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.	)

* * * * *

REPLY 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 reply in support of their Counter-Motion for Summary Judgment against 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").

I. INTRODUCTION

Faced with controlling opinions by both the Sixth Circuit and this Court upholding the constitutional validity of Kentucky's ballot access framework, Plaintiffs have now attempted to cast their lawsuit as an "as applied" challenge to the Commonwealth's petition signature requirement for "political groups." *See* Docket No. 37 (Pls.' Mem. in Opposition of Defs.' Mot.

for. Summ. J. and Reply in Support of Mot. for Summ. J. ("Pls.' Resp.")) at 3. But Plaintiffs' novel theory fails entirely – both because they have plainly challenged Kentucky's ballot access framework on its face (as this Court has already recognized) and because the Commonwealth's petition signature requirement has been upheld repeatedly – even as applied to "political groups," including the LPKY. *See Anderson v. Mills*, 644 F.2d 600, 607 (6th Cir. 1981); *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1209 (E.D. Ky. 1991). As a result, Plaintiffs' strained attempts to distinguish these controlling precedents fail entirely.

Moreover, a rational basis review would be appropriate even under the more recent *Anderson-Burdick* test, because the uncontroverted factual record now makes clear that Plaintiffs have suffered no actual injury as a result of Kentucky's ballot access laws. To be clear, Plaintiffs have failed to identify *any* candidates that they have been unable to place on the 2016 general election ballot. Furthermore, the April 1, 2016 deadline for filing statements of candidacy for state office has now passed – and Plaintiffs have offered into evidence only a single statement of candidacy (for a candidate that they have not even attempted to place on the ballot via petition). *See* Docket No. 37-1 (Supp. Eckenburg Decl.) at Ex. A. To the contrary, Plaintiffs now concede that they have not undertaken *any* effort to place *any* candidate on the 2016 general election ballot via petition – and will only collect signatures to place their respective presidential candidates on the 2016 ballot (which they have not yet done). *Id.* at ¶¶ 7-8, 20, 25; Docket No. 37-3 (Supp. Krogdahl Decl.) at ¶¶ 14, 15. Accordingly, the Court should apply a rational basis standard of review and uphold the Commonwealth's ballot access laws because Defendants have identified "'important regulatory interests'" that they advance. *See Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014).

Regardless, Plaintiffs have simply failed to demonstrate a significant modicum of support statewide either for their "political groups" or any candidates individually – and under similar circumstances, this Court has recognized that the LPKY was not entitled to place its candidates on the general election ballot. *See Ehrler*, 776 F. Supp. at 1210 (rejecting challenge by LPKY where, as here, there was no evidence that plaintiffs had prepared petitions and attempted to obtain the required number of signatures from any of Kentucky's registered voters). For the same reasons, Plaintiffs plainly are not entitled to injunctive relief here – much less to have this Court rewrite Kentucky's ballot access laws in the manner that they have proposed. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991).

II. DISCUSSION

For the reasons set forth in Defendants' opening brief, Docket No. 33-1, summary judgment in their favor 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)). Summary judgment in favor of Defendants is further appropriate because Plaintiffs have failed to identify any issue of material fact for trial.

A. Plaintiffs' Novel Attempt To Challenge Kentucky's Petition Signature Requirement As Applied To "Political Groups" Is Without Merit.

No doubt in recognition of the fact that courts in the Sixth Circuit have repeatedly upheld the constitutionality of Kentucky's ballot access framework, Plaintiffs now attempt to cast their lawsuit as an "as applied" challenge to the ballot access requirements Kentucky law places on "political groups." *See* Docket No. 37 (Pls.' Resp.) at 3 ("This case challenges Kentucky's ballot access framework applied to *minor parties*, and specifically the Libertarian and Constitution

Party of Kentucky who desire to run *multiple candidates for multiple offices*, over a period of time.") (emphasis in original). But Plaintiffs' novel theory fails for multiple reasons.[1]

As an initial matter, this Court has already recognized that Plaintiffs have asserted a facial challenge. *See* Docket No. 26 (Mem. Op. & Order) at 7 ("Plaintiffs essentially challenge the constitutionality of the Commonwealth's entire ballot access framework."). This is because Plaintiffs take issue with requirements of Kentucky's ballot access framework that apply *only* to independent candidates and "political groups" that have failed to demonstrate a significant modicum of statewide support. By challenging Kentucky's ballot access requirements for "political groups," Plaintiffs "have in effect asserted a facial challenge." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). 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.

Moreover, Plaintiffs have now conceded what Defendants maintained all along: that their lawsuit is merely an attempt to evade Kentucky's longstanding and relatively modest petition signature requirement for independent candidates and "political groups." *See, e.g.*, Docket No. 37 (Pls.' Resp.) at 11 ("That is the very point of this lawsuit: there is no way for the LPKY to run

[1] As set forth separately in Section II.C.1, *infra*, Plaintiffs have in any event failed to identify any candidate that they have been unable to place on the 2016 general election ballot. To the contrary, Plaintiffs have conceded that other than collecting signatures for their respective presidential candidates, they have elected not to invest resources or undertake other efforts to place *any* candidates on the 2016 general election ballot via petition. *See* Docket No. 37-1 Supp. Decl. of Cyrus Eckenburg ("Supp. Eckenburg Decl.") at ¶¶ 24, 25; Docket No. 37-3 (Supp. Decl. of Marthina (Tina) Krogdahl ("Supp. Krogdahl Decl.")) at ¶ 15. Moreover, the April 1, 2016 deadline for filing statements of candidacy for state office has now passed – and Plaintiffs have offered into evidence only a single statement for a Libertarian candidate who allegedly filed months before the LPKY's nominating convention – and apparently had not been authorized to do so. *See id.* at ¶ 7. However, that candidate is not a party here – and Plaintiffs have not sued expressly on his behalf. *See* Docket No. 1 (Verified Compl. for Declaratory and Inj. Relief for Constitutional Violations) ("Compl.") at ¶¶ 2, 5.

multiple petition drives for multiple candidates….”). But Kentucky’s petition signature requirement has been upheld repeatedly by courts in the Sixth Circuit – even in cases involving “political groups” and their candidates. *See Anderson v. Mills*, 644 F.2d 600, 607 (6th Cir. 1981) (“[I]t cannot be said that Kentucky has invidiously discriminated against political candidates *or groups* in setting up its system.…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.”) (emphasis added); *Libertarian Party v. Davis*, 601 F. Supp. 522, 524 (E.D. Ky. 1985) (rejecting challenge to Kentucky’s ballot access framework by the Libertarian Party); *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1209 (E.D. Ky. 1991) (Kentucky’s petition signature requirement “imposes no undue burden on independent candidates *and minority party candidates*.”) (emphasis added).

B. Plaintiffs Cannot Meaningfully Distinguish Controlling Precedents Upholding Kentucky’s Ballot Access Framework.

Courts in the Sixth Circuit have considered previous challenges to Kentucky’s ballot access framework by the LPKY and others – and have rejected each one. *See Mills*, 644 F.2d at 607 (“[I]t cannot be said that Kentucky has invidiously discriminated against political candidates *or groups* in setting up its system.…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.”) (emphasis added); *Davis*, 601 F. Supp. at 524 (rejecting challenge to Kentucky’s ballot access framework by the Libertarian Party); *Ehrler*, 776 F. Supp. at 1209 (Kentucky’s petition signature requirement “imposes no undue burden on independent candidates *and minority party candidates*.”) (emphasis added). Like Plaintiffs’ challenge here, each of these lawsuits was brought either by a “political group” or candidate subject to Kentucky’s petition signature requirement for accessing the general election ballot.

Nonetheless, Plaintiffs strain to distinguish these controlling precedents by suggesting that the litigants there did not "intend[] to run multiple candidates, for multiple offices, over a period of time, as the plaintiffs in this matter do….". *See* Docket No. 37 (Pls.' Resp.) at 2.[2] But the LPKY itself was a plaintiff in *Ehrler* – as well as Ernest McAffee, its candidate for Governor of Kentucky and Paul Thiel, its candidate for Railroad Commissioner (third district). *See Ehrler*, 776 F. Supp. at 1201. Accordingly, it is disingenuous at best for the LPKY to claim that its failed challenge to Kentucky's ballot access framework did not involve an attempt to run multiple candidates for multiple offices.[3] The *Davis* case likewise involved an effort by the Libertarian Party to place multiple candidates on the general election ballot.

Plaintiffs' effort to distinguish *Mills* on the grounds that it involved an independent candidate is likewise meaningless. *See* Docket No. 37 (Pls.' Resp.) at 2. Kentucky's petition signature requirement applies equally to independent candidates and "political group" candidates – because by definition, neither have yet demonstrated a significant modicum of statewide

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[2] Plaintiffs' subjective intentions alone are insufficient grounds for this Court to depart from established precedent. As set forth in Section II.C.1, *infra*, the undisputed factual record makes clear that to date, Plaintiffs have not undertaken any effort to place any candidates on the ballot via petition – and have chosen not to dedicate resources to placing any candidates on the ballot except for their respective presidential candidates (which they have not yet started to do). Docket No. 37-1 (Supp. Eckenburg Decl.) at ¶¶ 20, 24, 25; Docket No. 37-3 (Supp. Krogdahl Decl.) at ¶ 9, 10, 14. Moreover, the April 1, 2016 deadline for filing statements of candidacy for state office has now passed – and Plaintiffs have offered evidence of only a single statement of candidacy that was filed months before the LPKY's nominating convention by a candidate who is not a party to this lawsuit. *Id.* at ¶ 7.

[3] Indeed, this Court's holding in *Ehrler* bars the LPKY's improper attempt to relitigate the same legal issue here. *See Hooker v. Fed. Election Comm'n*, 21 Fed. App'x 402, 405-06 (6th Cir. 2001) (successive challenge to constitutionality of campaign finance statutes was precluded where plaintiff attempted to relitigate the same claim). The LPKY should further be estopped from raising new arguments that it failed to assert in its earlier challenge to Kentucky's ballot access framework. *See Consolidated Television Cable Serv., Inc. v. City of Frankfort, Ky.*, 827 F.2d 354, 357-58 (6th Cir. 1988); *Tompkins v. Rockcastle Cnty. Courts*, No. 09-398-GFVT, 2010 WL 333692 (E.D. Ky. Jan. 21, 2010).

support.[4] Nor is there any merit to Plaintiff's suggestion that Kentucky's ballot access framework must treat "political group" candidates differently than independent candidates – particularly where, as here, Kentucky does not impose any additional requirement for a "political group" to have its party affiliation accompany its candidate's name on the ballot and as a result, is exceptionally accommodating of Plaintiffs' associational rights.[5]

The Supreme Court of the United States has repeatedly upheld the constitutionality of state frameworks that, like Kentucky's, impose the same ballot access requirements on both independent candidates and "political group" candidates. *See e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 433, 442 (1971) (upholding Georgia election scheme that provided independent candidates and nominees of a "political group" with the same method to access the ballot). Accordingly, Plaintiffs' reliance on *Storer v. Brown*, 415 U.S. 724 (1974), to suggest that Kentucky's ballot

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[4] Although Plaintiffs continue to refer to themselves misleadingly as a "political party" or a "minor party," Docket No. 37 (Pls.' Resp.) at 3 n.3, their characterization as a "political group" under Kentucky law is not merely a matter of semantics. The Constitution does not entitle every group of individuals that announces itself as a "political party" to the same rights as a "political party" or "political organization" – which by definition, have demonstrated a significant modicum of statewide support *for their groups*. *See e.g.*, *Libertarian Party of N.H. v. Gardner*, 638 F.3d 6, 17 (1st Cir. 2011) ("It is well established that a state may base its recognition of a party, and the benefits of recognition, on the party's past electoral strength or demonstrated support."); *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.").

[5] Many states do not allow "political group" candidates to appear on the ballot accompanied by their "political group" name until the group itself has demonstrated a significant modicum of support statewide. *See, e.g.*, *Schrader v. Blackwell*, 241 F.3d 783, 791 (upholding Ohio law that restricted candidates from appearing on ballot with "political group" name until the group had demonstrated a significant modicum of support statewide). By way of further contrast with Kentucky's ballot access framework, the Tennessee framework invalidated in *Hargett* did not provide any mechanism for a "political group" candidate to appear on the ballot accompanied by the name of his or her "political group" until the group itself had demonstrated a significant modicum of support. *See Green Party of Tenn. v. Hargett*, 767 F.3d 533, 539 (6th Cir. 2014).

access requirements for "political group" candidates must be different from those for independent candidates, Docket No. 37 (Pls.' Resp.) at 2, is misplaced entirely.[6]

In short, Plaintiffs cannot meaningfully distinguish this lawsuit from previous failed efforts by the LPKY and others to challenge Kentucky's ballot access framework. *See Mills*, 644 F.2d at 607; *Davis*, 601 F. Supp. at 524; *Ehrler*, 776 F. Supp. at 1209. The doctrine of *stare decicis* alone entitles Defendants to summary judgment. *See Kimble v. Marvel Entm't*, -- U.S. --, 135 S.Ct. 2401, 2409 (2015).

C. In Any Event, Kentucky's Ballot Access Framework Passes Muster Under ***Anderson-Burdick*.**

Even if the Court chooses to review Kentucky's ballot access framework under the more recent *Anderson-Burdick* test, it easily passes constitutional muster. *See Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014) ("The first step in this analysis is important," and requires the Court to "'consider the character and magnitude of' the plaintiff's alleged injury"). Indeed, Plaintiffs' supplemental affidavits make clear that they have not suffered *any* actual injury in fact. *See e.g.*, Docket No. 37-1 (Supp. Eckenburg Decl.) at ¶¶ 20, 24, 25; Docket No. 37-3 (Supp. Decl. of Marthina (Tina) Krogdahl ("Supp. Krogdahl Decl.") at ¶ 15. Moreover, this Court and others have already recognized the constitutional validity of Kentucky's petition

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[6] Although "[t]he First Amendment protects the rights of citizens to associate and to form political parties for the advancement of common political goals and ideas," and, "[a]s a result, political parties' government, structure, and activities enjoy constitutional protection," there is no severe burden imposed by laws that do not directly prevent political groups from organizing or exclude a particular group from participating in the electoral process. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-58 (1997). Accordingly, where, as here, Plaintiffs remain free to "endorse whom [they] like[], to ally [themselves] with others, to nominate candidates for office, and to spread [their] message to all who will listen," their associational rights are protected. *Id. See also Schrader*, 241 F.3d at 790 (6th Cir. 2011) (recognizing that "states have significant authority to regulate the formation of political parties and the identification of candidates on the ballot").

signature requirement – the only conceivable burden on Plaintiffs in accessing the ballot – 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); *Davis*, 601 F. Supp. at 524. Accordingly, "rational-basis review applies, and the regulations will pass constitutional muster if the state can identify 'important regulatory interests' that they further." *Hargett*, 767 F.3d at 546 (citations omitted). Regardless, Kentucky's ballot access framework passes constitutional muster even under a more flexible analysis.

1. The Uncontroverted Record Makes Clear That Plaintiffs Have Not Suffered Any Injury In Fact.

The uncontroverted evidence of record reveals that Plaintiffs here have not suffered any actual injury in fact as a result of Kentucky's ballot access framework. Indeed, Plaintiffs have failed to identify *any* candidates that they have been unable to place on the 2016 general election ballot. In addition, the April 1, 2016 deadline for filing statements of candidacy for state office has now passed – and Plaintiffs have offered into evidence only a single statement of candidacy by David Watson, a Libertarian candidate for the Kentucky House of Representatives. *See* Docket No. 37-1 (Supp. Eckenburg Decl.) at Ex. A. Ironically, Mr. Watson's statement of candidacy was allegedly filed in November 2015 – some four months before he was "duly nominated by the appropriate congressional district convention on March 12, 2016" – and presumably without the LPKY's authorization. *Id.* at ¶¶ 7, 9 ("Until a candidate is nominated,

they are not permitted to run as a Libertarian under party rules.").[7] In any event, Mr. Watson is not a party to this lawsuit and the LPKY has not sued expressly on his behalf. And none of Plaintiffs have undertaken efforts to place Mr. Watson (or any other candidate) on the general election ballot via petition. *See id.* ¶ 7 ("*He and/or his campaign* is currently in the process of obtaining the requisite number of signatures to be placed on the 2016 general election ballot.") (emphasis added).

To the contrary, Plaintiffs now concede that they have not undertaken *any* effort to place *any* candidate on the 2016 general election ballot via petition.[8] *Id.* at ¶¶ 7-8, 20, 25; Docket No. 37-3 (Supp. Krogdahl Decl.) at ¶¶ 14, 15. Moreover, Plaintiffs admit that they will only collect signatures to place their respective presidential candidates on the 2016 general election ballot – but have not even started doing so. *See* Docket No. 37-1 (Supp. Eckenburg Decl.) at ¶¶ 20, 25; Docket No. 37-3 (Supp. Krogdahl Decl.) at ¶ 15. As a result, the Court should disregard entirely Plaintiffs' repeated and entirely speculative claims that Kentucky's ballot access framework will require them to spend hundreds of thousands of dollars to collect hundreds of thousands of

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[7] The circumstances of Mr. Watson's filing only underscore why Kentucky law appropriately imposes the same ballot access requirements on "political group" candidates and independent candidates – as further supported by Plaintiffs' admissions that their "nominees" for offices other than President of the United States must collect their own signatures.

[8] Although Plaintiffs claim repeatedly that Director of Administration and Elections Mary Sue Helm stated "incorrectly" that they "have not taken any steps to place <u>*any*</u> candidates on the November 2016 general election ballot," *see* Docket 37-1 (Supp. Eckenburg Decl.) at ¶ 5, Docket No 37-3 (Supp. Krogdahl Decl.) at ¶ 5, none of Plaintiffs appears to have attempted any effort to place any candidate on the ballot via petition – which, as Plaintiffs are well aware, is the only manner in which their candidates may access the general election ballot. *But see Ehrler*, 776 F. Supp. at 1210. Where, as here, "[t]here [wa]s no evidence that plaintiffs ha[d] 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," this Court held that plaintiffs "ha[d] not shown *any* support for their candidates," and "absent a showing of a 'significant modicum of support,' [they] [we]re not entitled to be placed on the November election ballot." *Id.* (emphasis in original).

signatures. *See, e.g.*, Docket No. 37 (Pls.' Resp.) at 11, 17, 33. The evidence of record makes clear that Plaintiffs have opted to nominate at most only a very few candidates in connection with the 2016 general election – and will collect at most 5,000 signatures each for their respective presidential candidates. *See* KRS 118.315 (setting forth signature requirement).

Moreover, the other alleged burdens identified by Plaintiffs are entirely self-inflicted – and are not imposed directly by Kentucky law. For example, the Court should reject Plaintiffs' suggestion that they "would have nominated substantially more candidates for office … but for the current Kentucky ballot access law." Docket 37-1 (Supp. Eckenburg Decl.) at ¶ 10. Quite plainly, there is nothing about Kentucky's ballot access framework that precluded Plaintiffs from nominating additional candidates and having them file statements of candidacy by April 1, 2016. Other burdens that Plaintiffs have attempted to manufacture – including an artificially limited window to gather signatures for nominating petitions – arise from timing pressures created by Plaintiffs' own internal nominating rules and procedures, and do not flow directly from Kentucky law. *See, e.g.*, *id.* at ¶¶ 9, 11-13, 17-18; Docket No. 37-2 (Supp. Decl. of Ken Moellman, Jr. at ¶¶ 4-6; Docket No 37-3 (Supp. Krogdahl Decl.) at ¶¶ 7-10, 12.

Because Plaintiffs have plainly not suffered any "'concrete and particularized'" injury in fact, they appear to lack standing even to bring this suit. *See, e.g.*, *Hooker v. Fed. Election Comm'n*, 21 Fed. App'x 402, 406 (6th Cir. 2001) (reviewing "the minimal constitutional requirements for standing in federal courts," including that "(1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the challenged conduct; and (3) it must be likely that a favorable decision will remedy the injury.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Clearly, any alleged injury to Plaintiffs caused by the Commonwealth's ballot access laws is entirely "'conjectural' or 'hypothetical.'"

Id. Regardless, because the uncontroverted factual record reveals that Plaintiffs have not suffered *any* actual injury in fact as a result of Kentucky's ballot access framework, the Court should apply a rational basis standard of review and uphold the Commonwealth's ballot access laws if Defendants identify "'important regulatory interests'" that they advance. *Hargett*, 767 F.3d at 546 (citations omitted).

2. As A Matter of Law, Kentucky's Petition Signature Requirement Is Not A Severe Burden On Plaintiffs' Rights.

A rational basis standard of review is further appropriate because this Court has already recognized that Kentucky's relatively modest signature petition requirement – the only conceivable burden placed on Plaintiffs in accessing the general election ballot – is not a severe burden on their rights. *See Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1209 (E.D. Ky. 1991) (Kentucky's petition signature requirement "imposes no undue burden on independent candidates *and minority party candidates*.") (emphasis added). *See also Anderson v. Mills*, 664 F.2d 600, 607 (6th Cir. 1981) ("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.").

Plaintiffs' continued reliance on *Hargett* to suggest otherwise is misplaced. *See* Docket No. 37 (Pls.' Resp.) at 22-26. This is because Plaintiffs have still failed to identify any requirement of Kentucky's ballot access framework that allegedly operates in conjunction with its facially valid petition signature requirement for "political group" candidates to deprive them of any constitutional rights. *But see Hargett*, 767 F.3d at 545 (remanding because record did not allow the Sixth Circuit "to determine the extent to which the plaintiffs are burdened by the signature requirement, *as it operates in combination with Tennessee's new deadline and other aspects of its ballot-access scheme*….") (emphasis added). Although Plaintiffs' supplemental declarations set forth several artificial and in any event self-inflicted timing pressures created by

their own internal nominating procedures, they have still not identified any other requirements *imposed by Kentucky law* that might exacerbate the minimal burden presented by its petition signature requirement. *Compare* Docket No. 37-1 (Supp. Eckenburg Decl.) at ¶¶ 9, 11-13, 17-18; Docket No. 37-3 (Supp. Krogdahl Decl.) at ¶¶ 7-10, 12 *with Hargett*, 767 F.3d at 545.[9] A rational basis standard of review is further applicable for this reason. *Id.* at 546.

3. Kentucky's Ballot Access Framework Reasonably Advances Important State Interests.

Because the uncontroverted record reflects that Plaintiffs here have not suffered any actual injury in fact – and regardless, this Court and others have recognized that Kentucky's petition signature requirement for "political groups" does not impose any severe burden on Plaintiffs – Kentucky's ballot access framework passes constitutional muster under *Anderson-Burdick* because Defendants have identified "'important regulatory interests'" that it furthers. *Hargett*, 767 F.3d at 546 (citations omitted). Defendants have more than satisfied this burden.

There can be no dispute that Kentucky's petition signature requirement 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." *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005); Docket No. 33-2 (Decl. of Mary Sue Helm in

[9] Moreover, unlike the far more restrictive Tennessee ballot access framework challenged in *Hargett*, once Plaintiffs' candidates have satisfied 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* Docket No. 33-2 (Decl. of Mary Sue Helm in Support of Defs.' Counter-Motion for Summ. J.) at ¶ 13.

Support of Defs.' Counter-Motion for Summ. J.) at ¶ 4.[10] The relatively modest burden associated with the petition signature requirement is likewise justified by the Commonwealth's strong interests in maintaining the stability of its political system, ensuring that candidates have a significant modicum of support and preventing voter confusion, ballot overcrowding and frivolous candidacies. *See, e.g.*, *Jenness*, 403 U.S. at 442. Accordingly, both the Sixth Circuit and this Court have recognized previously that 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.

Accordingly, Defendants have more than met their burden of identifying "important regulatory interests" furthered by Kentucky's ballot access framework. As a result, Kentucky's ballot access framework passes constitutional muster under either a rational basis standard or a more flexible balancing analysis. *See Hargett*, 767 F.3d at 546.

4. Plaintiffs Have Failed To Demonstrate A Significant Modicum Of Support Statewide For Their Respective Groups.

Plaintiffs continue to 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) – even though that provision only potentially enlarges Plaintiffs' rights – and plainly does not burden or discriminate invidiously against them.

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[10] The United States Supreme Court has "never required a State to make a 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 v. Socialist Workers Party*, 479 U.S. 189, 194-195 (1986). *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).

Plainly, Kentucky's petition signature requirement is the only potential burden faced by Plaintiffs in placing any candidates on the general election ballot. But the Commonwealth may require a "political group" to demonstrate a significant modicum of support statewide *for their group* before qualifying as a "political organization." *See e.g., Libertarian Party of N.H. v. Gardner*, 638 F.3d 6, 17 (1st Cir. 2011) ("It is well established that a state may base its recognition of a party, and the benefits of recognition, on the party's past electoral strength or demonstrated support."); *Munro*, 479 U.S. at 195 ("[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."). This is precisely what Plaintiffs have failed to demonstrate here.

As an initial matter, Plaintiffs concede that the CPKY enjoys even less support in Kentucky than the LPKY. *See* Docket No. 37 (Pls.' Resp.) at 5 n.5. But the LPKY itself has failed to identify evidence of a significant modicum of support statewide for its "political group." Instead, the LPKY relies entirely on the results of two isolated elections – for state treasurer in 2011 and U.S. Senate in 2014 – in which its candidates received, respectively, 4.61 percent and 3.1 percent of the votes cast statewide. *See, e.g., id.* at 6. But these results only underscore that although two of the LPKY's candidates have received some support for their individual candidacies, the LPKY itself has never achieved a significant modicum of support statewide.

Instead, presidential and gubernatorial contests have been recognized as an appropriate measure of statewide support for a "political group" – and the General Assembly may plainly require "political groups" to demonstrate a significant modicum of support in a top-level executive branch race before elevating their status to that of a "political organization." *See Green Party of Ark. v. Martin*, 649 F.3d 675, 686 (8th Cir. 2011) ("It is not unfair for [a state] to

tie the test for a political party's support to the races for governor and presidential electors, traditionally the two races [] that have garnered the most overall votes, thus furthering [the state's] interests by providing the broadest basis on which to test a party's support."). But Plaintiffs have never even placed a gubernatorial candidate on the general election ballot, much less achieved at least two percent of the vote statewide in a presidential race.[11]

At the same time, other "political groups" in Kentucky have qualified as "political organizations" in seventeen percent (17%) of presidential elections since 1924 – and 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."[12] Accordingly, Plaintiffs have simply been unable to achieve the significant modicum of statewide support for their "political groups" that other groups have been able to demonstrate. This is all the more reason why the Court should reject Plaintiffs' demand to nominate a slate of candidates to the general election ballot without having demonstrated *any* modicum of support whatsoever for either their "political groups" (by achieving at least two percent of the vote in a presidential contest) or individual candidates (via petition).

D. Plaintiffs Are Not Entitled To Their Requested Relief.

For the reasons set forth in Defendants' opening brief, Plaintiffs are not entitled to injunctive relief. *See* Docket No. 33-1 (Defs.' Memo. in Response to Pls.' Mot. and in Support of Counter-Mot. for Summ. J.) at 29-31. Indeed, Plaintiffs have not demonstrated a strong

[11] According to Plaintiffs, however, the Libertarian Party appears poised to qualify as a "political organization" later this year. *See* Docket No. 37-1 (Supp. Eckenburg Decl.) at ¶ 14 (noting that Gary Johnson, the Libertarian Party's leading candidate for President, is polling above ten percent (10%) nationally – particularly in a general election matchup with Republican front runner Donald Trump and Democratic front runner Hillary Clinton).

[12] *See* Docket No. 1 (Compl.) at ¶ 21; Docket No. 16-1 (Pls.' Mem. in Support of Their Mot. for TRO, Prelim. Inj., Permanent Inj., and Summ. J.) at 5; Docket No. 16-6 (Decl. of Richard Winger) at ¶ 18.

likelihood of success on the merits – and their supplemental affidavits make even more apparent that any alleged injury to them is entirely "'conjectural' or 'hypothetical'" because they have not even attempted to place any candidates on the 2016 general election ballot via petition (and have not identified any candidate who has been unable to access the ballot). *See Hooker v. Fed. Election Comm'n*, 21 Fed. App'x 402, 406 (6th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Moreover, the injunctive relief sought by Plaintiffs would impair the Commonwealth's important state interests in preventing voter confusion, and avoiding ballot overcrowding and the presence of frivolous candidacies.

Regardless, Plaintiffs plainly are not entitled to the specific relief that they have sought – namely the entry of a proposed order that would require the Court to rewrite Kentucky's ballot access framework. *See* Docket No. 37-5 (Proposed Order). By way of example, Plaintiffs suggest that the Court extend the April 1, 2016 deadline for filing statements of candidacy for state office, deem the Libertarian Party plaintiffs to be "political organizations" based solely on the performance of their candidates in past races for lower level offices, and allow both the Libertarian Party plaintiffs and the CPKY to qualify as "political organizations" in the future by submitting a single petition containing 5,000 signatures (which the Commonwealth has never recognized as an appropriate measure of statewide support for a "political group"). *See id.*

However, "the general federal rule is that courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991). Moreover, "[e]liminating unconstitutional conditions is not the same as adding new language, and the [United States Supreme] Court has sounded a note of caution even about eliminating unconstitutional conditions when a federal court reviews *state* statutes." *Id.* at 1124 (emphasis in original). Accordingly, the Sixth Circuit has recognized that:

> Even in cases in which the Supreme Court has seemed to act legislatively, it has done so in narrowly circumscribed ways and has maintained its general reluctance for federal courts to make policy decisions in relation to state statutes. Thus, the rule that courts are not to redraft statutes to preserve constitutionality remains generally applicable.

Id. *See also id.* at 1126 ("This Circuit has adhered to the principle that a federal court 'has very limited powers in construing state statutes or municipal ordinances.'") (citation omitted). As a result, the Court should reject Plaintiffs' invitation to rewrite Kentucky's ballot access laws to suit their own political purposes.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Counter-Motion for Summary Judgment and enter a judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 9, 2016, I electronically filed this Reply 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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