No. 10-3106

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GREEN PARTY OF ARKANSAS; MARK SWANEY and REBEKAH KENNEDY,

Plaintiffs-Appellants,

v.

MARK MARTIN, in his official capacity as Secretary of State of the State of Arkansas,

Defendant-Appellee.

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock
(4:09-cv-00695-DPM)

APPELLANTS' REPLY BRIEF

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Appellee Mark Martin, in his official capacity as Secretary of State of the State of Arkansas ("the State"), advances several arguments in favor of affirming the district court's grant of summary judgment below. First, the State asserts that the burdens imposed by Arkansas's party decertification statute are not severe. Second, the State argues that Arkansas has legitimate and compelling state interests in decertifying any political party whose candidate for President or Governor in the prior general election did not attract 3 percent of the vote. Third, the State contends that the burdens imposed by Arkansas's party decertification statute are reasonable and justified in light of those interests. Fourth and finally, the State contends that these restrictions fall within constitutional limits, as suggested by Supreme Court and Circuit Court authority concerning other states' ballot access schemes.

As a threshold matter, the State's brief obscures one crucial point. There are only two routes to securing a political party label for a candidate on a general election ballot in Arkansas: (1) filing a "new political party" petition with 10,000 signatures from qualified electors, *see* ARK. CODE ANN. § 7-7-205; or (2) garnering at least 3 percent of the entire vote cast for Governor or the presidential electors in the last general election, *see* ARK. CODE ANN. § 7-1-101(21)(A).[1] The State

[1] There is also a separate procedure for nominating presidential candidates by petition and securing a partisan label. *See* ARK. CODE ANN. 7-8-302(5). This is discussed in detail later in this brief.

suggests that Appellants Green Party of Arkansas ("GPA"), Mark Swaney ("Swaney"), and Rebekah Kennedy ("Kennedy") (collectively, "Appellants") may also obtain ballot access by filing independent candidate petitions or through write-in campaigns. The last two options do not provide a political party ballot access.

Arkansas law prohibits independent candidates from affiliating themselves with a non-qualified political party. *See* ARK. CODE ANN. § 7-7-103 (outlining independent candidate's petition procedures); *id*. § 7-5-207(d) (mandating that an independent candidate may only appear on the ballot with the label "INDEPENDENT"). Even though an independent candidate "for a district, county, or township office" may secure ballot position by collecting signatures from 3 percent of the qualified electors in the political subdivision up to 2,000—one-fifth of the signature requirement for statewide party qualification—s/he would still be barred from announcing any party affiliation. *Id*. § 7-7-103(b)(1)(A). Therefore, any Green Party-aligned independent candidate would be wholly deprived of the opportunity to signal his positions and beliefs on the ballot by utilizing a political party label. *See Norman v. Reed*, 502 U.S. 279, 288 (1992) (the First and Fourteenth Amendments protect the "right of citizens to create and develop new political parties" and of "like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences") (citation omitted); *Tashjian v. Republican Party*

of Conn., 479 U.S. 208, 220-21 (1986) (referring to informative function of party labels as "shorthand designation of the views of [the] party['s] candidates on matters of public concern"). As the Eighth Circuit has stated, "[a] candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process." *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). As for write-in candidates, they appear on the ballot with no political party label. The actual and sole issue in this case is whether Arkansas's party decertification statute is constitutional.

I. Legal Standard

To determine whether a particular restriction on associational rights violates the First and Fourteenth Amendments, a court must apply the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1986). The *Anderson* test requires the court first to weigh the "character and magnitude" of the burdens that the State imposes on those rights against the interests that the State offers as justification for those burdens. *Id*. at 789. When the law "imposes only 'reasonable, nondiscriminatory restrictions'" upon the rights of a party, candidate, or voter, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). However, when the law places heavy or discriminatory burdens on those rights, "the regulation must be 'narrowly drawn to

advance a state interest of compelling importance.'" *Id*. (quoting *Norman*, 502 U.S. at 289). Appellants bear the burden on the first step in the above test (evaluating the "character and magnitude" of the burden), whereas the State bears the burden on the second step (advancing interests sufficient to justify the burden). *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992).

II. The Burdens Imposed by Arkansas's Party Decertification Statute are Severe

A. *Arkansas's Party Decertification Law Burdens a Political Party's Right to Self-Determination*

Fundamental rights are at stake in this case, and the State's brief pays insufficient attention to the fact that Arkansas's ballot access scheme forces a new political party, which has successfully petitioned for ballot position, to contest races it may have no motivation or resources to contest. In striking down Connecticut's closed primary statute and recognizing a political party's freedom to associate with unaffiliated voters, the Supreme Court stated that "the Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224. This principle was reaffirmed in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), which treated as core protected activity a political party's "discretion in how to organize itself, conduct its affairs, and select its leaders." *Id*. at 230. By logical extension, a political party must also be free to pursue only those offices it wishes, and any regulation which

forces it to do otherwise must be closely scrutinized for constitutional infirmity. In his concurrence in *California Democratic Party v. Jones*, Justice Kennedy underscored this point in finding California's blanket primary unconstitutional:

> When the State seeks to *direct changes in a political party's philosophy* . . . , the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment.

530 U.S. 567, 587 (2000) (Kennedy, J., concurring) (emphasis added). Writing for the majority, Justice Scalia asserted that he could conceive of "no heavier burden on a political party's associational freedom" than "forced association." *Id*. at 581-82. Here, the forced "association" is not with certain members of the electorate, but with certain races which the party for strategic reasons may not want to pursue.

To grasp the extent of this law's infringement upon these constitutional rights, consider a hypothetical "All-Change-Is-Local" Party, which seeks *only* to contest local and state legislative elections and has absolutely no desire to field candidates for President, Governor, Senator, or U.S. Representative. Under Section 7-1-101(21)(A), that party would be forced either to contest any presidential or gubernatorial race in order to avoid decertification, or to waste precious resources in assembling and re-filing a new political party petition every two years. Similarly, GPA co-chair Kennedy has represented that the GPA "would like to focus on smaller, more local races, as consistent with our party's values, however state law requires us to build a party from top-down, and to focus on two

of the most expensive races to compete in to maintain our status." (Appellants' Sep. App. 326). The GPA's coordinator Swaney echoed this sentiment. (*Id*. at 331-32). The decertification statute fundamentally infringes the GPA's autonomy to choose races where it can have some impact and to chart its own course to long-term growth.

As appears below, the State has not identified a sufficiently compelling interest or even a merely legitimate, important, and non-discriminatory reason to justify forcing a developing political party either to contest the election(s) *of the state's choosing* or petition for access in every single election.

B. *Historically, With Only One Exception, Alternative Parties Are Always Decertified After Arkansas's General Election*

When considering the relative burden imposed by a particular ballot access restriction, "[p]ast experience will be a helpful, if not always an unerring, guide[.]" *Storer v. Brown*, 415 U.S. 724, 742 (1974). The impact of Arkansas's decertification scheme becomes quite clear when considered in historical perspective.

Since its enactment in 1971, only one political party, aside from the Republican Party and the Democratic Party, has satisfied the 3 percent threshold to avoid decertification: the Reform Party of Arkansas in 1996. (Appellants' Sep.

App. 356).[2] Arkansas's gubernatorial races have seen far fewer alternative-party candidates over the same period, and those few have never secured the requisite 3 percent of the vote. (*Id*. at 78-82). Most importantly, over 60 efforts to become a certified political party in Arkansas since 1971 have failed. (*Id*. at 379).[3] "The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *Am. Party of Texas v. White*, 415 U.S. 767, 783 (1974) (quoting *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)); *see also McLain*, 637 F.2d at 1165 (in striking down ballot access statute, crediting record of third parties' failure to qualify in

[2] Ross Perot ran in the 1992 presidential race as well, but as an independent. The Supreme Court of Arkansas later held that since Perot had attained 10.43 percent of the vote in 1992, this had the effect of creating the Independent Party of Arkansas ("IPA"), which could avoid decertification and thus was entitled to nominate candidates by primary. *Lewis v. West*, 318 Ark. 334, 337-38 (1994). The IPA became a qualified political party on September 19, 1994. *Id*. at 336. However, no such party existed in 1992, because no such party had filed a new political party petition to secure ballot position. That is why Appellants do not count Perot's 1992 performance as a second instance in which a political party satisfied the 3 percent vote threshold. Notably, the district court held that "only one party has met the 3% threshold in a presidential election (the Reform Party in 1996)." (Appellants' Sep. App. 345; *see also id*. at 356 ("[O]nly one party has maintained its status under the statute's 3% threshold.")).

[3] Contrary to the State's assertions, this information was contained in a document that was made part of the record pursuant to Judge Marshall's September 28, 2010 order which directed the filing of Plaintiffs-Appellants' Proposed Findings of Fact and Law in the record. (Appellants' Sep. App. 363-79). Notwithstanding Judge Marshall's clarification that he did not rely on the factual assertions contained therein in granting summary judgment for the State, this document was made part of the record. (*See id*. at 365 ("The Court directs the Clerk to certify a supplemental record—starting with *Document No. 94* and going forward to the end—to the Court of Appeals on 4 October 2010.")).

North Dakota "with regularity, or even occasionally" and fact that American Party was the "only third party to field party candidates in the past three decades"). With only one party in one election qualifying for the retention of its status, the 3 percent vote threshold renders avoiding party decertification nearly theoretical.

C. *Party Decertification Under These Circumstances Forces a Developing Party Like the GPA to Conduct a Petition Drive Before Every Election, Squandering Scarce Financial and Human Resources*

The State's constant refrain is that the GPA can simply petition for ballot access if it fails to garner 3 percent of the relevant presidential or gubernatorial race, and that the GPA has successfully done so in advance of the 2006, 2008, and 2010 general elections. Nevertheless, gathering 10,000 petition signatures in a matter of 90 days is no small feat for a developing political party. *See* ARK. CODE ANN. § 7-7-205(a). Swaney has represented that the 2010 petition drive has once again "seriously drained" the GPA's funds. (Appellants' Sep. App. 328-32). Senate candidate and GPA co-chair Kennedy also declared that the recurring petitions had depleted the party's funds and severely hindered their efforts to organize, recruit, hire professional staff, and launch voter outreach and public education campaigns. (*Id*. at 326). To be compelled to repeat the petition process again and again due to an exceedingly narrow test for continued party existence is a severe burden.

This suit challenges the decertification statute as applied to the GPA. Even if the Court assumes the petition requirement is facially valid, as the Supreme Court has noted, "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer*, 415 U.S. at 737. Here, the decertification provision does "change its character when combined with" the 10,000-signature petition requirement and creates an unconstitutional burden. *Id*.

III. The State Has Failed to Identify Compelling Interests

The State has proffered four interests which purportedly justify its ballot access and party decertification scheme, including the prevention of: (1) ballot overcrowding; (2) frivolous candidacies; (3) voter confusion; and (4) additional costs from running a primary for an alternative party. (Appellee's Br. 21, 36). The State is also concerned with "preserving the ballot for serious contenders in an election," but that merely recapitulates (2) without adding anything. (*Id*. at 21).

First, while in the abstract ballot overcrowding can be a legitimate state interest, as a practical matter, this is not even remotely an issue in Arkansas. Granted, the Supreme Court has affirmed that a state need not demonstrate actual electoral problems before implementing reasonable procedures to control access to the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("We have 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."). However, in Arkansas, a lack of political competition is more frequently observed than anything approaching "overcrowding" on the general election ballot. According to the 2008 Historical Report of the Secretary of State, the most candidates to appear in a general election race for a single office since 1971 was seven in the 2008 presidential race. (Appellants' Sep. App. 35). And even seven candidacies do not make a ballot "crowded." As Justice Harlan recognized in *Williams v. Rhodes*, 393 U.S. 23 (1968), "the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion." *Id*. at 47 (Harlan, J., concurring).

Significantly, between 2001 and 2007, Arkansas had the highest proportion of uncontested races of any state. (Appellants' Sep. App. 283-84, 289-92, 294, 307, 381). Sixty-five percent of the state's legislative elections between 2001 and 2007 were uncontested, and between 2004 and 2008, almost 78 percent went uncontested. (*Id*. at 282-83). From 2004 to 2008, voters in only 8 Senate districts total had the opportunity to choose between candidates. (*Id*. at 301). Additionally, the State saw the highest average vote for winning candidates and the highest average margin of victory between 2001 and 2007. (*Id*. at 292-93). These trends continued in 2008. (*Id*. at 297).

Additionally, the GPA has with some frequency mounted the only challenge to a lone major-party candidate. In 2008, for an election that drew widespread interest and massive turnout nationwide, the races for the following offices would have been uncontested in Arkansas but for the GPA's candidate: (1) Senator; (2) U.S. Representative for District 2 (ignoring a write-in candidate who garnered only 665 votes); (3) U.S. Representative for District 3; and (4) U.S. Representative for District 4. Arkansas only has four Congressional districts, which means 75 percent of the state's races for the U.S. House of Representatives would have been uncontested but for the entry of a GPA nominee. (*Id*. at 38, 67). Moreover, in 2008, the race for Congressional District 1 in fact did go uncontested. (*Id*. at 67).

The State's second proffered interest, frivolous candidacies, has been mentioned as a legitimate interest by the Supreme Court, but it is not compelling. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (citing "avoiding confusion, deception, and even frustration of the democratic process" as "important state interest[s]"). A state may craft regulations to prevent abuse of the ballot but, as with overcrowding, this interest is only as strong as the risk is real. Reasonable ballot access restrictions to guard against an explosion of candidacies

are allowed, but beyond a certain point, this is simply a means of protecting the two established parties' dominance. The Supreme Court has expressly rejected this as a legitimate justification, notwithstanding any stability dividend such favoritism might pay. *See Anderson*, 460 U.S. at 802 (citing *Williams*, 393 U.S. at 23, 31-32) ("In *Williams v. Rhodes* we squarely held that protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena."); *see also Timmons*, 520 U.S. at 366-67 (acknowledging certain restrictions "may, in practice, favor the traditional two-party system," but reaffirming that a state cannot "completely insulate the two-party system from minor parties' or independent candidates' competition and influence").

Third, avoiding voter confusion is a legitimate state interest, but it is essentially duplicative of "ballot overcrowding." The state would have no cognizable interest in preventing ballot overcrowding but for the possibility that certain voters might have difficulty casting their ballot.

Lastly, the State points to the additional financial and administrative burdens of running a primary for an alternative party. (Appellee's Br. 36-37). The Supreme Court has held as a matter of law that increased costs cannot justify a ballot access restriction. In *Tashjian*, the Court rejected "the possibility of future increases in the cost of administering the election system" as insufficient grounds

to infringe the First Amendment rights of a political party. 479 U.S. at 218. Writing for the Court, Justice Marshall emphasized that "the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford." *Id*. This, therefore, cannot serve as a compelling rationale for the party decertification statute.

In short, the State has offered the Court several boilerplate and overlapping reasons for the decertification statute, but none are compelling when considered in context, even if they might otherwise be legitimate and important. Moreover, the Secretary of State's brief does not communicate these reasons with any particularity so as to justify the precise scheme the state has adopted.

IV. The Burdens Imposed By the Party Decertification Statute Are Not Justified By the State's Asserted Interests

Even if the Court concludes that the State has identified legitimate and important or compelling interests in this matter, there is a crucial aspect of the *Anderson* inquiry's second step that the State fails to address, namely the nexus requirement. As the Supreme Court has explained, "the Court must not only determine the legitimacy and strength of each of those interests; it also must consider *the extent* to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789 (emphasis added). By its silence as to the specific necessity of this particular decertification standard, the State's brief appears to suggest that any non-arbitrary reason for a particular ballot access

restriction defeats a First Amendment challenge, regardless of the *degree* to which the particular restriction is necessary. *See, e.g.*, *Norman*, 502 U.S. at 293 ("Accepting the legitimacy of the interest claimed would not, however, excuse the requirement's unconstitutional breadth."). Respectfully, the law is otherwise, even as to lesser burdens. The lower court which ruled in the State's favor rejected the notion that mere rational basis scrutiny applied: "This review is not the rational-basis inquiry advocated by the State." (Appellants' Sep. App. 351). In addition to being reasonable and non-discriminatory, the restriction must also, at a bare minimum, be weighed against and found to be sufficiently supported by an important regulatory interest. Here, where fundamental rights have been severely burdened, the law must be narrowly tailored to a compelling interest. Ultimately, under either standard, the State has failed to demonstrate why its interests specifically demand the application of such a stringent party decertification law, and this is fatal to its arguments.

A. *The State's Brief Is Completely Silent As to Why an Office-Specific Decertification Provision Would Not Equally Satisfy Its Interests and Thus Concedes the Decertification Provision Is Not Narrowly Tailored*

The Supreme Court has explained that where a ballot access regulation imposes severe burdens on a nascent party, it must be "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *White*, 415 U.S. at 781. Similarly, in *MacBride v. Exon*, 558

F.2d 443 (8th Cir. 1977), the Eighth Circuit stated that "[t]he measures adopted by a state may not go beyond what the state's compelling interests actually require, and broad and stringent restrictions or requirements cannot stand where more moderate ones would do as well." *Id*. at 448. Here, the State has not demonstrated a sufficiently close relationship between the ends and means at issue. In each of the depositions counsel for Appellants conducted, state officials failed to explain the specific interests that necessitated such a stringent ballot access scheme. More precisely, the State has not explained: (1) why the party decertification standard must be linked without exception to the results of a prior presidential or gubernatorial race, and (2) why the state's proffered interests in safeguarding the ballot from overcrowding and the electorate from confusion would not be equally served by an office-specific alternative.

Arkansas could easily disaggregate party qualification by office, applying the 3 percent threshold to the party's share of the last vote *for each specific race*. Six states (Connecticut, Georgia, Illinois, Missouri, Nebraska, and Oregon) disaggregate continued party qualification in some fashion, applying different standards and tests for different levels of public office, and each of those states would likely identify the very same interests Arkansas has in this litigation. *See* CONN. GEN. STAT. ANN. § 9-372(6); GA. CODE ANN. §§ 21-2-180(2), 21-2-2(25); 10 ILL. COMP. STAT. ANN. § 5/10-2; MO. REV. STAT. ANN. § 115.013(10); NEB.

REV. STAT. ANN. § 32-610; ORE. REV. STAT. ANN. §§ 248.008(1)(b), (4). Significantly, in sustaining Missouri's petition and signature distribution requirements, the Eighth Circuit in *Libertarian Party v. Bond* underscored that a new political party would become "established," *i.e.* avoid decertification, if any statewide candidate secured at least 2 percent "of all votes cast *for that office*." 764 F.2d 538, 542-43 (8th Cir. 1985) (emphasis added). The liberality of Missouri's disaggregated decertification provision was an important factor in the court's approval of the petition requirement for initial access. *Id*. at 543 ("Thus, the signature requirement is essentially merely a one-time burden for parties which actually have a minimal amount of voter support."). By contrast, Arkansas's decertification provision contains such a steep threshold that almost invariably the petition requirement becomes a repeated and cumulative burden.

Arkansas's officials have even conceded that there is no legitimate reason for failing to use an office-specific alternative. When former Secretary of State Charlie Daniels ("Daniels") was asked if he could "think of any good reason why the three percent threshold should be limited to the presidential and governor's race," he admitted that he could not. (Appellants' Sep. App. 239). When he was asked if Arkansas had "any interest in preventing or discouraging a party" from focusing on local or regional races, as opposed to statewide contests, he also answered "No." (*Id*. at 238). Indeed, the only explanation Daniels gave for

making the gubernatorial and presidential races the relevant benchmarks was that "generally in those elections, there are more votes cast; there's a greater voter turnout." (Dkt. No. 50, Opp'n to Mot. for Summ. J., Ex. 2, Daniels Tr. 49:13-21). When pressed again on what specific state interests or reasoned justifications are promoted by the decertification standard, Daniels again could not identify any. (*Id.* at 53:24-54:6).[4]

Not only has the State failed to explain away the statute's over-inclusiveness by articulating why a disaggregated party disqualification scheme is inadequate to its purposes, but part of Arkansas's ballot access scheme is directly at odds with its identified interests. In Arkansas, an uncertified party, *i.e.* a "political group," can place a presidential candidate on the ballot by submitting a petition with a mere 1,000 registered electors' signatures, and there is no time limit for the collection of these signatures. ARK. CODE ANN. § 7-8-302(5). Therefore, a political party seeking to contest solely local, district, and other political subdivision races must gather *10 times* as many signatures as a party nominee who wishes to seek the presidency in Arkansas. One party that has demonstrated widespread support in

[4] Another approach to party decertification would allow the party to run candidates in any race as long as the party had secured 3 percent in *any* statewide race, which the GPA clearly accomplished in 2008. During her deposition, Pam Ratliff, the Assistant Director of Elections for the Arkansas Secretary of State's Elections Division, considered that proposal and stated that her job would not be affected at all if such a rule were applied. (Dkt. No. 50, Opp'n to Mot. for Summ. J., Ex. 7, Ratliff Tr. 7:10-16, 56:7-13).

down-ticket races would be subjected to the repeated burden of producing 10,000 signatures each election to contest non-presidential seats, whereas another party's presidential candidate could continually jump on the ballot with 1,000 signatures *even if* that party never attracts more than a handful of votes.

Furthermore, there is a glaring inconsistency between such a minimal requirement for partisan access to the presidential race and Arkansas's strict prohibition on any independent candidate's use of a non-qualified party label. ARK. CODE ANN. § 7-5-207(d). With respect to district, county, or township offices, candidates may attain ballot position with 2,000 signatures. However, whereas a party label is automatically bestowed upon a presidential nominee if his/her party collects 1,000 signatures, down-ticket candidates who net twice as many signatures still cannot publicize any party affiliation on the ballot. *Id*. §§ 7-7-103(b)(1)(A), 7-5-207(d). Relying on the State's own representations as to its interests, the scheme is so internally inconsistent that it borders on arbitrary. *See MacBride,* 558 F.2d at 448-49 (striking down "arbitrary" petition requirement with such an early deadline as to "effectively prevent a third party presidential candidate from ever gaining a position on the state's general election ballot"). The Court should find that the decertification scheme is not narrowly tailored to the goal of uniformly reducing ballot overcrowding, frivolous candidacies, and voter confusion, or even sufficiently connected to those interests.

If Arkansas were truly committed to preventing ballot overcrowding, frivolous candidacies, and voter confusion across the board, it would not throw open the highest profile race—the presidential race—to any independent candidate or new political party that can gather 1,000 signatures. If the law is intended to tolerate a presidential race with numerous partisan labels on the ballot, then there can be no justification for refusing to allow the same political diversity in "district, county, or township offices" unless the party acquires 10 times as many signatures. The virtually unfettered access afforded to presidential nominees defies logic, as well as the argument Appellee has outlined for the Court as to why its law satisfies the *Anderson* balancing test. In 2008, seven candidates, including candidates from the Libertarian, Constitution, Green, and Socialism/Liberation parties, plus an independent candidate, all appeared as contenders for the Presidency on Arkansas's general election ballot, *the most of any federal or state race held in Arkansas that year*. (Appellants' Sep. App. 35). In 2004, six presidential candidates appeared on the ballot in Arkansas, again the most of any federal or state race held in Arkansas that year. (*Id*. at 173-74). The State has not explained this inconsistency, which severely undermines its position in this litigation: that a party decertification threshold arbitrarily pegged to the very same presidential race which has a bare 1,000-signature entry requirement is necessary to limit the playing field to parties with a "significant modicum of support." *Munro*, 479 U.S.

at 193. Ultimately, the decertification statute is not carefully calibrated to that purported end.

Finally, the Supreme Court has viewed with skepticism an identified state interest that is treated seriously in one ballot access context and minimized or even ignored in another. In the 1992 opinion in *Norman v. Reed*, the Supreme Court struck down a disparity in the signature requirements for statewide qualification and qualification within a multidistrict political subdivision. 502 U.S. at 293-95. The rule, which the Court noted adversely and disproportionately affected emerging local parties, required "a party's organizers to obtain 25,000 signatures for each district [in a multidistrict subdivision] in which they run candidates" or suffer disqualification of all their candidates running in that subdivision. *Id*. at 282, 293. Justice Souter wrote:

> [A] prerequisite to establishing a new political party in such multidistrict subdivisions is some multiple of the number of signatures required of new statewide parties. . . .
>
> Organizers of a new party could therefore win access to the statewide ballot, but not the Cook County ballot, by collecting all 25,000 signatures from the county's city district. *But if the State deems it unimportant to ensure that new statewide parties enjoy any distribution of support, it requires elusive logic to demonstrate a serious state interest in demanding such a distribution for new local parties.* Thus, . . . the State's requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster. [Respondent] has *adduced no justification for the disparity here.*

Id. at 293-94 (emphasis added). Therefore, according to controlling Supreme Court authority, consistency in a state's treatment of a proffered interest is essential. Lacking consistency, the state must come forward with an explanation for the differential treatment with respect to separate ballot qualifications. Here, the State treats its interest in preventing ballot overcrowding and voter confusion seriously when it comes to decertifying a political party (even one that has in fact performed quite well in non-presidential races), but seems not to care at all whether the presidential race includes two, seven, or twenty candidates. If there is a justification for this incongruity, aside from impermissible discrimination against alternative parties, the State has not identified it.

B. *The GPA Has Demonstrated a "Significant Modicum of Support," Demonstrating That Arkansas's Party Decertification Threshold Is At Best Arbitrary and At Worst Purposeful Discrimination Against Developing Alternative Parties*

Even if the Court concludes the burdens imposed by the decertification provision are not severe, Arkansas has not set forth a sufficiently close relationship between the statutory scheme and its interests in this *as-applied* challenge. Application of the arbitrary 3 percent litmus test masks the actual support the GPA does in fact enjoy in Arkansas and the benefit it has conferred in giving the state's voters an actual choice in a number of key races that would have been uncontested. In an effort to paper over the GPA's impressive 2008 electoral performance in non-presidential races, the State discounts any race in which the GPA ran against either

(1) only one of the two major parties, or (2) only independent or write-in candidates. (Appellee's Br. 9-11). Indeed, it is suggested that the only races which indicate the GPA's true level of support in Arkansas are those which are also contested by both Republicans and Democrats. (*Id*. at 30). Correspondingly, the State asserts that the gubernatorial and presidential races, which are always contested by both major parties and attract the highest vote totals, provide the best metric for a third party's level of support. (*Id*. at 18). Unfortunately, this conclusion is submitted without reasoned analysis, and it is flawed. Logically, a party may enjoy a "significant modicum of support" in a given state, and yet, still fail to garner 3 percent of the vote in the presidential and gubernatorial elections. A voter might wish to ensure that the highest federal or state executive office is filled with a member of one of the established and experienced parties and nevertheless cast a vote for qualified, alternative-party candidates in down-ticket races.

Here, the GPA has demonstrated significant support in the 2008 and 2010 elections, with Kennedy earning over 20 percent of the vote in the 2008 Senate race and almost 27 percent in the 2010 Attorney General race, Richard Carroll winning a state legislative seat in 2008, and Bobby Tullis garnering nearly one

third of the vote for State Treasurer in 2010. (Appellants' Sep. App. 35, 101).[5] Former Secretary of State Daniels conceded that the 2008 general election demonstrated that the GPA did enjoy a "significant modicum of support" in Arkansas. (*Id*. at 224-29). The Director of the State Board of Election Commissioners Susie Stormes also agreed that the GPA has shown a significant level of support among Arkansas voters. (*Id*. at 271). As applied to the GPA, the decertification statute is sweeping in a party that actually *does* enjoy a "significant modicum of support."

In a first-past-the-post, winner-take-all system, political power tends to aggregate in two broad coalitions which compete for a shifting political center and attempt to avoid an empty-handed second place. Whatever Arkansas's legislators may think of a third party's vying for an inevitable third place, that party has a constitutional right to seek ballot position, present the voters with an alternative, and campaign for support the same as the two established parties. The State

[5] The Court may take judicial notice of the certified 2010 election results in Arkansas pursuant to Federal Rule of Evidence 201. In *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001), the Tenth Circuit took judicial notice of a Congressman's reelection shortly before oral argument and the percentage of the vote he obtained. *Id*. at 885 n.8. The 2010 general election results from Arkansas may be viewed on VoteNaturally, "Arkansas's one-stop online guide to voting in the Natural State," which is linked from the official website of the Arkansas Secretary of State's Elections Division. *See* Arkansas Secretary of State Presents VoteNaturally, 2010 General Election & Non-Partisan Judicial Runoff Election: Results by Contest, http://www.votenaturally.org/electionresults/index.php?ac:show:by_contest=1&elecid=231 (last visited Feb. 22, 2011).

appears to argue that it need not tailor its restrictions at all, once it has proffered any legitimate, important interest. That cannot be the rule, since then, a 20, 30, or 40 percent vote threshold could be set for continued party qualification, and the statute would survive the *Anderson* balancing test. Instead, the State must explain the specific relationship between the particular means and the particular ends and why the ballot access scheme is reasonable even in light of the over-inclusiveness (decertifying parties with demonstrated success) and under-inclusiveness (presidential nominations by 1,000 signatures) which Appellants have identified. Even if *narrow* tailoring is not applied, the law requires *some* tailoring and a justification for the extent of the burden's severity. Lacking a reasoned basis for restricting the GPA's rights, the State's regulation must be found unconstitutional.

C. *The State's Cited Authorities Do Not Support Its Position*

The State first relies on the Supreme Court's opinion in *Jenness*, but this case did not squarely address Georgia's decertification provision. Instead, the Court evaluated and upheld the state's petition requirement, which in fact only required "the signatures of 5% of the eligible electorate *for the office in question*." 403 U.S. at 438 (emphasis added). The office-specific scheme did not require local party candidates to demonstrate a significant modicum of *statewide* support in order to run in a state legislative or municipal race. Such a petition scheme was far more liberal than what exists today in Arkansas, and the Court was careful to

emphasize the "open quality of the Georgia system." *Id*. at 439. Thus, this case cannot be read as blanket approval for any kind of two-tier structure.

The Supreme Court's decision in *American Party of Texas v. White* is similar to *Jenness*, except Texas's petition requirement was not office-specific. However, *White* also did not squarely address a decertification requirement; it was not listed as one of the five provisions challenged by the appellants. 415 U.S. at 779-80. It is clear that the issue presented in this litigation was not precisely before the Court, because the majority opinion characterized the vote threshold for retention of party status as an onerous requirement from which the minor parties are fortunately exempt and the primary process in the same manner. *Id*. at 782-83 & n.16. The Court did not consider an as-applied challenge with a record of electoral performance such as the GPA's; nor did the case properly set up the key issue, the interaction between onerous decertification and petition requirements. As such, *White* does not control the outcome in this case.

Furthermore, as the Fourth Circuit has noted, *White* is called into some doubt by *Norman*, in which the Court "cautioned . . . that it may be impermissible for a state to 'foreclose the development of any political party lacking the resources to run a statewide campaign.'" *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1224 (4th Cir. 1995) (quoting *Norman*, 502 U.S. at 289)). This line in particular suggests that *White* and its progeny like *McLaughlin*, which relied upon *White* to

sustain North Carolina's decertification statute, must be narrowed to their facts. *Id.* at 1223-26 (expressing reservations about the severity of North Carolina's scheme and whether *White* survives subsequent Supreme Court rulings). After all, each of these cases is quite context-dependent, and each ballot access scheme must be evaluated on its own terms to determine whether the scheme effectively "forecloses" a third party's development by requiring it (counter-intuitively) to build from the top down.

The State also cites the Tenth Circuit's decisions in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988), and *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982). In *Rainbow Coalition*, the court merely held that variation in a signature requirement created by using alternating gubernatorial and presidential races as benchmarks was not unconstitutional. 844 F.2d at 742-44. It is of no help to the State in this case. *Arutunoff* was cited but not discussed in the State's brief, so we do not address it here.

Additionally, *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006) presented different issues from the ones before the Court in this litigation. *Rogers* involved a challenge to a petition requirement, and the appellants argued that their prior satisfaction of the vote threshold to avoid party decertification should excuse them permanently from the petition requirement. *Id*. at 191. The Court principally

focused on the burden imposed by the 2 percent signature requirement for minor party candidate petitions. *Id*. at 193, 196. Though the Court rejected the appellants' additional argument that the petition requirement should be waived when a party has previously satisfied the vote threshold (but not in the immediately preceding election), this was not the focus of the opinion. *Id*. at 196-197. The Court wrote: "The fact that a minor political party has earlier shown a modicum of support by meeting a separate goal which entails a separate distinction, does not render the burden on plaintiffs an improper one." *Id*. at 196. Here, Appellants directly target the burdens imposed by the test governing retention of party status and do not merely seek to invoke a prior fulfillment of the vote threshold as a safe harbor. *Rogers* is therefore of limited weight and, at any rate, non-binding in this Circuit.

Lastly, *Libertarian Party of Maine v. Diamond*, 992 F.2d 365 (1st Cir. 1993) only treated a variety of ballot access requirements, not a standard for retention of party status, so it is inapplicable here.

V. Conclusion

From a historical point of view, one could not have devised a more effective scheme to permanently exclude nascent alternative parties from Arkansas politics. The only candidate to ever satisfy the 3 percent standard was independently wealthy and thus financially able to run a campaign for national office, with the

necessary advertisement buys. Smaller parties devoted to building up from the local level can only aspire to that capacity. Party decertification statutes which are pegged to third-party success in *only* Presidential and/or gubernatorial races are thinly disguised attempts to preserve national-party dominance and Republicans and Democrats' duopoly. That disguise happens to dovetail nicely with some uncontroversial, but overblown, interests identified by the State. Upon careful reflection, however, those interests do not justify the *extent* of the burdens imposed by such a stringent party decertification statute which was first enacted to impede the American Party.

In reality, Arkansas's election code tolerates a large number of parties on the ballot, but *only* for presidential races. Given the identified interests and the State's silence on this deviation, the Court has not been provided with an explanation for why the State fails to effectuate its principles and address its concerns with uniformity across its ballot access scheme. The State does not tell us why parties with significantly less support than the GPA may run repeatedly for President on 1,000 collected signatures, while the GPA must struggle to run candidates in local and political subdivision races. The State fails to mention why it has not provided an exception to the decertification test for parties that election after election demonstrate significant support in non-presidential and non-gubernatorial races. These are fairly simple alternatives that would equally serve the State's interests,

while better guarding Appellants' constitutional rights. Absent an explanation for the course the State *has* taken, its scheme fails the *Anderson* balancing test.

For the foregoing reasons, we respectfully ask the Court to reverse the lower court's grant of summary judgment to the State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). Excluding those portions of the brief exempted from the limitations by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,992 words. The brief was prepared in Microsoft Office Word 2003 using Times New Roman 14-point font.

/s/ Laughlin McDonald

CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, February 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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