IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Robert S. JOHNSTON III and the LIBERTARIAN PARTY OF MARYLAND

Plaintiffs,

v.

Linda H. LAMONE, in Her Official Capacity as Administrator of the Maryland State Board of Elections

Defendant.

Case No. 1:18-cv-03988-CCB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Robert S. Johnston III and the Libertarian Party of Maryland hereby move the Court for a temporary restraining order and preliminary injunction, enjoining defendant Linda Lamone from removing or excluding the Libertarians from any Voter Registration Application (or parallel forms or processes of voter registration or party affiliation) approved by the State Board of Elections until the Plaintiffs' constitutional claims can be adjudicated by this Court. Plaintiffs ask the Court to grant this relief immediately by way of temporary restraining order, and to order expedited briefing on the motion for preliminary injunction so that the Court may hear the evidence and arguments of all parties before the temporary restraining order expires.

The requested relief is necessary because counsel for the defendant has informed the plaintiffs that unless this Court issues an injunction, she intends imminently to remove the Libertarian Party from the Voter Registration Application through which Maryland residents register to vote. As explained in the Complaint, doing so would unconstitutionally infringe the rights of Maryland residents to associate for political purposes, to nominate candidates to stand for election before their fellow Maryland voters, and ultimately to vote for those candidates. If enforced, the provisions at issue in this case will deprive the Libertarians of their status as a recognized political party and allow them to regain that status only by presenting a petition showing that at least 10,000 eligible voters support the recognition of the party. Ostensibly, the purpose of this requirement is to demonstrate that the party has the support of at least 10,000 eligible voters. But the State already has even better evidence that the Party has the requisite level of support: the State's own voter registration records show that more than 22,000 voters are registered as Libertarians.

The Election Law requirements challenged in our Complaint are not the iron grip of totalitarianism; they are not even the product of malevolence of any kind. But they are harmful

nonetheless. They pointlessly and irrationally impose significant burdens on minority parties in Maryland without advancing any legitimate State interest. These burdens have the effect of depriving all Maryland voters of more robust political debate and wider freedom of choice in the voting booth. The plaintiffs' Complaint therefore seeks declaratory and injunctive relief to recognize that the State cannot compel the plaintiffs to spend thousands of hours or pay as much as $100,000 demonstrating what the State already knows. Because the State already knows that over 22,000 registered voters in Maryland consider themselves Libertarians, the State also already knows there are at least 10,000 voters in Maryland who want to see Libertarians on the ballot. Requiring those 22,000 Libertarians to go out and collect entirely duplicative evidence of that fact from 10,000 of their overwhelmingly Democratic, Republican, and unaffiliated neighbors would be like fining the Libertarian Party $100,000 for being small.

Election officials know that requiring 10,000 signatures from a Libertarian Party with over 22,000 registered members doesn't make any sense, but they feel bound to enforce the law as written. The Attorney General's office likewise feels bound to defend the statutory scheme, because that's what Attorneys General do. But the speech and association rights of minority parties and likeminded voters in Maryland are protected by an even higher law in the U.S. Constitution, and those rights cannot be sacrificed to a complete charade. Plaintiffs depend on this Court to make that clear.

First, however, the plaintiffs face a new obstacle we thought we had avoided. Even before the Complaint was filed, counsel for the plaintiffs had secured from the Attorney General's office an agreement to maintain the status quo during the pendency of this litigation. Counsel had agreed to work together to streamline the adjudication of the claims, possibly with stipulated facts and an early motion for summary judgment, and the Attorney General's office

suggested that we enter into a formal stipulation maintaining the status quo after the Complaint was on file. Grannis Decl. ¶ 5. Consequently, the plaintiffs filed their Complaint without any request for temporary injunctive relief.

However, within the last week, counsel for the defendant has informed the plaintiffs that the defendant no longer believes she can maintain the status quo because a new political organization within Maryland has recently qualified for recognition as a "political party" under Maryland's Election Law. The Maryland State Board of Elections understandably feels an obligation to redesign and reprint the Voter Registration Application (and associated materials throughout the state for parallel electoral processes such as online voter registration and registration at the Motor Vehicle Administration), to permit Maryland voters to affiliate with the new "Bread and Roses Party." Less understandably, the State apparently feels that this prevents it from honoring the agreement to keep the Libertarian Party on all the same forms while this Court examines the Libertarians' constitutional claims. Grannis Decl. ¶ 7.

Removing the Libertarian Party from the Maryland Voter Registration Application (and parallel registration paths at county election boards, at the Motor Vehicle Administration, online, and elsewhere) would cause irreparable harm to the Party and its members by interfering with the associational rights of Libertarians throughout Maryland. As the State's own statistics for the last four years demonstrate, there are in a typical month perhaps 25,000 Maryland voters who are either registering or re-registering to vote. An average of 243 Maryland voters each month have been choose either to renew their affiliation with the Libertarian Party or to affiliate with the Libertarian Party for the first time. Johnston Decl. ¶ 13. Excluding the Libertarian Party from the forms and online protocols the State uses for this purpose would interfere with the ability of these voters to find the Party and make common cause with their likeminded neighbors.

Moreover, this "missed connection" will be virtually impossible to correct if the Court ultimately determines that the Libertarian Party should have been recognized all along. The phantom Libertarian voters will have chosen either to affiliate with another party or to register as "unaffiliated," and neither situation will give either the Libertarian Party or the State any insight as to whether that particular voter would really have preferred to affiliate with the Libertarians. Nor, if the Court rules for the Libertarians, will it be practicable for the State to contact *all* the new registrants (registering at a rate of 25,000 per month) to ascertain later whether they would like to affiliate with the Libertarian Party after all.

By contrast, if this Court were to grant the temporary relief requested here, then even if the Court were ultimately to decide against the Libertarian Party's constitutional claims on the merits, it would be easy for the State Board to produce a list of all voters who affiliated with the Libertarian Party from January 1, 2019 to the date of the Court's decision. The State could, if it chose, give those voters (perhaps only 1 out of every 100) special notice of their opportunity to change their party affiliation in response to the Court's decision. The balance of the equities thus weighs decidedly in favor of temporary injunctive relief for the plaintiffs. Continuing to offer the Libertarian Party as an option on the State's registration forms during the pendency of this litigation does no harm to anyone, and it can be quickly undone if the Court rejects our claims. But excluding the Libertarian Party from the registration processes before the constitutional issues have been settled could do great harm, affecting tens of thousands of voters per month, and that exclusion would be nearly impossible to correct if the plaintiffs were ultimately to prevail. It is, in short, much better to err in favor of the plaintiffs at this time than in favor of the defendant. We might also observe that the relief we seek from the Court here is no more than the defendant initially offered to give us voluntarily.

Temporary injunctive relief is also firmly in the public interest. Keeping the Libertarian Party on the Voter Registration Application during the pendency of this litigation will give voters in Maryland greater freedom of association and may well lead to greater electoral choice as the party approaches the 1% threshold set under the Election Law. In addition, the requested relief will avoid the disruption that might attend a sudden removal of the Libertarians followed by a restoration if and when this Court finds that the Libertarians have a constitutional right not to be removed. In addition, allowing voters to affiliate with the Libertarian Party during the pendency of this litigation will necessarily give the State more of exactly the kind of information it claims to be interested in: information on the level of support for the Libertarian Party within Maryland.

For all of these reasons, therefore, the plaintiffs ask this Court (1) to enter a temporary restraining order as soon as possible, preventing the defendant from implementing any change to the Voter Registration Application (or parallel forms or processes of voter registration or party affiliation) that would exclude the Libertarian Party as one of the listed options for party affiliation; (2) requiring the defendant to file any objection to the requested relief not later than Monday, January 28, 2019: (3) permitting the plaintiffs to file a reply by Wednesday, January 30, 2019; and (4) setting a hearing date for Friday, February 1, 2019, to consider whether to convert the temporary restraining order into a preliminary injunction.

LEGAL AND FACTUAL BACKGROUND

Maryland law permits "recognized" political parties to nominate candidates directly to the general election ballot without the need for each individual candidate to collect signatures and file his or her own petition with state or local boards of elections. To obtain these ballot access privileges for the first time, a new political party in Maryland is required, among other

things, to submit a petition to the State Board of Elections. "Appended to the petition shall be papers bearing the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the first day of the month in which the petition is submitted." Md. Code Ann., Elec. Law § 4-102(b)(2)(i).

Once a political party has been recognized by the State, it automatically retains its status "until December 31 in the year of the second statewide general election following the party's qualification under § 4-102." Md. Code Ann., Elec. Law § 4-103(a)(1). Statewide general elections occur every two years, so each successful petition enables a party to obtain ballot access benefits for no more than four years. A party, once recognized, gets an automatic extension of its ballot access privileges if it has attracted the party affiliations of at least 1% of all registered voters. Md. Code Ann., Elec. Law § 4-103(a)(2). Since the enactment of this provision of the Election Law, no party other than the Democrats and the Republicans has ever attracted the affiliation of more than 1% of registered voters.[1] Thus, large parties need not concern themselves with any of the mechanics of renewing their party recognition, nor do any of the Democrats and Republicans in the General Assembly need to worry about how they will get their names on the ballot for re-election.

For smaller parties, however—*i.e.*, every party that Maryland has recognized under these laws except the Democrats and the Republicans—the only path to automatic renewal is for the party's gubernatorial or presidential nominee to attract more than 1% of the vote. *Id.* When recognition is extended based on vote totals, it lasts for only one two-year election cycle, so all it

[1] The Libertarian Party, which is Maryland's third-largest party, had attracted the affiliations of approximately 22,464 registered voters as of December 31, 2018. That represented a little more than half a percent of Maryland's 4,028,106 registered voters as of that date. Approximately 54.8% of the state's active registered voters are Democrats, 25.4% are Republicans, and 18.6% are unaffiliated with any party. Johnston Decl., Ex. A.

takes is one election in which the top of the ticket finishes with less than 1% and a small party finds its party recognition in jeopardy. When that happens, the party must re-qualify "by complying with all the requirements for qualifying as a new party under § 4-102." Md. Code Ann., Elec. Law § 4-103(c). This means submitting a new petition with the names of at least 10,000 registered voters, as described above.

The Libertarian Party has been recognized without interruption since its successful petition drive in 2012. The Libertarian nominee for Governor attracted more than 1% of the votes cast in the 2014 election for Governor—the first and only time in the modern era that a small-party candidate has achieved this—and the Libertarian nominee for President attracted more than 1% in 2016. Due in no small part to this period of uninterrupted recognition by the State, the number of registered voters affiliated with the Libertarian Party grew from 9,753 at the end of 2011 to 22,464 at the end of 2018. Significantly, this has occurred at a time when party affiliation has in general declined. In 2017, for example, the Libertarian Party was the only recognized political party in Maryland that grew at all; the others all shrank that year. Johnston Decl. ¶ 7. However, during the 2018 Gubernatorial General Election, the Libertarian nominee for Governor received approximately 13,241 votes, fewer than the approximately 23,045 votes (1% of the total votes cast for governor) necessary to extend the party's official recognition automatically. Johnston Decl. ¶ 6. As a consequence, the Election Law on its face requires the party to submit a new party recognition petition signed by at least 10,000 registered voters.

Collecting these 10,000 will be a significant burden to the Libertarian Party, as it is to any small party—and small parties are the only parties that ever need to bother with it. The rules governing signature validation and counting (*see generally* Md. Code Ann., Elec. Law §§ 6-201 through 6-211) are complicated enough that, as a practical matter, petitioners hire professional

petition circulators who collect signatures by standing in public or semi-public places (*e.g.*, outside grocery stores) and asking passers-by if they will sign a petition in support of the petitioning party's access to the ballot. It is slow work, and growing concerns about the sharing of personal information that may end up in the public record or on computerized marketing lists has only made it slower in recent years. Circulators sometimes report that three hours of diligent, polite requests might produce many expressions of goodwill but fewer than twenty signatures. The plaintiffs allege in the Complaint that professional circulators currently charge between $2.50 and $4.00 per collected signature plus expenses such as transportation and lodging. If it were practicable to submit a successful party recognition petition with exactly 10,000 signatures, it could take more than 1,500 hours of work and cost the Libertarian Party between $25,000 and $45,000 to collect those signatures and submit them for official validation and counting. Johnston Decl. ¶ 10.

But in fact, a successful party recognition petition requires the collection of far more than 10,000 signatures. Circulators who are collecting signatures outside a grocery store do not have access to voter registration databases, and many people who are kind enough to stop and sign the petition may be embarrassed to admit that they are not actually registered to vote. Thus, signatures from non-voters inevitably make their way onto the petition pages. In addition, Maryland's validation standards virtually guarantee the invalidation of many signatures for reasons related to the way the signers wrote their names, even though the State Board of Elections definitively identifies them as having come from particular registered voters.[2] All told,

[2] The specifics of these name-related disqualifications of known registered voters are discussed at greater length in the Complaint, but the details are not relevant to this motion except insofar as they make it clear that the burden of complying with the law is perhaps two-and-a-half times as great as a 10,000-signature requirement would suggest on its face.

the State used these standards to invalidate almost 60% of the signatures on the Libertarian Party's 2011 petition. Johnston Decl. ¶ 4. Consequently, for a party recognition petition to be safe from challenge under the State's interpretation of its validation standards, the sponsoring party should probably collect at least 25,000 signatures, raising the cost burden on smaller parties to something more like $65,000–$110,000. Johnston Decl. ¶ 11.

ARGUMENT

"The standard for a temporary restraining order is the same as a preliminary injunction." *Maages Auditorium v. Prince George's Cty.*, 4 F. Supp. 3d 752, 760 n.1 (D. Md. 2014). The plaintiffs must establish (1) that we are likely to succeed on the merits; (2) that we are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in our favor; and (4) that an injunction is also in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[A]ll four requirements must be satisfied." *Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014) (quoting *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010)). This Court should grant the requested temporary restraining order and preliminary injunction because all four elements of this standard are satisfied here.

I. Plaintiffs Are Likely to Succeed on the Merits of Their As-Applied Challenge to the Signature-Collection Requirement.

The plaintiffs are likely to succeed on the merits of this as-applied challenge to the signature-collection requirement because Maryland law on this point exhibits the same lack of means-end rationality that the Supreme Court has repeatedly relied upon to strike down similar requirements elsewhere. The root of the problem is that when the State's own records show that there are 22,464 Libertarians in Maryland, it is completely pointless for the State to require those 22,464 Libertarians to go out and collect 10,000 signatures for the ostensible purpose of showing

that there are at least 10,000 voters who want Libertarians on the ballot. It is actually worse than pointless, because the signatures collected to satisfy such a requirement inevitably come overwhelmingly from Democrats, Republicans, and unaffiliated voters who simply support free speech and free elections. No legitimate governmental interest is advanced by applying the signature-collection requirement in these circumstances; the defendant cannot hope to demonstrate that it is *necessary* to achieve any *compelling* State interest.

The applicable standard has been well known for a generation:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this standard, the level of justification required to sustain an election regulation varies depending on the nature and extent of the burden imposed. When electoral rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The application of the signature-collection standard under the circumstances of this case cannot be sustained under this standard.

A. The Signature-Collection Requirement Severely Burdens Rights Protected by the First and Fourteenth Amendments to the U.S. Constitution.

The first step in the constitutional analysis is to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This is important not only because the burden must later be weighed against whatever state interest is asserted on the other side, but also because the "character and magnitude" of the

restriction determine the level of scrutiny applied by the reviewing court. Prior decisions of the U.S. Supreme Court, the Fourth Circuit, and even the Maryland Court of Appeals make clear that laws that make it difficult for smaller parties to nominate candidates for the general election are generally viewed as "severe" restrictions on voting rights which are not constitutional unless they are "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434.

"Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Socialist Workers Party*, 440 U.S. at 184 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

It is not, of course, *always* unconstitutional for a state to require aspiring candidates or their sponsoring parties to collect signatures in order to obtain ballot access. In *Jenness v. Fortson*, the Supreme Court upheld Georgia's signature-collection requirement as it recognized "an important state interest in requiring some preliminary showing of *a significant modicum of support* before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S. 431, 442 (1971) (emphasis added).

But the Court has repeatedly struck down signature-collection requirements that don't in fact advance the state's interest in demonstrating "a significant modicum of support" and preventing undue fragmentation. Thus, in *Illinois State Board of Elections v. Socialist Workers Party,* the Court invalidated an Illinois law requiring over 60,000 signatures (later reduced administratively to 35,947 signatures) to run for office in Chicago when only 25,000 were required to run for statewide office. 440 U.S. at 177, 187. The Court found "no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago" than for the state of which Chicago is only a part. 440 U.S. at 186.

Likewise, in *Norman v. Reed*, 502 U.S. 279 (1992), the Court struck down a similarly irrational signature-collection requirement for Cook County, Illinois. The Harold Washington Party, already established in Chicago and named after its late Mayor, wished to establish itself in Cook County, and in order to do that state law required it to qualify candidates for the entire slate of county offices. But because county board seats in Cook County are allocated by separate districts, state law required the Harold Washington Party to collect not just the 25,000 required for statewide office, or even 25,000 for Cook County as a whole, but 25,000 signatures for *each district within* Cook County. 502 U.S. at 283-84. This was essentially a fractal replication of the constitutional flaw the Court had already confronted in *Socialist Workers Party*, and the Court said so. 502 U.S. at 293.

Norman v. Reed was not simply a repeat of *Socialist Workers Party*, however. An important part of the significance of *Norman v. Reed* for our case is that the Court explicitly treated the signature-collection requirement as a "severe restriction" that could only be justified by a "compelling" state interest.

> To the degree that a State would thwart [the constitutional interests of like-minded voters in nominating candidates for election] by limiting the access of new parties

> to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see *Anderson* [*v. Celebrezze*, 460 U.S. at 789], and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

Norman v. Reed, 502 U.S. at 288-89. Just to make sure that no one missed this point, six months later in *Burdick* the Court cited *Norman v. Reed* as the sentinel authority for the proposition that "'severe' restrictions" must be "'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman*). The Fourth Circuit has dutifully applied the same standard to North Carolina's ballot access restrictions, treating them as "undoubtedly severe." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995).

It is crucial to recognize that the constitutional harm in these cases is *not* that the signature-collection requirements kept the Harold Washington Party or the Socialist Workers Party from *winning.* The harm is that these requirements kept them (or at least threatened to keep them) from *participating*. As Justice Marshall wrote eloquently for the Court in *Socialist Workers Party*:

> The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression.

440 U.S. at 185-86 (citation omitted).

We have repeatedly adverted to the financial burden of the signature-collection requirement, so the defendant might perhaps try to reframe the injury here as a purely financial one—the need to spend $100,000. That wouldn't help. Under *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down filing fees of $1,000, $1,424.60, and $6,300 respectively), financial burdens much smaller have been found unconstitutional. *See also Harper v. Va. Bd. of*

Elections, 383 U.S. 663 (1966) (invalidating a poll tax of not more than $1.50 per resident over the age of 21 as a denial of equal protection). That is in large part a recognition of the unequal effect that such burdens have on the content of our electoral speech. The Court in *Bullock* noted that the imposition of financial burdens as a means of restricting access to the ballot created an "obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community," while giving "the affluent the power to place on the ballot their own names or the names of persons they favor." 405 U.S. at 144. "[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status," and "has a real and appreciable impact on the exercise of the franchise." *Id.*

Signature collection is a small-party problem, and the magnitude of the expenditures required here is a very significant barrier for a small party to overcome. It is true that the Libertarian Party has successfully borne this burden in the past, but that is a lousy reason for imposing it once again. Even on the assumption that the Libertarian Party is capable of spending $100,000 to gather 10,000 valid signatures, such barriers are constitutionally suspect to the extent they systematically bias election speech toward viewpoints conventionally held by wealthier groups of voters and candidates.

B. Enforcement of the Signature-Collection Requirement Under These Circumstances Does Not Advance the State's Interest in Ensuring that Recognized Parties Have a "Significant Modicum of Support."

The "significant modicum of support" rationale from *Jenness* is the primary governmental interest against which signature-collection prerequisites for ballot access are measured. It is also, in this case, the primary reason why the application of the signature-collection requirement cannot be constitutionally applied to the Libertarian Party in 2019: The

10,000-signature petition requirement simply does not advance the State's interest in gauging the level of support enjoyed by the Libertarian Party within Maryland.

We have referred somewhat vaguely in this Memorandum to "the circumstances of this case," but let us be very precise about the most important circumstance: The State's own records show that there were 22,464 registered voters affiliated with the Libertarian Party as of December 31, 2018. So if, as the defendant must concede, 10,000 registered voters of *any* affiliation are enough to demand ballot access for Libertarians, then it must follow logically that 10,000 voters affiliated with the Libertarian Party are sufficient to show at least the same "significant modicum of support." Surely *double* the required number must be sufficient. The fact of 22,464 registered Libertarians is therefore decisive here. The State would learn *nothing new* about the level of support for the Libertarian Party by requiring the party to submit a petition full of the signatures of 10,000 registered voters, particularly when those signatures would overwhelmingly belong to voters who are not (yet) Libertarians.

The math alone is enough in our opinion, but if harder pressed we would add that the validation of petition signatures in Maryland is a rather notoriously difficult problem. *See, e.g., Doe v. Montgomery Cty. Bd. of Elections*, 962 A.2d 342 (Md. 2008) (articulating a strict validation standard that disqualifies the signatures of many registered voters based solely on the way they write their names); *Montgomery Cty. Volunteer Fire-Rescue Ass'n v. Montgomery Cty. Bd. of Elections*, 15 A.3d 798 (Md. 2011) (holding that even illegible signatures can be counted if there is "sufficient cumulative information" to identify the signer as a registered voter); *Md. State Bd. of Elections v. Libertarian Party of Md.*, 44 A.3d 1002 (Md. 2012) (reaffirming the strict standards of *Doe* and holding that Maryland's Election Law required the State Board to disqualify thousands of petition signatures for name-related defects even though the signers had

been positively identified as registered voters). Having stoutly maintained throughout all these cases that there are strong reasons for the State to flyspeck petition signatures, how on Earth could the State justify sending the Libertarian Party out to collect 10,000 more when they could not hope to make them as reliable as the records the State already has?

Moreover, the signatures on a petition come from people who are not (yet) Libertarians. Those signatures are therefore much weaker indicators of support than party affiliations are. Many Democrats, Republicans, and unaffiliated voters support ballot access for smaller parties like the Libertarians and Greens simply because they support free speech and free elections. People who formally affiliate with the Libertarian Party, however, are much more likely to support Libertarian ballot access because they support Libertarian policies and candidates. If the point is to ensure that Libertarians enjoy a "significant modicum of support," then the evidence of support provided by party affiliation records is self-evidently stronger.

Indeed, the State's own Voter Registration Application ("VRA") essentially says as much. Item 9 on the current form (attached as Exhibit B to the Johnston Declaration) states, "You must register with a political party if you want to take part in the political party's primary election, caucus, or convention. Check one box only." The State then lists all the recognized parties, plus "Unaffiliated (independent of any party)" and "Other—Specify." Johnston Decl. ¶ 9. Significantly, the VRA's reference to "the political party's primary election, caucus, or convention" enumerates the only three ways that a political party in Maryland can nominate candidates for a general election. The VRA is telling Maryland voters that they "must register with a political party" if they want to participate in putting that party's candidates on the ballot. Furthermore, the VRA alerts voters to the fact that they must "[c]heck one box only." Because Maryland is a closed-primary state, voters who use the VRA to affiliate with the Libertarian

Party are telling the State not only that they want to help nominate Libertarians for the general election, but that they want this strongly enough to forgo any chance of influencing the primaries in which the Republicans and Democrats nominate their candidates.

Voters who sign a new party petition outside a grocery store make no such representation. Significantly, the statutory standards do not require a voter who signs a party recognition petition to be affiliated with the petitioning party, or even to represent that he or she will vote for a candidate from the petitioning party. Thus, a signature on a Libertarian Party petition tells the State much less about the level of support for the Party than a formal affiliation does. It follows that a successful Libertarian Party petition with the signatures of at least 10,000 registered voters on it tells the State much less about the current support for the Libertarian Party than the State's own records already demonstrate.

It should come as no surprise, then, that virtually all other states that offer these two different paths to party recognition give more relative weight to party affiliation. Richard Winger, a nationally recognized expert on ballot access laws, identifies only seven states, including Maryland, in which a party can achieve or retain ballot access either by attracting a specified number of party registrations or by submitting a petition with a specified number of signatures. In five of those seven states, the number of required signatures greatly exceeds the number of required party affiliations, reflecting the "common sense" idea that signatures show a far weaker form of support. In California, a party registration is approximately twenty times more valuable for ballot access purposes than a petition signature. Maryland and Nebraska are the only exceptions, and the Nebraska case is probably an anomaly for the reasons explained by Mr. Winger. In Nebraska, even though the registration threshold of 10,000 is *above* the petition threshold of approximately 5,000, it is nonetheless *below* the registration levels then current

among all ballot-eligible parties in Nebraska, including the Libertarians. And it was set there by a state senator who had recently become a Libertarian, and who was trying to make requalification easier for her party. For that reason, no party in Nebraska has yet faced a requirement to collect fewer signatures than its current registration totals. Winger Decl. ¶¶ 5, 7, 11. If Maryland requires the Libertarian Party to collect 10,000 signatures despite having over 22,000 registered voters, it will apparently be the first time anything so illogical has been required.

Notably, the Maryland Court of Appeals has itself used very similar logic in striking down its former "double petition" requirement under its state constitution. In *Md. Green Party v. Md. Bd. of Elections*, the Court of Appeals cited the State's primary interest in gauging "public support for the nominee," plus "the State's interest in limiting the number of candidates on the ballot so as to avoid confusion and avoiding a ballot overloaded with the name of frivolous candidates having virtually no support among the voters." 832 A.2d 214, 235-36 (Md. 2003). But the Court of Appeals of Maryland held that it doesn't make sense to require people who have just submitted a petition with 10,000 signatures on it to submit a second petition with a *smaller* number of signatures on it: "It is difficult to comprehend how the second petitioning requirement adds very much more, in the way of showing public support, to the first petitioning requirement." *Md. Green Party*, 832 A.2d at 236. In other words, the State is not permitted to burden voting rights with mere busy work. The same logic applies here.

We do not question the State's interest in ensuring that there is a "significant modicum of support" within Maryland for the Libertarian Party, nor do we claim that it is *per se* unreasonable to set the signature requirement at 10,000 in order to evidence that "significant modicum of support." Our argument is rather that the State's conceded interest in gauging popular support is

simply not advanced one iota by requiring Maryland's 22,464 Libertarians to stand outside grocery stores to collect 10,000 signatures from their non-Libertarian neighbors. The Constitution does not permit the state to condition electoral participation on the successful completion of a game of "Mother May I."

C. No Other State Interest Served by the Signature-Collection Requirement Is Sufficiently Weighty to Justify Its Application Here.

Because time is short and the briefing may be truncated, we have tried to anticipate other state interests the defendant might raise in opposition. Two may be worth discussing.

First, the state could perhaps point to cases in which the Court has recognized the state's interest in channeling voters toward a winning candidate with broad public support. *Bullock v. Carter* suggested the state might have an interest in trying to ensure that the winning candidate "is the choice of a majority, or at least a strong plurality, of those voting." 405 U.S. at 145. This interest supposedly justifies ballot access restrictions that tend to prevent the vote from splintering among too many factions. One threshold problem with the argument here would be that there is no evidence of such splintering in Maryland. In fact, the Libertarians are the only small party whose nominee has ever attracted more than 1% in the gubernatorial election, and we have done it only once.

More fundamentally, however, this suggestion is deeply at odds with Justice Marshall's observations for the Court in *Socialist Workers Party* about the ways minor parties affect the politics of our nation. It's not all about winning; it's also about the scope and quality of the conversation that we have. Plaintiffs feel very strongly that election speech for all of us, Libertarians and non-Libertarians alike, would be enriched immeasurably by the inclusion of more viewpoints—our own, certainly, but also those of other small parties with whom we may share little philosophical agreement. We're for this because we're for self-government in the

liberal tradition. Fortunately for us, so is the case law. The exclusion threatened by the signature-collection requirement cannot be justified as exclusion for exclusion's sake.

A second justification might be improvised from the Fourth Circuit's approval of North Carolina's "two-tier" system of ballot access in *McLaughlin v. N.C. Bd. of Elections*. In *McLaughlin*, North Carolina argued that it was reasonable to expect new parties to grow after initial recognition, and therefore it was permissible for the State to require parties that fell short of a 10% vote threshold in their *second* election to go back to the drawing board and collect signatures from 2% of the voters. 65 F.3d at 1215. Again, one threshold problem with the argument here is that Maryland does not have North Carolina's system.[3] It is not at all clear that Maryland's system either can be or ever has been characterized as a "two-tier" system, and it would be a little suspicious to start now.

But once again there is an even more fundamental reason why the *McLaughlin* decision cannot prop up Maryland's signature-collection requirement here: *McLaughlin* involved a party that had only 677 registered voters statewide. 65 F.3d at 1220. Thus, *McLaughlin* simply did not raise the question whether the state can make small parties spend large amounts of money gathering data that will be in every way inferior to what the state already has in its files. Our case is not about the number of signatures required, but the irrationality of requiring them to be collected at all when the number of affiliated voters in the state is already more than twice as great.

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[3] Indeed, not even North Carolina still has the North Carolina system reviewed in *McLaughlin.* It proved such a severe limitation on electoral speech that the state legislature has now slashed the polling threshold to 2%, and signatures (if needed at all) are needed from only 0.25% of the total number of voters who voted in the most recent gubernatorial election. In addition, North Carolina automatically recognizes any party that successfully placed a presidential nominee on the ballot in at least 70% of the states in the preceding presidential election. N.C. Gen. Stat. Ann. § 163A-950.

The central problem here is the complete absence of means-end rationality. In *Socialist Workers Party*, it was irrational for Illinois to require more signatures in Cook County than it required for statewide office. In *Norman v. Reed*, it was irrational for Illinois to require more signatures for counties subdivided into districts than for counties not so subdivided. In *Maryland Green Party*, it was irrational for Maryland to require a second batch of signatures that was merely a subset of the first. And here, it is irrational for the state to require us to collect the signatures of 10,000 people who are overwhelmingly not (yet) Libertarians when the state has an entire administrative agency that it pays to count Libertarians and that agency says there are 22,464 of us in the state. This is a problem with which *McLaughlin* did not wrestle.

The case law says that ballot access restrictions like the signature-collection requirement must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. at 288-89. Maryland's requirement that the Libertarian Party collect 10,000 signatures, overwhelmingly from non-Libertarians, when the Libertarian Party already has over 22,000 members registered with the State, cannot pass muster under this standard.

D. The Permanent Relief Sought by the Plaintiffs Is Modest and Reasonable.

To the extent that the Court might find it relevant to our likelihood of success on the merits, we wish to emphasize that the permanent relief we seek is modest and reasonable. Indeed, the "permanent" relief we seek is, in a sense, also temporary. Our argument, once again, is not that the State can never require new parties to submit petitions with 10,000 signatures; our argument is that the State cannot require this of parties that already have substantially more than 10,000 registered voters affiliated with them in the State's official records. Because the State knew there were over 22,464 registered Libertarians in Maryland when our party recognition was set to expire on December 31, 2018, we believe that the statutory requirement to submit a petition with 10,000 names on it was constitutionally inapplicable as of that date.

We do not, however, seek recognition that is literally "permanent." It could be that in four more years, Maryland voters will have abandoned their current level of support for the Libertarian Party—a risk that all parties bear and must bear. Our request for "permanent" relief is therefore limited only to official recognition of the Libertarian Party and of the Party's continuing ability to nominate candidates throughout the state until December 31, 2022—the same position the Party would be in if it actually went through the pointless exercise of collecting 10,000 signatures.

II. The Plaintiffs Are Likely to Suffer Irreparable Injury Unless this Court Grants Preliminary Injunctive Relief.

Having addressed the plaintiffs' likelihood of success on the merits, we return to the remaining elements of our request for temporary relief. The first of these is the likelihood of irreparable harm to the plaintiffs if temporary relief is not granted.

Removing the Libertarian Party from the Maryland Voter Registration Application (and parallel registration paths at county election boards, at the Motor Vehicle Administration, online, and elsewhere) would cause irreparable harm to the Party and its members by interfering with the associational rights of Libertarians throughout Maryland. To understand why, it helps to take a closer look at the voter registration data attached as Exhibit A to the Declaration of Robert S. Johnston III.

The State Board of Elections reports "new registration" and "removals" separately for each party each month. Johnston Decl. ¶ 8. The new registrations consist of new libertarians moving into Maryland from elsewhere, young libertarians registering to vote for the first time, and even registered Maryland Libertarians who might be find the Party's name missing when updating their addresses with the State. The "removals" represent some who leave the state, some who die or become inactive, and of course some who choose other parties. As the State's

own statistics for the last four years demonstrate, there are on average about 243 "new registrations" for the Libertarian Party each month, and about 150 "removals," for a net increase of about 100 new Libertarians per month. Johnston Decl. ¶ 8. This has been a key to the Party's recent growth and its future prospects for full participation as a major party in Maryland elecitons. In 2017, the Libertarian Party was the only party in Maryland to have more additions than subtractions; the others all shrank. Johnston Decl. ¶ 7.

Obviously, if the Libertarian Party is not listed as an option for these voters, many who are unaware of this lawsuit may assume that the Party has become inactive in Maryland, and they may choose to affiliate with another party or to resign themselves to "unaffiliated" status. Thus, excluding the Libertarian Party from the forms and online protocols the State uses for this purpose would interfere with the ability of these voters to find the Party and make common cause with their likeminded neighbors. Moreover, this "missed connection" will be virtually impossible to correct if the Court ultimately determines that the Libertarian Party should have been recognized all along.

This would be bad enough if it only affected people who are not currently Libertarians, but the fact is that many current Libertarians have occasion to re-register with the State from time to time, such as when they change addresses. To the extent that the State is permitted to exclude the Libertarian Party from the VRA and all the parallel online registration procedures while this case is pending, it will actually interfere with the *current* affiliations of *current* registered voters. The result will be not just to freeze the Libertarian Party in place, but to shrink it each month, in a mirror image of the growth it has been experiencing since 2012. And importantly, all of this will *deprive* the State of information about whether there is a "significant

modicum of support" for Libertarians within the state, in direct contravention of the very constitutional interest upon which it must rely in this litigation.

In light of these substantial harms, the Court may well wonder why we initially filed our Complaint without a request for temporary injunctive relief. The answer is simply that we had already discussed the point with the Attorney General's office and were relying on that office's representations that the defendant would be willing to preserve the status quo for the pendency of the litigation. As soon as we learned otherwise, we filed this motion.

III. The Balance of Equities Favors the Plaintiffs.

There are two primary reasons why the balance of equities favors the Plaintiffs' request for temporary relief. The first is that we are asking no more than the Attorney General's office had already agreed to give us before the Complaint was even filed. We understand that circumstances changed, and we bear no grudge, but the fact remains that the relief we are requesting from this Court does no harm to the defendant either officially or personally.

In addition, there is a large disparity in the relative risks to the parties during the pendency of the litigation. For example, if this Court were to grant the temporary relief requested here, then even if the Court were ultimately to decide against the Libertarian Party's constitutional claims on the merits, it would be easy for the State Board to produce a list of all voters who affiliated with the Libertarian Party from January 1, 2019 to the date of the Court's decision. The State could, if it chose, give those voters special notice of their opportunity to change their party affiliation in response to the Court's decision. Thus, continuing to offer the Libertarian Party as an option on the State's registration forms during the pendency of this litigation does no harm to anyone, and it can be quickly undone if the Court rejects our claims. By contrast, excluding the Libertarian Party from the registration processes before the constitutional issues have been settled could do great harm, affecting tens of thousands of voters

each month, and that exclusion would be nearly impossible to correct if the plaintiffs were ultimately to prevail. It is, in short, much better to err in favor of the plaintiffs at this time than in favor of the defendant.

IV. Preliminary Injunctive Relief Is in the Public Interest.

Temporary injunctive relief is also firmly in the public interest. Voters in Maryland will benefit from greater electoral choice and will avoid the disruption that might attend a sudden removal of a party that this Court may find has a constitutional right not to be removed. In addition, allowing voters to affiliate with the Libertarian Party during the pendency of this litigation will necessarily give the State more of exactly the kind of information it claims to be interested in: information on the level of support for the Libertarian Party within Maryland.

CONCLUSION

It may be unfashionable to downplay differences in political opinion, but we nonetheless repeat that this is not the iron grip of totalitarianism, nor even the product of malign political machinations; we rather like the people at the State Board of Elections. But it happens to be both burdensome and irrational, a fatal combination. Application of the signature-collection requirement in our case would systematically (if unintentionally) restrict political choice and reduce political debate within Maryland, in violation of the constitutional liberties of the plaintiffs and all the other voters in Maryland for whom they continue to speak up and speak out. We ask only for "Constitutional common sense."

For all of the foregoing reasons, the plaintiffs ask this Court (1) to enter a temporary restraining order as soon as possible, preventing the defendant from implementing any change to the Voter Registration Application (or parallel forms or processes of voter registration or party affiliation) that would exclude the Libertarian Party as one of the listed options for party affiliation; (2) requiring the defendant to file any objection to the requested relief not later than

Monday, January 28, 2019: (3) permitting the plaintiffs to file a reply by Wednesday, January 30, 2019; and (4) setting a hearing date for Friday, February 1, 2019, to consider whether to convert the temporary restraining order into a preliminary injunction.

Respectfully submitted,

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