No. 16-1034

In The Supreme Court of the United States

LIBERTARIAN PARTY OF KENTUCKY, et al.,

Petitioners,

v.

ALISON LUNDERGAN GRIMES, KENTUCKY SECRETARY OF STATE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly applied this Court's flexible *Anderson-Burdick* analysis in affirming that Kentucky's long-standing ballot-access framework comports with the guarantees of the United States Constitution.

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INTRODUCTION

Despite Petitioners' belated effort to manufacture new issues for the Court's consideration, their petition does not merit review. *See* United States Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). To the contrary, there are compelling reasons for the Court to deny the petition for a writ of certiorari. *First*, the petition is infected by multiple misstatements – all of which flow from Petitioners' apparently deliberate failure to inform the Court that the Libertarian Party recently qualified as a "political organization" in Kentucky's 2016 general election – an accomplishment that Petitioners nonetheless continue to mischaracterize as "'virtually impossible.'"[1] Petitioners' lack of candor and egregious misstatements are reason alone to deny their petition. *Second*, in light of the Libertarian Party having ultimately qualified in November 2016 as a "political organization" under Kentucky law – and thereby obtaining for at least the next four years the very relief sought by the Libertarian National Committee, Inc. (the "LNC") and the Libertarian Party of Kentucky (the "LPKY," and together with the LNC, the "Lead Petitioners") – no important controversy remains that is worthy of this Court's consideration. *Finally*, the Court should not consider purported new

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[1] *Compare* Pet. at 9-10 *with* Commonwealth of Kentucky, Alison Lundergan Grimes, Secretary of State, November 8, 2016, Official 2016 General Election Results, For the office of President and Vice President of the United States, http://elect.ky.gov/results/2010-2019/Documents/2016%20General%20Election%20Results.pdf (the "Official 2016 General Election Results").

requirements of its *Anderson-Burdick* test fabricated belatedly by Petitioners. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Indeed, both lower courts properly stated and applied *Anderson-Burdick* in rejecting Petitioners' claims – but even had they somehow erred in its application, the petition should still be denied. *See* United States Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

STATEMENT OF THE CASE

A. Kentucky's Ballot-Access Scheme Affords Petitioners Multiple Avenues To The General Election Ballot.

Kentucky has long adhered to a three-tier ballot-access framework that, as demonstrated recently by its November 2016 general election, promotes access to the general election ballot for new or small political groups such as Petitioners here. *See, e.g.*, *Greene v. Slusher*, 190 S.W.2d 29, 30 (Ky. 1945) ("Our statutes recognize three distinct groups as being entitled to have their respective candidates or nominees voted for in a regular election, namely, (1) a political party; (2) a political organization which polled as much as two per cent of the total vote of the state at the last presidential election; and (3) independent candidates or a political organization which did not cast that percentage of the total vote in the presidential election."); *Anderson v.*

Mills, 664 F.2d 600, 607 (6th Cir. 1981) (recognizing that Kentucky's ballot-access framework "provides greater access to the political process than would a single route to the general election ballot."). Indeed, Kentucky's framework provides general election ballot access to each of three distinct groups in a manner designed to "recognize[ ] the differences between established well-financed parties/candidates, and those candidates and parties who have no elaborate political network." *Id.*

A major "political party," such as the Democratic or Republican parties, is defined by Kentucky law as "an affiliation or organization of electors representing a political party and having a constituted authority for its government and regulation, and whose candidate received at least twenty percent (20%) of the total vote cast in the last preceding election at which presidential electors were voted for." Ky. Rev. Stat. § 118.015(1). A "political party" typically nominates candidates to the general election ballot by nominating convention (for the offices of United States President and Vice President) or party primary (for all other offices). *See* Ky. Rev. Stat. §§ 118.305; 118.325(1). Persons seeking office as the candidate of a political party must file nomination papers no later than the last Tuesday in January preceding its primary election. *See* Ky. Rev. Stat. § 118.165.

At the opposite end of the political spectrum, Kentucky's framework similarly provides general election ballot access to new or small political groups that have failed to demonstrate a significant modicum

of statewide support for their candidates, such as Petitioners (at least before Kentucky's November 2016 general election). *See* Ky. Rev. Stat. § 118.015(9). A "political group" need not demonstrate any level of previous electoral success and may instead place its candidates on the general election ballot via nominating petition. *See* Ky. Rev. Stat. §§ 118.305; 118.315. Accordingly, to be placed on the general election ballot along with their affiliated "political group," candidates need only demonstrate a relatively modest modicum of support for their own candidacy by obtaining a designated number of signatures on a nominating petition. *See id.*

To be placed on the general election ballot, a "political group" candidate for a statewide office must obtain the signature of five thousand (5,000) voters. *See* Ky. Rev. Stat. § 118.315(2). For all other offices, a much lower number of signatures is required. *See id.* For example, "political group" candidates for United States Congress must obtain only four hundred (400) signatures, and "political group" candidates for the General Assembly need obtain only one hundred (100) signatures. *Id.* "Political group" candidates for a city office or board of education member must obtain only two (2) signatures to be placed on the general election ballot. *Id.* Candidates of a "political group" have roughly nine months to obtain the number of signatures required to obtain access to the general election ballot (from November of the year preceding the election until August of the election year). *See* Ky. Rev. Stat. §§ 118.315(2); 118.365.

Although binary frameworks enacted by other states have been deemed constitutional where they provide general election ballot access only to the equivalents of a "political party" and a "political group," Kentucky nonetheless offers a third avenue to the ballot.[2] In fact, Kentucky law further allows a "political group" to qualify itself as a "political organization" when its "candidate received two percent (2%) or more of the vote of the state at the last preceding election for presidential electors." Ky. Rev. Stat. § 118.015(8). Once qualified as a "political organization" by demonstrating a significant (albeit comparatively modest) modicum of statewide support for its candidates, the group can nominate candidates to the general election ballot in the same manner as a "political party" (by nominating convention or primary). *See* Ky. Rev. Stat. §§ 118.305; 118.325.

Despite Petitioners' apparent deliberate failure to disclose the pertinent facts while continuing to claim misleadingly that "[i]t is 'virtually impossible' in the modern political landscape for minor parties to qualify for general ballot access under Kentucky's regime," Pet. at 9, this is exactly what the Lead Petitioners achieved just months ago when their presidential candidate, Gary Johnson, received 2.8 percent (2.8%)

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[2] *See, e.g.*, *Jenness v. Fortson*, 403 U.S. 431 (1971) (recognizing constitutional validity of binary Georgia ballot-access framework that provided general election ballot-access only to candidates of a "political party" nominated by party primary, or candidates of a "political body" (or independent candidates) who filed a nominating petition signed by five percent (5%) of voters statewide.).

of the votes cast for U.S. President in Kentucky's 2016 general election. *See* Official 2016 General Election Results, *supra* note 1. Thus, as demonstrated through the recent experience of Lead Petitioners, Kentucky's three-tier ballot access framework in fact enhances – and plainly does not restrict or discriminate invidiously against – the rights of "political groups." *See Mills*, 664 F.2d at 607.

B. Kentucky's Ballot-Access Laws Have Not Unduly Burdened The Rights Of Petitioners.

Having qualified recently as a "political organization," the Lead Petitioners can no longer claim that Kentucky's ballot-access framework presents an undue burden on their rights. Moreover, because Kentucky's ballot-access framework provides all Petitioners general election ballot access via multiple routes – including by nominating petition – the only conceivable burden standing between the Constitution Party of Kentucky (the "CPKY") and access to the ballot is its collection of the requisite number of voter signatures. *See* Ky. Rev. Stat. § 118.315. Despite past efforts by the Lead Petitioners and others to challenge various aspects of the statutory regime as applied to "political groups," Kentucky's petition signature requirement has been consistently upheld. *See Mills*, 664 F.2d 600; *Libertarian Party v. Davis*, 601 F. Supp. 522 (E.D. Ky. 1985); *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200

(E.D. Ky. 1991).[3] Moreover, Petitioners failed to identify any other restrictions imposed by Kentucky's ballot-access framework that might operate in combination with its facially valid petition signature requirement for "political group" candidates to deprive them of any constitutional rights. *But see Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 (6th Cir. 2014).

As a result, Petitioners have attempted to manufacture certain "combined effects" of Kentucky's ballot-access framework that allegedly work a hardship upon them – including an artificially-limited window to gather signatures for nominating petitions. But all of these purportedly exacerbating circumstances are self-inflicted by Petitioners and are not imposed

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[3] In *Ehrler*, the District Court recognized that "a state can require nominating petitions of independent candidates *and minority party candidates* to contain signatures equal to five percent (5%) of the total votes cast in the most recent general election." 776 F. Supp. at 1208 (emphasis added). Accordingly, based on the total votes cast in Kentucky's 2016 presidential election, a requirement that Petitioners' candidates each collect more than 96,000 signatures to be placed on the general election ballot would pass constitutional muster. *See* Official 2016 General Election Results, *supra* note 1 (indicating that 1,924,149 total votes were cast in Kentucky's November 2016 general election for President and Vice President of the United States). Put another way, Kentucky law affords Petitioners general election ballot-access provided that they submit the signatures of approximately one-quarter of one percent (.26%) of the voters in its last general election. *See id.*

directly by Kentucky law.[4] For example, the financial costs resulting from Petitioners' choice to rely on "professional petition gatherers" is not a burden imposed directly by Kentucky law. *Compare* Pet. at 15 *with Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 576-77 (6th Cir. 2016). *See also Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011) (because state did "not impose a fixed fee in order to gain access to its ballot," even though plaintiff "may incur some costs because of its choice to hire individuals to collect signatures, the ballot access scheme d[id] not impose severe burdens on the [political group] and [the State] need not collapse every barrier to ballot access.").[5]

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[4] *See, e.g.*, Pet. at 13-14 (although the voluntary choice by the Lead Petitioners to wait until May 31, 2016, to nominate a Presidential candidate may have delayed their ability to collect signatures on a candidate petition, any such time constraints arose from their own internal nominating rules and procedures, and not Kentucky law).

[5] The alleged costs cited by Petitioners are grossly exaggerated. *See* Pet. at 19-20. First, having qualified as a "political organization," the Lead Petitioners presumably will not incur any costs in gathering signatures for at least the next four years. Second, the figures cited by Petitioners assume that they would field a candidate for every partisan race on the general election ballot – even though the evidence of record contains only a single statement of candidacy (by a Libertarian candidate) for 2016. In any event, any hypothetical costs assumed voluntarily by Petitioners are not a severe burden imposed by Kentucky law. *See, e.g.*, *Libertarian Party of N.H. v. Gardner*, 126 F. Supp. 3d 194, 205 (D. N.H. 2015) ("[E]ven if raising th[e] amount [for professional petition gatherers] will prove infeasible for LPNH, the party remains free to collect nominating papers for free by recruiting and organizing sufficient volunteers.").

Furthermore, Petitioners' suggestion that "Kentucky's ballot access regime, applied to non-Democratic and non-Republican parties, makes it impossible to systemically place candidates on the ballot" is belied by their own admissions and relevant facts. *See* Pet. at 22. To the contrary, it is undisputed that the Libertarian Party has placed a presidential candidate on the Kentucky ballot in every presidential election since 1988 – and that the CPKY has done the same in the 2000, 2004 and 2008 presidential elections. *See* Eckenburg Declaration, R. 16-2, Page ID # 185, at ¶ 9; Moellman Declaration, R. 16-3, Page ID # 190, at ¶ 6; Krogdahl Declaration, R. 16-4, Page ID # 202, at ¶ 7; Helm Declaration, R. 33-2, Page ID # 363, at ¶ 16.

In reality, Petitioners have not had any problems in consistently placing their candidates on the ballot in Kentucky. For example, even before qualifying as a "political organization" in 2016, the LPKY succeeded in placing at least twenty-one (21) candidates on the general election ballot between 2000 and 2014. *See* Helm Declaration, R. 33-2, Page ID # 362, at ¶ 15.[6] Accordingly, Kentucky's constitutionally valid ballot-access laws plainly have not presented any

[6] Although the CPKY has not placed any candidates on the ballot since the 2008 general election, it placed six candidates on the general election ballot between 2000 and 2008, including three candidates in 2004. *See* Helm Declaration, R. 33-2, Page ID # 363, at ¶ 17. Regardless, the CPKY does not challenge its ability to access the general election ballot, since it concedes that it "can gather the 5,000 signatures." Krogdahl Declaration, R. 16-4, Page ID # 202, at ¶ 6.

significant burden to Petitioners or deprived them of a meaningful opportunity to access the ballot.[7]

C. The Lower Courts Appropriately Rejected Petitioners' Invitation To Rewrite Kentucky Law.

Despite the fact that they had not yet demonstrated a significant modicum of support statewide for their "political groups," Petitioners demanded the right to nominate their candidates directly to the 2016 general election ballot by party primary or convention, in the same manner as "political parties" and "political organizations" – but without having demonstrated *any* modicum of support for *any* candidate. The unprecedented relief sought by Petitioners would have rendered superfluous Kentucky's constitutionally valid petition signature requirement for "political group" candidates – and as a practical matter, would have surrendered the general election ballot to any number of "political groups" or their candidates regardless of whether they had achieved any level of public support

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[7] *See, e.g.*, *Jenness*, 403 U.S. at 438 (recognizing that in light of access to Georgia general election ballot by nominating petition signed by 5% of eligible voters, "[a]ny political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective office it chooses. So far as the Georgia election laws are concerned independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish . . . In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.").

whatsoever. *See, e.g.*, Verified Complaint, R. 1, Page ID # 14 (seeking entry of an order that Petitioners be permitted *unconditionally* to nominate candidates directly to the general election ballot).

Clearly, Petitioners' challenge amounted to nothing more than a thinly-veiled attempt to evade Kentucky's petition signature requirement for "political group" candidates. *See, e.g.*, Pet. at 19. Indeed, other than bringing their lawsuit, there is no evidence of record that Petitioners undertook any efforts to place any particular candidates on the 2016 general election ballot via petition. *See* Helm Declaration, R. 33-2, Page ID # 362, at ¶ 12.

Instead, on November 17, 2015, former counsel for Petitioners sent a letter to the Office of the Secretary of State and State Board of Elections threatening legal action and demanding that the LPKY and CPKY be permitted "to nominate candidates for state and local office in the same manner as the Republican and Democratic Parties of Kentucky" and that the Libertarian National Committee and Constitution Party National Committee be permitted "to place [their] candidates on the Presidential ballot."[8] Although former counsel for Petitioners recognized expressly that their candidates could qualify for general election ballot access by nominating petition, he suggested that Kentucky's laws – including its petition signature requirement – "constitute unconstitutional burdens on

[8] *See* Correspondence from Chris Wiest to Lynn Zellen, et al., R. 33-2, Page ID # 365-66.

[Plaintiffs-Appellants'] First and Fourteenth Amendment rights." *Id.*

However, Petitioners' former counsel did not offer any evidence that his clients or any of their candidates had demonstrated a significant modicum of support from Kentucky voters. *Id.* In fact, counsel for Petitioners failed to identify any particular candidates whom they believed to have qualified for general election ballot access. *Id.*

Nonetheless, on December 4, 2015, Petitioners filed a Complaint against Secretary Grimes and the Board of Elections Respondents, as well as the Kentucky Attorney General, seeking entry of "permanent injunctive relief to prohibit enforcement of Kentucky's ballot access laws" and an order "direct[ing] that [Plaintiffs] be permitted to nominate, through the procedures of each party, their nominees to federal, state, and local office, as if they were a 'political organization' under Kentucky's ballot access regime." *See* Verified Complaint, R. 1, Page ID # 14.

In late December 2015, Respondents moved separately to dismiss this action pursuant to Fed. R. Civ. Pro. 12(b)(6). *See* Attorney General's Motion, R. 6, Page ID ## 81-89; Defendants' Motion to Dismiss, R. 7, Page ID ## 90-97. On February 3, 2016, Petitioners filed their Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Summary Judgment. *See* Plaintiffs' Motion in Support of Injunctive Relief and Summary Judgment, R. 16, Page ID ## 153-54.

By an order entered February 22, 2016, the District Court granted the motion to dismiss by the Attorney General and denied the motion to dismiss by Secretary Grimes and the Board of Elections Respondents. *See* Memorandum Opinion, R. 26, Page ID ## 287-98. On March 21, 2016, Secretary Grimes and the Board of Elections filed a Counter-Motion for Summary Judgment. *See* Defendants' Counter-Motion, R. 33, Page ID ## 323-37. The parties completed briefing on their cross-motions for summary judgment on May 9, 2016. *See* Defendants' Reply, R. 38, Page ID ## 478-96. On May 19, 2016, the District Court heard oral argument on the parties' cross-motions for summary judgment.

On July 8, 2016, the District Court appropriately entered its Opinion and Order denying Petitioners' motion for summary judgment and granting summary judgment in favor of Respondents. *See* Opinion & Order, R. 45, Page ID ## 546-63. Notably, the District Court concluded that Kentucky's ballot-access framework as adopted by the General Assembly does not present a severe burden on the rights of Petitioners and comports with the guarantees of the United States Constitution. *Id.*

Days later, on July 11, 2016, Petitioners appealed to the Sixth Circuit and filed an "emergency motion" for an expedited appeal and briefing schedule. On July 14, 2016, the Court of Appeals set an expedited briefing schedule requiring Petitioners to file their brief on July 21, 2016, and Respondents to file their brief one week later on July 28, 2016. On August 26, 2016, the Sixth

Circuit entered its Opinion affirming. *See Libertarian Party of Ky. v. Grimes*, 835 F.3d 570 (6th Cir. 2016). Petitioners filed a Petition for Panel Rehearing and Rehearing *En Banc* on September 7, 2016, which was denied on September 27, 2016.

Kentucky's 2016 general election occurred on November 8, 2016. The Libertarian candidates for President and Vice President of the United States, Gary Johnson and Bill Weld, received 53,752 votes of 1,924,149 total votes cast, or 2.8 percent (2.8%). *See* Official 2016 General Election Results, *supra* note 1. As a result, the Lead Petitioners qualified as a "political organization" – meaning that since 1924, a "political group" has qualified as a "political organization" in twenty-one percent (21%) of Kentucky's presidential elections.[9] *See* Verified Complaint, R. 1, Page ID #9, at ¶ 21; Winger Declaration, R. 16-6, Page ID ## 217-18, at ¶ 18. Moreover, for at least the next four years, the Lead Petitioners obtained the relief that they sought by way of this lawsuit.

Nonetheless, on November 11, 2016, Petitioners filed an application to extend the time to file a petition

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[9] Contrary to their repeated (and continued) claims that this is a "virtually impossible" accomplishment, *see* Pet. at 10, Petitioners' own expert indicated that the Lead Petitioners appeared poised to qualify as a "political organization" in November 2016. *See* Supplemental Declaration of Eckenburg, R. 37-1, Page ID # 455, at ¶ 14 (noting that Gary Johnson, the Libertarian Party's leading candidate for President, was polling above ten percent (10%) nationally – particularly in a general election matchup with Republican Party nominee Donald J. Trump and Democratic Party nominee Hillary Rodham Clinton).

for a writ of certiorari until February 24, 2017, which was granted by Justice Kagan. Their petition for a writ of certiorari followed months later.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR CERTIORARI IS INFECTED BY MULTIPLE MISSTATEMENTS OF FACT AND LAW.

As a threshold matter, Respondents are obligated to inform the Court that the petition contains multiple misstatements. *See* United States Supreme Court Rule 15 ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."). The Court should deny the petition as a result of these misstatements alone – all of which flow from Petitioners' apparently intentional failure to disclose that the Libertarian Party recently qualified as a "political organization" in Kentucky's 2016 general election. *See* Pet. at 5-24 (purporting to summarize the relevant factual background, but omitting the highly probative circumstance that, under

Kentucky law, the Lead Petitioners had qualified as a "political organization" in November 2016).[10]

Indeed, because of Petitioners' failure to disclose the Libertarian Party's recent qualification as a "political organization" under Kentucky law – and because they appear to have copied slavishly from earlier pleadings that predated the November 2016 general election – their petition is infected throughout with blatant falsehoods. These include the following misrepresentations:

- Asserting erroneously that "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." Pet. at 9 (emphasis in original) (failing to disclose that in November 2016, the Libertarian Party qualified for general ballot access in Kentucky for the next four years);

- Suggesting, contrary to the factual record, that "[i]t is 'virtually impossible' in the modern political landscape for minor parties to qualify for general ballot access under Kentucky's regime." Pet. at 9 (failing to

[10] Petitioners' passing reference to some party other than the Democratic and Republican Parties having qualified for automatic ballot access in Kentucky in 2016 – without disclosing that it was, in fact, the Lead Petitioners themselves – only further suggests that Petitioners failed deliberately to meet their duty of candor to the Court. *See* Pet. at 9. Likewise, Petitioners continue to cite repeatedly to outdated affidavits that could not possibly have addressed the results of the November 8, 2016 general election. *See, e.g.*, *id*. (citing a declaration by Petitioners' expert dated January 23, 2016).

disclose that the Lead Petitioners qualified for general ballot access in November 2016, meaning that a minor party has done so in twenty-one percent (21%) of Kentucky's presidential elections since 1924);

- Reiterating that "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." Pet. at 10 (same, citing affidavit of Petitioners' expert dated January 23, 2016);

- Claiming that "[i]f 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." Pet. at 12 (omitting Kentucky from the list of states in which the Libertarian Party has been a ballot-qualified party);

- Suggesting disingenuously that "[w]hile 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." Pet. at 19 (emphasis in original) (failing to disclose that

the Libertarian Party qualified as a "political organization" in Kentucky's 2016 general election under the current ballot-access framework);

- Claiming erroneously that "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." Pet. at 19 (failing to disclose that the Lead Petitioners will face no such restrictions for at least the next four years);

- Stating misleadingly that Petitioners will be forced to spend "a staggering $544,250" on collecting signatures to place their candidates on the ballot in 2018, "the next extremely onerous year," Pet. at 20 (despite Kentucky law providing that for the next four years, the Lead Petitioners will be able to nominate their candidates directly to the general election ballot);

- Asserting that "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." Pet. at 22 (failing to disclose that the Lead Petitioners can now nominate candidates to the general election ballot);

- Proclaiming, contrary to the Lead Petitioners' own recent experience, that "[t]here is no way to break the cycle without the ability to place the entire party and all of its

nominees on the ballot." Pet. at 34 (despite the Lead Petitioners having qualified as a "political organization" in Kentucky's 2016 general election *without* placing the entire party and all of its nominees on the ballot); and

- Claiming outrageously that Kentucky's ballot-access framework, "for all practical purposes, denies access," Pet. at 38 (despite the Lead Petitioners having both placed candidates on the 2016 general election ballot and having further qualified as a "political organization").

Petitioners' lack of candor and repeated misstatements are dubious at best. Moreover, because their multiple mischaracterizations are central to their substantive arguments (which have been eviscerated by recent factual developments), the Court should deny a writ on these grounds alone.

II. THERE IS NO REMAINING CONTROVERSY WARRANTING REVIEW BY THIS COURT.

Petitioners' failure to disclose that the Libertarian Party qualified recently as a "political organization" under Kentucky law does not appear to be merely coincidental. Indeed, because treatment as a "political organization" was the very relief sought by Petitioners, the results of Kentucky's 2016 general election have disproven their argument that general ballot access is "'virtually impossible'" to obtain and completely muted (if not technically mooted) any live controversy

worthy of this Court's consideration.[11] For this reason, Petitioners' apparently intentional omission of these circumstances was also an abdication of their "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n.23 (1997) (noting the "duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness") (emphasis in original).

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[11] *Compare* Official 2016 General Election Results, *supra* note 1 (reflecting that the Libertarian candidate for President, Gary Johnson, received 2.8 percent of the total votes cast for U.S. President in Kentucky's 2016 general election, thereby qualifying the Libertarian Party as a "political organization" under Kentucky's ballot-access framework) *with* Verified Complaint, R. 1, Page ID # 14 (demanding the right to "nominate, through the procedures of each party, their nominees to federal, state, and local office, as if they were a 'political organization' under Kentucky's ballot access regime"). Moreover, it is well-established that to satisfy the case or controversy requirement of Article III, " 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Indeed, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727, 184 L. Ed. 2d 553 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

The Court's scarce resources should hardly be expended on a matter where the Lead Petitioners have achieved the very relief that they sought through the orderly operation of the same ballot-access framework that they continue to attack as unconstitutional. In addition, the Lead Petitioners' recent success does not appear to be anomalous – indeed, their own expert predicts that the Libertarian Party's performance should only improve during the next four years, when it will presumably nominate an entire slate of candidates to Kentucky's general election ballot. *See, e.g.*, Pet. at 34 (claiming that "[t]he unrebutted evidence in this case established that down ticket races affects [sic] Presidential performance, and Presidential performance is affected by down ticket races.") (citing Decl. Winger, R. 37-4, Page ID ## 471-74). Moreover, the Lead Petitioners' qualification for general ballot access under Kentucky's framework challenge distinguishes this matter from those ballot-access cases in which the Court has recognized a matter worthy of review despite the passage of an election.[12] Here, because the Lead Petitioners have now received the relief that they sought by way of this lawsuit, there remains only "an abstract dispute about the law" that presently will have no bearing on their ability to access Kentucky's general election ballot. *See Alvarez*, 558 U.S. at 93.

Nor do the remaining Petitioners' arguments present an important issue meriting this Court's review. The factual record makes clear that the CPKY

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[12] *See generally, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

has never demonstrated a significant modicum of support among Kentucky's electorate that would entitle it to automatic ballot access. *But see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("[T]he state's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support."). Indeed, Petitioners themselves do not suggest as much – and concede that the CPKY and the Lead Petitioners are not similarly situated in this regard. *See* Pet. at 7. Accordingly, the facts of this case simply do not present any consequential controversy warranting further review by this Court.

Finally, the Lead Petitioners' recent success in qualifying as a "political organization" underscores both the fallaciousness of their substantive arguments (which have been reasserted here without modification) and the prescient conclusion reached appropriately by both lower courts. Indeed, contrary to their continued insistence that such an accomplishment is "'virtually impossible,'" to achieve, the Lead Petitioners nonetheless qualified as a "political organization" without resort to any judicial action, legislative revision, or other change to Kentucky's ballot-access framework. *See* Pet. at 9-10. Given these circumstances – combined with the remaining Petitioners' undisputed failure to demonstrate a significant modicum of support among Kentucky's electorate – the petition should be denied.

III. THE COURT SHOULD NOT CONSIDER PURPORTED NEW REQUIREMENTS OF *ANDERSON-BURDICK* FABRICATED BELATEDLY BY PETITIONERS.

None of the specific arguments in the petition for certiorari were advanced in Petitioners' merits brief submitted to the Sixth Circuit. Instead, each appeared for the first time in a petition for rehearing filed by Petitioners after entry of the Sixth Circuit's opinion and judgment affirming. *See* Pet. for Rehearing at 2-15.[13] *But see, e.g.*, *Chaidez v. United States*, 133 S. Ct. 1103, 1113, n.16 (2013) (declining to rule on new arguments raised partially in petition for rehearing because petitioner did not "adequately raise them in the lower courts," and reminding that "'we are a court of review, not first view. . . .'") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)).

Nonetheless, in denying the petition for rehearing, the Sixth Circuit concluded appropriately "that the issues raised in the petition were fully considered upon the original submission and decision of the case." Order dated Sept. 27, 2016. This is because Petitioners' untimely arguments merely attempt to fashion from whole cloth supposed new requirements of *Anderson-Burdick* that were encompassed by the analysis applied appropriately by the Sixth Circuit.

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[13] For example, the petition for certiorari cites to at least ten cases not included in Petitioners' merits brief in the Sixth Circuit, *see* Pet. at 25-37, putting aside other newly cited authorities, including a 2006 article authored by Petitioners' hired expert. *See id.* at 36 n.9.

Compare Pet. at 24-38 *with Libertarian Party of Ky.*, 835 F.3d at 572-78. Indeed, before the Sixth Circuit entered its opinion affirming, Petitioners never suggested the existence of a stand-alone "non-discrimination principle," specific criteria to determine the existence of a "severe burden" short of exclusion (or virtual exclusion) from the ballot, or a requirement under *Anderson-Burdick*'s "flexible analysis" that states choose the least burdensome means of advancing their interests in avoiding voter confusion, ballot overcrowding and frivolous candidacies. *But see* Pet. at 24-38.

Even had they been preserved, Petitioners' new arguments are wholly lacking in merit. First, although the *Anderson-Burdick* analysis certainly incorporates equal protection principles, it has never been viewed by this Court or others as including a "non-discrimination principle" as an independent step – and Petitioners never suggested otherwise before the Sixth Circuit entered its opinion affirming. *See* Verified Complaint for Declaratory and Injunctive Relief for Constitutional Violations at ¶¶ 40-41 (characterizing *Anderson-Burdick* framework accurately and without reference to any stand-alone "non-discrimination principle"); Appellants'

Brief at 26-27 (same).[14] Moreover, the new cases cited belatedly by Petitioners do not support the existence of any independent "non-discrimination principle" under *Anderson-Burdick*, and instead are distinguishable by the particular features of the ballot-access laws involved.[15]

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[14] Contrary to Petitioners' suggestion, they did not identify the District Court's failure to recognize their belatedly advanced "non-discrimination principle" as "a separate assignment of error." *Compare* Pet. at 28 *with* Appellants' Brief at 49-50 (suggesting only that "[t]he District Court erred in failing to find an equal protection violation."). In any event, again contrary to Petitioners' representation, the Sixth Circuit nonetheless considered their equal protection claim as part of its *Anderson-Burdick* analysis. *See Libertarian Party of Ky.*, 835 F.3d at 573-74 ("We have not yet . . . 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. We do so today following the well-established *Anderson-Burdick* framework, which 'serves as a single standard for evaluating challenges to voting restrictions.' ") (citing *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (internal quotation omitted) (emphasis in original)). *See also id*. at 577 ("To the extent that a minor party . . . 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 Tennessee 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.").

[15] *See* Pet. at 25-27, 30 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 214 (1986); *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305 (3d Cir. 1999);

Likewise, *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015) turned on specific elements of Tennessee's ballot-access laws not presented by Kentucky's framework. *Compare* Pet. at 27-28 *with* Appellees' Brief at 39 n.24 (unlike the Tennessee ballot-access scheme challenged in *Hargett*, which required "political groups" seeking ballot retention to achieve the same level of electoral success as "political parties" in less time, Kentucky's framework provides the same amount of time to "political parties" and "political groups" to achieve success in a presidential election). Indeed, *Hargett*, 791 F.3d 684 did not endorse (or even discuss) the purported "non-discrimination principle" now advanced by Petitioners.[16] Put simply, the lower courts applied *Anderson-Burdick* appropriately – and there is no reason for the Court to grant certiorari to consider Petitioners' recently manufactured "non-discrimination principle."

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992); *Green Party v. Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004); *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970); *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994)). Moreover, Petitioners have quoted this Court's language making clear that consideration of whether a state election law includes discriminatory restrictions is not an independent step under *Anderson-Burdick*, but instead may inform the level of review applied as part of the analysis. *See id.* at 25 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)); *Libertarian Party of Ky.*, 835 F.3d at 577-78.

[16] As a result, and in light of the plain distinctions between the two ballot-access frameworks involved, it is absurd of Petitioners to suggest that the Sixth Circuit rendered an opinion in conflict with its own decision in *Green Party of Tennessee v. Hargett*. *See* Pet. at 28.

Second, the Sixth Circuit determined correctly that "[t]he burden of the Commonwealth's ballot-access scheme on [Petitioners] . . . falls well short of 'severe,'" because it affords them multiple means of access to the general election ballot – without one path being significantly more onerous than the other.[17] Contrary to Petitioners' suggestion, although the Court of Appeals recognized that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot," *Libertarian Party of Ky.*, 835 F.3d at 574, it did not announce as a rule that *only* exclusion or virtual exclusion from the ballot could amount to a severe burden. *Compare* Pet. at 31-35 (suggesting that the Sixth Circuit erroneously required "a showing of 'exclusion or virtual exclusion' to sustain a 'severe burden'") *with Libertarian Party of Ky.*, 835 F.3d at 575 (recognizing expressly that "[i]n some circumstances, the 'combined effect' of ballot-access restrictions can pose a severe burden.") (citations omitted). Accordingly, the Sixth Circuit's analysis is consistent with the decisions of this Court and others – and despite

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[17] *See Libertarian Party of Ky.*, 835 F.3d at 575 ("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 (65,244 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.") (citations omitted).

Petitioners' attempt to create one, there is no conflict warranting the Court's review.[18]

Finally, contrary to Petitioners' belated suggestion, the flexible middle-tier of *Anderson-Burdick* review does not require the Commonwealth to have adopted the least restrictive means of advancing its important state interests in maintaining the stability of its political system, ensuring that candidates have a modicum of support before putting their name on the ballot, and preventing voter confusion, ballot overcrowding and frivolous candidacies. *See, e.g.*, *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005); *Jenness*, 403 U.S. at 442. Putting aside that Petitioners' new argument relies almost exclusively on cases and other authorities that were not included in their merits brief in the Sixth Circuit, *see* Pet. at 36-38, they have failed to identify any authority supporting their suggestion that federal courts must substitute their judgment for that of state legislatures (and

[18] Indeed, Petitioners themselves contemplated that Kentucky's ballot-access framework may not impose a "severe burden" on their rights, and as a result, would trigger the flexible *Anderson-Burdick* analysis employed appropriately by the lower courts. *See* Verified Complaint for Declaratory and Injunctive Relief for Constitutional Violations at ¶ 41 (alleging that if "Kentucky's ballot access provisions, facially and as applied to minor political parties, such as the LNC, LPKY and CPKY, do not constitute a severe burden on the rights of the Plaintiffs, then they constitute more than a minimal burden, and do not pass muster under the flexible analysis that weights [sic] the burdens of Plaintiffs against the Commonwealth's asserted interest and chosen means of asserting it, under the prevailing U.S. Supreme Court cases of *Anderson v. Celebrezze*, 460 U.S. 7[8]0 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992).").

rewrite ballot-access laws) where the state's interests might be advanced by less burdensome means. Again, there is simply no conflict warranting this Court's review – much less a conflict with the Sixth Circuit's own opinion in *Green Party of Tennessee v. Hargett*.

CONCLUSION

Respondents respectfully suggest that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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