IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LIBERTARIAN PARTY OF OKLAHOMA, et al.,	)	
Plaintiffs,	)	
vs.	)	NO. CIV-12-119-D
PAUL ZIRIAX, et al.,	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Before the Court is the motion [Doc. No. 3] of Plaintiff Libertarian Party of Oklahoma ("Libertarian Party")[1] for a preliminary injunction pursuant to Fed. R. Civ. P. 65. Plaintiff seeks to enjoin Defendants from enforcing the provisions of Okla. Stat. tit. 26, § 1-108 (2011) as it applies to Plaintiff with regard to the statute's deadlines for the submission of petition signatures, and the number of signatures, required to recognize the Libertarian Party as a political party and secure its placement on the Oklahoma ballot for the 2012 elections. Defendants filed a response to the motion, and Plaintiff filed a reply.

On March 12, 2012, the Court conducted a hearing on the motion. Plaintiff Libertarian Party appeared through its counsel of record, James C. Linger; Defendants appeared through their counsel, Assistant Attorneys General Martha R. Kulmacz and Nancy A. Zerr. The Court received the stipulations of the parties, and heard the testimony of witnesses. In addition, the Court admitted into evidence numerous exhibits offered by the parties.

At the close of the hearing, the parties were directed to submit written closing arguments, and

[1]Although the Green Party of Oklahoma is also a plaintiff in this action, the parties have stipulated that it does not seek a preliminary injunction.

they have done so. Having considered the evidence at the hearing and the parties' briefs and arguments, the Court now issues its ruling on the request for a preliminary injunction.

I. Background:

On January 31, 2012, Plaintiffs brought this action to challenge the constitutionality of Oklahoma's amended statute governing the procedures for the recognition of new political parties and the placement of such parties' candidates on the election ballot. As Plaintiffs allege, the applicable statute, Okla. Stat. tit. 26, § 1-108 ("§1-108") was amended on May 10, 2011 to require submission of a notice to form a recognized political party no later than March 1 of any even-numbered year. The previous deadline for doing so was May 1 of any even-numbered year. The amendment became effective on November 1, 2011. The amended statute does not alter the number of registered voter signatures which must appear on the petition, as that number remains at five percent (5%) of the total votes cast in the last general election either for Governor or for electors for President and Vice President. § 1-108(2). The parties agree that, for the 2012 election year, the five-percent requirement is satisfied by submission of 51,739 valid signatures on or before March 1, 2012. The Libertarian Party contends that the amendment to § 1-108 is unconstitutional as applied to it because the March 1 deadline unreasonably restricts its ability to obtain recognition as an organized political party in Oklahoma for the 2012 election cycle.

Although the amendment provides a one-year period for collecting petition signatures, that time period is necessarily shortened to ten months this year because the amendment was not enacted until May of 2011. In its request for injunctive relief, the Libertarian Party asks the Court to order the extension of the March 1 petition deadline to May 1, 2012. Alternatively, it asks the Court to reduce the total number of petition signatures required for compliance with the March 1 deadline to

account for the reduced period for gathering signatures. As an additional alternative request, it asks the Court to direct that the Libertarian Party be placed on the 2012 ballot and select its candidates in a nominating convention.

In response, Defendants argue that the amendment to § 1-108 was enacted for the sole purpose of ensuring Oklahoma's compliance with a 2009 federal law, the Military and Overseas Voter Empowerment Act ("MOVE Act")[2]. Congress enacted the Move Act to ensure that military personnel and other overseas voters receive absentee ballots in sufficient time to complete and return them for inclusion in primary and general elections. The MOVE Act requires each state to mail absentee ballots to members of the military and other voters residing overseas at least 45 days prior to that state's scheduled primary, runoff primary, special and general elections. According to Defendants, to ensure Oklahoma's compliance with the MOVE Act, the entire Oklahoma election cycle had to be adjusted so that deadlines and events occur earlier in the calendar year of 2012 than in prior years. One of the altered deadlines is the deadline for submission of petitions required to obtain recognition as a political party in Oklahoma, thus ensuring placement on the election ballots. Defendants contend that the new deadline is necessary to meet other election-cycle deadlines which must be satisfied prior to the printing and distribution of absentee ballots in compliance with the MOVE Act, and the altered deadline is not designed to restrict a minority political party's ability to be recognized and placed on the Oklahoma ballot. Defendants also argue that the five-percent requirement is not new and has been upheld as constitutional in previous court decisions.

II. Standards governing preliminary injunctions:

[2]The Move Act amended the Uniformed and Overseas citizens Absentee Voting Act of 1986, and is codified at 42 U. S. C. §§ 1973ff to 1973ff-7.

"Preliminary injunctions are extraordinary equitable remedies designed to 'preserve the relative positions of the parties until a trial on the merits can be held.'" *Westar Energy, Inc. v. Lake*, 552 F. 3d 1215, 1224 (10th Cir. 2009) (quoting *University of Texas v. Camenisch*, 451 U. S. 390, 395 (1981)). Thus, a preliminary injunction "serves to preserve the status quo." *MacArthur v. San Juan County*, 497 F. 3d 1057, 1066 (10th Cir. 2007), (citing *Keirnan v.Utah Transit Authority*, 339 F. 3d 1217, 1220 (10th Cir. 2003)). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Port City Properties v. Union Pacific R. Co.*, 518 F. 3d 1186, 1190 (10th Cir. 2008); *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)); *see also Schrier*, 427 F.3d at 1258.

To obtain a preliminary injunction, the movant must show: 1) a substantial likelihood of success on the merits;[3] 2) irreparable harm to the movant if the injunction is denied; 3) the threatened harm to the movant outweighs any harm to the opposing party if the injunction issues; and 4) issuance of the injunction would not be adverse to the public interest. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (quoting *Chamber of Commerce v. Edmondson,* 594 F.3d 742, 764 910th Cir. 2010)); *see Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the

[3]While some Tenth Circuit cases do not include the word "substantial" in listing this factor, the recent decisions do so. *See, e.g., Flood v. ClearOne Communications, Inc.,* 618 F. 3d 1110, 1117 (10th Cir. 2010);*Chamber of Commerce v. Edmondson*, 594 F. 3d 742 (10th Cir. 2010); *Attorney General of Oklahoma v. Tyson Foods, Inc.,* 565 F. 3d 769, 788 (10th Cir. 2009);*Westar Energy, Inc. v. Lake*, 552 F. 3d 1215, 1224 (10th Cir. 2009). The Tenth Circuit has also referred to this factor as requiring a plaintiff to show a "reasonable probability" that it will succeed on the merits. *See, e.g., Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F. 3d 1081, 1100 (10th Cir. 2003).

extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted).

In some circumstances, if the movant can establish that the factors of irreparable harm, the balancing of hardships, and the public interest tip strongly in its favor, the preliminary injunction test is modified, and the movant may meet the requirement that there is a likelihood of success on the merits by showing "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Davis v. Mineta*, 302 F. 3d 1104, 1111 (10th Cir. 2002); *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F. 3d 1190, 1195 (10th Cir. 1999).

This modified test does *not* apply, however, where the requested relief is among the "disfavored" categories of injunctions, including those which: 1) disturb the status quo; 2) are mandatory as opposed to prohibitory; or 3) afford the movant substantially all the relief he may recover at the conclusion of a full trial on the merits. *See O Centro Espirta Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F. 3d 973, 975 (10th Cir. 2004) (en banc), *aff'd sub nom.*, 546 U.S. 418 (2006). In such cases, the movant must satisfy a heightened burden and make a strong showing that all four factors are met. *Id.; see also Attorney General v. Tyson Foods, Inc.*, 565 F. 3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F. 3d 1203, 1210 (10th Cir. 2009). The Tenth Circuit has also held the modified test is inapplicable where a preliminary injunction seeks to "stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme*." Nova Health Systems v. Edmondson,* 460 F. 3d 1295, 1298 n. 6 (10th Cir. 2006); *Heideman*, 348 F. 3d at 1189; *Aid for Women v. Foulston,* 441 F.3d 1101, 1115 (10th Cir. 2006). Courts "presume that all governmental action pursuant to a statutory scheme is "taken in the public interest.'" *Aid for Women*,

441 F.3d at 1115 n.15.

Because the Libertarian Party seeks mandatory relief which alters the existing procedures pursuing to § 1-108 and impacts actions by the Election Board taken pursuant to a state statutory scheme, the requested injunction falls within the "disfavored categories" of injunctive relief. Accordingly, the modified test for relief is inapplicable, and the Libertarian Party must establish all four elements of the requirements for a preliminary injunction. It bears a "heightened burden" of proof in this regard, and must show that "the exigencies of the case support the granting of a remedy that is extraordinary." *O Centro*, 389 F.3d at 975. As explained, *supra,* to satisfy that burden the Libertarian Party must present evidence establishing a "clear and unequivocal" right to relief. *Heideman,* 348 F.3d at 1188; *Kikumura*, 242 F.3d at 955.

III. The parties' stipulations:

The parties have stipulated and agreed to the following[4]:

1. Only the Libertarian Party of Oklahoma is seeking a preliminary injunction.

2. The Defendants reserve all objections regarding Plaintiffs' standing, particularly as to the Green Party and the Plaintiff(s) affiliated with the Green Party.

3. The Defendants have been correctly designated, but because the Libertarian and Green Parties' names in this lawsuit differ from the names formally submitted to the Oklahoma State Election Board, it is unknown to the Defendants whether the Plaintiffs are correctly designated.

4. Venue of this Court is properly invoked.

5. The United States Congress in October of 2009, passed the MOVE Act, Pub.L.No. 111-84,

[4]In incorporating the parties' stipulations into this Order, the Court has revised some terminology to ensure consistency with the format of this Order and avoid repetition. The Court has not altered the substance of the stipulations, and the original text appears in the parties' submission filed of record on March 9, 2012 [Doc. No. 11].

Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009), which amended the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7.

6. Okla. Stat. tit. 26, § 1-108 was amended on May 10, 2011, when Governor Mary Fallin signed H.B. 1615, the "Let the Troops Vote Act" ("H.B. 1615"), which had an effective date of November 1, 2011. Governor Mary Fallin signed the current amended Okla. Stat. Tit. 26, § 1-108 ("§ 1-108") on May 10, 2011.

7. H.B. 1615 placed into state law the MOVE Act requirement of mailing absentee ballots to military and overseas voters at least 45 days prior to primary run-off, special and general elections, and made it applicable to both state and federal elections in Oklahoma.

8. H.B. 1615 also moved candidate filing periods and the primary and runoff primary to earlier dates to permit the Election Board to comply with the 45-day mailing requirement for absentee ballots; it also made other changes to the election cycle calendar to accommodate changes to the primary and candidate filing periods.

9. For 2012, the five-percent petition signature requirement of § 1-108 for new political party recognition requires petition signatures to be filed by March 1, 2012, with signatures of 51,739 registered voters of Oklahoma.

10. Under § 1-108, both before and after the 2011 amendment, each petition page must contain the names of registered voters from a single county.

11. By notice to the Oklahoma State Election Board ("Election Board") on May 3, 2011, the Libertarian Party of Oklahoma notified the Election Board of its intent to form a new recognized political party.

12. By notice dated October 3, 2011, the Americans Elect party notified the Election Board

of its intent to form a new recognized political party.

13. By notice dated October 20, 2011, the Green Party of Oklahoma notified the Election Board of its intent to form a new recognized political party, but communicated no further with the Election Board and did not submit any petitions or signatures.

14. By notice dated October 7, 2011, the Constitution Party notified the Election Board of its intent to form a new political party, but communicated no further with the Election Board and did not submit any petitions or signatures.

15. Both before and after the 2011amendment to § 1-108, the statute provided for a maximum of one year from the date of the filing of the Notice of Intent to Form Political Party in which to obtain the required petition signatures, with the proviso that, prior to the amendment, the petition signatures could be submitted no later than May 1 in even-numbered years, and after the 2011 amendment the submission deadline was no later than March 1 of even-numbered years.

16. In 2003, § 1-108 was amended so as to move the petition signatures deadline from May 31 to May 1 of even-numbered years, such as 2004.

17. The Libertarian Party challenged the constitutionality of the 2003 change in the petition signatures deadline from May 31 to May 1, but lost its request for a temporary injunction, and the statute, § 1-108, was upheld as constitutional in *Libertarian Political Organization v. Clingman*, 162 P.3d 948 (Okla. Civ. App. 2007), which appellate decision was not appealed to the United States Supreme Court.

18. Under § 1-108, both before and after the 2011 amendment, the Election Board has 30 days from the date the petitions are filed to verify the signatures and recognize the political organization as a political party or determine that the petition signatures are insufficient, which

deadline in 2012 is March 31, 2012.

19. In 2012, there is a blackout period during the primary season, from April 1 to August 31, 2012, when voter party affiliation changes may be submitted but are not processed until September 1. In 2004, this period commenced June 1.

20. In the year 2004, the filing period for political party nominations in the State of Oklahoma was June 7, 8 and 9, 2004, and in 2012 it is April 11, 12, and 13, 2012.

21. In the year 2004, the filing deadline for contesting a political party's candidates was June 11, 2004, at 5:00 p.m., and in 2012 it is April 17, 2012, at 5:00 p.m.

22. In the year 2004, the political party primary election in the State of Oklahoma was held July 27, 2004, and in 2012 it is June 26, 2012.

23. In 2012, the MOVE Act and H.B. 1615 require absentee primary election ballots to be mailed no later than May 11, 2012.

24. In any race where a single candidate does not obtain a majority of the votes in the primary election a run-off primary election is held.

25. In the year 2004, the run-off primary election in the State of Oklahoma was held August 24, 2004, and in 2012 it will be August 28, 2012.

26. In 2012, the MOVE Act and H.B. 1615 require that absentee run-off election ballots must be mailed no later than July 13, 2012.

27. In the year 2004, the general election in Oklahoma was held November 2, 2004, and in 2012 it will be November 6, 2012.

28. In 2012, the MOVE Act and H.B. 1615 require that absentee general election ballots must be mailed no later than September 21, 2012.

29. The Libertarian Party of Oklahoma filed Notices of Intent to Form a Recognized Political Party on May 1, 2003, April 16, 2007, and May 3, 2011.

30. The Libertarian Party of Oklahoma, after having had twelve months including March and April to circulate its 2004 petition, submitted unverified signatures totaling 26,462 on Friday, April 30, 2004.

31. On March 1, 2012, after circulating for almost ten months, and without circulating in March and April as it had in 2004, the Libertarian Party of Oklahoma submitted 57,137 unverified signatures.

32. Americans Elect filed its Notice of Intent to Form a Recognized Political Party on October 3, 2011, and submitted 89,062 unverified signatures on February 28, 2012.

33. Under § 1-108, the number of valid signatures required in 2004 to obtain status as a recognized political party was 51,781, and in 2012 the number is 51,739.

34. On January 15, 2004, there were 1,938,377 registered voters in Oklahoma, of which 51,781 constitutes 2.6% of the state's registered voters.

35. On January 15, 2012, there were 2,000,610 registered voters in Oklahoma, of which 51,739 constitutes 2.6% of the state's registered voters.

36. On March 1, 2012, the Libertarian Party of Oklahoma filed its written authorization permitting registered Independent voters to vote in the Libertarian Party of Oklahoma's primary and run-off primary elections scheduled June 26 and August 28, 2012, should the Libertarian Party of Oklahoma be recognized as a political party.

37. The Election Board is in the process of verifying the 2012 petition signatures submitted by Americans Elect and the Libertarian Party of Oklahoma, but it is impossible prior to March 12,

2012 (the date of the preliminary injunction hearing herein), to complete that task for either organization.

38. If the Libertarian Party of Oklahoma did submit 51,739 valid signatures on March 1, 2012, the Libertarian Party of Oklahoma will be recognized by the Secretary of the Election Board as a political party in Oklahoma.

39. Both before and after the 2011 amendment to § 1-108, in order for a recognized political party to retain its political party status, the party's candidate in the highest race being contested, that is, either the governor's race or the presidential race depending upon which election is involved, must garner ten percent (10%) of the total votes cast in Oklahoma in that election.

40. Although the Libertarian Party of Oklahoma has gained recognized party status through the petition process in the past, it has never received ten percent (10%) of the total votes cast in any presidential election and has never retained its political party status following any election cycle.

41. To retain recognized party status following the 2012 election cycle, the political party's candidate must garner ten percent (10%) of the votes cast in Oklahoma in the presidential election.

42. In *Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F.Supp. 118 (W.D.Okla. 1984) (the "1984 case"), the Defendants inadvertently failed to timely file a response to the Plaintiffs' summary judgment motion, and a default judgment was entered. The court refused to vacate that judgment, and ordered that the Libertarian Party, which had been unsuccessful in its petition drive to form a new political party in Oklahoma under § 1-108, be granted political party status. Because election cycle deadlines had already expired, a lengthy order was entered changing numerous election cycle deadlines and procedures, including permitting for that year only the nomination of Libertarian candidates by political party convention instead of by primary election.

Subsequent to the default judgment in the 1984 case, Oklahoma increased the circulation time period for petition signatures from ninety days to a maximum of one year. Since the default judgment was entered in the 1984 case, the Libertarian Party of Oklahoma never again successfully challenged § 1-108, and it has twice lost such challenges, first in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740 (10th Cir. 1988), and then in *Libertarian Political Organization v. Clingman*, 162 P.3d 948 (Okla. Civ. App. 2007).

43. There were 141 registered Libertarian Party voters in the State of Oklahoma as of November 5, 1996.

44. There were 360 registered Libertarian Party voters in the State of Oklahoma as of June 30, 2000.

45. There were 455 registered Libertarian Party voters in the State of Oklahoma as of January 15, 2004.

46. There are currently1,958 voting precincts in the State of Oklahoma. Pursuant to Okla. Stat. tit. 26, §§ 2-123 and 1-128.1, each precinct must have a minimum of three officials working an election, totaling more than 5,874 precinct workers working each election.

47. Oklahoma statutes require the Election Board to provide training for all members and employees of each county election board every two years. In addition, each precinct official is to receive in-person training every two years. The training conducted by the Election Board and each respective County Election Board for the 2012 election cycle has already been completed.

48. Oklahoma bans all write-in voting in its elections.

49. The 2012 primary election ballots for Oklahoma have not yet been printed.

50. Okla. Stat. tit. 26, § 5-105(A) provides that: "To file as a candidate for nomination by

a political party to any state or county office, a person must have been a registered voter of that party for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state. Provided, this requirement shall not apply to a candidate for the nomination of a political party which attains recognition less than six (6) months preceding the first day of the filing period required by law. However, the candidate shall be required to have registered with the newly recognized party within fifteen (15) days after such party recognition."

IV. Findings of Fact:

In addition to the facts to which the parties have stipulated, the Court finds the following facts were established at the March 12 hearing:

1. According to the testimony of current Libertarian Party Chairman Clark Duffe, the Libertarian Party was aware as early as May 3, 2011 that the Oklahoma Legislature had approved H.B. 1615, which included the March 1, 2012 deadline for submitting petition signatures necessary to obtain recognition as a political party organization. Mr. Duffe also testified that the Libertarian Party had monitored the legislation, and it supported an unsuccessful lobbying effort by Oklahomans for Ballot Access Reform to reduce to 22,500 the number of petition signatures required to obtain Oklahoma recognition as a political party.[5]

2. The record does not reflect the date on which the Libertarian Party began circulating petitions to collect the signatures required for submission on March 1, 2012. Mr. Duffe testified that, as Libertarian Party Chairman, he was responsible for overseeing the signature collection.

[5]Although the Oklahoma House of Representatives approved the reduced number, the Oklahoma Senate did not vote on the measure. Election Board Secretary Paul Ziriax, who also serves as Secretary of the Oklahoma Senate, testified that the measure remains pending in the Oklahoma Senate. However, if passed, it will not impact the current number of signatures required to obtain political party recognition in 2012.

According to Mr. Duffe, about 5,000 to 6,000 signatures were collected by October of 2011. He was not certain how many people circulated petitions, but believed that about 10 to 15 people did so over an unspecified time period. Signatures were collected in Norman, Edmond, Tulsa, and Oklahoma City, and Mr. Duffe believed several Libertarian Party members participated in collecting the signatures.

3. Former Libertarian Party chairman Robert Murphy testified the Libertarian Party hired individuals to circulate petitions and obtain signatures to submit by the 2012 deadline. Neither Mr. Duffe nor Mr. Murphy knew how many persons circulated petitions.

4. Mr. Murphy testified that, in late February of 2012, he was asked to review the petitions to be submitted on March 1 to sample the validity of the signatures. Mr. Murphy randomly reviewed about 80 of those petitions, which contained approximately 700-800 of the total 57,137 signatures on the petitions submitted by the Libertarian Party on March 1, 2012. He obtained a copy of the Election Board's computerized list of registered voters so he could compare the names on that list to those reflected on the petitions.

5. Mr. Murphy testified that, in his opinion, some names on the 80 petitions he reviewed were invalid because he found them illegible, and he regarded some others as invalid because he could not locate them on the Election Board's list. According to Mr. Murphy, his conclusion regarding invalidity was not based on any particular methodology or any procedure utilized by the Election Board, but reflected only his personal opinion. Based on that opinion, he found about 82 percent of the approximately 789 signatures he examined to be valid. He also testified that other unidentified Libertarian Party members examined some petitions, and they concluded about 85

percent of the signatures were valid.[6] According to Mr. Murphy, this rate was consistent with the validity rate for a 1980 petition effort in which he participated.

6. Mr. Murphy testified that he did not mark the petitions he reviewed to reflect his opinions regarding validity or invalidity, nor did he retain any record of the petitions he reviewed or the results of his review.

7. Mr. Murphy also testified that the Election Board is responsible for validating the petition signatures, and its conclusion would prevail over his opinion and that of others who reviewed the petitions. Mr. Murphy further testified that, in his opinion and based on his sampling as to validity of signatures, the Libertarian Party will "probably" fall short of the required number for the 2012 election.

8. According to Mr. Duffe, the Libertarian Party has been active in Oklahoma since 1972. There are 97 individuals on its state membership list. Because it is not currently a recognized political party, there is no record of registered voters having Libertarian Party affiliation. As the parties' stipulations establish, the number of Libertarian Party registered voters in years in which it was a recognized party has varied from 141 in 1996 to 455 in 2004. *See* Stipulation Nos. 43-44. Mr. Duffe also testified the current headquarters of the Oklahoma Libertarian Party is maintained in his residence, and previous chairmen also maintained the headquarters at their residences.

9. Mr. Duffe testified that the Libertarian Party held its 2012 state convention on March 10, 2012, and fifteen people attended.

10. The evidence reflects that, during the years in which the Libertarian Party has qualified

[6]There is no evidence regarding the procedures applied by the unidentified additional persons who reviewed the petitions for validity, nor is there evidence regarding the number of signatures they examined.

as an organization with candidates on the Oklahoma ballot, the percentage of total votes obtained by its candidates is considerably less than that of other minority parties. Defendants' Exhibit 35.

11. As the parties' Stipulation No. 39 establishes, Oklahoma law provides alternative means of ballot access for a political organization. If a party achieves recognition via the petition process and appears on the ballot, it retains status as a recognized political party if its candidate for the highest office[7] receives ten percent of the total votes cast in that year. Okla. Stat. tit. 26 § 1-109. If the organization satisfies that requirement, it is not required to submit petitions to achieve party recognition in the ensuing election year. The 2011 amendment to § 1-108 does not change this alternative means of ballot access in Oklahoma. As the parties have also stipulated, a Libertarian Party candidate has never obtained ten percent of the total vote for a gubernatorial or presidential candidate. Stipulation No. 39. The evidence establishes that the Libertarian Party was on the Oklahoma ballot in 1980, 1984, 1988, 1992, 1996, and 2000. Defendants' Exhibit 35. In those years, its percentage of statewide votes was less than one percent in all but 1980, when it received 1.2 percent of the vote. *Id.* The average percentage of statewide votes for the Libertarian Party in the years in which it appeared on the ballot is .59 percent. *Id.*

12. The Libertarian Party has conducted nine petition signature drives in Oklahoma, and has been successful five times.[8] On each of those occasions, the number of signatures required to achieve party recognition was based on five percent of the votes cast in the most recent gubernatorial or presidential election.

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[7]As the parties have stipulated, if there is no presidential election in the year in which the party appears on the ballot, the highest office is Governor of Oklahoma; otherwise, it is President of the United States. Stipulation No. 39.

[8]As a result of the 1984 Order, it also appeared on the ballot a sixth time.

13. The requirement that an organization obtain signatures equivalent to five percent of the total vote for the most recent statewide gubernatorial or presidential election has been in place since 1974, and that percentage was not altered by the 2011 amendment to § 1-108.

14. As the parties have stipulated, the Libertarian Party has authorized Oklahoma voters registered as Independents to vote in the Libertarian Party June 26, 2012 primary election.

15. Mr. Duffe testified he does not currently anticipate that the Libertarian Party will have a 2012 primary election in Oklahoma, as he has not been notified that more than one individual will seek election as a Libertarian for any office on the ballot. However, the parties have stipulated that the deadline for a candidate to file for any Oklahoma state office is April 11 through April 13, 2012, and that, thereafter, an individual candidate's filing may be contested until April 17, 2012. Stipulation Nos. 20, 21. Thus, whether a Libertarian Party primary election will be needed cannot be determined until the filing period closes on April 13, and the party has no control over whether multiple candidates file for any particular office as Libertarian candidates. According to Mr. Ziriax's testimony, if candidate challenges are pursued, the Election Board must ultimately conduct a public hearing to determine if the challenged candidate satisfies the requirements of the office he or she seeks. This must be accomplished before primary election ballots, including absentee ballots, can be prepared and circulated.

16. With respect to the Election Board's procedure for validating signatures submitted for 2012, Mr. Ziriax and Assistant Election Board Secretary Frances Roach testified that Election Board staff members initially review the petitions upon their submission, count the number of names reflected on the petitions, and provide the submitting person with a receipt. Ms. Roach was present on March 1 when the Libertarian Party submitted its petitions, and she observed the initial count

reflecting the 57,137 signatures submitted. She verified this by her affidavit submitted as Defendants' Exhibit 3. She testified that the Libertarian Party petitions consisted of two to three boxes, plus a stack of additional petitions. The petition form utilized in 2012 is submitted as Defendants' Exhibit 14, and it reflects spaces at the top for the name of the party and the name of the Oklahoma county from which petition signatures were collected. The form then has spaces for the name and address of the signatory as well as his or her signature.

17. According to Ms. Roach, some of the Libertarian Party's 2012 petitions were organized by county, but some were not. Some of the petitions did not include the name of the county in the space provided, and others listed the name of a city in that space. This lack of organization increased the processing time for the petitions.

18. Ms. Roach testified that the Election Board's standard procedure is to count the number of signatures when the petitions are physically submitted, and staff members perform this task. The petitions are then copied and organized by county, and sent to the election board of the appropriate county. Each county election board is then required to verify the signatures appearing on the petitions listing voters in its county. The procedures followed by the Election Board and provided to county boards are set out on Defendants' Exhibit 4. The county boards' procedure involves verification by a computer system. Names appearing on the petitions are input into the county's computer, and must be compared to the existing database reflecting the voters validly registered in that county. Where the printed signature is unclear, staff members must input names in an effort to determine if that name or a similar name appears to be accurate. There may be numerous similar names in the county's database, and those must be compared with addresses to determine validity. According to Ms. Roach, both the State Election Board and individual county boards hire additional

staff during election years to assist in this process as well as other election year duties such as preparation of ballots.

19. As the parties have stipulated, the Election Board received petitions from the Libertarian Party and from Americans Elect for the 2012 elections. Although Americans Elect did not file its intent to form a political party until October 3, 2011, it submitted petitions reflecting 89,062 signatures on February 28, 2012. The Libertarian Party's notice of intent to form a political party was filed significantly earlier, on May 3, 2011, and it submitted petitions reflecting 57,139 signatures on March 1, 2012. According to Ms. Roach, the Election Board set a March 26, 2012 deadline for all county election boards to complete verification for the Americans Elect petitions. For the Libertarian Party petitions, that deadline is March 28, 2012. The deadlines vary because the two parties submitted their petitions on different dates. Pursuant to § 1-108, the Election Board must determine, no later than March 31, 2012, whether there are sufficient valid signatures to permit placing a political organization on the ballot.

20. At the March 12 preliminary injunction hearing, the Libertarian Party brought petitions containing approximately 4,576 additional signatures which had been collected since March 1. If the Election Board were required to process the additional signatures within a week after the March 12 preliminary injunction hearing, Mr. Ziriax testified the additional signatures would not likely interfere with the Election Board's compliance with the MOVE Act deadlines.

21. According to the parties' Stipulation No. 23 and the testimony of Mr. Ziriax and Ms. Roach, Oklahoma must mail overseas absentee ballots for the primary election no later than May 11, 2012 in order to comply with the MOVE Act and the amendment to § 1-108.

22. Mr. Ziriax testified that he has been notified by the United States Attorney General's

office that a federal lawsuit could be filed against Oklahoma if it does not comply with the MOVE Act requirements for the primary, runoff primary, and general elections in 2012. He also testified that New York was sued by the United States when it failed to comply with the MOVE Act, and a New York federal court entered orders directing compliance and establishing detailed procedures for ensuring compliance. *See* February 14, 2012 Order in *United States of America v. State of New York, et al.,* Case No. 1:10-CV-1214 (GLS/RFT), submitted as Defendants' Exhibit 8.

23. In Oklahoma from 1976 through 2011, minor political parties have been successful in securing political party recognition through the petition process in presidential election years. Defendants' Exhibit 37. These include the Libertarian Party, which has appeared on the presidential ballot in five presidential elections; the New Alliance Party; and the Reform Party. In addition, in 1968, the American Party was successful. *Id.* Also, Independents have placed presidential candidates on the ballot via the alternative means of paying a filing fee without gaining party recognition. Defendants' Exhibit 39. Although the official determination has not yet been made by the Election Board, witnesses opined that the Americans Elect party will likely be recognized in 2012 in light of the 89,062 signatures it turned in to the Election Board on February 28, 2012.

V. Conclusions of Law:

A. Likelihood of success on the merits:

To demonstrate a likelihood of success on the merits of its claim, a plaintiff is required "to present 'a prima facie case showing a reasonable probability that [it] will ultimately be entitled to the relief sought.' " *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp*. 320 F. 3d 1081, 1100 (10th Cir. 2003) (quoting *Autoskill v. Nat'l Educ. Support Sys.*, 994 F.2d 1476, 1487 (10th Cir.1993)). The movant is not required to show there is an "absolute certainty" that it will prevail on the merits.

Autoskill, 994 F. 2d at 1487. However, because the Libertarian Party seeks injunctive relief which is disfavored by the Tenth Circuit Court of Appeals, it must satisfy a heightened standard as to this and all elements for injunctive relief, and must present evidence establishing a clear and unequivocal right to relief. *See, e.g., O Centro*, 389 F.3d at 975; *Heideman,* 348 F.3d at 1188.

To prevail on the merits of its constitutional challenge in this case, the Libertarian Party must demonstrate that § 1-108 presents an unreasonable restraint on the exercise of its constitutional rights. Where, as here, a party asserts a constitutional challenge to a state election law, a court should apply the following analysis in adjudicating the merits of that challenge:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Strict scrutiny is not always mandated where a ballot access challenge is presented, and it applies only where "the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson,*460 U.S. at 793 (quoting *Clements v. Fashing*, 457 U.S. 957 (1982)). "Not every electoral law that burdens associational rights is subject to strict scrutiny." *Clingman v. Beaver,* 544 U.S. 581, 582 (2005). Rather, the Court must apply the balancing test set out in *Anderson* and its progeny.

To determine if the Libertarian Party has demonstrated a likelihood of success on the merits of its claim, the Court must first determine if it has articulated a valid constitutional right. The

Court finds that it has done so, as it is well-established that citizens "have a fundamental interest in creating and developing political parties." *Libertarian Political Organization of Oklahoma v. Clingman,* 162 P. 3d 948, 951 (Okla. Civ. App. 2007)(citations omitted).

The Libertarian Party must also show, however, that the state law restricts or limits its pursuit of this interest; if so, the state must demonstrate a corresponding interest 'sufficiently weighty to justify the limitation.'" *Id.* (quoting *Norman v. Reed,* 502 U.S. 279, 289 (1992)). Although a minor political party may face problems in obtaining political office, the state does not have a duty to ameliorate those problems. *Timmons v. Twin Cities Area New Political Party,* 520 U.S. 35 (1997). However, a state may not impose unreasonable restrictions which serve to favor only the two major political parties and exclude others, thereby effectively giving the major parties a "complete monopoly." *Williams v. Rhodes,* 393 U.S. 23, 32 (1968).

Acknowledging Supreme Court precedent, the Libertarian Party does not argue that Oklahoma's procedures for obtaining ballot access create restrictions which are *per se* unconstitutional as applied to it. Its challenge is limited to the specific change in those requirements which resulted in the March 1, 2012 amended deadline to collect signatures required to obtain political organization status via the petition requirement. Although the amendment to § 1-108 sets a twelve-month period for collecting signatures, that time period is shorter in 2012 because the amended statute was not passed until May of 2011. Thus, the Libertarian Party argues that it has been unconstitutionally deprived of 61 days to collect the required signatures for 2012 or, alternatively, that requiring the same five-percent basis for determining the number of signatures is unconstitutional in the context of the shortened collection period.

The Court concludes that the Libertarian Party has not made a showing of likely success on

the merits of this claim. The record reflects that the Libertarian Party has previously challenged the constitutionality of § 1-108 prior to the 2011 amendment, and its challenges have been rejected. In 2007, the Oklahoma Court of Civil Appeals rejected its constitutional challenges to both the requirement that signatures total five percent of the vote in the last gubernatorial or presidential election and the May 1 deadline for submitting signatures. *Libertarian Party of Oklahoma*, 162 P. 3d at 955-56. The Tenth Circuit rejected the same constitutional challenge in *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988), finding both the five percent requirement and the then-applicable May 31 deadline for submitting petition signatures constitutionally valid. Those same requirements were also held valid in *Coalition for Free and Open Elections v. McElderry,* 48 F. 3d 493, 498 (10th Cir. 1995).

These decisions are consistent with Supreme Court precedent. The Libertarian Party correctly points out that some decisions have found specific state regulations unconstitutional. *See, e.g., Anderson,* in which the Court found unconstitutional restrictions on an Independent candidate's ability to obtain placement on Ohio's presidential election ballot. However, the Court has held that specific restrictions are not subject to a "litmus-paper test," and must be viewed in the context of the regulatory scheme developed by the state. *Storer v. Brown,* 415 U.S. 724, 730 (1974). Instead, the regulation at issue must be viewed under the balancing test of *Anderson.*

Specifically important to the analysis in this case is the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431 (1971). In *Jenness,* the Court rejected constitutional challenges to Georgia's deadline for submission of petition signatures and its percentage requirement for the number of signatures required, and both requirements were more restrictive than Oklahoma's current statutory requirements, as well as the requirements as applied in the 2012 election cycle.

In *Jenness*, the Court considered a challenge to Georgia's ballot access law. To be placed on Georgia's election ballot, a candidate was required to submit a nominating petition signed by at least five percent of the number of registered Georgia voters, and the candidate was required to obtain the requisite signatures within a six-month time period. *Jenness,* 403 U.S. at 438. The Court found those provisions did not result in an unconstitutional restriction on the right to ballot access. *Id.* at 441-42. In doing so, the Court concluded these restrictions served the state's interest "in requiring some preliminary showing of a significant modicum of support" for a political organization, in addition to the recognized state interests " in avoiding confusion, deception, and even frustration of the democratic process at the general election" by placing reasonable restrictions on ballot access. *Jenness,* 403 U.S. at 442.

Oklahoma's current law is less restrictive than the Georgia law approved in *Jenness.* It is not disputed that the current law allows ten months for collecting signatures in 2012; Georgia allowed only six months. It is also not disputed that the five percent calculation in Oklahoma is based on the percentage of votes cast in the most recent gubernatorial or presidential election, while Georgia required signatures equivalent to five percent of the registered voters at the time of the previous election. The parties in this case have stipulated that the 51,739 voter signatures required for 2012 recognition as a political party in Oklahoma is the equivalent of only 2.6 percent of the state's registered voters. Thus, the formula applied by Oklahoma to determine the number of signatures required for a petition results in a substantially lower number than would result from application of the Georgia formula which *Jenness* found constitutional.

In finding no constitutional infirmity in Georgia's restrictions, the *Jenness* court noted that the petition signatures required were not limited to those who professed intent to vote for the

individual, nor were voters prohibited from signing more than one petition or voting in another party's primary after signing a petition. *Jenness,* 403 U.S. at 438-39. In this case, the evidence establishes that Oklahoma also has no such prohibitions, as petition signatories are required only to be registered voters in Oklahoma. As *Jenness* observed, the absence of such requirements reflects the law creates "no suffocating restrictions whatever upon the free circulation of nominating petitions." *Jenness,* 403 U.S. at 438. The absence of "suffocating restrictions" under the Oklahoma statutory regime is also borne out by the fact that the Americans Elect party has far exceeded the minimum signature requirements in less time than the Libertarian Party, and presumably will gain recognition in 2012 in light of the high number of signatures it submitted.

The Court further finds significant the *Jenness* court's acknowledgment that Georgia, like Oklahoma, also provided alternative means of ballot access. If a Georgia political party appeared on a ballot via the petition requirement, it was not required to submit a new petition in the ensuing election year if it achieved 20 percent of the vote total for the election in which it appeared. *Jenness,* 403 U.S. at 439. As the parties in this case have stipulated, Oklahoma has a similar alternative, but it requires only 10 percent of the vote total to achieve continued ballot status.

The Libertarian Party argues that *Jenness* is not a persuasive decision because, at the time it was decided, Georgia had placed several minority party candidates on its ballots, and some had achieved a plurality of the votes, while Oklahoma has had fewer minority candidates. The Court does not find this contention persuasive, however, as the evidence reflects that minority parties, including the Libertarian Party, have successfully petitioned and appeared on the ballot in Oklahoma. Defendants' Exhibits 37, 39. That they have not achieved vote pluralities does not reflect an unconstitutional restriction on access to the ballot.

Based on the foregoing, the Court finds that, although the Libertarian Party has constitutionally protected interests which could be impacted by unreasonable state restrictions, it has not shown a likelihood of success on the merits of its claim that the current Oklahoma law presents an unconstitutional restriction on the exercise of its constitutional rights.

Even if the Court concluded that the Libertarian Party could make this showing, however, it must also consider the State's interest in adhering to the restriction embodied in § 1-108. *Anderson, 460* U.S. at 789. While political parties have First and Fourteenth Amendment rights to associate for the advancement of common beliefs, states have an important interest in regulating elections. *See, e.g., Storer v. Brown,* 415 U.S. 724, 730 (1974). In considering such challenges, the Supreme Court has identified numerous state interests that are served by regulations regarding ballot access and political party organization, including the goal of ensuring elections are "fair and honest" and create "some sort of order, rather than chaos...to accompany the democratic process." *Id.*; *see also Anderson,* 460 U.S. at 796; *Jenness,* 430 U.S. at 442.

In this case, Defendants have not only advanced the traditional state interests of ensuring efficient and fair elections, but have also raised the additional interest of complying with the MOVE Act federal requirements securing the rights of members of the military and other overseas voters to participate in Oklahoma's elections by the timely receipt of absentee ballots.

The State has presented compelling evidence that the amendment to § 1-108 was necessitated by the MOVE Act and attendant deadlines for preparing and timely mailing ballots to overseas voters. The evidence establishes that at least one court has taken remedial action against a state which failed to comply with the MOVE Act. *See* Defendants' Exhibit 2. The Libertarian Party expressly acknowledges the validity of the MOVE Act and agrees with its goal.

There is no evidence before the Court suggesting that, in enacting H.B. 1615 and thus amending § 1-108, the Oklahoma Legislature was motivated by anything other than the need to comply with the MOVE Act. There is no evidence before the Court that legislators sought to prevent the Libertarian Party or any other political organization from attaining organized political party status, nor is there evidence that it sought to make that process more difficult for new organizations. The evidence thus does not reflect the concern that, by shortening the petition deadline to March 1, Oklahoma is seeking to achieve a "complete monopoly" for the two major parties. *See Williams,* 393 U.S. at 32.

The Court concludes that the evidence currently before it suggests the State can show that, by enacting the legislation resulting in the shortened deadline for submitting petitions, it was pursuing valid state interests which outweigh the Libertarian Party's need to have twelve months, instead of ten months, in which to collect the requisite number of signatures.

B. Irreparable harm:

Assuming the Court had concluded that the Libertarian Party could show a likelihood of success on the merits, the Libertarian Party would also have to show that it will suffer irreparable harm in the absence of injunctive relief.

The Tenth Circuit has emphasized the importance of showing irreparable harm, concluding that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,* 356 F. 3d 1256, 1260 (10th Cir. 2004) (citations

omitted)[9].

The requisite element of irreparable harm requires a showing that such harm is imminent. "Regardless of the nature of the injury, the party seeking injunctive relief must show that 'the injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Pinson v. Pacheco,* 2010 WL 3911348, at *3 (10th Cir. Oct. 7, 2010) (unpublished opinion) (quoting *Heideman*, 348 F. 3d at 1189). "Purely speculative harm will not suffice, but rather, '[a] plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative' and will be held to have satisfied his burden." *RoDa Drilling Co. v. Siegal*, 552 F. 3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coalition v. Flowers*, 321 F. 3d 1250, 1258 (10th Cir. 2003). A showing of past harm is not sufficient, as "[t]he purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result" without its issuance. *Schrier v. University of Colorado*, 427 F. 3d 1253, 1267 (10th Cir. 2005).

"In determining whether a plaintiff has made the requisite showing, we further assess 'whether such harm is likely to occur before the district court rules on the merits.'" *RoDa Drilling*, 552 F. 3d at 1210 (quoting *Greater Yellowstone,* 321 F. 3d at 1258). "If 'a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.'" *Id.* (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, at 139-40 (2d ed. 1995) ("Wright & Miller")).

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[9]In other cases, however, the Circuit has held that, if the movant is unable to show substantial likelihood of success on the merits, the Court "need not address the other prongs of the preliminary injunction test." *Oklahoma, ex rel. Oklahoma Tax Comm'n v. International Registration Plan*, 455 F. 3d 1107, 1116 (10th Cir. 2006); *Heideman*, 348 F. 3d at 1189. However, as noted in *Dominion Video,* it appears the focus in the most recent cases is irreparable harm.

It is well-settled that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura,* 242 F.3d at 963 (citing 11A Wright & Miller, § 2948.1). "However, this statement relates only to the *irreparability* aspect of the alleged injury, and not to its *imminence*." *Pinson,* 397 F. App'x at 492 (emphasis added). As the Tenth Circuit explained:

> We may assume that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief. However, that has no bearing on whether the alleged constitutional injury is imminent. If the possibility of future harm is speculative, the movant has not established that he will suffer "irreparable injury...if the preliminary injunction is denied." *Kikumura,* 242 F.3d at 955 (emphasis added).

Id. "[P]urely speculative harm does not amount to irreparable injury." *Greater Yellowstone Coalition,* 321 F. 3d at 1258. However, "an injury is not speculative simply because it is not certain to occur. An 'irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *Id.* (emphasis in original) (quoting *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 484-85 (3rd Cir. 2000)); *see also Chamber of Commerce v. Edmondson*, 594 F. 3d 742, 771 (10th Cir. 2010).

In this case, it is not disputed that, on the March 1 deadline, the Libertarian Party submitted petitions reflecting 57,137 signatures – more than the 51,739 required for its recognition as a political party. However, the Libertarian Party asserts that, once the validation process is completed, many of the collected signatures will be invalidated, and the total number will probably be less than 51,739. Thus, it contends that, absent injunctive relief, it will suffer irreparable harm because it cannot satisfy the statutory requirement.

The only evidence in support of this belief was presented by the Libertarian Party former

chairman, Mr. Murphy, who testified that he was asked to review the 2012 petitions to be submitted to determine the validity of the signatures. According to Mr. Murphy, to accomplish this task, he compared some of the petitions with the Oklahoma Election Board's computer base reflecting Oklahoma registered voters. He testified that he randomly reviewed about 80 of the petitions he was provided. The 80 petitions reflected approximately 700-800 of the total 57,137 signatures reflected on the petitions. According to Mr. Murphy, he compared the 700-800 signatures to the Election Board's computerized data, and found about 82 percent of the signatures were valid. However, he also testified that unidentified other Libertarian Party members examining the petitions for validity concluded that the validity rate was 85 percent[10]. Mr. Murphy believed this rate was consistent with the validity rate for a 1980 petition effort in which he was involved.

Mr. Murphy also testified, however, that his conclusion regarding the invalidity of some signatures was not based on any particular methodology or on any procedure utilized by the Election Board, but reflected only his personal opinion. According to Mr. Murphy, he considered some signatures invalid because he found them illegible. He concluded others were invalid because he could not locate the names in the Election Board data. Mr. Murphy also testified that the official validation process is conducted by the Election Board, and that its decision would prevail over his conclusions. He did not mark the petitions he reviewed to reflect his opinions, nor did he retain any record of the petitions he reviewed or the results of his review.

Mr. Murphy testified that he did not participate in the collection of petition signatures for the 2012 election cycle. According to Mr. Murphy, the Libertarian Party hired individuals to circulate

[10]The current Oklahoma Libertarian Party chairman, Clark Duffe, testified that he was told the validity rate ranged from 72 percent to 85 percent.

the petitions.

The evidence before the Court reflects that, at the present time, the Libertarian Party submitted signatures in a number that exceeds the number required by 5,398 signatures. Although the testimony reflects that the validation process to be conducted by the Election Board *may* result in reducing the number to less than the required 51,739 signatures, that outcome is speculative. Plaintiffs offered no evidence other than an opinion based on Mr. Murphy's personal belief regarding the validity of signatures that the Libertarian Party will "probably" fall short of the required number. While it may turn out to be true that the validation process will reduce the number of signatures that will be counted by the Election Board, the Court cannot conclude that the evidence establishes a clear showing that the Libertarian Party will not satisfy the minimum signature requirement.

As noted, *supra,* to establish irreparable harm, a plaintiff is not required to show absolute certainty that the injury will occur; however, a plaintiff "must demonstrate a *significant risk"* that such harm will result if injunctive relief is not granted. *Greater Yellowstone Coalition,* 321 F. 3d at 1258 (emphasis in original). If the possibility of future harm is speculative, the movant has not established that he will suffer irreparable injury. *Kikumura,* 242 F.3d at 955. Furthermore, the relief requested by Plaintiffs in this case requires a clear showing of *imminent* irreparable injury. *Pinson,* 397 F. App'x at 492 (emphasis added) (citing *Kikumura,* 242 F.3d at 955).

The evidence before the Court reflects that some of the signatures reflected on the Libertarian Party's March 1 petitions may be invalidated. However, the evidence that the invalid signatures will reduce the number below 51,739 is not sufficient to establish a significant risk of that occurrence, and is speculative. The Court finds the evidence insufficient to establish the imminent risk of irreparable harm required to support the extraordinary remedy of injunctive relief.

C. Balancing of harm to the movant and nonmovant:

Even assuming that the Libertarian Party could satisfy the element of irreparable harm, the Court must then balance that harm against the harm resulting to Defendants if the injunction is issued. The Court must consider whether the threatened injury to the movant outweighs the potential harm to the defendants if the injunction is granted. *See, e.g., Kikumura,* 242 F. 3d at 955.

For the reasons discussed herein, the Court concludes that this balance does not favor the Libertarian Party. In balancing the equities the Court notes that the new deadlines do not impose upon the Libertarian Party any greater burden than those of other potential organizations seeking recognition as political parties in 2012. Like all other organizations, the Libertarian Party had ten months in which to gather the signatures. As the evidence shows, the Americans Elect party submitted well over the required number of unverified signatures on its petitions, yet it did not notify the Election Board of its intent to form an organization until approximately five months after the Libertarian Party filed its notification. All potential organizations were aware in May of 2011 that a time period of ten months would be required to collect signatures, and the Libertarian Party was aware of the new deadline at that time.

If the State is required to extend the deadline to May 1, as the Libertarian Party requests, it will face extreme difficulty in taking all steps required to comply with the MOVE Act. Although the Libertarian Party does not currently believe it will have primary elections, thus eliminating the need for compliance with the MOVE Act for that stage of the election cycle, the evidence shows that whether multiple primary candidates will exist cannot be determined until the April filing period is concluded and any challenges to candidate qualifications are resolved. Moreover, whether a primary will be required is beyond the control of the party.

A delay until May 1 would also increase the burdens on the Election Board and its personnel in tabulating and verifying the additional signatures as well as in performing the other duties required to comply with the new deadlines. These include, but are not limited to, the need to prepare and mail to overseas voters the primary ballots by May 11, 2012. An extension of the petition deadline to May 1 would allow only ten days to complete that task, while the current law provides for 30 days in which to do so. As Ms. Roach testified, alterations in the schedule would create the need to hire additional personnel. Furthermore, the verification of petitions would be occurring during the time period in which Election Board personnel are performing other duties required for the election cycle. Ultimately, moving the deadline risks Oklahoma's noncompliance with the MOVE Act, which could result in federal litigation and potential liability for the Election Board's violation of federal law. Although the Election Board could probably proceed to count the additional signatures collected by Plaintiff after the March 1 deadline without jeopardizing compliance with the MOVE Act deadlines, doing so would require altering the current duties of Election Board staff. More importantly, such a mandatory injunctive order would require an entitlement to extraordinary relief which the Court has determine has not been shown by the evidence.

Based on the evidence discussed herein, the Court concludes that the harm resulting to the Election Board and Oklahoma is likely to outweigh the harm resulting to the Libertarian Party if it is granted the relief it requests.

Similarly, the alternatives proposed by the Libertarian Party do not alleviate the harm to the State resulting from interference with the existing deadlines for this year's election cycle. Altering the percentage of valid signatures to somehow account for the shortened time period for signature collection does not alleviate the interference resulting from this proposal. Furthermore, there is no

formula proposed that could be viewed as adequately protecting the interests of all organizations that might have sought party recognition, as the Libertarian Party has shown no reason why it should be allowed a more lenient means of complying with the law than those parties who indicated an intent to seek recognition but failed to submit petitions. For the same reasons, the alternative means of directing the Libertarian Party be placed on the ballot results in more lenient treatment for it without a corresponding showing of a strong reason for doing so. The Libertarian Party has not advanced a basis for this extraordinary relief other than the contention that similar relief was ordered in a previous case involving a time frame requiring signatures within a 90-day period. *See Libertarian Party of Oklahoma v. Oklahoma State Election Board,* 593 F. Supp. 118 (W.D. Okla. 1984). Because the facts present in that case differ significantly from those in the instant case, the Court does not find the Libertarian Party's argument persuasive. In that case, the party was faced with a 90-day deadline, which has since been extended to one year. Even the ten-month time period applicable to the 2012 election cycle, however, is significantly greater than that applicable in 1984. Furthermore, the court in 1984 was not faced with the federal requirements of the MOVE Act and the attendant required alteration of the entire election cycle.

D. Consideration of the public interest:

In assessing the propriety of injunctive relief, the Court is also required to consider the impact of that relief on the public interest. A party seeking a preliminary injunction is not required to show that the requested injunctive relief will serve the public interest; rather, it must show the issuance of the injunction would not be adverse to the public interest. *Heideman,* 348 F. 3d at 1188; *Kikumura,* 242 F. 3d at 955. Typically, the public interest prong is "nothing more than a restatement of the 'balance of hardships' prong." *See Heideman,* 348 F.3d at 1191. Here, however,

the Court finds that there is a public interest in ensuring the rights of military personnel and other overseas voters in participating in Oklahoma's elections, and the alteration of the election schedule likely to result from the Libertarian Party's requested relief could adversely impact that interest. While there is a public interest in securing ballot access for minor political parties, the restrictions resulting from the reduced petition deadline do not place sufficiently severe restrictions on that interest to justify the extraordinary relief requested.

VI. Conclusion:

For the foregoing reasons, the Court concludes the Libertarian Party has not satisfied its burden of showing that the circumstances of this case warrant granting the extraordinary relief of a preliminary injunction.

VII. Order:

It is therefore ordered that the motion of the Libertarian Party for a preliminary injunction [Doc. No. 3] is DENIED.

IT IS SO ORDERED this 19th day of March, 2012.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE