UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CIVIL ACTION NO. 3:15-CV-86 GFVT

THE LIBERTARIAN PARTY OF KENTUCKY, *et al.*	)
Plaintiff,	)
v.	)
ALISON LUNDERGAN GRIMES SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY, *et al.*	)
Defendants.	)

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MEMORANDUM IN RESPONSE TO PLAINTIFFS' PENDING MOTION AND IN SUPPORT OF COUNTER-MOTION FOR SUMMARY JUDGMENT BY SECRETARY GRIMES AND THE BOARD OF ELECTIONS DEFENDANTS

Defendants Alison Lundergan Grimes, in her official capacities as Secretary of State of the Commonwealth of Kentucky and Chair of the State Board of Elections, and the Executive Director and Members of the State Board of Elections in their official capacities ("Defendants"), respectfully submit this memorandum of law in response to the pending Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Summary Judgment (Docket No. 16) by Plaintiffs The Libertarian Party of Kentucky (the "LPKY"), Libertarian National Committee, Inc. (the "LNC"), Ken Moellman, Jr. and the Constitution Party of Kentucky (the "CPKY," and collectively, "Plaintiffs") and in support of Defendants' Counter-Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs' facial challenge to Kentucky's longstanding three-tier ballot access framework is without legal or factual merit. *See, e.g.*, Docket No. 26 (Mem. Op. & Order) at 7 (recognizing that "Plaintiffs essentially challenge the constitutionality of the Commonwealth's entire ballot

access framework."). Indeed, the United States Court of Appeals for the Sixth Circuit has already had occasion to examine the constitutionality of Kentucky's ballot access system and upheld it as valid. *See Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981).

Moreover, Kentucky's ballot access framework plainly passes constitutional muster under the more recently employed *Anderson-Burdick* test. This Court and others have recognized properly that the only conceivable burden placed on Plaintiffs in accessing the general election ballot – Kentucky's nominating petition signature requirement – "imposes no undue burden on independent candidates *and minority party candidates*." *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1209 (E.D. Ky. 1991) (emphasis added). Accordingly, Kentucky's relatively modest petition signature requirement – even as applied to "political groups" such as Plaintiffs – is constitutionally permissible because it reasonably furthers important state interests including maintaining the stability of its political system and preventing voter confusion, ballot overcrowding and the presence of frivolous candidacies. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S 189, 194-95 (1986).

Although Plaintiffs attempt to make much out of Kentucky's mechanism allowing "political groups" to qualify as "political organizations" (and nominate candidates by convention or party primary) where they have achieved two percent (2%) of the vote in the last presidential election, that provision serves only to potentially promote further participation by "political groups" such as Plaintiffs – and plainly does not restrict their access to the ballot or discriminate invidiously against them. *See, e.g., Mills*, 664 F.2d at 607; *Am. Party of Tex. v. White*, 415 U.S. 767 (1974). In any event, there is nothing unconstitutional about requiring "political groups" to demonstrate a significant (albeit comparatively modest) modicum of support statewide before allowing them to nominate candidates to the general election ballot in the same manner as

"political parties." *Id.*

In sum, Plaintiffs' lawsuit amounts to nothing more than a transparent effort to evade Kentucky's constitutionally valid petition signature requirement. In fact, other than demanding to have unidentified candidates placed on the ballot and filing this lawsuit, Plaintiffs appear to have done nothing to place any candidates on the November 2016 general election ballot. *See* Decl. of Mary Sue Helm in Support of Defs.' Counter-Motion for Summ. Judg. ("Helm Decl.") ¶ 12 (attached hereto as "Ex. A").

Instead, Plaintiffs have sought unprecedented relief in the form of a declaration that they may nominate candidates in the same manner as "political organizations" and "political parties" *without condition* – including any demonstration of a significant modicum of support statewide for either their "political groups" or any particular candidates. *See* Docket No. 1 (Verified Compl. for Declaratory and Inj. Relief for Constitutional Violations ("Compl.")) at 14. However, the undisputed facts make clear that despite being able to consistently place candidates on the general election ballot, Plaintiffs have failed to ever achieve a significant modicum of political support in Kentucky – although other "political groups" have succeeded in doing so.

II. FACTUAL BACKGROUND

A. Kentucky's Longstanding Statutory Framework Provides Plaintiffs Multiple Means Of Access To The General Election Ballot.

Kentucky has long adhered to a three-tier ballot access framework that, in fact, promotes access to the general election ballot for new or small political groups such as Plaintiffs. *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." *Mills*, 664 F.2d at 607 (upholding the constitutional validity of Kentucky's ballot access framework).

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*." KRS 118.015(1) (emphasis added). 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* KRS 118.305; KRS 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* KRS 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 Plaintiffs here. *See* KRS

118.015(9).[1] 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* KRS 118.305; KRS 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.*

For example, to be placed on the general election ballot, a "political group" candidate for a statewide office (or federal office elected statewide) must obtain the signature of five thousand (5,000) voters. *See* KRS 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* KRS 118.315(2); KRS 118.365.

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[1] Plaintiffs mischaracterize themselves repeatedly as "minor parties," while at the same time referring misleadingly to "political parties" as "major parties." *See, e.g.*, Docket No. 16-1 (Pls.' Mem. in Support of Their Mot. For TRO, Prelim. Inj., Permanent Inj., and Summ. J. ("Pls.' Mem.")) at 22. But under Kentucky law, new and small groups such as Plaintiffs are defined plainly as "political groups." KRS 118.105(9). Indeed, Plaintiffs miss the point entirely in complaining of their "inability to place the entire *party* on the ballot, as the major parties do," Docket No. 16-1 (Pls.' Mem.) at 22 (emphasis added). Under Kentucky law, Plaintiffs are not "political parties" at all – because by definition, they have failed to demonstrate the significant modicum of statewide support for their groups required to qualify themselves as such. KRS 118.015(1).

Although 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 way.[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." KRS 118.015(8). Once qualified as a "political organization" by demonstrating a significant (albeit comparatively modest) modicum of statewide support for its candidates, a "political group" can nominate candidates to the general election ballot in the same manner as a "political party" (by nominating convention or primary). *See* KRS 118.305; KRS 118.325. Accordingly, Kentucky's three-tier ballot access framework potentially enlarges – and plainly does not restrict or discriminate invidiously against – the rights of "political groups" such as Plaintiffs. *See Mills*, 664 F.2d at 607.

B. Kentucky's Ballot Access Framework Has Not Burdened Plaintiffs' Rights.

Because Kentucky's ballot access framework provides Plaintiffs general election ballot access via multiple routes – including by nominating petition – the only conceivable burden standing between Plaintiffs and access to the ballot is their collection of the requisite number of voter signatures. *See* KRS 118.315. But despite past efforts by the Libertarian Party plaintiffs and others to challenge various aspects of Kentucky's petition signature requirement as applied to "political groups," it has been upheld consistently by this Court and others. *See Mills*, 664 F. 2d 600; *Libertarian Party v. Davis*, 601 F. Supp. 522 (E.D. Ky. 1985); *Libertarian Party of Ky.*

[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.).

v. Ehrler, 776 F. Supp. 1200 (E.D. Ky. 1991).[3] Moreover, Plaintiffs have failed to identify any other features of 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. *Compare* Docket No. 16-1 (Pls.' Mem.) at 7-16 *with Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 (6th Cir. 2014).[4]

Furthermore, Plaintiffs' suggestion that they are "unable to consistently place [their] candidates on the ballot in Kentucky" is belied by their own admissions and other undisputed facts. *See* Docket No. 16-1 (Pls.' Mem.) at 3, 5. To the contrary, it is undisputed that the

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[3] In *Ehrler*, this 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." *Ehrler*, 776 F. Supp. at 1208 (emphasis added). Accordingly, based on the total votes cast in Kentucky's 2015 gubernatorial election, a requirement that Plaintiffs' candidates each collect more than 48,700 signatures to be placed on the general election ballot would pass constitutional muster. *See* Helm Decl. ¶ 8 (attesting that Kentucky voters cast 973,692 votes in its 2015 gubernatorial election). Put another way, Kentucky law affords Plaintiffs general election ballot access provided that they submit the signatures of only one-half of a percent (0.5%) of voters in its last gubernatorial election. *See id.*

[4] The fact that Plaintiffs rely on "professional petition gatherers" to gather the required number of voter signatures is a self-imposed burden that only underscores their lack of significant support among Kentucky's electorate. *See, e.g.*, Docket No. 16-2 (Decl. of Cyrus Eckenburg in Support of Mot. for Prelim. Inj. and Permanent Inj. ("Eckenburg Decl.")) ¶¶ 14-16; Docket No. 16-3 (Decl. of Ken Moellman, Jr. in Support of Mot. for Prelim. Inj. and Permanent Inj. ("Moellman Decl.")) ¶ 9-11; Docket No. 16-6 (Decl. of Richard Winger in Support of Mot. for Prelim. and Permanent Inj. ("Winger Decl.")) ¶¶ 28-29. Plainly, the financial costs associated with hiring "professional petition gatherers" is not a burden imposed directly by Kentucky law. *See, e.g., Green Party of Ark. 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."). In any event, these costs assumed voluntarily by Plaintiffs do not constitute a severe burden. *See, e.g., Libertarian Party of N.H. v. Gardner*, No. 14-cv-322-PB, 2015 WL 5089838, *11 (D. N.H. Aug. 27, 2015) ("For better or worse, in modern political terms, $50,000 is a relatively small amount of money. And even if raising that amount will prove infeasible for LPNH, the party remains free to collect nominating papers for free by recruiting and organizing sufficient volunteers.").

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* Docket No. 16-2 (Eckenburg Decl.) ¶ 9; Docket No. 16-3 (Moellman Decl.) ¶ 6; Docket No. 16-4 (Decl. of Marthine Krogdahl in Support of Mot. for Prelim. Inj. and Permanent Inj. ("Krogdahl Decl.")) ¶ 7; Helm Decl. ¶ 16.

In reality, Plaintiffs do not appear have any problems in consistently placing their candidates on the ballot in Kentucky. For example, between 2000 and 2014, the LPKY has placed at least twenty-one (21) candidates on the general election ballot. Helm Decl. ¶ 15.[5] Accordingly, Kentucky's constitutionally valid ballot access laws plainly do not present any significant burden to Plaintiffs or deprive them of a meaningful opportunity to access the ballot.[6]

C. Plaintiffs Have Failed To Demonstrate A Significant Modicum Of Support Statewide.

Despite having a clear path to the general election ballot via nominating petition, Plaintiffs' central complaint is that they are unable to nominate candidates to the ballot by party primary or convention in the same manner as a "political organization." *See, e.g.*, Docket No. 1 (Compl.) at 14 (seeking entry of an order directing that Plaintiffs "be permitted to nominate,

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[5] 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. Helm Decl. ¶ 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." Docket No. 16-4 (Krogdahl Decl.) ¶ 6.

[6] *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.").

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."). But Plaintiffs have failed consistently to demonstrate the relatively modest modicum of statewide support required to qualify as a "political organization" under Kentucky's ballot access framework. *See* KRS 118.305; KRS 118.325 (providing that a "political group" can qualify as a "political organization" where its "candidate received two percent (2%) or more of the vote of the state at the last preceding election for presidential electors").

In fact, Plaintiffs' own admissions reveal that their "political groups" do not enjoy a significant modicum of support among Kentucky's voters. For example, there are barely five thousand Kentucky voters registered as Libertarians out of approximately 3.2 million registered voters (less than .15% of registered voters in Kentucky). *See* Docket No. 16-2 (Eckenburg Decl.) ¶ 6; Helm Decl. ¶¶ 5, 6. Moreover, less than three hundred Kentucky voters are registered as members of the Constitution Party – or less than .009% of registered voters. *See* Helm Decl. ¶¶ 5, 7. Nor have Plaintiffs suggested that they could muster the financial resources to conduct a primary election or party convention even if they could qualify as a "political organization." To the contrary, the CPKY concedes that it has raised less than $1,000.00 in each of the past four years. *See* Docket No. 16-4 (Krogdahl Decl.) ¶ 6. Moreover, the LPKY admits that "as a practical matter, [it] could raise perhaps [only] $50,000 in an election cycle." *Compare* Docket No. 16-2 (Eckenburg Decl.) ¶ 17 *with Libertarian Party of N.H.*, 2015 WL 5089838 at *11 ("For better or worse, in modern political terms, $50,000 is a relatively small amount of money.").

Nor have Plaintiffs ever achieved a significant modicum of statewide support at Kentucky's polls. Plaintiffs concede that they have been unable to achieve even a minimal

modicum of support in any of the many elections in which they have placed a presidential candidate on the ballot. *See, e.g.* Docket No. 16-1 (Pls.' Mem.) at 8 (admitting that the Libertarian Party has never polled more than two percent of the votes cast in a presidential election in any state). Indeed, no candidate of the LPKY or the CPKY has ever received even one percent of Kentucky's vote in a presidential election – despite other "political groups" in Kentucky having qualified as "political organizations" in seventeen percent (17%) of the presidential elections since 1924 (and twenty-four percent (24%) of such elections excluding those where the Libertarian Party nominated a presidential candidate, but no "political group" qualified as a "political organization").[7] *See* Docket No. 1 (Compl.) at ¶ 21; Docket No. 16-6 (Winger Decl.) ¶ 18.

Although Plaintiffs claim to fare better in other statewide elections, *see* Docket No. 16-1 (Pls.' Mem.) at 8, they have never nominated a candidate for Governor of Kentucky nor had a candidate for any other statewide office receive even five percent (5%) of the total vote. *See* Helm Decl. ¶¶ 9, 10; Docket No. 16-2 (Eckenburg Decl.) ¶ 11 (conceding that the most significant statewide results that any Libertarian candidate has achieved in Kentucky are 3.1 percent of the vote in the 2014 United States Senate race and 4.61 percent of the vote in the 2011 race for State Treasurer). For its part, the CPKY can only point to a single race for the 79th Kentucky House District during 2010, in which its losing candidate received 27.4 percent of the vote. *See* Docket No. 16-4 (Krogdahl Decl.) ¶ 7. But by definition, the results of an election for

[7] The repeated ability of other "political groups" in Kentucky to qualify as "political organizations" (by achieving two percent of the vote in a presidential election) stands in stark contrast to Plaintiffs' claim that "it is impossible, or 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." Docket No. 16-1 (Pls.' Mem.) at 13.

a single House of Representatives district cannot possibly demonstrate a significant modicum of support statewide for the Constitution Party or its candidates.

In short, the undisputed facts eviscerate completely any argument that Kentucky's ballot access framework is itself to blame for Plaintiffs' admitted lack of any significant support from Kentucky's electorate. To the contrary, Kentucky law plainly affords Plaintiffs and their candidates a legitimate and achievable opportunity to access the general election ballot – where they have been rejected repeatedly by Kentucky voters. Quite plainly, Plaintiffs have failed consistently to achieve the significant modicum of support statewide reasonably required by Kentucky law to qualify as a "political party" or "political organization."[8] Nonetheless, their candidates may still access the general election ballot by nominating petition. *See* KRS 118.305; KRS 118.315.

D. Plaintiffs Have Attempted Transparently To Evade Kentucky's Constitutionally Valid Petition Signature Requirement.

Despite the fact that they have never demonstrated a significant modicum of support statewide for their "political groups," Plaintiffs now demand to nominate their candidates

[8] Nor have Plaintiffs offered evidence that they enjoy a significant modicum of support in Kentucky as measured by any other accepted yardstick. For example, Plaintiffs have not adduced evidence that they could meet the requirements for direct ballot access in the thirty-eight states where political groups can allegedly transform themselves into a ballot-qualified party before any particular election. *See* Docket No. 16-1 (Pls. Mem.) at 7, 10; Docket No. 16-6 (Winger Decl.) ¶ 8. In fact, these states generally require signatures equal to two to three percent of the votes cast in the previous gubernatorial election – which, based on the results of Kentucky's 2015 gubernatorial election, would require Plaintiffs to obtain between approximately 19,485 and 29,227 signatures. *See, e.g.*, Ala. Code. 17-9-3 (requiring petition signed by three percent (3%) of votes cast in last gubernatorial election); N.C. Gen. Stat. Ann. 163-96 (requiring petition signed by registered and qualified voters equal to two percent (2%) of the total votes cast in most recent gubernatorial election); Okla. Stat. Ann. tit. 26, 1-108 (requiring signatures of registered voters equal to at least three percent (3%) of total votes cast in last gubernatorial election). But by Plaintiffs' own admissions, they are unable to collect this many signatures during an election cycle. *See, e.g.*, Docket No. 16-1 (Pls.' Mem. in Supp. of Mot. for Summ. J.) at 10.

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. Clearly, the unprecedented relief sought by Plaintiffs would render superfluous Kentucky's constitutionally valid petition signature requirement for "political group" candidates – and as a practical matter, would surrender the general election ballot to any number of "political groups" or their candidates regardless of whether they have achieved any level of public support whatsoever. *See, e.g.*, Docket No. 1 (Compl.) at 14 (seeking entry of an order that Plaintiffs be permitted *unconditionally* to nominate candidates directly to the general election ballot). Quite plainly, Plaintiffs' lawsuit amounts to nothing more than a thinly-veiled attempt to evade Kentucky's petition signature requirement for "political group" candidates. *See, e.g.*, Docket No. 16-1 (Pls.' Mem.) at 22.

On November 17, 2015, counsel for Plaintiffs 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 LNC and Constitution Party National Committee be permitted "to place [their] candidates on the Presidential ballot."[9] Although counsel for Plaintiffs 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 [Plaintiffs'] First and Fourteenth Amendment rights." *Id.* However, Plaintiffs' 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, Mr. Wiest failed to identify any particular candidates

[9] *See* Exhibit 1 to Helm Decl. (Correspondence from Christopher Wiest to Lynn Zellen, *et al.* dated November 17, 2015).

whom Plaintiffs believed to have qualified for general election ballot access. *Id.*

Nonetheless, on December 4, 2015, Plaintiffs filed this lawsuit against Defendants and the Attorney General of Kentucky 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* Docket No. 1 (Compl.) at 14. Other than the filing of this lawsuit, Plaintiffs do not appear to have taken any steps to place their candidates on the 2016 general election ballot. *See* Helm Decl. ¶ 12.

In late December 2015, Defendants and the Attorney General moved separately to dismiss this action pursuant to Fed. R. Civ. Pro. 12(b)(6). *See* Docket No. 6 (Mot. to Dismiss of Jack Conway, Attorney General of the Commonwealth of Kentucky); Docket No. 7 (Defs.' Mot. to Dismiss). On February 3, 2016, while the motions to dismiss were still pending, Plaintiffs filed a Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Summary Judgment (the "Motion"). *See* Docket No. 16. Despite having moved for summary judgment and conceding that there were no genuine issues of material fact, *see* Docket No. 16-1 (Pls.' Mem.) at 16, Plaintiffs nonetheless suggested that the parties should engage in factual discovery. *See id.* at 1 n.1. Moreover, although Plaintiffs have until, at the soonest, August 2016 to file nominating petitions to place their candidates on the general election ballot, they filed simultaneously a separate motion suggesting that the Court should resolve this matter on an expedited basis.[10] *See* Docket No. 17-1 (Pls.' Mem. in Supp. of Their Emergency Mot. for Expedited Consideration and Deadlines to Resolve and Hear this Matter) at 2.

[10] Pursuant to KRS 118.365(b), Plaintiffs have even more time – until September 9, 2016 – to place presidential candidates on the 2016 general election ballot via nominating petition.

By an order entered February 22, 2016, the Court granted the motion to dismiss by the Attorney General, and denied Defendants' motion to dismiss. *See* Docket No. 26 (Mem. Op. & Order). One day later, this matter was referred to Magistrate Judge Edward B. Adkins, *see* Docket No. 27 (Order), who immediately scheduled a telephonic status conference for March 1, 2016. *See* Docket No. 29 (Order). On March 7, 2016, Magistrate Judge Adkins entered an order denying Plaintiffs' demand for a period of fact discovery and granting Plaintiffs' emergency motion for expedited consideration of the issues presented in this matter only to the extent that the parties would "complete briefing on the pending and expected dispositive motions." *See* Docket No. 32 (Order Following Telephone Conference).

III. DISCUSSION

Summary judgment in favor of Defendants is appropriate because "'there is no genuine dispute as to any material fact and [Defendants] are entitled to judgment as a matter of law.'" *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 822 (6th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). Moreover, Defendants are entitled to summary judgment even though the Court "must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Here, even without disputing the accuracy of the declarations offered by Plaintiffs – and construing the evidence in their favor – Plaintiffs' claims fail plainly as a matter of law.

A. Plaintiffs Have Asserted A Facial Challenge To Kentucky's Three-Tier Ballot Access Framework.

Plaintiffs' lawsuit is a facial challenge to Kentucky's three-tier ballot access framework as codified by KRS Chapter 118. *See* Docket No. 1 (Compl.) ¶¶ 39-41 (purporting to challenge KRS 118.015 and KRS 118.305 both "facially and as applied to minor or small political parties, such as the LNC, LPKY and CPKY. . . .."). Specifically, Plaintiffs challenge the requirement of

KRS Chapter 118 that "political groups" qualify as "political organizations" by demonstrating a significant modicum of support in a presidential election before being entitled to nominate a slate of candidates by convention or party primary in a subsequent general election.[11]

But by KRS Chapter 118's own terms, this requirement applies only to "political groups" – because both "political organizations" and "political parties" have by definition already demonstrated a significant modicum of support statewide by satisfying the very requirement challenged by Plaintiffs – or a more stringent one. *See* KRS 118.015. Accordingly, by attempting to challenge Kentucky's three-tier ballot access framework as applied to "political groups," Plaintiffs "have in effect asserted a facial challenge." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). *See also* Docket No. 26 (Mem. Op. & Order) at 7 ("Plaintiffs essentially challenge the constitutionality of the Commonwealth's entire ballot access framework.") As a result, "[i]f even one set of circumstances exists in which the state can constitutionally apply the statutes to ["political groups"], Plaintiffs' claim fails." *Hargett*, 791 F.3d at 692.

B. The Sixth Circuit Has Upheld Kentucky's Ballot Access Framework As Constitutionally Valid.

As an initial matter, the United States Court of Appeals for the Sixth Circuit has already had occasion to examine Kentucky's framework for ballot access – and upheld it as constitutionally valid. *See Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981). In *Mills*, the plaintiff challenged specifically, on equal protection grounds, the same signature petition requirement that presents the only conceivable burden on Plaintiffs in accessing the general

[11] *Id.* at ¶ 39 (alleging that "Kentucky's ballot access laws, and specifically, KRS. 118.015 and KRS. 118.305, afford no method, other than through the results of a Presidential Election, in which a party or group must achieve 2% of the vote, for a political group to obtain blanket ballot access.").

election ballot. But like this Court, the Sixth Circuit recognized that the plaintiff in *Mills* was actually "urging a more sweeping indictment of Kentucky election laws," and in fact challenged "a scheme which provides for more than one way to obtain a position on the Kentucky general election ballot." *Compare id.* at 607 *with* Docket No. 26 (Mem. Op. & Order) at 7.

In considering the constitutionality of Kentucky's ballot access framework, the Sixth Circuit relied heavily on *Jenness v. Fortson*, 403 U.S. 431 (1970), which made clear that multiple "avenues to the general ballot were not only acceptable, but indeed, desirable," because "[u]nder such a scheme small struggling candidates/parties would not be put through the expense of conducting a primary election, but could still appear on the general election ballot." *Mills*, 664 F.2d at 607. The Sixth Circuit then concluded that:

> Following the reasoning of Jenness, it cannot be said that Kentucky has invidiously discriminated against political candidates *or groups* in setting up its system. Rather, it has recognized the differences between established well-financed parties/candidates, and those candidates *and parties* who have no elaborate political network. Its format provides greater access to the political process than would a single route to the general election ballot.

Id. (emphasis added).

Accordingly, the Sixth Circuit has already determined, as a matter of law, that Kentucky's ballot access framework does not discriminate unconstitutionally against "political groups" – and to the contrary, actually promotes access to the ballot.[12] For this reason alone, Defendants are entitled to summary judgment. *See Kimble v. Marvel Entm't*, -- U.S. --, 135 S.Ct. 2401, 2409 (2015) ("*Stare decisis* – in English, the idea that today's Court should stand by

[12] Although the Sixth Circuit in *Mills* did not directly address the ability of "political groups" to qualify as "political organizations" by achieving 2% of the statewide vote at the last presidential election, Kentucky's longstanding third path to the general election ballot only further promotes ballot access for "political groups." *See, e.g., Greene v. Slusher*, 190 S.W.2d 29, 30 (Ky. 1945).

yesterday's decisions – is 'a foundation stone of the rule of law.'… *stare decisis* carries enhanced force when a decision … interprets a statute.") (citation omitted).

C. Kentucky's Three-Tier Ballot Access Framework Plainly Passes Constitutional Muster Under The *Anderson-Burdick* Test.

Not only has the Sixth Circuit already recognized the constitutionality of Kentucky's ballot access framework, but Kentucky's ballot access laws plainly satisfy the court's more recently-adopted *Anderson-Burdick* test. As the Sixth Circuit has recognized, under the *Anderson-Burdick* test:

> 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 these interests," as well as the "extent to which those interests make it necessary to burden the plaintiff's rights."

Green Party of Tenn. v. Hargett, 767 F.3d 533, 546 (6th Cir. 2014) (citations omitted). Moreover, the Sixth Circuit has emphasized that:

> The first step in this analysis is important. When the restrictions imposed by the state are "severe," they will fail unless they are narrowly tailored and advance a compelling state interest. If however, the regulations are minimally burdensome and nondiscriminatory, rational-basis review applies, and the regulations will pass constitutional muster if the state can identify "important regulatory interests" that they further. Of course, many regulations "fall in between these two extremes." In these situations, courts engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.

Id. (citations omitted). Here, Kentucky law clearly does not impose any severe restrictions on Plaintiffs. *See Mills*, 664 F.2d at 607; *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1208 (E.D. Ky. 1991). To the contrary, as set forth above, Kentucky's three-tier ballot access framework actually provides Plaintiffs greater access to the political process by providing them

multiple avenues to the general election ballot. *See Mills*, 664 F.2d at 607 (citing *Jenness v. Fortson*, 403 U.S. 431).

Moreover, the only potential burden on Plaintiffs in placing their candidates on the ballot is the petition signature requirement provided by KRS 118.315 – which has long been recognized as constitutional – and which Plaintiffs at least claim not to be challenging. *See Ehrler*, 776 F. Supp. at 1208; *Mills*, 664 F.2d at 607; Docket No. 16-1 (Pls.' Mem.) at 22. Accordingly, because the petition signature requirement is minimally burdensome and nondiscriminatory, the Court should review Kentucky's ballot access framework under a rational basis standard. *See Hargett*, 767 F.3d at 546. In any event, Kentucky's ballot access framework passes constitutional muster even under a more flexible analysis.

1. This Court Has Recognized That Kentucky's Petition Signature Requirement Is Not a Severe Burden on Plaintiffs' Rights.

Plaintiffs claim repeatedly that they are not challenging the provisions of Kentucky's ballot access laws that afford ballot access to any candidate for statewide office (or federal office elected statewide) upon the filing of a nominating petition containing the signatures of 5,000 registered voters. *See* KRS 118.315; Docket No. 16-1 (Pls.' Mem.) at 22 ("Plaintiffs do not challenge the existence of a petition, requiring 5,000 signatures to place a candidate . . . on the ballot"). But the signature requirement is the only conceivable burden placed by Kentucky's ballot access framework on Plaintiffs or their candidates.[13] In fact, the relatively modest burden

[13] Unlike in *Hargett*, Plaintiffs here have failed to identify any other feature of Kentucky's ballot access framework that allegedly operates in combination with its facially valid petition signature requirement for "political group" candidates to deprive them of any constitutional rights. *See Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 (6th Cir. 2014) (remanding where record did not allow the court "to determine the extent to which the plaintiffs are burdened by signature requirement, *as it operates in combination with Tennessee's new deadline and other aspects of its ballot-access scheme*….") (emphasis added). For example, unlike the Tennessee ballot access framework challenged in *Hargett*, once Plaintiffs' candidates have satisfied

presented by Kentucky's petition signature requirement is the only threshold that Plaintiffs must cross to place their candidates on the general election ballot, accompanied by their affiliated "political group." *See Mills*, 664 F.2d at 607 ("All a candidate seeking placement via KRS 118.315 must do to have his name placed on the general ballot is obtain 5,000 signatures.").[14]

However, both this Court and the Sixth Circuit have upheld Kentucky's petition signature requirement as constitutional – even as applied to "political groups" such as Plaintiffs. *See Ehrler*, 776 F. Supp. at 1208 (noting that "Kentucky's requirement that nominating petitions for statewide office contain the signatures of 5,000 registered voters in Kentucky has twice been challenged and upheld.") (citing *Mills*, 664 F.2d 600); *Libertarian Party v. Davis*, 601 F. Supp. 522 (E.D. Ky. 1985)). In *Ehrler*, the LPKY likewise attempted unsuccessfully to challenge Kentucky's signature petition requirements as applied to its candidates. After reviewing various United States Supreme Court opinions addressing nominating petition requirements, this Court recognized that:

Kentucky's nominating petition signature requirement, they are entitled to appear on the general election ballot accompanied by their affiliated "political group" and its logo. *See* Helm Decl. ¶ 13. Moreover, Plaintiffs have not identified any deadlines or other aspects of Kentucky's ballot access scheme that might potentially exacerbate the minimal burden presented by its petition signature requirement. *But see Hargett*, 767 F.3d at 545 (other aspects of regime also challenged).

[14] Kentucky's ballot access framework does not impose any additional requirement for a "political group" to have its party affiliation accompany its candidate's name on the ballot – and accordingly, is far more accommodating of "political groups" than other ballot access schemes which have nonetheless been deemed constitutional. *See, e.g., Stein v. Ala. Sec. of State*, 774 F.3d 689 (11th Cir. 2011) (upholding a ballot access regime that required additional requirements for a candidate's name to appear as affiliated with a "party label"). Apparently in recognition of this fact, the Libertarian Party has cited Kentucky's framework favorably as an example of a regime in which a political group may have its name appear next to its candidates on the ballot, even though the group is not otherwise qualified to appear on the ballot statewide. *See Libertarian Party of Ill. v. Ill. State Bd. of Elections*, No. 1:12-cv-02511, 2016 WL 723076, *6 (N.D. Ill. February 24, 2016) (citing Pls.' Sur-Reply, Docket No. 57-1 at 2-3).

> The generalization to be distilled from the foregoing cases is 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.

Ehrler, 776 F. Supp. at 1208 (discussing, for example, *Jenness*, 403 U.S. 431; *Storer v. Brown*, 415 U.S. 724 (1973); *Am. Party of Tex. v. White*, 415 U.S. 767 (1973)) (emphasis added).[15] Accordingly, this Court concluded that Kentucky's petition signature requirement "imposes no undue burden on independent candidates *and minority party candidates*." *Ehrler*, 776 F. Supp. at 1209 (emphasis added).[16]

The relatively modest burden presented by Kentucky's requirement that candidates of new or small political parties obtain the signatures of five thousand (5,000) or fewer registered

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[15] The Supreme Court has made clear that there is nothing unconstitutional about requiring the candidates of "political groups," such as Plaintiffs, to obtain the requisite number of signatures. *See, e.g., Jenness*, 403 U.S. at 441 ("Insofar as we deal here with the claims of a 'political body,' as contrasted with those of an individual aspirant for public office or an individual voter, the situation is somewhat different. . . . But we can hardly suppose that a small or new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizational paraphernalia required of a 'political party' as a condition for conducting a primary election. . . . The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically broad support, on the one hand, and a new or small political organization on the other.") (citations omitted).

[16] This Court's holding in *Ehrler* not only eviscerates Plaintiffs' claims that Kentucky's ballot access framework severely burdens their constitutional rights, but also serves as grounds to reject the LPKY's new arguments regarding Kentucky's threshold for "political groups" to qualify as "political organizations." *See Consolidated Television Cable Serv., Inc. v. City of Frankfort, Ky.*, 827 F.2d 354, 357-58 (6th Cir. 1988) (affirming dismissal of successive challenge where plaintiff could have, but did not, raise argument in prior action); *Tompkins v. Rockcastle County Courts*, No. 09-398-GFVT, 2010 WL 333692 (E.D. Ky. Jan. 21, 2010) (rejecting a successive constitutional challenge and recognizing that, "[t]he doctrine of claim preclusion, sometimes referred to as *res judicata*, not only bars a party from attempting to relitigate a claim which has already been decided against the party, but it also bars litigation of every issue which could have been raised with respect to the prior claim.") (internal citations omitted).

voters to appear on the general election ballot is even more clear in contrast to more burdensome prerequisites adopted by other states that have nonetheless been found constitutional. *See Ehrler*, 776 F. Supp. at 1208-09. By way of example, based on the 973,692 votes cast in Kentucky's 2015 gubernatorial election, a requirement that Plaintiffs' candidates obtain more than forty-eight thousand (48,000) signatures would pass constitutional muster. *See* Helm Decl. ¶ 8; *Ehrler*, 776 F. Supp. at 1208. Or put another way, even though the Commonwealth could require validly that Plaintiffs' candidates obtain signatures equaling five percent (5%) of the total votes cast in its most recent general election, in reality, Kentucky's ballot access framework only requires Plaintiffs to obtain signatures equaling one-half a percent (.5%) of the votes cast in the 2015 gubernatorial election. *Id.* Viewed in this light, there can be no doubt that this Court concluded correctly that Kentucky's petition signature requirement does not impose any "undue burden" on "political groups" such as Plaintiffs. *See Ehrler*, 776 F. Supp. at 1209.

Moreover, the factual record here demonstrates similarly that Kentucky's petition signature requirement has not prevented the "political group" Plaintiffs from performing their primary functions.[17] *Compare* Section II(B), *supra with Green Party of Ark. v. Martin*, 649 F.3d 675, 684 (8th Cir. 2011) (although plaintiff argued "that alternative parties ha[d] experienced hardships in achieving access to the ballot, [its own] success in securing ballot access" in previous general elections "diminishe[d] its own argument.") (citing *Storer v. Brown*, 415 U.S. 724, 742 (1974)) ("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.")). Because Plaintiffs have consistently placed candidates on the general

[17] *See Hargett*, 767 F.3d at 547 ("If a restriction does not 'affect a political party's ability to perform its primary functions,' such as organizing, recruiting members, and choosing and promoting a candidate, the burden typically is not considered severe.") (citation omitted).

election ballot via nominating petition, Kentucky's signature requirement clearly does not impose a severe burden on their rights as a matter of law or fact. *See, e.g.*, Docket No. 16-4 (Krogdahl Decl.) ¶ 6 (admitting that the CPKY "can gather the 5,000 signatures.").[18]

To the contrary, compared to nominating petition requirements in other states that have been deemed constitutional, the five thousand (or fewer) signatures required by Kentucky's ballot access framework present, at most, a relatively modest burden to Plaintiffs. *See Ehrler*, 776 F. Supp. at 1208. Accordingly, the Court should apply a rational basis review – under which Kentucky's three-tier ballot access framework will pass constitutional muster if Defendants identify "important regulatory interests" that it furthers. *See Hargett*, 767 F.3d at 546. In any event, any burden placed on Plaintiffs by Kentucky's petition signature requirement is outweighed easily by the Commonwealth's interests in maintaining the stability of its political system, as well as preventing voter confusion, ballot overcrowding and frivolous candidacies. *See Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005); Helm Decl. ¶ 4.

2. Kentucky's Petition Signature Requirement Reasonably Furthers Important State Interests.

Kentucky's reasonable and nondiscriminatory petition signature requirement has been upheld repeatedly as constitutionally valid. *See, e.g.*, *Mills*, 664 F.2d 600. Indeed, Kentucky's petition signature requirement plainly furthers important state interests in maintaining the stability of its political system, as well as preventing voter confusion, ballot overcrowding and frivolous candidacies – all while at the same time "provid[ing] greater access to the political

[18] *See also, e.g.*, *Swanson v. Worley*, 490 F.3d 894, 903 (11th Cir. 2007) ("[W]e conclude that Alabama's signature requirement by itself does not impose a severe burden on plaintiffs' rights but is a reasonable, nondiscriminatory restriction.") (analyzing Ala. Code. 17-9-3, which requires petition signed by three percent (3%) of votes cast in last gubernatorial election to access ballot for presidential election).

process than would a single route to the general election ballot." *Id.* at 607.[19] Accordingly, employing the *Anderson-Burdick* approach, Kentucky's petition signature requirement for "political group" candidates plainly passes constitutional muster under either an appropriate rational basis review or a more flexible balancing analysis. *See Hargett*, 767 F.3d at 54.

As an initial matter, Kentucky's petition signature requirement reasonably furthers the Commonwealth's strong interest "in maintaining the stability of its political system and ensuring that candidates have a modicum of support before putting their name on the ballot." *Blackwell*, 430 F.3d at 375. The Sixth Circuit has recognized that, "[a]lthough there are clearly limits, a wide range of methods of requiring potential candidates to show support have been upheld as a legitimate means to achieve this important state interest." *Id.* (citing *Munro*, 479 U.S. at 194-95; *White*, 415 U.S. 767; *Jenness*, 403 U.S. 431). In *Blackwell*, the Sixth Circuit held that an Ohio nominating petition provision requiring signatures from less than the "five percent of the voting population from a relevant geographic area" held constitutional in *Jenness* was justified by the "state's interest in verifying that a candidate has a modicum of support," and accordingly, passed constitutional muster. *Id.* at 375.

Here, the relatively modest burden placed on Plaintiffs by Kentucky's petition signature requirement is likewise justified by the Commonwealth's similarly strong interests in maintaining the stability of its political system, ensuring that candidates have a significant

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[19] *See also Blackwell*, 430 F.3d at 375 (recognizing "important state interest" in "maintaining the stability of its political system and ensuring that candidates have a modicum of support before putting their name on the ballot"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997) ("The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (reaffirming that in light of state interest in preventing voter confusion, ballot overcrowding and the presence of frivolous candidacies, "States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. . . .'") (citation omitted).

modicum of support and preventing voter confusion, ballot overcrowding and frivolous candidacies. *See, e.g.*, *Jenness*, 403 U.S. at 442 ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception and even frustration of the democratic process at the general election."). *See also* Helm Decl. ¶ 4.[20] Accordingly, as both this Court and the Sixth Circuit have recognized previously, both Kentucky's petition signature requirement and overall ballot access scheme are reasonably related to the Commonwealth's interests and pass constitutional muster. *See Mills*, 664 F.2d at 607-08; *Ehrler*, 776 F. Supp. at 1208.

3. Kentucky May Plainly Require A "Political Group" To Demonstrate A Significant Modicum Of Support Statewide Before Qualifying As A "Political Organization."

Although Kentucky's petition signature requirement is the only potential burden to Plaintiffs in placing their candidates on the general election ballot, they nonetheless attack Kentucky's third-way provision that enables "political groups" to qualify as "political organizations" (and nominate a slate of candidates to the general election ballot by a convention or party primary) if their candidate receives two percent (2%) or more of the vote in the last presidential election. *See* KRS 118.015, KRS 118.305, KRS 118.325. Indeed, Plaintiffs appear

[20] In any event, the United States Supreme Court recognized in *Munro* that "[w]e have never required a State to make particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194-95. *See also id.* at 195 ("To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."); *Navarro v. Neal*, 716 F.3d 425, 431-32 (7th Cir. 2013) (holding that "the speculative concern that altering the challenged signature requirement would lead to a large number of frivolous candidates qualifying for the ballot and, consequently, voter confusion [wa]s sufficient" to justify petition signature requirement).

to take the untenable position that they should be entitled to nominate a slate of candidates to the general election ballot without demonstrating *any* modicum of support whatsoever for their candidates – by petition or otherwise. *See* Docket No. 1 (Compl.) at 14.

But the feature of Kentucky's ballot access framework that permits "political groups" to qualify as "political organizations" – and therefore provides an alternative route for Plaintiffs' candidates to access the general election ballot – is not in any sense a burden or restriction on Plaintiffs' rights. To the contrary, Kentucky's three-tier ballot access framework affirmatively promotes access to the ballot by appropriately recognizing distinctions between "political parties," "political organizations" and "political groups."[21] In fact, the United States Supreme Court has recognized the constitutionality of more restrictive binary ballot access schemes that fail to even offer an intermediate path for groups such as Plaintiffs to nominate candidates by party primary or convention (short of qualifying as a political party). *See, e.g., Jenness*, 403 U.S. 431 (upholding as constitutional Georgia ballot access framework that provided only two paths to the general election ballot: as the candidate of a political party or by nominating petition).

Moreover, Kentucky's ballot access framework is both reasonable and nondiscriminatory as to Plaintiffs because none of its three paths to the general election ballot is "inherently more burdensome" on "political groups" than any other. *See id.* One could certainly argue that placing candidates on the general election ballot as nominees of a "political organization" – which would require a "political group" to conduct either a party primary or convention after first nominating a presidential candidate and achieving two percent (2%) of the statewide vote in

[21] *See Mills*, 664 F.2d at 607 (holding that Kentucky's ballot access framework does not invidiously discriminate against political groups, and to the contrary, has provided "greater access to the political process" by "recogniz[ing] the differences between established well-financed parties/candidates, and those candidates and parties who have no elaborate political network.").

a presidential election – would be potentially more burdensome than placing the same candidates on the ballot through Kentucky's nominating petition process.[22] In any event, Kentucky's mechanism for "political groups" to qualify as "political organizations" – upon a far lower demonstration of electoral success than that required of "political parties" over the same time period – in no way discriminates against Plaintiffs. *See, e.g.*, *White*, 415 U.S. 767 (upholding as constitutional Texas ballot access framework that provided similarly that a political group could only nominate candidates for the general election ballot by primary election or nominating convention where its candidate achieved more than two percent (2%) of the total vote cast for governor in the last general election).[23]

Furthermore, as a factual matter, Kentucky's ballot access framework has not placed a burden on the rights of new or small political groups generally. By Plaintiffs' own admission, although none of their candidates has ever achieved the two percent (2%) of the vote in a presidential election required to qualify as a "political organization," other "political groups" have been able to do so in seventeen percent (17%) of presidential elections since 1924 – and

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[22] *See Mills*, 664 F.2d at 607 (recognizing that although Kentucky's ballot access framework provides for different paths to the general election ballot, "it cannot be said that the route open to the candidate via petition is inherently more burdensome than that open to a party candidate. Indeed, it could be argued that the primary system is more burdensome than the petition system since, at least insofar as the major parties are concerned, many prospective candidates with 5,000 or more votes in a primary election will not find their names on the general election ballot."); *Jenness*, 403 U.S. at 440-41(same).

[23] Unlike the Tennessee ballot access scheme challenged in *Hargett*, Kentucky's framework does not require "political groups" seeking ballot retention to achieve the same level of electoral success as "political parties" in less time. *See Hargett*, 791 F.3d at 695 (recognizing that "only Tennessee's access-retention system forces minor political parties to attain the *same* vote percentage as major political parties in *less* time.") (emphasis in original). By contrast, under Kentucky's ballot access framework, both "political parties" and "political groups" have the same amount of time to achieve success in a presidential election. *See* KRS 118.015. Moreover, a "political group" can qualify as a "political organization" if its candidate achieves two percent (2%) of the total votes cast, whereas to qualify as a "political party," a group's candidate must receive twenty percent (20%) of the votes cast. *Id.*

twenty-four percent (24%) of presidential elections since 1924 excluding those where the Libertarian Party nominated a presidential candidate, but no "political group" qualified as a "political organization."[24]

Put simply, other "political groups" in Kentucky have succeeded in demonstrating the significant modicum of support necessary to qualify as a "political organization" that Plaintiffs have failed repeatedly to achieve. *See* Docket No. 16-1 (Pls.' Mem.) at 4-5 (conceding that the LPKY has nominated a presidential candidate in every election since 1988 and that the CPKY nominated a presidential candidate in 2008); Helm Decl. ¶ 16 (CPKY nominated a presidential candidate in 2004 and 2000). But Plaintiffs' own evidence makes clear that their "political groups" do not enjoy a significant modicum of support in Kentucky. As a result, Plaintiffs suggest that the Court should dispense altogether with the requirement that they demonstrate any modicum of support – significant or otherwise – and simply allow their candidates (and by extension, the candidates of any other "political group") unfettered access to the general election ballot. *See* Docket No. 1 (Compl.) at 14.

But Kentucky may plainly require a "political group" to qualify as a "political organization" – by demonstrating a relatively modest modicum of support statewide – before allowing it to nominate its candidates by convention or party primary in the same manner as a "political party." *See, e.g.*, *Munro*, 479 U.S. at 196 ("We think that the State can properly reserve the general election ballot for 'major struggles,' by conditioning access to that ballot on a showing of a modicum of voter support.") (citation omitted); *White*, 415 U.S. at 782 ("[W]e think that the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of

[24] *See* Docket No. 1 (Compl.) at ¶ 21; Docket No. 16-1 (Pls.' Mem.) at 5; Docket No. 16-16 (Winger Decl.) ¶ 18.

community support."). Quite clearly, if Plaintiffs cannot demonstrate a significant modicum of support in Kentucky for their "political groups," they are not entitled to nominate a slate of candidates to the general election ballot by party primary or convention. *Id.*

Nor is there any merit to Plaintiffs' suggestion that achieving two percent (2%) of the vote in a presidential election is an unconstitutionally restrictive form of demonstrating a significant modicum of support for their "political groups."[25] Indeed, not only has the United States Supreme Court upheld a similar prerequisite for political groups wishing to nominate by party primary or convention – it has done so where the alternative means of ballot access was far more burdensome than the five thousand (5,000) signatures per candidate required by Kentucky's framework. By way of example, under the ballot access scheme deemed constitutionally valid in *White*, political groups whose candidate did not achieve more than two percent (2%) of the vote in the last gubernatorial election were required to hold precinct nominating conventions *and* demonstrate the support of twenty-two thousand (22,000) voters. *See id.* at 783.

Indeed, other than demanding placement of their candidates on the general election ballot and filing this action, Plaintiffs have taken no affirmative steps to be placed on the November 2016 general election ballot. *But see Ehrler*, 776 F. Supp. at 1210. Accordingly, "[t]here is no evidence that plaintiffs have prepared petitions and attempted to obtain the required number of signatures from any of Kentucky's registered voters, regardless of political party affiliation, to show some support for their candidates." *Id.* Under these circumstances, Plaintiffs "have not

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[25] *See White*, 415 U.S. at 780-788 (upholding as constitutional Texas ballot access framework in which minor political groups whose candidate did not achieve more than two percent (2%) of the vote in the preceding gubernatorial election were not entitled to nominate candidates by primary election or nominating convention – and were instead required to pursue precinct nominating conventions *and* demonstrate the support of persons numbering at least one percent (1%) of the total vote cast for governor at the last preceding general election).

shown *any* support for their candidates," and "absent a showing of a 'significant modicum of support,' [they] are not entitled to be placed on the November election ballot." *Id.* (emphasis in original).

D. Plaintiffs Are Not Entitled To Injunctive Relief.

As described above, Kentucky's three-tier ballot access framework does not violate Plaintiffs' constitutional rights. As a result, Plaintiffs are not entitled to any relief – much less to preliminary injunctive relief. Indeed, the same reasons that require the denial of Plaintiffs' motion for summary judgment also support denial of their demand for preliminary injunctive relief.

The standard for a preliminary injunction is well-established in the Sixth Circuit. A court considers the following factors: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (citing *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)). [26]

Here, none of the four factors supports injunctive relief for Plaintiffs. First, Plaintiffs cannot show a likelihood of success on the merits. Because the parties agree that there is no genuine issue of material fact, adjudication of the merits is simultaneous with the Court's consideration of Plaintiffs' request for preliminary injunctive relief. For the reasons set forth at length in the preceding sections, as a matter of law, Plaintiffs cannot prevail on their claims that

[26] Plaintiffs have not made any effort to pursue an *ex parte* Temporary Restraining Order pursuant to Fed. R. Civ. P. 65(b) and, instead, elected to proceed simultaneously with a demand for preliminary injunction and summary judgment. *See* Docket No. 16. Accordingly, Defendants address the standard for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a).

Kentucky's ballot access framework is unconstitutional. To the contrary, it has been upheld repeatedly as constitutional by this Court and others. *See Mills*, 664 F.2d at 607; *Ehrler*, 776 F. Supp. at 1208.

Likewise, the second factor, whether Plaintiffs would suffer "irreparable injury," also weighs in favor of denying injunctive relief. Plaintiffs will suffer no "irreparable injury" because their selected candidates may still appear on the 2016 general election ballot by petition pursuant to KRS 118.315. Although Plaintiffs have apparently made no effort other than filing this lawsuit to place their candidates on the ballot, they have until August 9, 2016 to do so via nominating petition (and until September 9, 2016 for presidential candidates). Accordingly, Plaintiffs are not threatened by any potential injury – much less an "irreparable" one.

Finally, the third and fourth factors (potential harm to others and the public interest) also compel the denial of preliminary injunctive relief. In this case, the public interest may be analyzed together with the consideration of whether an injunction would "cause substantial harm to others" because the Commonwealth's interest in administration of Kentucky's election laws serves the undisputed state interests of preventing voter confusion, avoiding ballot overcrowding and the presence of frivolous candidacies. *See Munro*, 479 U.S. at 194 ("States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot . . . .'") (citation omitted).

By contrast, entry of the injunctive relief that Plaintiffs seek – direct access to the general access ballot without any demonstration of a significant modicum of support statewide for their political groups or any candidates – would cause public harm and run entirely contrary to the Commonwealth's interest in maintaining a well-ordered election framework that furthers the democratic process. *See, e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

In sum, Plaintiffs cannot satisfy any of the criteria required to support their demand for injunctive relief. Instead, the undisputed factual record requires denial of Plaintiffs' requested relief because their claims fail as a matter of law, they will not suffer irreparable injury absent injunctive relief and the public interest would be harmed through entry of the requested injunction. Accordingly, Plaintiffs' demand for injunctive relief should be denied.

IV. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion and enter summary judgment in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2016, I electronically filed this Memorandum in Response to Plaintiffs' Pending Motion and in Support of Counter-Motion for Summary Judgment with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CIVIL ACTION NO. 3:15-CV-86-GFVT

THE LIBERTARIAN PARTY OF KENTUCKY, *et al.*

Plaintiffs,

v.

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

Defendants.

* * * * *

DECLARATION OF MARY SUE HELM IN SUPPORT OF DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

1. I, Mary Sue Helm, am a resident of the Commonwealth of Kentucky, am of legal age, and am competent to make this Declaration based on my personal knowledge.

2. I currently serve as, and have at all times relevant to these proceedings served as, the Director of Administration and Elections for the Office of the Kentucky Secretary of State.

3. In my capacity of Director of Administration and Elections, my general duties include management of fiscal and personnel matters, public documents, legal affairs and special projects and commissions for the Office of the Secretary of State. I also oversee the division responsible for attesting and keeping a register of the official acts of the Governor, as well as all candidate filings and certification of the names of candidates to be printed on ballots. Moreover, before serving as the Director of Administration and Elections, I spent more than four years serving as the acting Director of the State Board of Elections. In total, I have served the

Commonwealth of Kentucky for over 39.5 years, and have spent 28 years serving in the Secretary of State's Office.

4. Based on my many years of experience in the Secretary of State's Office, I can attest that Kentucky's election laws appropriately regulate ballot access to maintain the stability of Kentucky's political system and to prevent voter confusion, ballot overcrowding and frivolous candidacies. These interests are achieved by laws enacted by the General Assembly requiring "political parties" and "political organizations" to demonstrate a significant modicum of support statewide before qualifying to nominate candidates to the general election ballot by convention or party primary. Similarly, laws enacted by the General Assembly require "political group" candidates and independent candidates to demonstrate a significant modicum of support for their individual candidacies before being placed on the general election ballot via nominating petition.

5. According to data maintained by the Kentucky State Board of Elections, as of March 15, 2016, there were 3,230,123 registered voters in Kentucky.

6. According to data maintained by the Kentucky State Board of Elections, as of March 15, 2016, there were only 5006 voters registered as members of the Libertarian Party of Kentucky ("LPKY").

7. According to data maintained by the Kentucky State Board of Elections, as of March 15, 2016, there were only 276 voters registered as members of the Constitution Party of Kentucky ("CPKY").

8. In Kentucky's last statewide election, the 2015 gubernatorial election, Kentucky voters cast 973,692 votes.

9. To the best of my knowledge, no LPKY or CPKY candidate has ever been elected to statewide office in Kentucky. Also to the best of my knowledge, no LPKY or CPKY

candidate has ever received even 5% of the votes cast in a statewide election, and no CPKY candidate has ever received more than .3% of the votes cast in a statewide election.

10. To the best of my knowledge, neither the LPKY nor the CPKY has ever nominated a candidate for Governor in Kentucky.

11. I have reviewed the correspondence from counsel for Plaintiffs demanding that the LPKY and the CPKY be permitted to nominate their candidates "in the same manner as the Republican and Democratic Parties of Kentucky," and to place Plaintiffs' "candidates on the Presidential ballot." *See* Letter from Christopher Wiest to Lynn Zellen, *et al.* dated November 17, 2015 (attached hereto as "Exhibit 1"). To the best of my knowledge, Plaintiffs have never identified any particular candidates that they wish to place on the general election ballot.

12. To the best of my knowledge, aside from demanding to have unidentified candidates placed on the general election ballot and filing this lawsuit, Plaintiffs have not taken any steps to place any candidates on the November 2016 general election ballot.

13. In Kentucky, when a "political group" or "political organization" nominates a candidate by petition pursuant to KRS 118.315, the candidate appears on the ballot accompanied by their "political group" affiliation and logo.

14. Since 1988, the LPKY has consistently nominated a presidential candidate by petition. In these presidential elections, the LPKY candidate has received the following percentage of the vote: 1988, 0.2%; 1992, 0.3%; 1996, 0.5%; 2000, 0.2%; 2004, 0.1%; 2008, 0.3%; and 2012, 0.95%.

15. Between 2000 and 2014, the LPKY has placed at least twenty-one candidates on the general election ballot.

16. In 2000, 2004 and 2008, the CPKY nominated a presidential candidate by petition. In these presidential elections, the CPKY candidate received the following percentage of the vote: 2000, 0.06%; 2004, 0.1%; 2008, 0.3%.

17. Although the CPKY has not placed any candidates on the ballot since the 2008 general election, it placed seven candidates on the general election ballot between 2000 and 2008, including three candidates in 2004.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 18th day of March 2016.

Mary Sue Helm

Mary Sue Helm

Exhibit 1

Chris Wiest, Attorney at Law, PLLC
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
(859) 486-6850 (office)
(859) 495-0803 (facsimile)
(513) 257-1895 (cellular)
chris@cwiestlaw.com

November 17, 2015

Lynn Zellen
Office of the KY Secretary of State
700 Capital Ave., Ste. 152
Frankfort, KY 40601

Maryellen Allen
Kentucky Board of Elections
140 Walnut Street
Frankfort, Kentucky 40601

By electronic mail, facsimile and
Ordinary U.S. mail

Re: Third Party Ballot Access

Dear Ms. Zellen and Ms. Allen:

My office has been retained by the Libertarian National Committee, the Libertarian Party of Kentucky, the Constitution Party of Kentucky, and several individual voters to pursue a constitutional challenge to Kentucky's ballot access laws.

As you are aware, except insofar as party's candidate receives 2% or more in a Presidential General Election, Kentucky affords no blanket or across the board method for a minor political party to achieve consistent ballot access. *See, .e.g.*, K.R.S. 118.325.

Kentucky's laws do not permit a political party to submit a petition for all of its candidates, or for those candidates to qualify, except by the candidate (but not the party) to submit an individual petition.

Kentucky's laws, therefore constitute unconstitutional burdens on my clients First and Fourteenth Amendment rights. *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015); *Green Party v. Hargett*, 700 F.3d 816 (6th Cir. 2012); *Green Party of Tenn. v. Hargett*, 493 Fed. Appx. 686 (6th Cir. 2012); *Green Party v. Hargett*, 953 F. Supp. 2d 816 (MD Tenn. 2013).

The Sixth Circuit's decisional law in *Hargett* is binding in this district, and, consequently, will result in the relief we intend to seek being granted.

Chris Wiest Attorney at Law, PLLC

I have offered, in prior litigation with the Board of Elections, the opportunity to resolve lawsuits via a consent order. In each instance, the Board of Elections has declined, and in each instance, because this office brings only well grounded and successful complaints, it has resulted in costly attorney fee awards and payments paid by the Kentucky taxpayers. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015); *Russell v. Grimes*, 53 F. Supp. 3d 1004 (EDKY 2014); *Brown v. Ky. Legislative Research Comm'n*, 2014 U.S. Dist. LEXIS 9486 (EDKY 2014); *Brown v. Ky. Legislative Research Comm'n*, 2013 U.S. Dist. LEXIS 184443 (EDKY 2013); *Brown v. Ky. Legislative Research Comm'n*, 966 F. Supp. 2d 709 (EDKY 2013).

I make the same offer again – the Kentucky Board of Elections can agree to a consent order, in which it: (1) neither admits nor denies the constitutional violations at issue; (2) agrees to an injunction and declaration by the court that permits the Libertarian Party of Kentucky and Constitution Party of Kentucky to nominate candidates for state and local office in the same manner as the Republican and Democratic Parties of Kentucky; and (3) agrees to an injunction by which it permits the Libertarian National Committee and Constitution Party National Committee to place its candidates on the Presidential ballot.

In exchange, we would agree to forgo the pursuit of attorney fees in the matter. My clients, concerned, as most political groups are, with the upcoming election season in 2016, have directed me to file suit on November 24, 2015, if we do not have an agreement. I am prepared to do so.

Please let me know what your decision is.

Very truly yours,

/s/Christopher Wiest

Christopher Wiest

Cc: LPKY; LNC; Const. Party of KY; Indiv. Clients