

CASE NO CIV-12-119-D

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

LIBERTARIAN PARTY OF OKLAHOMA, et al.,

Plaintiffs,

vs.

PAUL ZIRIAX, et al.,

Defendants.

**DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION [DKT. 3] AND BRIEF IN SUPPORT [DKT. 4]**

MARTHA R. KULMACZ, OBA # 5137
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Section
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Tele: (405) 521-3921 Fax: (405) 521-4518
Martha.Kulmacz@oag.ok.gov
Attorney for Defendants

March 7, 2012

2 Exhibits in PDF format attached

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**DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION [DKT. 3] AND BRIEF IN SUPPORT [DKT. 4]**

Defendants for their Objection to Plaintiffs' Motion for Preliminary Injunction and Brief in Support, [Dkt. 3 & 4], state:

STATEMENT OF THE CASE

Plaintiffs challenge as unconstitutional Oklahoma's election statute, OKLA. STAT. tit. 26, § 1-108, which requires that to become recognized as a political party an organization must prior to March 1 submit valid voter signatures totaling 5% of the number of votes in the last general election. Plaintiffs complain that the signature requirement combined with the March 1 deadline, the loss of March and April as circulation months, and in 2012 alone the availability of only ten months in which to obtain signatures is overly burdensome, does not serve a legitimate state interest, and is unconstitutional.

The Libertarian Party of Oklahoma ("LPO") has litigated and lost challenges to this statute. *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988)(5% signature requirement and Oklahoma election law scheme upheld); *Libertarian Political Organization of Oklahoma v. Clingman*, 2007 OK CIV APP 51, 162 P.3d 948 (5% signature requirement and moving filing date from May 31 to May 1 upheld as constitutional). LPO was denied a temporary injunction in 2004 in *Clingman* when it objected to the change in the filing date. LPO now seeks a preliminary injunction from this Court extending its signature gathering deadline from March 1 to May 1, 2012. Defendants object to all relief Plaintiffs request.

STATEMENT OF FACTS

1. Because of the long history of disenfranchisement of military and overseas voters, the United States Congress in October, 2009, passed the Military and Overseas Voter Empowerment Act (“MOVE Act”), Pub.L.No. 111-84, 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.A §§ 1973ff to 1973ff-7.

2. OKLA. STAT. tit. 26, § 1-108 was amended on May 10, 2011, as part of broad changes to the election calendar to bring Oklahoma into compliance with the MOVE Act which required that absentee ballots be mailed to military and overseas voters at least 45 days prior to primary, runoff primary, special and general elections. *See* H.B. 1615, “Let the Troops Vote Act”), Exhibit 1.

3. In order to be able to timely comply with the federal 45-day mailing requirement, Oklahoma’s election cycle had to be adjusted so that many events occurred earlier in the year. Plaintiffs challenge only the March 1 deadline change.

4. 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.

5. 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.

6. 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. The MOVE Act requires absentee ballots to be mailed May 11, 2012.

7. In the year 2004, the Run-off Election in the State of Oklahoma was held August 24, 2004, and in 2012 it will be August 28, 2012. The MOVE Act requires that Absentee ballots must be mailed July 13, 2012.

8. In the year 2004, the General Election in Oklahoma was held November 2, 2004, and in 2012 it will be November 6, 2012. The MOVE Act requires that Absentee ballots must be mailed September 21, 2012.

9. The LPO filed Notices of Intent to form a new political party on May 1, 2003, August 22, 2005, April 16, 2007, and May 10, 2011.

10. After circulating its 2004 petition for a full year, LPO on Friday, April 30, 2004, submitted unverified signatures totaling only 26,462, yet on March 1, 2012, after circulating for ten months LPO submitted 57,137 unverified signatures.

11. Americans Elect filed its Notice of Intent to Form a Recognized Political Party on October 3, 2011, and after circulating its petition for five months, submitted 89,062 unverified signatures on February 28, 2012.

12. The LPO was required, under OKLA. STAT. tit. 26, § 1-108, to obtain 51,781 signatures to obtain status as a recognized political party in 2004, and 51,739 signatures in 2012.

13. In January, 2004, there were 1,938,377 registered voters in Oklahoma. The percentage of this required to be obtained by the LPO was only 2.6% of the registered voters in the state. In 2012, there were 2,000,610 registered voters, of which 51,739 constitutes 2.6% of the state's registered voters.

14. The LPO has a history of being dilatory in the signature gathering process, its excuses being that sometimes the weather was inclement, there was too much wind, or that sometimes they did not feel like collecting signatures on certain days.

15. If Oklahoma's March 1 petition signature date is struck down and reset to May 1, it will have a domino effect on already expired April 11-13 candidate filing and April 1 registration change dates and on the subsequent filing, ballot preparation, ballot mailing dates and election dates which will cause military and overseas voters to be disenfranchised and cause Oklahoma to violate the MOVE Act and be subject to suit by the United States. LPO has authorized Independent voters to vote in the LPO primary. The Plaintiffs failed to make the United States and the Independent and absent voters parties to this lawsuit.

16. The history of the Libertarian Party in Oklahoma demonstrates that their failure to obtain and retain recognized status is not due to Oklahoma election laws, but rather is due to their inability to appeal to the electorate.

17. The Oklahoma State Election Board ("OSEB") is in the process of verifying the petition signatures submitted by Americans Elect and LPO. It is impossible prior to March 12, 2012, to complete that task for either organization. If LPO did submit 51,739 valid signatures on March 1, 2012, it will be recognized by the Secretary of the OSEB as a political party in Oklahoma.

18. This case is not amenable to resolution by way of settlement. Oklahoma strongly believes its statutes are constitutional. The Tenth Circuit appears to interpret even a one-time settlement to accommodate a one-time reduction of twelve months to ten months

as constituting an admission of unconstitutionality after which the state may not enforce a signature requirement other than the decreased signatures agreed to in the one-time settlement. *See Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984).

20. Plaintiffs needlessly delayed in filing these proceedings and needlessly delayed in seeking a preliminary injunction, resulting in disadvantage and in harm to Defendants. Defendants object to Plaintiffs' request for preliminary injunctive relief.

CHALLENGED STATUTE: OKLA. STAT. TIT. 26, § 1-108.

Formation of new political parties

A group of persons may form a recognized political party at any time except during the period between March 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year;
2. After such notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with such Secretary, bearing the signatures of registered voters equal to at least five (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of such petitions must contain the names of registered voters from a single county. Petitions may be circulated a maximum of one (1) year after notice is filed, provided that petitions shall be filed with the Secretary not later than March 1 of an even-numbered year. Such petitions shall not be circulated between March 1 and November 15 of any even-numbered year; and
3. Within thirty(30) days after receipt of such petitions, the State Election Board shall determine the sufficiency of such petitions. If such Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

ARGUMENT AND AUTHORITY

I. A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

A. INTRODUCTION

“A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule.” *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir.1984). It “constitutes drastic relief to be provided with caution ... [and] should be granted only in cases where the necessity for it is clearly established.” *United States, ex rel., Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888–89 (10th Cir.1989). The right to relief on a preliminary injunction “must be clear and unequivocal.” *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1256 (10th Cir.2003). To obtain the extraordinary remedy of a preliminary injunction, Plaintiffs must establish: (1) LPO will suffer irreparable injury unless the injunction issues; (2) the threatened injury to LPO outweighs whatever damage the proposed injunction may cause the Defendants; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *Nova Health Systems v. Edmondson*, 460 F.3d 1295 (10th Cir. 2006). “To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005).

“[T]he primary goal of a preliminary injunction is to preserve the pre-trial *status quo*.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir.2009). Therefore, “courts should be especially cautious when granting an injunction that requires the nonmoving party to take affirmative action—a mandatory preliminary injunction—before a trial on the merits occurs.”

Id. Injunctions that disrupt the *status quo* are particularly disfavored and “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Beltronics, USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir.2009) (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir.2005)). When a preliminary injunction would alter the *status quo*, the movant bears a heightened burden and “must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.” *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir.2004) (*en banc*), *aff’d*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

The Tenth Circuit does have a modified standard for some preliminary injunctions. However, the modified standard does not apply to three types of historically disfavored injunctions: “(1) preliminary injunctions that alter the *status quo*; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir.2005)(quoting *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975(2004)). In the case before this Court, Plaintiff LPO seeks a disfavored preliminary injunction which would alter the *status quo*, grant a mandatory injunction, and grant LPO all of the relief it seeks if it were to prevail on the merits. Plaintiff is unable to meet its burden of persuasion.

B. PLAINTIFFS' CLAIMS ARE MOOT.

Further, having submitted 57,137 unverified signatures, 5,398 or 10.4% signatures more than the minimum 51,739 valid signatures required, Plaintiffs' claims are now moot. The gravamen of Plaintiffs' Complaint is that during 2012, the combined effect of (1) having only ten (10) months rather than twelve (12) months to circulate petitions and gather signatures, (2) a deadline of March 1 to submit signatures, and (3) that 51,739 signatures are required, were together purportedly unconstitutional. [Dkt.1 at part XI, p.13]. It is only in the year 2012 that all three of these occur, because in all subsequent years, there will always be at least twelve months to circulate. Thus, LPO will never again be subject to the combination of these three (3) circumstances.

LPO complied with the March 1, 2012, deadline, and turned in 57,137 unverified signatures. Thus, Plaintiffs accomplished not only what they claimed was not possible, they exceeded it. Their claims are now moot. The capable-of-repetition yet evades review exception to mootness does not apply. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109(1983). Because LPO submitted unverified signatures in excess of 51,739 and will not again be exposed to the combination of the three circumstances of which the Plaintiffs' complain, their claims are moot and should be dismissed.

C. LPO IS UNABLE TO ESTABLISH IT WILL SUFFER IRREPARABLE INJURY IF AN INUNCTION IS NOT ISSUED

A movant “satisfies the irreparable harm requirement by demonstrating ‘a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.’” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir.2009) (quoting *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1258 (10th Cir.2003)). LPO’s claimed “irreparable injury” is that without a preliminary injunction it will not be able to on or before March 1, 2012, gather and submit to the OSEB the 51,739 valid voter signatures required for the LPO to be recognized as a political party under OKLA. STAT. tit. 26, § 1-108. On March 1, 2012, the LPO submitted 57,137 unverified signatures. If all of the signatures prove to be valid, that is, they are from registered Oklahoma voters, LPO will be recognized as a party. Under the challenged statute, the OSEB has until March 31, 2012, thirty days, to determine the validity of the signatures. The process of checking validity is being diligently, efficiently and expeditiously conducted. In addition to LPO signatures, OSEB must also verify the validity of the 89,092 Americans Elect signatures submitted February 28, 2012. LPO having submitted substantially more unverified signatures than the minimum required, and OSEB not having threatened to wrongfully deny LPO recognition, LPO’s injury is purely speculative. LPO is unable to establish a significant risk of harm. Where the claim of threatened injury is speculative, injunctive relief is not available. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111(1983).

In addition, because a preliminary injunction would upset the *status quo*, this Court should deny the request for a preliminary injunction. *Nova Health Systems v. Edmondson*,

460 F.3d 1295, 1298, n. 5 (10th Cir.2006). The status quo is that LPO from May 10, 2011 until January 31, 2012 circulated petitions and gathered signatures knowing 51,739 signatures must be submitted. That status quo should not be altered.

D. THE THREATENED INJURY -- NOT GATHERING ENOUGH SIGNATURES BY MARCH 1, 2012 -- IS OUTWEIGHED BY DAMAGE AN INJUNCTION WILL CAUSE THE STATE. AN INJUNCTION WILL DISRUPT THE 2012 ELECTION CYCLE, WILL DISENFRANCHISE MILITARY AND OVERSEAS VOTERS AND WILL EXPOSE THE STATE TO SUIT FOR DECLARATORY AND INJUNCTIVE RELIEF BY THE UNITED STATES. FURTHER , PLAINTIFFS' DELAY IN FILING SUIT BARS PRELIMINARY INJUNCTIVE RELIEF DUE TO LACHES.

Even if LPO's First Amendment and Fourteenth Amendment rights had been infringed, which they have not, the Plaintiffs' claims are barred by laches. "Laches is an affirmative defense to claims for equitable relief." *Perry v. Judd*, ___ F.Supp.2d ___, 2012 WL 113865 at *5 (E.D.Va. 2012). "In essence, the doctrine penalizes a litigant for negligent or willful failure to assert his rights." *Id.* (quotation and citation omitted). "Laches can serve as a defense to a First Amendment claim." *Id.* "Laches requires proof of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id.* "[T]he first element of laches is lack of diligence, when 'the plaintiff delayed inexcusably or unreasonably in filing suit.'" *Id.* (citations omitted).

The second element is prejudice to the defendant. **The defendant must prove that he has suffered a disadvantage or some other harm caused by reliance on the plaintiff's conduct. Prejudice can be inferred simply from plaintiff's delay, or from evidence of specific harm. The greater the delay, the less prejudice required to show laches.**

Id. (citations omitted)(emphasis added).

Here LPO claims injury to First Amendment rights. If such injury occurred, the first day of injury was May 10, 2011, when H.B. 1615 was signed into law by Governor Fallin.

That is the first date for which it was certain that in order for a new political party to be recognized for the 2012 General Election, petitions supported by 51,739 valid voter signatures had to be submitted by March 1, 2012, approximately ten months later, and that H.B. 1615 had an effective date of November 1, 2011. *See* H.B. 1615 attached **Exhibit 1**. Plaintiffs were aware of the new law, having lobbied unsuccessfully for a lower signature requirement. *See Plaintiff's Brief in Support* (Dkt. 4 at 4). H.B. 1615 specified each of the election dates which were being changed to accommodate the MOVE Act, not just the change in the petition circulation date. *See* H.B. 1615, **Exhibit 1**. The bill is titled the "Let the Troops Vote Act". *Id.*

Faced with this purported injury to a fundamental right, Plaintiffs did nothing. They did not file suit seeking an immediate injunction. They did not seek to enjoin the November 1, 2011, effective date of the Let the Troops Vote Act. Instead, the Plaintiffs continued circulating under their May 3, 2011, Notice of Intent to Form a Political Party, knowing the completion date was March 1, 2012, and that they needed 51,739 signatures.

The Plaintiffs are neither politically naive nor are they strangers to ballot access litigation. Even though they contend ten months is not enough time to obtain 51,739 signatures, especially when the months of March and April are eliminated, Plaintiffs waited. In fact, they waited almost nine months before filing suit on January 31, 2012, one month before their petition signatures were required to be filed. *Complaint*, Dkt. 1. No Summons were issued. Instead, Plaintiffs requested that Defendants execute Waivers of Service of Summons, which would extend the time by which the Defendants were required to respond

to the Complaint. Plaintiffs sought no temporary restraining order. They did not seek an expedited hearing. They continued to wait. They waited until February 17, 2012, at about 5:00 p.m. before a three-day federal holiday weekend, and then filed their Motion for Preliminary Injunction and Brief in Support. Dkt. 3 & 4. Again, no temporary restraining order was sought, and no request for expedited hearing was filed. Plaintiffs then waited some more, until February 22, 2012, before verbally requesting a status conference, which was held February 24, 2012, less than a week before Plaintiffs' 51,739 signatures were due.

Plaintiffs' lack of diligence has significantly disadvantaged and harmed the Defendants. The OSEB established a reasonable, necessary, and comprehensive schedule of tasks regarding all 2012 election cycle events which commenced with the March 1 submission of signatures. If the March 1 date is changed, it will have a domino effect on all of the succeeding deadlines, in addition to the April 11-13 candidate filing date and April 1 deadline to change voter registration which will have already expired. The deadlines are detailed in Proposition I (D), starting with, but not limited to: March 31, 2012 deadline to determine LPO signature validity sufficiency; April 11-13, 2012, candidate registration deadline for June 26, 2012 primary; April 20 deadline to prepare and deliver ballot files to printer; May 7, 2012 deadline to deliver absentee ballots to the CEB's; May 11, 2012 military absentee ballot mailing deadline. If LPO gathers signatures until May 1 and submits those signatures on May 1, it is not possible for OSEB within the ensuing nine (9) days between May 1 and the May 11 MOVE Act mailing deadline to complete all the tasks required to verify signatures, and prepare, print, deliver and mail absentee ballots. Such an injunction

would cause OSEB to violate federal law and to disenfranchise military and overseas voters and subject Oklahoma to suit by the United States for violating the very law designed to prevent disenfranchisement.

The timing of Plaintiffs lawsuit has also adversely impacts the Defendants' ability to mount a defense. The Election Board had to prepare for the March 6, 2012, Presidential Preference Primary, but since February 28, 2012 has also been consumed with verifying the 89,062 Americans Elect petition signatures and the subsequent 51,739 LPO petition signatures. LPO's delay in filing suit thus curtailed the availability of OSEB staff to assist in the defense of this case. In addition, suit was filed immediately prior to the 2012 Oklahoma Legislative Session which commenced February 6. This adversely impacts defense preparation because the Secretary of the OSEB, who by law also serves also as Secretary of the Senate, must every day while the Senate is in session be on the Senate floor attending to his statutory Senate duties, curtailing his ability to assist in the defense of this case. Further, the timing of this lawsuit makes it impossible for the undersigned to adequately learn the facts and the law applicable in order mount a defense.

An injunction should be denied as any threatened injury to LPO is outweighed by the harm to Defendants. *Perry*, ___ F.Supp.2d ___ 2012 WL 113865 at **6-7(injunction seeking more time to obtain signatures denied where plaintiffs' delay in filing suit interfered with the election board's comprehensive schedule of tasks leading to the primary election); *Nat'l Council of Arab Americans v. City of N.Y.*, 331 F.Supp.2d 258, 265-66 (S.D.N.Y.

2004)(emergency was caused by plaintiffs' delay; injunction request barred by laches; defendants prejudiced in defending by plaintiffs delay in filing suit, failure to seek TRO).

A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action and cannot complain of the delay involved pending any final relief to which it may be entitled after a trial of all issues.

GTE Corporation v. Williams, 731 F.2d 676,679 (10th Cir. 1984)(citation omitted)(district court abused discretion granting preliminary injunction where plaintiff delayed in filing suit).

E. THE INJUNCTION, IF ISSUED, WOULD BE ADVERSE TO THE PUBLIC INTEREST

As discussed below, there has been a long and undisputed history of military and overseas voters being disenfranchised. The MOVE Act was designed and the United States is enforcing it to end that disenfranchisement. See Order, *United States vs. State of New York, et al.*, No. 1:10-cv-1214 (D.C.N.D. New York, February 14, 2012), Exhibit 2. As Proposition I (F)(1)(b) also establishes, commencing with the submission of Americans Elect's and LPO's petitions and signatures on February 28 and March 1, 2012, OSEB commenced its 2012 General Election process. The election calendar was carefully crafted to safeguard the rights of all of the multitude of participants in the months-long election process, without favoring one or the other, all while complying with federal law. It is contrary to the public's interest to disenfranchise even one military or overseas voter, or to grant an injunction without first making the absent military and overseas voters who will be disenfranchised, Independents who wish to vote in an LPO primary, plus the United States, party to these proceedings. *The Nation Magazine v. Dept. of State*, 805 F. Supp. 63, 74

(D.C.D.C.1992) (Temporary Restraining Order denied where it would injure rights of third parties not before the court.) *See* Fed.R.Civ.P. Rule 19(a).

It is contrary to the public's interest to enter an injunction because it will throw the already commenced 2012 election process into disarray. What may at first glance seem to be the simple act of altering one date - March 1 to May 1-- is in fact a complex, multi-faceted undertaking which will have a domino effect on already expired candidate filing and voter change of registration dates and on succeeding dates in the chain of election calendar interrelated dates. The MOVE Act makes it even more complex.

F. THERE IS NO SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Finally, Plaintiffs will not likely succeed on the merits of this case, as set forth below.

1. OKLAHOMA'S REQUIREMENTS TO BECOME A RECOGNIZED POLITICAL PARTY DO NOT UNDULY BURDEN PLAINTIFFS' RIGHTS.

a. Introduction

“The right to vote, the right to be associated with a political party, and the right to be a political candidate are important and valuable rights in our democracy.” *Libertarian Political Organization v. Clingman*, 2007 OK CIV APP 51, ¶ 8, 162 P.3d 948, 951 citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). While political parties do have First and Fourteenth Amendment rights to associate for the advancement of common beliefs, those rights do not insulate them from state regulation. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). The

States “have an ‘undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.’” *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789, n.9 (1983)). “States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.” *Munro*, 479 U.S. at 193.

Restrictions which do not affect a political party’s ability to perform its primary functions of organizing, developing or recruiting supporters, choosing a candidate, or voting for that candidate in a general election have been held to not impose a severe burden. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (laws prohibiting individual from appearing on ballot as candidate for more than one party are valid); *Burdick v. Takushi*, 504 U.S. 428 (1992) (an election system which prohibits write-in candidates is valid); *Clingman v. Beaver*, 544 U.S. 581 (1992) (Oklahoma’s semi-closed primary system allowing only registered party member and independents to vote in primary held valid).

“Although the power of the States to regulate the electoral process is expansive, that power may not be implemented in a manner that violates the Constitution.” *Green Party of Arkansas v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011). Oklahoma’s ballot access laws have been previously determined to pass Constitutional muster. *Libertarian Political Organization v. Clingman*, 2007 OK CIV APP 51, 162 P.3d 948 (5% signature requirement and May 1 deadline constitutional); *Coalition for Free and Open Elections v. McElderry*, 48 F.3d 493, 498 (10th Cir. 1995); *Rainbow Coalition of Okla. v. Okla. State Election Bd.*, 844

F.2d 740 (10th Cir. 1988) (5% requirement and May 31 deadline constitutional). Ballot access laws are reviewed under the flexible balancing of interests approach articulated in *Anderson v. Celebreze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

[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 those 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.

Celebreze, 460 U.S. at 789 (emphasis added).

The Court expressly recognized “that reasonable, nondiscriminatory restrictions” can generally be justified by “the State’s important regulatory interests.” *Id.* at 788. Thus, “[n]ot every electoral law that burdens associational rights is subject to strict scrutiny.” *Clingman v. Beaver*, 544 U.S. 581, 582 (2005). However, if the filing deadline imposes a “severe” burden, it must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992).

The Court cannot apply a “litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Although minor party candidates may face numerous problems in obtaining political office, there is no duty on the state to ameliorate those problems. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-68 (1997). The state's legislation "may, in practice, favor the traditional two-party system". *Id.* at 367. The state is not required to increase the likelihood that an unpopular candidate will gain ballot access. *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986). The State need not remove every barrier to ballot access. *See Am. Party of Texas v. White*, 415 U.S. 767, 794 (1974)(noting that the States need not "finance the efforts of every nascent political group seeking to organize itself").

The Tenth Circuit has upheld Oklahoma ballot access laws:

We have previously reviewed and upheld Oklahoma's ballot access laws governing the first of these alternatives in *Rainbow Coalition*, 844 F.2d 740. Specifically, we reviewed the laws requiring signature petitions for recognized party status to be filed no later than May 31 of the election year with the signatures of registered voters equal to at least 5% of the votes cast in the last election for Governor or for Presidential electors. In *Rainbow*, we upheld both the early filing deadline and the 5% threshold. *Id.* at 744, 747. The *Rainbow* court balanced the voters' freedom of expression and association rights embodied in the right to vote against Oklahoma's interests in running an orderly and timely election and found that Oklahoma's interests prevailed. We were somewhat troubled by the early filing deadline, but found that the State had a sufficient interest in such an early deadline because it needed to verify the signatures on the petitions, conduct primary elections and run-off primaries if necessary, allow challenges to the candidates' qualifications, administer recounts, allow judicial resolution of election challenges, print ballots, and mail out and receive absentee ballots. *Id.* at 745-47

Coalition for Free and Open Elections, 48 F. 3d at 497. Although 2011 amendments changed certain deadlines in compliance with the MOVE Act and to permit the military and overseas voters to timely vote, Oklahoma's overall ballot access scheme remains the same.

It is only LPO who seeks a preliminary injunction in an as-applied challenge to OKLA.

STAT. tit. 26 §1-108 for the 2012 election year. Although dates in other election statutes were also changed in 2011 to accommodate the MOVE Act, LPO challenges only § 1-108. LPO asserts that for the year 2012, it has been denied ballot access because: (1) the petition filing date was moved from May 1 to March 1, it had only ten (10) months to circulate its petition to obtain sufficient signatures, as opposed to the “maximum of one (1) year” referenced in the statute; (2) that it lost what LPO contends are the better months to circulate, March and April; and (3) LPO must turn in a relatively high number of signatures, totaling 5% of the vote in the last general election, 51,739 signatures. The 5% of signatures requirement was previously held constitutional. *Rainbow Coalition*, 844 F.2d 740 (10th Cir. 1988); *Libertarian Political Organization of Oklahoma v. Clingman*, 162 P.3d 946, 2007 CIV OK APP 51. Both Americans Elect and LPO have submitted unverified signatures far in excess of the valid minimum required, although the verification process is ongoing. Thus, Defendants assume Plaintiffs challenge whether the change in the petition filing deadline mandated by federal law in order to accommodate the rights of military and overseas voters passes constitutional muster.

- b. The March 1 filing deadline in OKLA. STAT. tit. 26, § 1-108 is necessary in order for state and local officials to fulfill their responsibilities in assuring ballot accuracy and timely distribution of ballots.**

Under the *Anderson* test, we examine the State’s interests and the extent to which those interests make it necessary to burden Plaintiffs’ rights. Both state and federal law mandate that absentee ballots be mailed to military and overseas voters no later than forty-

five (45) days before an election. *See* 42 U.S.C. § 1973ff-1(8) and OKLA. STAT. tit. 26, § 14-118. For the 2012 general election, the mandatory MOVE Act mailing dates are:

May 11, 2012 is mailing deadline for June 26, 2012, primary.

July 13, 2012 is mailing deadline for August 28, 2012, runoff primary.

September 21, 2012 is mailing deadline for November 6, 2012, General Election.

Oklahoma has a compelling interest in complying with these dates, because if it does not, the military and overseas voters will be disenfranchised and Oklahoma will be subject to suit by the United States for declaratory and injunctive relief. 42 U.S.C. § 1973ff-4. Federal law preempts the issue of when the absentee ballots must be mailed. *Doe v. Walker*, 746 F. Supp.2d 667, 675 (D. Md.2010)(“Any state law that conflicts with the mandatory provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)¹ is preempted and invalid. U.S. CONST. Art. 6, cl. 2”)(citing *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d 1305 (N.D. Fla.2000)); *United States v. Cunningham*, 2009 WL 3350028 (E.D. Va.)(“Virginia has an obligation under the Supremacy Clause to protect the federally-guaranteed civil right of UOCAVA voters to vote by absentee ballot in federal elections. To the extent that right conflicts with Virginia law, Virginia law must give way.”)(citing *Swift & Co. v. Wickham*, 382 U.S. 111, 120(1965). *Bush* recites the long history and dismal experience with disenfranchisement of military and overseas voters and the facts which lead to the October, 2009 enactment of the mandatory mailing date for absentee ballots. *Bush*, 123 F. Supp.2d at 1307-13.

¹It was the MOVE Act by which UOCAVA was amended in October, 2009 to provide for the 45-day mandatory mailing deadline. Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009).

If the State imposes “a deadline which does not allow sufficient time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots, the state imposes a severe burden on absent uniformed services and overseas voters’ fundamental right to vote.” *Doe*, 746 F. Supp.2d at 679-80. Should this Court enter injunctive relief extending the March 1 deadline, the OSEB will be unable to timely mail absentee ballots, and the military and overseas voters will be disenfranchised.

Given that the State was required by federal law to change the May 1 petition deadline to March 1, 2012 to ensure the military could vote, we next examine the manner in which OSEB allocates and uses the time in the election schedule which begins March 1.

Temporary help is hired to be present at OSEB on the date the petitions with signatures are delivered. Temporary help in addition to OSEB staff begin processing the petitions/signatures immediately. A party representative attends while all of the pages are counted and a receipt provided for the raw number of pages. Americans Elect’s receipt was for 10,461 pages, and LPO’s was for 7,320 pages. It took approximately 6-1/2 hours and 9 people to count the pages. Next, the OSEB sorts the pages by county. Although a party is supposed to submit the petitions pre-sorted by county, LPO did not do so. In addition, many LPO petitions contained the name of a city rather than a county. One additional day was required for nine people to sort LPO petitions by county, and to determine the correct county.

A spreadsheet is compiled identifying raw numbers of unverified signatures/pages for each county. If the minimum required signatures are present, 51,739 in 2012, the petitions are copied and the copies prepared for shipping to the respective counties’ County Election

Boards (CEB's) for voter verification. It takes approximately three days to copy the petitions. The original petitions are maintained at the OSEB. Both Americans Elect and the LPO submitted signatures from each of Oklahoma's 77 counties. The petitions are shipped/delivered first to the largest counties, as those counties have the most signatures to verify.

Six (6) regular employees and four (4) temporary employees are involved in the initial process of receiving the petitions, obtaining a raw number, preparing the spreadsheet, and preparing the petitions to be sent to the CEB's. Work on the petitions proceeds at the OSEB six days per week until the petitions are shipped to the CEB's. It takes 7-1/2 days from date of receipt to perform the initial work for both the Americans Elect and the LPO petitions prior to shipping to the CEB's.

When the CEB's receive the petitions, they begin verifying the voter names on the petitions. Each voter name is typed into the CEB computer to determine whether it matches a registered voter in that county. The number of valid voter signatures is tabulated. Although the signature itself is not compared, every name on each petition is typed into the computer to determine whether it matches. There is no list that is scrolled through, but even if there were, scrolling consumes more time than simply entering in the name. When a CEB completes the verification process, the tabulation of the number of valid signatures is transmitted to the OSEB. The amount of time it takes each CEB to complete this work historically runs from 5 to 20 days each. None of the 77 counties have reported results to the OSEB regarding Americans Elect or the LPO at the time of preparation of this Response.

As the results are received from the CEB's, the information is entered on the spreadsheet initially prepared by the OSEB. Historically, the OSEB has needed the entire 30 days to complete the voter verification process, particularly in years such as 2012 when multiple parties submit petitions. On or before March 31, or thirty days from receipt if that is earlier, the OSEB certifies the sufficiency of the new party petitions, and whether the party is now recognized.

As soon as the new party is recognized, candidates for that new party may change party affiliation within two weeks thereafter, that is, on or before April 14, 2012. The candidate filing period is April 11-13, 2012. The deadline to contest candidacy is April 17, 2012, with the OSEB hearing on a candidacy contest set April 23, 2012.

During this time the OSEB is also engaged in other activities. March 6, 2012 is the Presidential Preference Primary Election. From April 14, 2012, to May 1, 2012, the OSEB conducts the "election setup" for federal state and county primaries. "Election setup" is the programming done to create ballot print files and the database used to program the voting devices. There is a separate database for each of the 77 counties, so each of the setup tasks must be performed 77 times. The OSEB, not the CEB's, perform all of this work. The OSEB also creates audio files for the disabled voters component by recording the text for the ballots and importing it into the 77 databases, another federal requirement.

In addition, for a statewide primary or general election, there can be 500 to 1200 different ballot styles because there are different candidates on the ballot in different counties or precincts. Presidential and Vice Presidential candidates remain the same on each ballot

statewide, but candidates running for State House or State Senate, etc., are not. The number of ballot styles depends on many variables, such as the number of offices that actually appear on the ballot, which is not known until after the filing period closes. The order of the primary candidate names must be rotated, which also increases the number of ballot styles. Although there is no candidate rotation in a general election, the number of offices on the ballot is usually larger than in the primary.

If there is a contest, either of the candidacy or of an election, setup and ballot printing for the election might be delayed. If the contest affects a race in only one or a few counties, such as in a legislative race, the OSEB can proceed with working on the setup for other counties. If the contest affects a statewide race, such as Corporation Commissioner which appears on every ballot in the state, a contest can delay all preparations. The OSEB tries to account for potential delays when the calendar is developed, but contests can sometimes cause problems.

The above setup for federal, state and county primaries is scheduled from April 14, 2012, through May 1, 2012, but **the OSEB commences delivering the primary election ballots to the printer on April 20**, and continues delivering them through May 1, 2012. **The printer delivers the federal and state absentee ballots to the CEB's on May 7, 2012.** **The MOVE Act requires that the federal/state absentee primary election ballots be mailed to military and overseas voters no later than May 11, 2012.**

For each MOVE Act mailing, the CEB's must: (1) print and label two separate envelopes (one for the ballot affidavit, one for returning the ballot and one for mailing the

ballot); (2) identify the appropriate ballot for that person, such as correct Congressional and state districts; (3) place all information in the correct envelopes and seal the envelopes; and (4) physically transport the envelopes to the Post Office for mailing. The amount of time it takes to complete this process varies by county.

The LPO requests that this Court enter an injunction directing that the LPO may continue gathering signatures until **May 1, 2012**. Should such an order be entered and petition signatures are delivered to the OSEB on May 1, 2012, it will be physically impossible for the OSEB to verify the signatures on those petitions, process candidates, changes in party affiliation and filings for office, set up the ballot files and deliver them to the printer, print the absentee ballots, deliver the absentee ballots to the CEB's, and the CEB's prepare them for mailing, all within the nine days between May 1 and the MOVE Act mailing deadline of May 11, 2012. Because of the domino effect, any change from March 1 will cause the OSEB to be unable to meet subsequent deadlines.

In the meantime, during May 1 through June 1, 2012, the OSEB also conducts the above election setup for local elections, and continuously delivers ballots to the printer.

On May 29, 2012, the printer delivers the regular primary election day ballots to the CEB's. The CEB's conduct tests of the ballots and their voting machines, arrange for and train poll workers and sort and deliver the ballots to the appropriate precinct polling locations together with the voting machines. The state primary election is scheduled June 26, 2012, with a June 29, 2012 deadline for contests or to seek a recount. Contest hearings and recounts are scheduled for July 3-6, 2012.

Election setup for federal state and county runoff primaries is scheduled for June 30 through July 13, 2012. "Setup" is the same as that above for the primary. The state and federal runoff primary ballot files will be continuously delivered to the printer from July 5-13, 2012. **The printer will deliver the state and federal absentee ballots for the runoff primary to the CEB's on July 11, 2012, which the MOVE Act requires be mailed to the military and overseas voters no later than July 13, 2012.** On July 30, 2012, the primary runoff ballots will be delivered by the printer to the CEB's. The CEB's must then engage in all of the same activities as they did for the primary election. The runoff primary election is scheduled August 28, 2012, with a deadline of August 31, 2012, for contests or to request a recount, with hearings to be held September 4-7, 2012.

The election setup for federal, state and county general elections commences September 1-14, 2012. Setup is the same as that listed above for the primary and runoff primary. State and federal general election ballot files are delivered continuously to printer from September 7-14, 2012. **The printer delivers the state and federal absentee general election ballots to the CEB's on September 17, 2012, which under the MOVE Act must be mailed to the military and overseas voters no later than September 21, 2012.**

The election setup by the OSEB for local elections takes place September 14-28, 2012, with ballot files continuously delivered to the printer during that time.

The printer delivers the general election ballots to the CEB's on October 8, 2012. The CEB's must then engage in all of the same activities as they did for the primary election. The General Election takes place November 6, 2012.

Thrown into all of the above, is the additional task that if independent or unrecognized parties' candidates, under OKLA. STAT. tit. 26, § 10-101.1 or § 101.2, file on or before July 15, 2012, petitions with the required signatures (43,880 in 2012) to be placed on the ballot as presidential candidates, the OSEB must conduct and complete the same voter verification process identified for them as it does in March for prospective parties such as Americans Elect and LPO seeking party status under OKLA. STAT. tit. 26, § 1-108.

The State of Oklahoma has approximately 2,000,610 registered voters. The OSEB is staffed with 19 full-time employees and used an additional 5 temps on the petition signature project. This is the first year that elections are being conducted using the OSEB's new computer system. The OSEB has had to conduct statewide training for the CEB's on use of the new system. There are about 200 CEB employees statewide.

As one can see from the above, the entire process will be disrupted if the LPO is granted an injunction permitting it to continue circulating petitions until May 1, 2012. There simply is not time to compress into the nine days between May 1 and May 11 all of the activities which normally take place between March 1 through the mandatory May 11 MOVE Act mailing. The April 11-13, 2012 candidate filing and contest periods and the April 1 voter registration change deadline will have already expired. The military and overseas voters will be disenfranchised. Oklahoma will be subject to suit for injunctive or declaratory relief by the United States for failure to comply with the MOVE Act. The compelling interests of complying with the MOVE Act and permitting military and overseas voters to vote are in addition to previously recognized state interests.

Federal courts have recognized that any choice of a filing deadline is “necessarily arbitrary.” *U.S. Taxpayers of Florida v. Smith*, 871 F.Supp. 426, 432 (N.D.Fl. 1993)(citing *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983)). Consequently, the state is not required to pick a perfect deadline, just one that is reasonable in light of the burdens imposed. *Barr v. Ireland*, 575 F. Supp.2d 747, 760 (S.D.W.Va. 2008). In light of all of the facts and circumstances of this case, the March 1 deadline is reasonable. *See, e.g., Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004)(recognizing that time has to be allowed between petitions and elections for challenges to be made and adjudicated and ballots printed and distributed); *Libertarian Party of Maine v. Dunlap*, 659 F. Supp.2d 215, 244 (D. Maine 2009)(noting that “Elections Division staff needs to know which candidates names are to appear on the ballot no later than 11 weeks ahead of the election” to ensure that ballots can be printed and timely sent to absentee voters); *Barr v. Ireland*, 575 F. Supp.2d at 751 (finding filing deadline tied directly to date when absentee ballots must be distributed to military and other citizens); *U.S. Taxpayers of Florida v. Smith*, 871 F. Supp. 426 at 437 (finding filing deadline justified, recognizing that in addition to verifying signatures, election officials must conduct primaries, oversee voter registration and perform regular duties). Oklahoma’s interest is reasonable and is justified by the State’s legitimate and/or compelling interests in: (1) requiring potential candidates to show some minimum level of support by the electorate for their candidacy; (2) preventing the waste and confusion that might otherwise result from a lack of that showing; (3) avoiding disruption of the ballot and election preparation process; (4) assuring honest elections, (5) avoiding disruption of other responsibilities to assure ballot

accuracy and timely distribution of absentee ballots, and (6) complying with the federal MOVE Act to ensure that military and overseas voters are not disenfranchised and the State of Oklahoma is not sued.

c. The Signature Percentage Requirement of OKLA. STAT. tit. 26, § 1-108 and the time allowed to obtain the signatures does not violate Plaintiffs' First and Fourteenth Amendment rights.

Plaintiffs challenge the five percent (5%) signature requirement, separately and in conjunction with the petition filing date, as unconstitutionally burdening their rights to associate and to cast their votes effectively in violation of the First and Fourteenth Amendments. LPO contends it is too high a threshold to achieve, even though LPO has achieved it in the past, and appears on its way to doing so again in 2012, without Court intervention.

As much as a five percent (5%) signature requirement has been upheld as constitutional in numerous ballot access challenges. *See, e.g., Am. Party of Texas v. White*, 415 U.S.767, 789 (“Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face.”); *Storer*, 415 U.S.724, 739-40 (5% requirement not facially unconstitutional); *Jenness v. Fortson*, 403 U.S., 431, 438-39 (1971) (upholding Georgia statute requiring signatures of 5% of registered voters before independent candidates could be placed on ballot); *Swanson v. Worley*, 490 F.3d 894,905 (11th Cir. 2007)(upholding Alabama statute requiring independent candidates to obtain signatures of 3% of vote in last gubernatorial election); *Rogers v. Corbett*, 468 F.3d 188, 195 (3rd Cir. 2006) (upholding Pennsylvania statutes requiring minor party candidate to obtain signatures of 2% of vote in

last election); *Cartwright v. Barnes*, 304 F.3d 1138, 1141, 1142 (11th Cir. 2002) (reaffirming constitutionality of Georgia's 5% signature requirement); *Rainbow Coalition of Okla. v. Okla. State Election Bd.*, 844 F.2d 740, 741-42, 744 (10th Cir. 1988)(upholding Oklahoma statute requiring 5% percent of votes in last general election); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792-95 (11th Cir. 1983) (upholding Florida statute requiring minor party candidate to obtain 3% of all registered voters to appear on general election ballot); *Block v. Mollis*, 618 F.Supp.2d 142, 150 (D.R.I. 2009)(upholding Rhode Island statute requiring new party to obtain signatures of 5% of vote from prior election); *Libertarian Political Organization v. Clingman*, 2007 OK CIV APP 51, 162 P.3d 948(Oklahoma's 5% signature requirement and May 1 deadline upheld).

The Supreme Court has recognized that states have a legitimate interest in requiring that a new party demonstrate that it has significant support within the electorate. This interest is in "avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also Barr v. Galvin*, 626 F.3d 99, 111 (1st Cir. 2010).

This "support" requirement is meant "to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome run-offs, and may ultimately discourage voter participation in the electoral process.

Libertarian Party of Maine v. Diamond, 992 F. 2d 365, 371 (1st Cir. 1993). In addition, the requirement assures that a new political party designation "has some meaning." *Coalition for Free & Open Elections v. McElderry*, 48 F.3d 493, 498 (10th Cir. 1995). Thus, when candidates list a party affiliation, the voters and the state are entitled to some assurance that

the particular party designation has some meaning in terms of a “statewide, ongoing organization with distinctive political character.” *Storer v. Brown*, 415 U.S. 724, 745.

Oklahoma’s ranking in a scale of which state’s might be more or less restrictive than Oklahoma is irrelevant. The federal courts have recognized, “[a] court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature.” *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983)(citing *Storer v. Brown*, 415 U.S. at 729-730. The Supreme Court has upheld a broad array of election schemes, and thus, the issue in this case is whether Oklahoma’s election scheme is constitutional, not whether Oklahoma’s election scheme provides for more or less than do other states. *See Green v. Morthan*, 155 F.3d 1332, 1339 (11th Cir. 1998)(“There is a range of fees and signature requirements that are constitutional, and [a state] legislature is free to choose its ballot access requirement from that constitutional spectrum.”)

The bottom line is that Oklahoma’s statute requiring signatures equaling 5% of the vote in the last general election to be collected within a year, or even ten months, is more generous than what the United States Supreme Court upheld as constitutional in *Jenness v. Fortson*, 403 U.S. 431 (1971). In *Jenness*, 5% of the total voter registration was required, which is far more than Oklahoma’s 5% of the vote, to be obtained within 180 days was held constitutional. Thus, the ten month circulation period in 2012 passes constitutional muster. Under *Jenness*, Oklahoma could have required 100,000 signatures (5% of total voter registration), and limited circulation to six months, and still be within constitutional limits.

Furthermore, it is not possible to conduct a truly fair ranking of a states's signature requirements because of the variations in state ballot access laws beyond the number of signatures required. In addition, the cases cited by Plaintiffs are of limited value since they do not recognize the existence of the mandatory 45-day mailing requirement imposed on the States with enactment of the October, 2009, MOVE Act.

As an example, the Ohio case upon which Plaintiffs rely, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) involved an Ohio law requiring new political party petitions to be filed in November of the year preceding the general election – that is, almost twelve months before the November general election (120 days before the primary elections). *Blackwell* was decided prior to the MOVE Act, involved a filing deadline four (4) months earlier than Oklahoma's and thus is inapposite.

The Tennessee case on which Plaintiffs rely is also inopposite. The Tennessee statute was held unconstitutional because no minor party had ever qualified for the ballot, the Court mistakenly refused to acknowledge existence of the mandatory MOVE Act provisions, and there was no rational basis for 2 1/2% signature requirement for minor parties when only 75 to 275 signatures were required for independent candidates. Memorandum, *Green Party of Tennessee v. Hargett*, No. 3:11-0692 (MD Tenn, February 3, 2012). Tennessee filed its Notice of Intent to Appeal to the Sixth Circuit on March 2, 2012.

In determining whether the burden in Oklahoma on Plaintiffs' First Amendment rights is "severe", the inquiry is:

[C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate

will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.

Storer v. Brown, 415 U.S. 724, 742(1974). The LPO experience in Oklahoma has been that when they were diligent in their signature collecting efforts they made it on the ballot.

In 2004, LPO attempted to gain political party status. After failing to achieve the requisite number of signatures, LPO sued in Oklahoma State court alleging that Oklahoma's law was unconstitutionally burdensome. *Libertarian Political Organization of Oklahoma v. Clingman*, 162 P.3d 948 (Okla. Civ. App. 2007). In that year, 51,781 signatures were required, but LPO submitted only 26,462 unverified signatures. Oklahoma's law was held constitutional, and affirmed on appeal. The Oklahoma Court of Appeals affirmed, stating:

[T]he historical data does not prove that LPO has had an insufficient opportunity to be placed upon the ballot by using the petition procedure. The U.S. Supreme Court has generally been unimpressed with such arguments when other candidates or the same party have previously been successful using the same procedure. *See American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Here, the Libertarian Party has been able to place the name of its presidential candidate on the ballot, using essentially the same procedure as is now set forth in 26 O.S.2001 § 10-101.2, on two previous occasions.

Id. at 954. The Oklahoma Court further found it significant that the LPO made little effort to collect the required number of signatures. *Id.*

Further, although LPO complains about being required to submit its signatures March 1 rather than May 1, the earlier filing date actually benefits LPO. Early filing requirements provide benefits to political parties that a similar early filing requirement imposed on an independent candidate would not, such as: the structured intraparty contest by which party

candidates are selected; the publicity the party gains; the organizational support the party provides. *Wood v. Meadows*, 207 F.3d 708, 71 (4th Cir. 2000)

Oklahoma's signature requirement clearly falls within the range of petition signature requirements for new party ballot access that have been upheld as constitutional. As applied to LPO there is no evidence that Oklahoma's requirement alone or in conjunction with the state's filing deadlines and other election laws operates in a manner that is unconstitutionally restrictive. The current statute was signed into law on May 10, 2011. Americans Elect filed its Notice of Intent on October 3, 2011, seeking party recognition. This was five (5) months after LPO filed the LPO Notice of Intent. About five (5) months later, Americans Elect submitted 89,092 unverified signatures on February 28, 2012. LPO on the other hand spent ten (10) months obtaining 57,137 signatures, 5,398 or 10.4% more than the 51,739 minimum, but still claims a need for another two (2) months to collect more. Thus, in 2012 although it was for the first time petitioning in Oklahoma, Americans Elect was able to submit 56% more signatures than LPO and in half the time it took LPO, a political organization active in Oklahoma for decades. Under these facts LPO is hard pressed to establish that Oklahoma's ballot access laws are too restrictive.

Oklahoma has an important interest "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Munro*, 479 U.S. 189, 193 (1986). While unrecognized political parties representing minority views are vital to the continuation of representative government, this must be balanced with the state's important interests in controlling

fractionalism, avoiding voter confusion, reducing the burden of additional administrative costs. *Constitution Party of Kansas v. Biggs*, 2011 WL 1595042 at *8; *Nader v. Keith*, 385 F.3d 729, 732-33 (11th Cir. 2004). And now, with passage of the MOVE Act, it must also be balanced with the voting rights of military and overseas voters and the state's interest in avoiding suit by the United States for failure to comply with the MOVE Act. Oklahoma's 5% signature requirement, in and of itself or considered jointly with the 2012 circulation period, does not unnecessarily restrict or infringe on First Amendment or Fourteenth Amendment rights of Plaintiffs and are reasonable and justified by legitimate and compelling state interests. Under the *Anderson* balancing test, the Plaintiffs do not have a substantial likelihood of success on the merits, they are barred by laches, and the request for a preliminary injunction should be denied.

CONCLUSION

WHEREFORE, Defendants for all the reasons stated above request that this Court deny Plaintiffs' Motion for a Preliminary Injunction and Brief in Support.

Respectfully submitted,

s/ Martha R. Kulmacz

MARTHA R. KULMACZ, OBA # 5137
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Division
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Tele: (405) 521-3921 Fax: (405) 521-4518
Martha.Kulmacz@oag.ok.gov
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on March 7, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

James C. Linger, OBA # 5441
Elizabeth Cynita Thomas, OBA #22898
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
bostonbarristers@tulsacoxmail.com
Attorneys for Plaintiffs

s/ Martha R. Kulmacz

March 7, 2012Martha R. Kulmacz

An Act

ENROLLED HOUSE
BILL NO. 1615

By: Banz of the House

and

Sykes, Allen, Russell and
Marlatt of the Senate

An Act relating to election dates and deadlines; creating the Let the Troops Vote Act; providing short title; amending 26 O.S. 2001, Sections 1-102, as amended by Section 2, Chapter 162, O.S.L. 2003, 1-108, as last amended by Section 6, Chapter 53, O.S.L. 2004, 3-101, as last amended by Section 1, Chapter 224, O.S.L. 2005, 4-119, as amended by Section 7, Chapter 485, O.S.L. 2003, 5-110, as last amended by Section 8, Chapter 53, O.S.L. 2004, 5-115, as last amended by Section 4, Chapter 307, O.S.L. 2004, 5-119, 12-103, as last amended by Section 3, Chapter 369, O.S.L. 2004, 12-106, 12-108 and 12-113, as last amended by Sections 4 and 5, Chapter 369, O.S.L. 2004, 12-116, as amended by Section 6, Chapter 369, O.S.L. 2004, 13-102, as amended by Section 19, Chapter 545, O.S.L. 2004, 14-115.5, as amended by Section 22, Chapter 545, O.S.L. 2004, 14-118, as last amended by Section 1, Chapter 149, O.S.L. 2010, 20-101, as amended by Section 1, Chapter 174, O.S.L. 2003 and 20-102, as amended by Section 24, Chapter 485, O.S.L. 2003 (26 O.S. Supp. 2010, Sections 1-102, 1-108, 3-101, 4-119, 5-110, 5-115, 12-103, 12-108, 12-113, 12-116, 13-102, 14-115.5, 14-118, 20-101 and 20-102), which relate to election dates and procedures; modifying time period during which recognized political parties may be formed; changing dates upon which special elections may be held; modifying time period during which changes of political affiliation may be processed and approved; modifying period during which declarations of candidacy filed; modifying time period during which notices of withdrawal of candidacy and certain petitions may be filed; requiring certain

EXHIBIT

tabbles

petitions may be filed; requiring certain proclamation to prescribe filing and election dates that permit compliance with certain provisions; modifying time period during which occurrence of vacancy requires calling of special election; modifying time period after which special statewide election may be held after call; specifying filing period for certain municipal offices; modifying date of submission of list of nominees to absentee voting board; providing for transmission of absentee ballots; modifying date upon which Presidential Preferential Primary election held; eliminating procedure for return of certain funds; amending 11 O.S. 2001, Section 16-102, as amended by Section 25, Chapter 545, O.S.L. 2004 (11 O.S. Supp. 2010, Section 16-102), which relates to municipal elections; specifying filing period for certain municipal elections; repealing Section 9, Chapter 485, O.S.L. 2003, as amended by Section 21, Chapter 545, O.S.L. 2004 (26 O.S. Supp. 2010, Section 14-104.1), which relates to absentee ballots; providing for noncodification; and providing an effective date _____

SUBJECT: Election code

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law not to be codified in the Oklahoma Statutes reads as follows:

This act shall be known and may be cited as the "Let the Troops Vote Act".

SECTION 2. AMENDATORY 26 O.S. 2001, Section 1-102, as amended by Section 2, Chapter 162, O.S.L. 2003 (26 O.S. Supp. 2010, Section 1-102), is amended to read as follows:

Section 1-102. A Primary Election shall be held on the last Tuesday in ~~July~~ June of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election, unless otherwise provided by law. No candidate's

candidate shall have been nominated as herein provided, unless otherwise provided by law; provided further that this provision shall not exclude the right of a nonpartisan candidate to have his or her name printed upon the General Election ballots. No county, municipality or school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such primary election.

SECTION 3. AMENDATORY 26 O.S. 2001, Section 1-108, as last amended by Section 6, Chapter 53, O.S.L. 2004 (26 O.S. Supp. 2010, Section 1-108), is amended to read as follows:

Section 1-108. A group of persons may form a recognized political party at any time except during the period between ~~June 1~~ March 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year-;

2. After such notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with such Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of such petitions must contain the names of registered voters from a single county. Petitions may be circulated a maximum of one (1) year after notice is filed, provided that petitions shall be filed with ~~such~~ the Secretary no later than ~~May 1~~ March 1 of an even-numbered year. Such petitions shall not be circulated between ~~May 1~~ March 1 and November 15 of any even-numbered year-; and

3. Within thirty (30) days after receipt of such petitions, the State Election Board shall determine the sufficiency of such petitions. If such Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

SECTION 4. AMENDATORY 26 O.S. 2001, Section 3-101, as last amended by Section 1, Chapter 224, O.S.L. 2005 (26 O.S. Supp. 2010, Section 3-101), is amended to read as follows:

Section 3-101. A. No election required to be conducted by any county election board shall be scheduled for a day other than Tuesday.

B. Except as otherwise provided by law, no special election shall be held by any county, school district, technology center school district, municipality or other entity authorized to call elections except on the:

1. The second Tuesday of January, February, May, June, July, August, September, October, and November and the first Tuesday in March and April in odd-numbered years and the

2. The second Tuesday of January, and February, May, and December, the first Tuesday in March and April, the last Tuesday in July June, the fourth Tuesday in August, and the first Tuesday after the first Monday in November of any even-numbered year, except in any year when a Presidential Preferential Primary Election is held in February, the date for the special elections shall be the same date as the Presidential Preferential Primary Election.

C. In the event that a regular or special election date occurs on an official state holiday, the election shall be scheduled for the next following Tuesday.

SECTION 5. AMENDATORY 26 O.S. 2001, Section 4-119, as amended by Section 7, Chapter 485, O.S.L. 2003 (26 O.S. Supp. 2010, Section 4-119), is amended to read as follows:

Section 4-119. Any registered voter may make application under oath to change political affiliation by executing a form prescribed by the Secretary of the State Election Board at any time. The county election board secretary in the applicant's county of residence shall process and approve any such application for political affiliation change upon receipt, except as provided in Section 4-110.1 of Title 26 of the Oklahoma Statutes this title and except during the period from June 1 April 1 through August 31, inclusive, in any even-numbered year. The secretary shall process and approve such applications for change of political affiliation received or postmarked from June 1 April 1 through August 31 in any even-numbered year after August 31.

SECTION 6. AMENDATORY 26 O.S. 2001, Section 5-110, as last amended by Section 8, Chapter 53, O.S.L. 2004 (26 O.S. Supp. 2010, Section 5-110), is amended to read as follows:

Section 5-110. Declarations of Candidacy provided herein must be filed with the secretary of the appropriate election board no earlier than 8:00 a.m. on the ~~first Monday in June~~ second Wednesday of April of any even-numbered year and no later than 5:00 p.m. on the next succeeding ~~Wednesday~~ Friday. Such Declarations of Candidacy may be transmitted by United States mail, but in no event shall the secretary of any election board accept such Declarations after the time prescribed by law.

SECTION 7. AMENDATORY 26 O.S. 2001, Section 5-115, as last amended by Section 4, Chapter 307, O.S.L. 2004 (26 O.S. Supp. 2010, Section 5-115), is amended to read as follows:

Section 5-115. Any candidate may withdraw as a candidate only upon the filing of a written notice of withdrawal as a candidate with the secretary of the election board which accepted such candidate's declaration of candidacy. Such notice shall be signed by the candidate or a lawfully appointed personal representative or a lawfully appointed special administrator of any deceased candidate, whose signature shall be notarized by a notary public, and shall be filed on or before 5:00 p.m. on the ~~Friday~~ second business day following the close of the filing period prescribed by law.

SECTION 8. AMENDATORY 26 O.S. 2001, Section 5-119, is amended to read as follows:

Section 5-119. ~~Said~~ The petition must be filed no later than 5:00 p.m. on the second business day following the close of the filing period.

SECTION 9. AMENDATORY 26 O.S. 2001, Section 12-103, as last amended by Section 3, Chapter 369, O.S.L. 2004 (26 O.S. Supp. 2010, Section 12-103), is amended to read as follows:

Section 12-103. The proclamation required by Section 12-102 of this title shall prescribe filing and election dates that permit full compliance with the requirements of the federal Military and Overseas Voter Empowerment Act of 2009 and shall contain the following facts:

1. A filing period of three (3) days, on a Monday, Tuesday and Wednesday not less than ten (10) days from the date of such proclamation;

2. The date of the Special Primary Election, not less than twenty (20) days after the close of the filing period;

3. The date of the Special Runoff Primary Election, not less than twenty (20) days after the date of the Special Primary Election; and

4. The date of the Special General Election, not less than twenty (20) days after the date of the Special Runoff Primary Election.

Should such a vacancy occur ~~between~~ on or after March 1 ~~and June 1~~ of an even-numbered year, when a special election is required, the proclamation must contain dates that are the same as are required by law for the regular filing period, Primary Election, Runoff Primary Election and General Election, if practicable.

SECTION 10. AMENDATORY 26 O.S. 2001, Section 12-106, is amended to read as follows:

Section 12-106. A. Whenever a vacancy shall occur in the office of a member of the State Senate or the State House of Representatives, the vacancy shall be filled at a Special Election to be called by the Governor within thirty (30) days after the vacancy occurs; provided, no special election shall be called if the vacancy occurs after March 1 of any even-numbered year if the term of the office expires the same year.

B. If in an even-numbered year an incumbent State Senator with two (2) or more years remaining in the term for which elected shall file with the Oklahoma Secretary of State before ~~June 1~~ April 1 a resignation in writing which states that the resignation will not become effective immediately, but rather will become effective on some date certain that is after the General Election but before the convening of the next session of the Legislature, the vacancy shall be filled by a special election which shall be held in that even-numbered year on the same dates as the regular Primary Election, Runoff Primary Election and General Election. The filing period for the special election shall be the regular filing period prescribed in Section 5-110 of this title. The person elected in the General

Election of the special election shall take office on the date the resignation of the incumbent becomes effective and shall serve the remainder of the unexpired term.

SECTION 11. AMENDATORY 26 O.S. 2001, Section 12-108, as last amended by Section 4, Chapter 369, O.S.L. 2004 (26 O.S. Supp. 2010, Section 12-108), is amended to read as follows:

Section 12-108. Such proclamation shall contain the following facts:

1. A filing period of three (3) days, on a Monday, Tuesday and Wednesday not less than ten (10) days from the date of such proclamation;
2. The date of the Special Primary Election, not less than twenty (20) days after the close of the filing period; and
3. The date of the Special General Election, not less than twenty (20) days after the date of the Special Primary Election.

Should such a vacancy occur between on or after March 1 ~~and June 1~~ of an even-numbered year, when a special election is required, the proclamation must contain dates that are the same as are required by law for the regular filing period, Primary Election, Runoff Primary Election and General Election, if practicable.

SECTION 12. AMENDATORY 26 O.S. 2001, Section 12-113, as last amended by Section 5, Chapter 369, O.S.L. 2004 (26 O.S. Supp. 2010, Section 12-113), is amended to read as follows:

Section 12-113. Such proclamation shall contain the following facts:

1. A filing period of three (3) days, on a Monday, Tuesday and Wednesday, not less than ten (10) days from the date of such proclamation;
2. The date of the Special Primary Election, not less than twenty (20) days after the close of the filing period; and
3. The date of the Special General Election, not less than twenty (20) days after the date of the Special Primary Election.

Should such a vacancy occur ~~between on or after March 1 and June 1~~ of an even-numbered year, when a special election is required, the proclamation must contain dates that are the same as are required by law for the regular filing period, Primary Election, Runoff Primary Election and General Election, if practicable.

SECTION 13. AMENDATORY 26 O.S. 2001, Section 12-116, as amended by Section 6, Chapter 369, O.S.L. 2004 (26 O.S. Supp. 2010, Section 12-116), is amended to read as follows:

Section 12-116. In the event the Governor or the Legislature shall call for a special statewide election on any measure to be submitted to a vote of the people, ~~said the~~ election shall be held not fewer than ~~sixty (60)~~ seventy (70) days from the date ~~said the~~ election is called. Such special statewide election may be on the same date as a primary or general election or may be on some other date set by the Governor or the Legislature. In the event the board of county commissioners or the governing body of a municipality or school district or technology center school district or any other governmental subdivision calls for a special election on any question, ~~said the~~ election shall be held not fewer than sixty (60) days from the date ~~said the~~ election is called; provided, that a special election called by a school or technology center school district to be held on the date of the annual school runoff election shall not be held fewer than forty-five (45) days from the date ~~said the~~ special election is called. A special election to fill a vacancy for member of the board of education of a school district or to fill a vacancy for municipal office shall be scheduled not fewer than sixty (60) days from the date ~~said the~~ election is called.

SECTION 14. AMENDATORY 26 O.S. 2001, Section 13-102, as amended by Section 19, Chapter 545, O.S.L. 2004 (26 O.S. Supp. 2010, Section 13-102), is amended to read as follows:

Section 13-102. A. Not fewer than fifteen (15) days before the filing period for any regular municipal election, or in the event of a special election, not fewer than sixty (60) days before such election, the governing board of any municipality shall submit a resolution to the secretary of the county election board conducting such election. Such resolution shall contain the following facts:

1. The dates of the election or elections;
2. The offices to be filled or the questions to be voted upon at such election or elections;

3. Qualifications for such offices;

4. Designation of which offices shall be filled by voting by ward and which offices shall be filled by voting at large;

5. Indication of whether the election will be partisan or nonpartisan;

6. For charter cities where the charter is silent, indication of any portion of state law which will apply; and

7. Any other information necessary for conducting said election or elections.

B. In the event that a municipality governed by charter schedules a regular or special election for a municipal office on the same date as an election involving state or federal offices, the filing period for such municipal office shall be scheduled on a Monday, Tuesday and Wednesday not less than fifteen (15) days nor more than twenty (20) days following the date of the resolution or order.

SECTION 15. AMENDATORY 26 O.S. 2001, Section 14-115.5, as amended by Section 22, Chapter 545, O.S.L. 2004 (26 O.S. Supp. 2010, Section 14-115.5), is amended to read as follows:

Section 14-115.5 To carry out the provisions of Sections 14-115 and 14-115.4 of this title, the secretary of the county election board shall designate one or more absentee voting boards, to be composed of two (2) members each, with each member to be of a different political affiliation. No later than ~~July 1~~ June 1 in each even-numbered year, the chair of the county central committees of the two political parties having the highest number of registered voters in the county shall each submit a list of ten names to the secretary. Such lists shall contain names of registered voters of the county, who may be members of the county election board, except the secretary, or precinct election boards. The secretary shall be confined to such list in designating membership on the absentee voting board or boards, unless all persons on such lists are ineligible or unwilling to serve. In the event the chair of the county central committee of a political party fails to submit a list as herein provided, the secretary shall appoint membership to such board or boards from the ranks of registered voters of such party within the county. Provided further, that in the event the list of

names of either or both parties is exhausted and additional absentee voting boards are needed, the secretary shall appoint additional members to such boards from the ranks of such party or parties in the county. Members of an absentee voting board shall be reimbursed for their expenses at the same rate as a precinct judge or clerk, as provided in Section 2-129 of this title. One member of each such board serving a nursing home or convalescent hospital shall be allowed mileage reimbursement at the rate prescribed for travel by state employees according to the State Travel Reimbursement Act.

SECTION 16. AMENDATORY 26 O.S. 2001, Section 14-118, as last amended by Section 1, Chapter 149, O.S.L. 2010 (26 O.S. Supp. 2010, Section 14-118), is amended to read as follows:

Section 14-118. A. When an application for an absentee ballot pursuant to Section 14-117 of this title is received by the secretary of a county election board, it shall be the duty of the secretary to transmit by United States mail, by facsimile device as defined in Section 1862 of Title 21 of the Oklahoma Statutes, or as provided in subsection B of this section the ballots which the elector has requested and is entitled to receive. When an application for an absentee ballot is received at least forty-five (45) days before an election involving state or federal offices, the absentee ballot shall be transmitted by mail, by electronic mail, or by other means of electronic communication, as provided in this section, or by facsimile device as provided in Section 14-118.1 of this title, not less than forty-five (45) days preceding the election. When an application for an absentee ballot for an election involving state or federal offices is received less than forty-five (45) days preceding the election, the absentee ballot shall be transmitted by mail, by electronic mail, or by other means of electronic communication, as provided in this section, or by facsimile device as provided in Section 14-118.1 of this title, within forty-eight (48) hours of receipt of the application.

B. The secretary of the county election board may transmit balloting materials for any state or federal election, or for any other election as designated by the Secretary of the State Election Board as provided in subsection D of this section, ~~to an~~ by electronic mail address or by other means of electronic communication in a form and manner prescribed by the Secretary of the State Election Board, if the voter:

1. Is a Federal Post Card Application registrant and is eligible to receive an absentee ballot as provided by law;

2. Provides an electronic mail address; and
3. Requests that balloting materials be sent by electronic mail.

If the secretary of the county election board transmits a ballot to a voter ~~at an~~ by electronic mail address or by other means of electronic communication as provided in this subsection, the secretary shall amend the voter's federal postcard application for future elections to include the voter's electronic mail address.

C. An electronic mail address provided under this section is confidential and does not constitute public information for purposes of the Oklahoma Open Records Act. The secretary of the county election board shall ensure that an electronic mail address provided under this section is excluded from disclosure.

D. The Secretary of the State Election Board shall determine if balloting materials for any election other than a state or federal election may be produced in a form which would allow them to be transmitted ~~to an~~ by electronic mail address or by other means of electronic communication. If so, the Secretary shall so designate them. If such designation is not made, the balloting materials may be transmitted to the voter as provided in subsection A of this section.

E. All other provisions of this title that would normally apply to a ballot voted under this title apply to a ballot provided pursuant to the provisions of subsection B of this section.

F. The Secretary of the State Election Board may suspend the provisions of subsection B of this section if the Secretary determines that electronic transmission of balloting materials is not in the best interest of the people of this state due to a potential problem with the security of the balloting materials.

SECTION 17. AMENDATORY 26 O.S. 2001, Section 20-101, as amended by Section 1, Chapter 174, O.S.L. 2003 (26 O.S. Supp. 2010, Section 20-101), is amended to read as follows:

Section 20-101. A. A Presidential Preferential Primary for recognized political parties shall be held on the first Tuesday in ~~February~~ March in each of the years in which the President and Vice President of the United States are to be elected.

B. If one or more states having a mutual boundary with this state establish a single date for a regional primary, the State Election Board is authorized to change the date of the Oklahoma primary to the date established for the regional primary.

C. No county, municipality, school district or other entity authorized by law to call elections shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such Primary Election. However, this subsection shall not apply to home rule municipalities.

SECTION 18. AMENDATORY 26 O.S. 2001, Section 20-102, as amended by Section 24, Chapter 485, O.S.L. 2003 (26 O.S. Supp. 2010, Section 20-102), is amended to read as follows:

Section 20-102. A. Candidates for the nomination for President of the United States shall file with the Secretary of the State Election Board. Such candidates shall be members of political parties recognized under the laws of the State of Oklahoma and shall have filed a statement of candidacy with the Federal Election Commission and shall have raised and expended not less than Five Thousand Dollars (\$5,000.00) for said office. The candidates shall be required to swear an oath or affirm that they meet the aforementioned qualifications, and their signatures shall be witnessed by a notary public. Such filing beginning at 8:00 a.m. on the first Monday in December and ending at 5:00 p.m. on the next succeeding Wednesday, or at a time prescribed by the State Election Board for a Presidential Preferential Primary to be held on a date other than the first Tuesday in ~~February~~ March. A statement of candidacy must be accompanied by a petition supporting a candidate's filing signed by one percent (1%) of the registered voters in each congressional district eligible to vote for a candidate or one thousand (1,000) registered voters in each congressional district eligible to vote for a candidate, whichever is less, as reflected by the latest January 15 registration report; or by a cashier's check or certified check in the amount of Two Thousand Five Hundred Dollars (\$2,500.00). ~~Such check shall be forfeited unless a candidate receives more than fifteen percent (15%) of the votes cast.~~ The State Election Board shall cause the names of all candidates who have filed within the proper time to be printed on the official ballots. The ballots shall be prepared as provided for by law. Voters shall be restricted to one vote for the candidate of his or her choice of the political party in which the voter is registered.

B. Each page of a petition supporting a candidate's filing shall identify the county and the congressional district, and shall contain the names of registered voters in only one congressional district and in only one county.

C. Each page of a petition supporting a candidate's filing shall be verified. Verification shall be made in substantial compliance with the provisions of Section 6 of Title 34 of the Oklahoma Statutes.

SECTION 19. AMENDATORY 11 O.S. 2001, Section 16-102, as amended by Section 25, Chapter 545, O.S.L. 2004 (11 O.S. Supp. 2010, Section 16-102), is amended to read as follows:

Section 16-102. A. The provisions of Section 16-101 et seq. of this title shall not apply to any municipality which is governed by charter; provided, that elections for such municipalities which shall be conducted by the county election board shall be scheduled only on an election date identified by ~~Section~~ subsection B of Section 3-101 of Title 26 of the Oklahoma Statutes. However, such a municipality may, by indicating in its resolution calling an election, choose to follow any provision of state law governing elections conducted by a county election board when the municipality's charter or ordinances are silent on the matter addressed by such provision. In such instance, if the municipal election or any substantial portion thereof is not conducted by a county election board, the duties required of the county election board or its secretary shall be performed by the municipal authority designated by the municipal governing body and nothing herein shall be construed to require the county election board to perform any such duties. The residency requirements of Sections 16-109 and 16-110 of this title shall apply to all municipalities except to the extent that such residency requirements are governed by municipal charter.

B. The provisions of Sections 16-101 through 16-114 of this title shall not apply to any municipality subject to the provisions of the Oklahoma Town Meeting Act; provided, Section 16-103.1 of this title shall apply to such municipalities.

C. In the event that a municipality governed by charter schedules a regular or special election for a municipal office on the same date as an election involving state or federal offices, the filing period for such municipal office shall be scheduled on a

Monday, Tuesday and Wednesday not less than fifteen (15) days nor more than twenty (20) days following the date of the resolution or order.

SECTION 20. REPEALER Section 9, Chapter 485, O.S.L. 2003, as amended by Section 21, Chapter 545, O.S.L. 2004 (26 O.S. Supp. 2010, Section 14-104.1), is hereby repealed.

SECTION 21. This act shall become effective November 1, 2011.

Passed the House of Representatives the 3rd day of May, 2011.

Lee Demery

Presiding Officer of the House
of Representatives

Passed the Senate the 7th day of April, 2011.

Arthy Sykes

Presiding Officer of the Senate

OFFICE OF THE GOVERNOR

Received by the Governor this 4th
day of May, 2011,
at 5:21 o'clock PM.

By: Jessie R. Rogers

Approved by the Governor of the State of Oklahoma the 10th day of
May, 2011, at 11:42 o'clock AM.

Mary Fallin
Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this
10th day of May, 2011,
at 2:49 o'clock PM.

By: Michelle R. Dwyer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF NEW YORK and NEW)
 YORK STATE BOARD OF ELECTIONS,)
)
 Defendants.)
)
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Case No. 1:10-CV-1214 (GLS/RFT)

ORDER

In accordance with the Court's January 27, 2012 order, the Court hereby concludes that:

1. The United States filed this action on October 12, 2010, to remedy violations of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009).
2. UOCAVA guarantees active duty members of the uniformed services (and their spouses and dependents) and United States citizens residing overseas the right "to vote by absentee ballot in general, special, primary, and runoff elections for federal office." 42 U.S.C. § 1973ff-1.
3. New York is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. §§ 1973ff-1 & 1973ff-6(6).



4. New York failed to transmit all UOCAVA ballots in accordance with UOCAVA in the 2010 federal general election.

5. In the time since the 2010 federal general election, New York provided the United States and the Court with data concerning the transmission and receipt of UOCAVA ballots in that election in an effort to determine which, if any, voters were disenfranchised due to New York's failure to comply with UOCAVA.

6. At the present time, insufficient data has been obtained from the following 11 counties to determine whether UOCAVA voters in those counties were disenfranchised in the 2010 federal general election: Bronx, Kings, Nassau, New York, Niagara, Queens, Schenectady, Staten Island, Suffolk, Westchester, and Ulster.

Accordingly, it is ORDERED that:

(1) Within 7 days of this Order, the New York State Board of Elections ("NYSBOE") shall transmit the attached questionnaire to each county board of elections on the above list with instructions for the chief officials of each county board to certify the accuracy of the board's responses to the questionnaire.

(2) The parties shall administer the survey and take all other steps required by the Court in paragraphs (7) through (12) of the Court's January 27, 2012 order.

(3) To ensure New York's compliance with UOCAVA for the 2012 federal elections, and in accordance with paragraph (5) of the Court's January 27, 2012 order, the NYSBOE shall meet and confer with counsel for the United States 14 days and 7 days prior to each federal election in 2012 to provide the United States with a status update concerning New York's efforts to ensure UOCAVA compliance and the effectiveness of those efforts.

(4) To further ensure New York's compliance with UOCAVA for the 2012 federal elections, and in accordance with paragraph (5) of the Court's January 27, 2012 order, the NYSBOE shall file the following pre-election reports with counsel of record for the United States:

- a. Beginning the 55th day prior to each Federal election, survey each New York county to determine: (1) whether each county has received a sufficient number of printed absentee ballots sufficiently ahead of the 45-day mailing deadline to transmit those ballots as required by UOCAVA; (2) whether each county has the technical capacity to transmit all requested ballots by the requested method of transmission; (3) whether any county anticipates difficulties or a situation that would prevent it from transmitting all requested ballots to UOCAVA voters by the requested method of transmission and by the appropriate deadline; and (4) whether it would be appropriate for Defendants to provide additional support to any county to ensure that it meets the appropriate deadlines. Defendants shall provide the results of their survey to counsel for the United States in a format agreed to by the parties no later than 5:00 pm Eastern time on the 48th day before each Federal election.
- b. By the 45th day prior to each Federal election, obtain written or electronic certifications, in a format agreed to by the parties, of: (1) the number of absentee ballot applications received by each county on or before the 45th day before each Federal election from any voter entitled to vote pursuant to UOCAVA and the method of transmission requested; (2) the date on which the county began sending absentee ballots to those UOCAVA voters; (3) the

date on which and method of transmission by which the county completed sending those absentee ballots; and (4) an affirmative declaration that all UOCAVA ballots requested by the 45th day were transmitted by the 45th day by the requested method of transmission.

- c. Compile the data provided by the counties described in paragraph (4)(b) above into a spreadsheet format devised in consultation with the United States and transmit the spreadsheet electronically to counsel for the United States no later than 5:00 pm Eastern time on the 43rd day before each Federal election.
- d. Certify in writing to counsel for the United States that all of the data reported pursuant to paragraph (4)(b) of this Supplemental Decree is accurate to the best of their knowledge.
- e. Obtain written or electronic certifications, in a format agreed to by the parties, of: (1) the number of absentee ballot applications received by each county after the 45th day and on or before the 30th day before each Federal election from any voter entitled to vote pursuant to UOCAVA and the method of transmission requested; and (2) the date on which and method of transmission by which the county sent the requested ballots; and (3) an affirmative declaration that all UOCAVA ballots requested after the 45th day and on or before the 30th day were transmitted promptly by the requested method of transmission.
- f. Compile the data provided by the counties described in paragraph (4)(e) above into a spreadsheet format devised in consultation with the United States and

transmit the spreadsheet electronically to counsel for the United States no later than 5:00 pm Eastern time on the 29th day before each Federal election.

- g. Certify in writing to counsel for the United States that all of the data reported pursuant to paragraph (4)(e) of this Supplemental Decree is accurate to the best of their knowledge.

(5) Within two weeks of the date election results are certified for each federal election in 2012, NYSBOE shall file a report with counsel of record for the United States concerning the number of UOCAVA absentee ballots, by county, received and counted for each of those elections. The report will set forth the following information, by county, categorized by absent uniformed services voters with APO/FBP addresses or non-US street addresses; uniformed services voters at a street address within the US; and overseas civilian voters:

- a. The number of absentee ballots from UOCAVA voters received by local election officials before the close of business on the day of the final ballot receipt deadline for UOCAVA voters, as specified in N.Y. Election Law § 11-212, and counted;
- b. The number of absentee ballots from UOCAVA voters received after the close of business on the day of the final ballot receipt deadline for UOCAVA voters specified in N.Y. Election Law § 11-212; and
- c. The number of absentee ballots from UOCAVA voters that were not counted in the election for reasons other than late receipt, and the reasons such ballots were not counted.

(6) This Court shall retain jurisdiction to ensure additional relief as appropriate.

SO ORDERED.


GARY L. SHARPE
United States District Judge

Dated: February 14, 2012

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Questionnaire

County: _____

Instructions: Each New York county board of elections must answer the following questions. The co-commissioners of the board must sign the responses to these questions and attest to their accuracy under penalty of perjury. Responses must be submitted to the New York State Board of Elections within 30 days of receiving this survey. Please attach additional sheets of paper if necessary to respond completely to each question. All responses will be filed by the State with the U.S. District Court for the Northern District of New York in connection with *United States v. New York, et al.*, No. 1:10-CV-1214 (GLS/RFT) (N.D.N.Y. filed Oct. 12, 2010).

Part I: UOCAVA Ballot Requests

1. Please provide the number of UOCAVA ballot requests received by your county prior to September 18, 2010: _____.
2. Please provide the number of UOCAVA ballot requests received by your county between September 18, 2010 and October 1, 2010: _____.
3. Please provide the number of UOCAVA ballot requests received by your county between October 1, 2010 and October 10, 2010: _____.
4. Please provide the number of UOCAVA ballot requests received by your county after October 10, 2010: _____.

Part II: UOCAVA Ballot Transmittals

1. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) by October 1, 2010: _____.
2. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) between October 1, 2010 and October 10, 2010: _____.
3. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) after October 10, 2010: _____.
 - a. If ballots were transmitted after October 10, 2010, please provide the following:
 - i. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested before October 10, 2010: _____.

- ii. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested after October 10, 2010: _____.

Part III: UOCAVA Ballots Returned to the County

1. Please provide the number of UOCAVA ballots received by the county prior to November 2, 2010: _____.
2. Please provide the number of UOCAVA ballots received by the county between November 2, 2010 and November 24, 2010: _____.
3. Please provide the number of UOCAVA ballots received by the county after November 24, 2010: _____.

Part IV: Rejected UOCAVA Ballots

1. Please provide: a.) the number of UOCAVA ballots that were received prior to November 2, 2010 that were rejected and not counted: _____; and b.) the reason(s) for rejection of each of those ballots:

2. Please provide: a.) the number of UOCAVA ballots that were received between November 2, 2010 and November 24, 2010 that were rejected and not counted: _____; and b.) the reason(s) for rejection of each of those ballots:

3. Please provide the number of UOCAVA ballots that were received after November 24, 2010 that were rejected and not counted: _____.

- a. Were any ballots received after November 24, 2010 requested by October 10, 2010 and transmitted to the voter after that date? _____.
- i. If yes, please provide the number of such ballots: _____.
- ii. If yes, please provide the number of such ballots that were not counted only because they were received after November 24, 2010: _____.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief:

Co- commissioner's signature: _____

Printed name: _____

Title: _____

Date: _____

Co- commissioner's signature: _____

Printed name: _____

Title: _____

Date: _____