the United States House of Representatives represents just under 0.1% of the number of voters registered in each of Kentucky's six congressional districts; and 100 signatures for the Kentucky General Assembly represents roughly 0.3% of the number of voters registered in each of Kentucky's 100 house districts and roughly 0.1% of the number of voters registered in each of Kentucky's thirty-eight senate districts. *Ibid.* While there is surely some variance in the ratio of required signatures to registered voters at the county-or-lower level (since the signature requirements are fixed, while the number of registered voters per county ranges from 1,734 in Robertson County to 573,650 in Jefferson County), there is likely also variance in the difficulty of obtaining signatures depending on factors such as whether a county is predominantly urban or rural, and in any event the requirements of 100 or fewer signatures for county- or lower-level offices do not impose a severe burden for the reasons we set forth below. State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by county), http://elect.ky.gov/statistics/Documents/voterstatscounty-20160811-031759.pdf.

restrictions are subject to rational-basis review, and regulations falling in the middle warrant a "flexible analysis" that weighs the state's interests and chosen means of pursuing them against the burden of the restriction. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (citing *Anderson* and *Burdick*). The second step is to "identify and evaluate" the state's interests and justifications for its restrictions. *Id.* at 546. The third step is to assess the "legitimacy and strength" of those interests to determine whether the restrictions are constitutional burdens on ballot access. *Ibid.*

A

At the first step, we hold that the burden of the Commonwealth's ballot-access restrictions on appellants is not "severe." The hallmark of a severe burden is exclusion or virtual exclusion from the ballot. *Compare Lubin v. Panish*, 415 U.S. 709, 719 (1974) (striking $701.60 filing fee for ballot-access petition because it excluded indigent candidates from running for office with no reasonable alternative means of access), *and Williams v. Rhodes*, 393 U.S. 23, 24, 35 (1968) (striking "series of election laws," including requirement that minor political parties file a petition signed by the number of voters equal to fifteen percent of the votes cast in the preceding gubernatorial election, because it "made it virtually impossible" for any party other than the Republican Party and Democratic Party to gain ballot access), *with Jenness v. Fortson*, 403 U.S. 431, 438 (1970) (upholding a requirement that five percent of all registered Georgia voters sign candidate's petition for ballot access and noting that even serious restrictions on third parties'

ballot access are generally upheld unless they truly operate to "freeze the political status quo").

In some circumstances, the "combined effect" of ballot-access restrictions can pose a severe burden. *Citizens to Establish a Reform Party v. Priest*, 970 F. Supp. 690, 699 (E.D. Ark. 1996) (citing *Republican Party of Ark. v. Faulkner*, 49 F.3d 1289 (8th Cir. 1995)); *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582–83 (6th Cir. 2006) (striking down Ohio regulatory scheme where minor political parties could gain general-election ballot access only if they both participated in the March primary and—120 days prior to the March primary— filed a petition with signatures equal to one percent of the votes cast in the previous statewide election); *see also Jenness*, 403 U.S. at 442 (noting that Georgia's higher-than-most five-percent signature requirement was "balanced by the fact that Georgia has imposed no arbitrary restrictions whatever" on voters who want to sign multiple petitions). A very early filing deadline, for example, combined with an otherwise reasonable petitioning requirement, can impose a severe burden, especially on independent candidates or minority parties that must gather signatures well before the dominant political parties have declared their nominees. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 739–40 (1974) (remanding for further factual development where a California requirement that a party obtain approximately 325,000 signatures on a petition within a twenty-four-day period may have posed a severe burden); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997) (holding that a filing deadline fifty-four days before the primary election was an unconstitutional burden); *McLain v. Meier*, 637 F.2d

1159, 1163–64 (8th Cir. 1980) (finding "particularly troublesome" a filing deadline ninety days before the primary election); *Priest*, 970 F. Supp. at 697–98 (concluding that a filing deadline in January, more than four months before the primary election, was an "unreasonable burden").

The burden of the Commonwealth's ballot-access scheme on appellants thus falls well short of "severe": while the blanket-access requirement of gaining two percent of the votes in a presidential election may impose some financial costs on the Libertarian Party and the Constitution Party to the extent that meeting the threshold may require greater campaign efforts, those costs certainly do not constitute exclusion or virtual exclusion from the ballot. After all, the requirement that a minor party secure two percent of the actual votes cast in a presidential election is not substantially different from a requirement that a party secure signatures of two percent of the registered voters in a jurisdiction: indeed, the absolute number of votes required (35,944 out of 1,797,212 cast in the 2012 election, for example) is significantly lower than the number of signatures that would be required under a regulation that required the signatures of two percent of registered voters (65,224 out of 3,261,183)—and even such a burden would fall well below the five-percent requirement that the Supreme Court upheld in *Jenness*, 403 U.S. at 442. See State Bd. of Elections, Commonwealth of Ky., *Official 2012 General Election Results* (2012), http://elect.ky.gov/SiteCollection Documents/Election%20Results/2010-2019/2012/ 2012genresults.pdf; State Bd. of Elections, Commonwealth of Ky., Voter Registration Statistics Report (2016) (August report by district),

http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf.

Further, the two-percent requirement for blanket ballot access cannot constitute exclusion or virtual exclusion because blanket access is only one of two ballot-access mechanisms. The alternative option of filing petitions for each candidate's candidacy remains, as we have held before, *see Anderson v. Mills*, 664 F.2d at 606–07, a reasonable means of ballot access.

Although appellants argue that meeting the two-percent requirement "is impossible, or virtually impossible," Appellants' Br. 11, third parties in Kentucky have done exactly that several times in recent election cycles: the American Party in 1968, the Anderson Coalition in 1980, and the Reform Party in 1996. Appellants contend that "if [a] party is only interested in state politics," it is "impossible" for such a party to gain blanket ballot access. Appellants' Br. 12 (citing the Progressive Party of Vermont, which has eight state legislators but does not field any presidential candidates, as an example of the sort of political group that would find it very difficult to gain blanket ballot access under a statute like Kentucky's). But while that argument may have some force, since a party that failed ever to field a presidential candidate would be unable to gain two percent of the votes in a *presidential* election, the hypothetical burden of Kentucky's regulation on a hypothetical party has no bearing on appellants, and we do not decide how severe, if at all, such a burden would be.

Moreover, appellants have not demonstrated that the "combined effect," *Priest*, 970 F. Supp. at 699, of the Kentucky regulation is to impose a severe burden on

their access to the ballot. Indeed, the Libertarian Party has satisfied the petitioning requirement and fielded a candidate for President of the United States in every presidential election since 1988. Even the Constitution Party—which boasts fewer than 400 registered voters in Kentucky—has placed a presidential candidate on the ballot in 2000, 2004, and 2008. See State Bd. of Elections, Commonwealth of Ky., *Voter Registration Statistics Report* (2016) (August report by district), http://elect.ky.gov/statistics/Documents/voterstatsdistrict-20160811-031801.pdf. Unlike the preprimary filing deadlines in Hooks, 121 F.3d at 880, *McLain*, 637 F.2d at 1163–64, and *Priest*, 970 F. Supp. at 698, Kentucky allows political groups to file petitions for candidacy three months before the general election, and provides such groups approximately nine months to gather a quantity of signatures that amounts in almost all cases to less than 0.3% of the number of registered voters in the political unit that corresponds to each office. Ky. Rev. Stat. §§ 118.365(5), .315(2).

Appellants further argue that the burden of the regulation is severe because of the cost on the party of filing separate petitions for each office for which the party wishes to field a candidate. Appellants argue that if they wished to field a candidate for every state and county office over a four-year term,[2] the cost of

---

[2] Notably, over the four-year term including the 2017–2020 election years, appellants would have to field candidates for a total of 2,590 offices: 2,457 offices for the 2018 election, six for the 2019 election, and 127 for the 2020 election. Nothing in the record would indicate that appellants have ever sought or now seek to nominate candidates to anywhere near that number of offices over a four-year term.

petitioning would be as much as $734,328: $2 per signature for the 367,164 unique signatures that appellants claim would be required to satisfy the petitioning requirements for every office while maintaining a "safety factor" of 1.75.[3] Appellants compare this to the filing fee that the Supreme Court struck down in *Lubin*, 415 U.S. at 719. Appellants' Br. 31–32. But appellants cite figures based on the market rate charged by "professional petitioners" to gather signatures, even though nothing in the Kentucky regulation requires the use of such professionals. *Id.* at 16. And again, appellants present the hypothetical maximum cost of petitioning without demonstrating any likelihood that appellants would actually field a full slate of candidates for every state and county office during an actual four-year term. Thus, unlike the mandatory filing fee in Lubin, the incidental costs of gathering signatures on petitions do not come close to exclusion from the ballot, and thus do not impose a severe burden on ballot access.

Having concluded that the burden on appellants is not so "severe" as to warrant strict scrutiny, we also conclude that the burden is not so "minimal" as to warrant rational basis review. *Green Party of Tenn. v. Hargett*, 767 F.3d at 546 (citing *Burdick*, 504 U.S. 428). A burden is minimal when it "in no way limit[s] a political party's access to the ballot." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354

---

[3] Safety factor refers to the ratio of actual signatures gathered to signatures required. Candidates generally gather more signatures than required to hedge against the risk of invalid or duplicate signatures. Appellants' Br. 1–2.

(1997) (holding "minimal" any burden imposed by a regulation that prohibited an individual from appearing on the ballot as the candidate for more than one party), and *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (upholding statute allowing only registered members of a party and registered independents to vote in a primary election)). Here, the burden of the Kentucky regulation on appellants is at least somewhat greater than minimal because appellants must either earn sufficient votes in a presidential election to gain political-organization status, presumably at more-than-minimal cost in terms of time, effort, and money, or engage in petitioning that is not required of major political parties, with the result that minor parties will necessarily spend time, effort, and money gathering signatures that they could otherwise spend campaigning for candidates. To the extent that a minor party therefore fields fewer candidates or earns fewer votes than it would if it enjoyed blanket ballot access without having to earn it, the Kentucky regulation imposes a more-than-minimal burden. Since the Kentucky regulation thus falls somewhere "in between" minimal and severe, *Green Party of Tenn. v. Hargett*, 767 F.3d at 546, we will next engage in the "flexible analysis," *Anderson v. Celebrezze*, 460 U.S. at 789, that the district court rightly employed.

B

At the second step of *Anderson*/*Burdick*, we hold that Kentucky has an important interest in ensuring that candidates demonstrate a "significant modicum of support," *Jenness*, 403 U.S. at 442, before gaining access to the ballot, primarily in order to avoid voter

confusion, ballot overcrowding, and frivolous candidacies.

Under Article I, Section 4, of the United States Constitution, it falls to the states to prescribe the "times, places and manner of holding Elections," subject to some federal oversight. U.S. Const. art. I, § 4, cl. 1. The Supreme Court has held that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic process." *Storer*, 415 U.S. at 730 (finding a significant state interest in avoiding ballot confusion to be a valid justification for requiring independent candidates to be politically disaffiliated with other parties for one year before the primary election); *see also Timmons*, 520 U.S. at 364, 366 (noting that "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials" and that states have a "strong interest in the stability of their political systems").

The Commonwealth of Kentucky has asserted interests in avoiding the voter confusion, ballot overcrowding, and frivolous candidacies that would likely arise in increasing frequency as the number of parties with blanket ballot access increased. The district court rightly noted that the privilege of blanket access is significant, for any party with blanket access may field as many candidates as it nominates to every state and local election for a four-year term, adding a potentially great number of candidates to ballots statewide. The interests cited are central to the regulation of elections: for example, much of the

controversy attendant to the 2000 presidential election in Florida was occasioned by the fact that Florida permitted ten parties to be included on the presidential ballot, leading to a variety of confusing and unorthodox ballot designs that would not have been necessary with a smaller number of parties. Thus, the Commonwealth may sensibly require the kind of broad-level support that is measured by a political group's ability to garner two percent of the vote in a presidential election.

C

Finally, at step three of *Anderson*/*Burdick*, we hold that the Commonwealth of Kentucky's legitimate interests in regulating elections are sufficiently strong to justify its chosen means of achieving them, even if less restrictive means might be available. Appellants contend that rather than requiring political groups to obtain two percent of the votes in a presidential election in order to enjoy blanket ballot access, Kentucky should alternatively allow mid-term or gubernatorial election results to qualify a political association as a political party or organization. Appellants' Br. 13. Our job, however, is not to second-guess the legislative decisions of the Kentucky General Assembly but only to evaluate whether those decisions pass constitutional muster, and for the reasons discussed above in Parts II-A and II-B, the strength of Kentucky's interests in avoiding voter confusion, ballot overcrowding, and frivolous candidacies outweighs the modest burden of the ballot-access regulations on appellants.

As for the petitioning requirement, appellants argue that they should be able to file a single petition rather than separate petitions for each candidate. While such

a scheme would almost certainly require less time and effort of appellants if they chose to field many candidates in a given election year, it is not the system that Kentucky has chosen and that we now uphold.

III

We also affirm the district court's grant of Attorney General Beshear's motion to dismiss. The district court properly held that the Attorney General was not a proper defendant because the Attorney General's general enforcement powers did not provide a basis on which to grant appellants relief.

Accordingly, the district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-6107

[Filed August 26, 2016]

LIBERTARIAN PARTY OF KENTUCKY; LIBERTARIAN NATIONAL COMMITTEE, INC.; KEN MOELLMAN, JR.; CONSTITUTION PARTY OF KENTUCKY, Plaintiffs - Appellants,	)
v.	)
ALISON LUNDERGAN GRIMES, Secretary of State of the Commonwealth of Kentucky; JOSHUA G. BRANSCUM, JOHN HAMPTON, STEPHEN HUFFMAN, DONALD BLEVINS, JR., ALBERT B. CHANDLER, III, and GEORGE RUSSELL, Members of the State Board of Elections; MARYELLEN B. ALLEN, Executive Director, Kentucky State Board of Elections; ANDREW G. BESHEAR, Attorney General, all in their official capacities, Defendants - Appellees.	)

Before: MERRITT, BOGGS, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

Civil No. 3:15-cv-00086-GFVT

[Filed July 8, 2016]

THE LIBERTARIAN PARTY OF KENTUCKY, et al., Plaintiffs,	)
V.	)
ALISON LUNDERGAN GRIMES, et al., Defendants.	)

OPINION & ORDER

The Libertarian Party and the Constitution Party are active political associations in the Commonwealth of Kentucky and throughout the United States. Considered "political groups" under Kentucky's three-tiered election law scheme, the two associations do not presently enjoy the same ballot access rights and privileges as the more dominant Republican and Democratic Parties. As explained below, there is a mechanism for third parties in Kentucky to gain general access to the ballot. Significantly, this method is not so exclusive that the Constitution demands the

choice of the Kentucky legislature be voided. Accordingly, the Court DENIES the Plaintiffs' motion for summary judgment but GRANTS summary judgment in favor of the Defendants.

I

Political parties have been a part of the American governmental process almost since this country's conception. Though our first President vehemently warned against the dangers of developing a party system,[1] James Madison's supposition that "the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects" has proven true. *See* THE FEDERALIST NO. 10 (James Madison). The nation's first party, the Federalist Party, emerged around 1787, with the ideologically opposed Democratic-Republican Party soon to follow. From those early days until the present time, the United States has operated primarily as a two-party system, with the Democratic Party and the Republican Party currently dominant.

Nevertheless, a variety of minor, or "third," parties have played an important role in the nation's history and have contributed greatly to its richness. These include historic and present associations such as the Free Soil Party, the Know-Nothing Party, the Progressive Party, the Reform Party, the Green Party, and the two Plaintiffs. *See, e.g.*, THE ENCYCLOPEDIA OF THIRD PARTIES IN AMERICA (Immanuel Ness & James

---

[1] *See, e.g.*, Washington's Farewell Address to the People of the United States (Sept. 19, 1796), *available at* http://gwpapers.virginia.edu/documents/washingtons-farewell-address/.

Ciment, eds., 2000). In fact, one of the nation's current major parties has its roots as a third party. The Republican Party successfully displaced one of the existing major parties around the turn of the nineteenth century, and it has been one of the country's leading political groups ever since. *See* GRAND NEW PARTY, https://www.gop.com/history/ (last visited May 24, 2016); *see also Nader v. Keith*, 385 F.3d 729, 732 (7th Cir. 2004) (discussing roles of third parties in United States history).

Regardless of the size or the political dominance of such a group, the right to associate for the advancement of political ideas has been a crucial part of the nation's framework since the passage of the Bill of Rights. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Tashijian v. Republican Party of Conn*., 479 U.S. 208, 224 (1986) (noting a party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution."). The First Amendment, made applicable to the states through the Fourteenth Amendment, protects both the right to associate and the right to vote effectively as two of the nation's most sacred freedoms. *Williams*, 393 U.S. at 30. As the Supreme Court has explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The Constitution delegates the responsibility of carrying out elections to the states, subject to

congressional oversight. *See* U.S. CONST. art. I, § 4, cl. 1. As a result, state legislatures are the primary source of laws regulating local, state, and national elections, and each state has largely developed its own ballot access structure. *See* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1282 (Dec. 2005). While the Constitution undoubtedly protects the rights of citizens to associate in political parties, the Supreme Court has determined that states may enact reasonable regulations to help carry out elections and reduce related fraud. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic processes."). It logically follows, therefore, that the judicial branch has at times been called upon to consider the election laws of state legislatures and to ensure those laws do not infringe upon important constitutional freedoms.

The present lawsuit involves such a challenge. Both the Libertarian Party and the Constitution Party believe the Commonwealth of Kentucky's ballot access scheme abridges their First and Fourteenth Amendment rights. The two minor parties are allowed to participate in the political process in the Commonwealth pursuant to certain criteria outlined below, and they argue those criteria unduly interfere with their right to freely associate and to the equal protection of the law. The Plaintiffs have launched both an as-applied and facial challenge to the Commonwealth's two percent requirement, arguing the

law is unconstitutional "as applied to multiple candidates and petitions, and the ability, or lack thereof, of a 'Political Group' to elevate themselves to a 'Political Organization.'" [R. 37 at 1-2, 14; *see also* R. 1 at 13-14.] The question before the Court is simple: does the Kentucky General Assembly's chosen ballot access scheme comport with the guarantees of the Constitution? The short answer is "yes;" a more complete explanation as to why this is so follows.

II

A

The Plaintiffs in this case—the Libertarian Party of Kentucky, the Constitution Party of Kentucky, and individual members of both parties—are currently allowed to participate in the political process according to the following framework. Pursuant to Kentucky state law, every political association is classified as either a political party, a political organization, or a political group. A political party is an organization whose candidate received at least twenty percent of the total vote cast in the last preceding presidential election. KRS § 118.015(1). Based on the 2012 presidential election, the Republican Party and the Democratic Party are considered political parties under Kentucky law. [*See* R. 31-1 at 4.]

The second classification, a political organization, applies to an association whose candidate received at least two percent or more of the vote in the last preceding presidential election. KRS § 118.015(8). For example, Ross Perot of the Reform Party received more than two percent of the vote in the 1996 presidential election; therefore, the Reform Party was classified as

a political organization for the following four-year term. [*See* R. 1 at 9.]

An association that fails to qualify as a political party or a political organization is considered a political group under Kentucky law. KRS § 118.015(9). The Libertarian Party of Kentucky and the Constitution Party of Kentucky, having failed to obtain at least two, or twenty, percent of the vote in the 2012 presidential election, are currently classified as political groups.

All three classifications of political associations are afforded ballot access in Kentucky, though they qualify for the ballot in different ways. Political parties and political organizations earn general ballot access for the four-year period following a qualifying presidential election. KRS § 118.305(1)(a)-(d). Thus, a candidate of a political party or a political organization obtains ballot access by virtue of being his or her association's nominee. By contrast, political groups earn ballot access through petitioning. A candidate running on behalf of a political group—or an independent candidate running apart from any political association—must submit a petition containing a requisite number of signatures before the candidate will be added to a particular ballot. KRS § 118.315(2). The signature requirement varies by office. For example, a candidate running for President of the United States or Governor of the Commonwealth must collect the signatures of five thousand petitioners. *Id.* A candidate running for any congressional office must collect four hundred signatures, and a candidate for the state's General Assembly must collect one hundred signatures. *Id.*

The Plaintiffs concede the petition requirement for a single candidate in a single election cycle is an acceptable rule [*see, e.g.*, R. 37 at 4-5], and, indeed, this is not a case where the Plaintiffs have been denied access to the ballot altogether. Instead, the Plaintiffs' chief concern is with their parties' rights and privileges as a whole. The Plaintiffs are political groups who failed to obtain at least two percent of the vote in the 2012 presidential election but who nonetheless argue that they enjoy a significant modicum of support among Kentucky voters. They desire the same rights and privileges as political organizations and political parties—namely, they seek the general ballot access afforded to associations obtaining either two or twenty percent of the vote in a presidential race. As the law stands, the Plaintiffs must petition for ballot access in every race until the next presidential election, when they may once again attempt to obtain the requisite percentage of the vote and thus achieve the rights that come with political organization or political party classification under Kentucky law.

This scheme, the Plaintiffs argue, is unconstitutional. Through 42 U.S.C. § 1983, they bring this suit against the Defendants for a violation of their First Amendment rights to associate and for a violation of their rights to equal protection of the law under the Fourteenth Amendment. [*See* R. 1 at 12.] Because there is no outstanding factual dispute, the Court considers whether the Plaintiffs or the Defendants are entitled to

summary judgment on the constitutional challenges as a matter of law.[2]

B

Although the Defendants do not challenge the Plaintiffs' standing to bring the present lawsuit, standing is a threshold inquiry in every federal case which may not be waived by the parties. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). "To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted). Further, "a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based." *Haskell v. Washington Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citations omitted).

---

[2] The Plaintiffs styled their original motion as a "motion for a temporary restraining order, preliminary injunction, permanent injunction, and summary judgment." [R. 16.] The matter was then referred to United States Magistrate Judge Edward B. Atkins to craft a unique briefing schedule appropriate for the nature of the case. [*See* R. 27.] In response to the Plaintiffs' request for injunctive and summary judgment relief, the Defendants filed a "counter-motion for summary judgment." [*See* R. 33.] Following oral argument on the issues, the Court now considers the Plaintiffs' original motion and the Defendants' counter-motion as Rule 56 motions for summary judgment.

Here, the Plaintiffs have suffered an injury in fact due to their lack of general ballot access. This initial standing consideration requires the Plaintiffs' injury be both particularized and concrete. *Spokeo v. Robins*, ___ U.S. ___, 136 S. Ct. 1540 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)). Both requirements characterize the Plaintiffs' situation. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* (internal quotation marks omitted). The Libertarian Party of Kentucky and the Constitution Party of Kentucky are, as minor parties, personally affected by Kentucky's current election laws in that they must petition to obtain ballot access for each election rather than run a slate of their parties' candidates pursuant to a blanket ballot access scheme. Further, a "concrete" injury is a *de facto* injury that actually exists. *Id.* The Plaintiffs have suffered a concrete injury as a result of Kentucky's law because they have actually, and not just theoretically, been denied the general ballot access that political organizations and political parties enjoy. *Id.*; *see also Green Party of Tennessee v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (finding, where plaintiffs challenged Tennessee's ballot access laws, the laws "restricted the plaintiffs' political activities within the state and have limited their ability to associate as political organizations." Thus, the plaintiffs properly articulated harm for standing purposes.).

The remaining Article III and prudential standing requirements are also satisfied in this case. The Plaintiffs' injury in fact is fairly traceable to the Defendants, who are tasked with administering the Commonwealth's election laws. *See Bennett*, 520 U.S.

at 162; [*see also* R. 26 at 5-9 (discussing why Secretary Grimes and the Kentucky State Board of Elections are proper defendants in this case).] The injury is redressable, should the Court find Kentucky's ballot access scheme unconstitutional. *Bennett*, 520 U.S. at 162. And finally, the Plaintiffs are the appropriate litigants. *Haskell*, 864 F.2d at 1275. They are directly affected by the Commonwealth's three-tier political association framework, and, as members of the third tier, they have suffered "an injury peculiar to them and not common to all members of the public." *Hargett*, 767 F.3d at 544 (internal quotations omitted). The Court, therefore, is satisfied that the Plaintiffs have standing to bring the instant action, and the Court has jurisdiction to reach the merits of the case.

C

The instant action is not the first of its kind. As previously noted, federal courts have often been called upon to review the constitutionality of state electoral schemes, particularly with regard to whether the rights of third parties are being abridged. One of the earliest Supreme Court decisions in this field, *Williams v. Rhodes*, represents significant judicial support for third parties. *See Williams*, 393 U.S. 23. In that case, two third parties challenged a series of Ohio election laws, such as the petition signature requirement for new parties, an early filing deadline for the petitions, and a mandated primary election which had to conform to detailed standards. Finding the laws essentially foreclosed new, or old but small, parties from the ballot, the Supreme Court struck down Ohio's ballot access scheme in its entirety as a violation of the Equal Protection Clause. In reaching its decision, the

Supreme Court emphasized the right of individuals to associate for political advancement and the right of voters to cast their votes effectively as two of the nation's "most precious freedoms." *Id.* at 30. Specifically with regard to the value of third parties and the appropriateness of protecting their creation and growth, the Supreme Court stated:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. . . .
>
> There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Id. at 31-32.

The Plaintiffs ostensibly look to *Williams* as support for their arguments against Kentucky's current ballot access scheme, under which general ballot access for third parties has been repeatedly difficult to achieve. But while the *Williams* decision does serve as binding precedent over the present controversy, the case

represents "the high-water mark of protection afforded third-party challengers." *See* Evseev, 85 B.U. L. REV. at 1288. In subsequent case law, courts have more frequently upheld state ballot access restrictions, focusing on the rights of states to regulate elections rather than the protection of third party development. Shifting away from a seeming recognition of the inherent value of third parties, the Supreme Court has commented that "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363. Similarly, the Supreme Court has explained that while a state's interest in political stability does not allow it to "completely insulate the two-party system," a state may nonetheless "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Id*. at 367.

On the whole, this Court's thorough review of the relevant Supreme Court and Circuit precedent reveals the following trend: where a state's electoral scheme entirely forecloses third party voices, it will not survive a constitutional challenge. However, restrictions—even serious ones—on third parties' ballot access opportunities are generally upheld unless they truly operate to "freeze the political status quo." *Jenness v. Fortson*, 403 U.S. 431, 438 (1970); *see also* Evseev, 85 B.U. L. REV. at 1287-1302.

In recent years, the Sixth Circuit has summarized Supreme Court precedent on ballot access challenges and clarified the appropriate legal test for district courts within the Circuit to apply. The so-called *Anderson-Burdick* analysis, named for the Supreme Court's holdings in *Anderson v. Celebrezze*, 460 U.S.

780, 788-89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), instructs the Court to consider the Plaintiffs' instant challenge according to the following framework, which the Court does with the past fifty years of Supreme Court precedent in mind.

> First, the court must consider the character and magnitude of the plaintiff's alleged injury. Next, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must assess the legitimacy and strength of each of those interests, as well as the extent to which those interests make it necessary to burden the plaintiff's rights.

Hargett, 767 F.3d at 546 (internal citations and quotation marks omitted).

The first step of the test, which considers the character and magnitude of the Plaintiffs' alleged injury, requires the Court to determine whether the restrictions imposed by the Commonwealth are "severe" or "minimally burdensome." Where state restrictions are severe, "they will fail unless they are narrowly tailored and advance a compelling state interest." *Id.* (citing *Burdick*, 504 U.S. at 434). By contrast, minimally burdensome restrictions trigger rational basis review and "will usually pass constitutional muster if the state can identify important regulatory interests that they further." *Id.* (internal quotation marks omitted). For the myriad regulations falling somewhere in the middle, the Court should "engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (citing

Anderson, 460 U.S. at 798; *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012)).

In this case, the restriction placed on the Plaintiffs is the inability of their political associations to achieve general ballot access without obtaining either twenty percent or two percent of the vote in the last preceding presidential election. *See* KRS §§ 118.015(1), (8). The Plaintiffs argue the Libertarian Party of Kentucky and the Constitution Party of Kentucky both enjoy a significant modicum of support from Kentucky voters. [R. 16-1 at 4-5.] Both associations maintain they have been unable to consistently place their candidates on the ballot as a result of the Commonwealth's current scheme. [*Id.*] Because their candidates must currently petition separately for each individual race, the two associations consistently struggle to field multiple candidates for office. [*Id.* at 9-10.] While the Plaintiffs do not challenge the petition signature requirement as applied to single candidates for office, they do contest the inability of political associations that desire to run multiple candidates for multiple offices to achieve general ballot access "except through performance in the general election," which is limited to the results of the presidential race. [*See* R. 37 at 1, 3.]

The Commonwealth's current ballot access scheme does not impose a severe burden on the Plaintiffs. Whether a particular burden is appropriately categorized as severe involves both "legal and factual dimensions," *Hargett,* 767 F.3d at 547, and requires the Court to consider factors such as "the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the regulations on the voters, the parties and the

candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006). The challenged restriction here does not completely deprive the Plaintiffs of ballot access; rather, the Plaintiffs have been unable to obtain *general* or *blanket* ballot access as a result of the present law.

While securing places on the ballot through general access may be more convenient or cost-efficient than petitioning for each election, blanket ballot access itself does not appear to be a key associational right. The Commonwealth's scheme does not "restrict the ability of the [Plaintiffs] and its members to endorse, support, or vote for anyone they like," nor does it "exclude[ ] a particular group of citizens, or a political party, from participation in the election process." *Id.* (quoting *Timmons*, 520 U.S. at 361, 363). Plaintiffs are still able to run candidates—either an individual or a slate—for office, albeit through petitioning. And while the petitioning process may require extensive human and financial resources [*see* R. 16-1 at 10-13 (describing the need for professional petitioners and the costs thereof)], courts have already determined that some financial hardship due to repeated petitioning does not constitute a severe burden. *See Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011).[3]

---

[3] As the Eighth Circuit noted in *Martin*, "[a]lthough the Green Party may incur some costs because of its choice to hire individuals to collect signatures, the ballot access scheme does not impose severe burdens on the Green Party and Arkansas need not collapse every barrier to ballot access. *See Am. Party of Texas v. White*, 415 U.S. 767, 794, 94 S. Ct. 1296, 39 L.Ed.2d 744 (1974) (noting that

Further, other third parties have been able to achieve general ballot access pursuant to the Commonwealth's current election laws. [*See* R. 1 at 9 (describing the American Party, the Anderson Coalition, and the Reform Party as third parties who received more than two percent of the vote in 1968, 1980, and 1996, respectively).] Both the history of third parties in Kentucky as well as relevant case law suggest that the burden imposed on the Plaintiffs in this case is less than severe. Therefore, the challenged law need not survive heightened scrutiny. *See Hargett*, 767 F.3d at 546.

If the restrictions placed on the Plaintiffs are considered minimal under the *Anderson-Burdick* test, the Defendants' position survives rational basis review. *See id*. As justifications for its current ballot access scheme, the Commonwealth points to the need for preventing voter confusion, avoiding ballot overcrowding, and preventing frivolous candidacies. [*See, e.g*., R. 33 at 2-3.] To satisfy rational basis review, Kentucky need only point to "important regulatory interests" that are furthered by the scheme. *See id*. In *Timmons v. Twin Cities Area New Party*, the Supreme Court explained that "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials" and noted the states' "strong interest in the stability of their political systems." 520 U.S. at 364, 366. In light of this and other binding precedent, the interests articulated by the Defendants may best be considered "important

---

the States need not "finance the efforts of every nascent political group seeking to organize itself"). *Martin*, 649 F.3d at 683.

regulatory interests" that satisfy the requirements of rational basis review. *See Hargett*, 767 F.3d at 546.

The restrictions in place here do, however, appear to pose more than simply a "minimal" burden on the Plaintiffs, which triggers the "flexible analysis" outlined in *Hargett*. *See* 767 F.3d at 546. This flexible approach notwithstanding, analyzing the Commonwealth's justifications under a higher level of scrutiny does not change the end result. In *Storer v. Brown*, the Supreme Court considered a California law that required independent candidates to be politically disaffiliated for at least one year prior to the primary election. 415 U.S. at 728-739. While the exact level of scrutiny employed by the Supreme Court is unclear, the state justifications of requiring a preliminary showing of significant support and avoiding ballot confusion clearly survived some level of heightened scrutiny.[4] Similarly, in *American Party v. White*, the Supreme Court upheld the state defendant's interests in "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion" as sufficiently "necessary to further compelling state interests." 415

---

[4] While the *Storer* court acknowledged the "compelling state interests" requirement set forth in *Williams v. Rhodes* that would, today, be considered strict scrutiny, *see Storer*, 415 U.S. at 729, the Supreme Court appears to have used what is now known as the flexible approach of the *Anderson-Burdick* test. *Id.* at 730 (explaining the need to consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification"). Regardless, the state justifications were sufficient to survive the plaintiff's challenge to California's party disaffiliation requirement. *Id.* at 736-37.

U.S. 767, 780, 782 n. 14 (1974). In light of cases like these, the Court finds the Defendants' justifications for the Commonwealth's ballot access scheme sufficiently legitimate to survive the Plaintiffs' challenge. *See Hargett*, 767 F.3d at 546.

Notably, the Commonwealth's restrictions on a political association's ballot access do serve to further the Defendants' articulated goals. For example, one of the Commonwealth's objectives is to prevent frivolous candidacies resulting in lengthy and confusing ballots. [R. 33 at 3.] Under the current Kentucky framework, when a political association is given general ballot access for a four-year term, that association's candidates receive an automatic place on the ballot for local and statewide elections, as well as the next presidential election. This latter privilege is significant and presumably the justification for requiring third parties to achieve a modicum of support nationally. Thus, before granting a particular association automatic access to the presidential ballot, the Commonwealth may sensibly require that association to demonstrate the kind of broad-level support on the national scale that may be measured by the ability to obtain two percent of the vote in that particular race. To specifically justify using the election results of a preceding presidential, rather than gubernatorial, race, the Defendants point primarily to the fact that the General Assembly has chosen this method to measure an association's popularity and political seriousness. While it appears that most states measure a political association's modicum of voter support through that association's performance in a gubernatorial, instead of presidential, race [*see* R. 16-6 at 3-4], the Court is aware of no precedent forbidding the use of presidential

election results outright, particularly when ballot access for national elections is one of the privileges at stake.

Moreover, this is not a case where the challenged restriction combines with another objectionable law so as to taint the Commonwealth's three-tier framework. Ballot access schemes deemed deficient by the judiciary typically suffer from a number of infirmities rather than only one such questionable rule or regulation. In fact, the relevant case law is repeatedly concerned with the effect of a combination of restrictions on a third party's ballot access, rather than one individual condition. *See, e.g.*, *Storer*, 415 U.S. at 740-45 (remanding case to district court to consider the true feasibility of garnering the required number of signatures in light of the disqualification of primary voters and the twenty-four day time period allowed for petitioning); *Blackwell*, 462 F.3d at 585-591 (invalidating Ohio's ballot access scheme due to the "combined effect" of Ohio's primary requirement with the early filing deadline, among other laws).

Here, the Plaintiffs challenge primarily one restriction—the inability of a political association to convert from political group to political organization status without obtaining two percent of the presidential vote. Put another way, the Plaintiffs decry their inability to obtain blanket ballot access apart from their performance in the presidential race. [*See* R. 37 at 1-2.] The sole restriction at play here is insufficient for the Court to deem the Commonwealth's ballot access scheme unconstitutional. Under the present framework, all an association must do to elevate itself from a political group to a political

organization is to obtain a place on the presidential ballot through petitioning, and then to garner two percent of the votes cast by the electorate. KRS § 118.015(8)-(9).

Political groups that fail to achieve political organization status must undertake repeated petitioning, and the Court recognizes that may not be preferable for those associations. Nevertheless, Kentucky's petition requirement itself does not appear to be particularly burdensome when considered in conjunction with the Commonwealth's other election laws. For instance, the Plaintiffs make no reference to an early deadline for filing petitions or some other restriction that hinders their abilities to obtain a place on the presidential ballot in the first instance. *Compare, e.g.*, *Williams*, 393 U.S. at 24-26 (describing the "series of election laws" which have "made it virtually impossible for a new political party" to be placed on the Ohio ballot); *Blackwell*, 462 F.3d at 586-87 (discussing "the burden imposed by statutes requiring political parties to file registration petitions far in advance of the primary and general elections"). And while the Plaintiffs repeatedly emphasize the difficulties that come with petitioning for multiple candidates' ballot access throughout a four-year term, achieving a place on the presidential ballot so as to attempt to achieve blanket ballot access has not itself been a problem. [*See* R. 16-6 at 8-9 (explaining the Constitution Party successfully gathered signatures to place a candidate on the Kentucky ballot in the 2008 presidential race and that the Libertarian Party "has also successfully placed its candidates for President on the ballot in Kentucky each Presidential election year since 1988.").]

In *Jenness v. Fortson*, the Supreme Court noted the apparent stringency of a particular Georgia requirement but still upheld the law in the absence of other questionable restrictions. *See* 403 U.S. at 442 ("The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes"). The instant lawsuit is like *Jenness* in the sense that only one other state maintains a ballot access scheme tied to presidential election performance, but that rarity is "balanced" by the lack of other arbitrary restrictions which undermine an association's ability to properly function. *Id.*; *see also* [R. 16-6 at 3-4 (describing Washington as the only other State where an association must qualify for blanket ballot access during a presidential year).]

III

In the end, the third parties here decry the Commonwealth's ballot access scheme on public policy grounds. In essence, they seek what is in their view a better law than the one enacted by the Kentucky General Assembly, and they want this Court to impose that law.

Perhaps Kentucky lawmakers could have chosen a more inclusive path to general ballot access. The benefits of that choice, as articulated by the Plaintiffs, are certainly defensible. But it is not the job of a federal judge applying the United States Constitution to lecture the Kentucky political branches on how best to

do their job. The important protections embodied in American federalism demand this modest role for the judiciary. *See, e.g.*, *Burrage v. United States*, ___ U.S. ___, 134 S. Ct. 881, 892 (2014); *Harris v. McRae*, 448 U.S. 297, 326 (1980) ("It is the role of the courts only to ensure that congressional decisions comport with the Constitution. . . . [W]e cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident, or out of harmony with a particular school of thought.") (internal quotation marks and citations omitted). Simply put, if Kentucky's ballot access framework comports with constitutional protections as explained by the teachings of recent case law, this Court's work is done.

Accordingly, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** that the Plaintiffs' Motion for Summary Judgment [R. 16] is **DENIED** and the Defendants' Counter-Motion for Summary Judgment [R. 33] is **GRANTED**. Judgment in favor of the Defendants shall be entered contemporaneously herewith.

This the 8th day of July, 2016.

/s/ Gregory F. Van Tatenhove
Gregory F. Van Tatenhove
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

Civil No. 3:15-cv-00086-GFVT

[Filed July 8, 2016]

THE LIBERTARIAN PARTY OF KENTUCKY, et al., Plaintiffs,	)
V.	)
ALISON LUNDERGAN GRIMES, et al., Defendants.	)

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and in accordance with the Opinion and Order entered contemporaneously herewith, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Judgment is entered in favor of the Defendants with respect to all issues raised in this proceeding;

2. Any pending motions [R. 43] are **DENIED**; as **MOOT**;

3. This action is **DISMISSED** and **STRICKEN** from the Court's active docket; and

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

This the 8th day of July, 2016.

/s/ Gregory F. Van Tatenhove
Gregory F. Van Tatenhove
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-6107

[Filed September 27, 2016]

LIBERTARIAN PARTY OF KENTUCKY, ET AL., Plaintiffs-Appellants,

v.

ALISON LUNDERGAN GRIMES, SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY, ET Al., Defendants-Appellees.

BEFORE: MERRITT, BOGGS, and McKEAGUE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

Constitutional and Statutory Provisions

U.S. Const., Amend I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and in the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the law.

Ky. Rev. Stat. Section 118.015. Definitions

As used in this chapter [*i.e.*, Chapter 118, entitled *Conduct of Elections*], unless the context otherwise requires:

(1) A "political party" is an affiliation or organization of electors representing a

political policy and having a constituted authority for its government and regulation, and whose candidate received at least twenty percent (20%) of the total vote cast at the last preceding election at which presidential electors were voted for; . . . .

(8) "Political organization" means a political group not constituting a political party within the meaning of subsection (1) of this section but whose candidate received two percent (2%) or more of the vote of the state at the last preceding election for presidential electors; and

(9) "Political group" means a political group not constituting a political party or a political organization within the meaning of subsections (1) and (8) of this section.

Ky. Rev. Stat. Section 118.305. Persons entitled to have name on ballot - Certification of names of candidates. . . .

(1) Except as provided in KRS 118.345, and subject to the provisions of subsections (2), (3), and (4) of this section, the county clerk of each county shall cause to be printed for the voting machines and on the absentee ballots for the regular election the names of the following persons:

(a) Candidates of a political party, as defined in KRS 118.015, who have received certificates of nomination at the preceding primary, or certificates of nomination under KRS 118.185,

and whose certificates of nomination have been filed with the Secretary of State or the appropriate county clerk;

* * * *

(d) Candidates who have been nominated by a political organization as provided in KRS 118.325 and whose certificates or petitions of nomination have been filed with the Secretary of State or the appropriate county clerk within the time prescribed in this chapter;

(e) Independent candidates who have been nominated by petition as provided in KRS 118.315, and whose petitions of nomination have been filed with the Secretary of State or the appropriate county clerk within the time prescribed in this chapter;

* * * *

Ky. Rev. Stat. Section 118.315. Nomination for regular election by petition - Form of petition. . . .

(1) A candidate for any office to be voted for at any regular election may be nominated by a petition of electors qualified to vote for him or her, complying with the provisions of subsection (2) of this section. No person whose registration status is as a registered member of a political party shall be eligible to election as an independent, or political organization, or political group candidate, nor shall any person be eligible to election as

an independent, or political organization, or political group candidate whose registration status was as a registered member of a political party on January 1 immediately preceding the regular election for which the person seeks to be a candidate. This restriction shall not apply to candidates to those offices specified in KRS 118.105(7), for supervisor of a soil and water conservation district, for candidates for mayor or legislative body in cities of the home rule class, or to candidates participating in nonpartisan elections.

(2) The form of the petition shall be prescribed by the State Board of Elections. It shall be signed by the candidate and by registered voters from the district or jurisdiction from which the candidate seeks nomination. The petition shall include a declaration, sworn to by the candidate, that he or she possesses all the constitutional and statutory requirements of the office for which the candidate has filed. Signatures for a petition of nomination for a candidate seeking any office, excluding President of the United States in accordance with KRS 118.591(1), shall not be affixed on the document to be filed prior to the first Wednesday after the first Monday in November of the year preceding the year in which the office will appear on the ballot. Signatures for nomination papers shall not be affixed on the document to be filed prior to the first Wednesday after the first Monday in

November of the year preceding the year in which the office will appear on the ballot. A petition of nomination for a state officer, or any officer for whom all the electors of the state are entitled to vote, shall contain five thousand (5,000) petitioners; for a representative in Congress from any congressional district, or for any officer from any other district except as herein provided, four hundred (400) petitioners; for a county officer, member of the General Assembly, or Commonwealth's attorney, one hundred (100) petitioners; for a soil and water conservation district supervisor, twenty-five (25) petitioners; for a city officer or board of education member, two (2) petitioners; and for an officer of a division less than a county, except as herein provided, twenty (20) petitioners. It shall not be necessary that the signatures of the petition be appended to one (1) paper. Each petitioner shall include the date he or she affixes the signature, address of residence, and date of birth. Failure of a voter to include the signature affixation date, date of birth, and address of residence shall result in the signature not being counted. If any person joins in nominating, by petition, more than one (1) nominee for any office to be filled, he or she shall be counted as a petitioner for the candidate whose petition is filed first, except a petitioner for the nomination of candidates for soil and water conservation district supervisors may be counted for every petition to which his or her signature is affixed.