UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ALAN P. WOODRUFF, DANIEL FENTON, LIBERTARIAN PARTY OF NEW MEXICO, GREEN PARTY OF NEW MEXICO, and DONALD HILLS,	)	
Plaintiffs,	)	Civil Action No: 1:09-cv-00449 LFG/KMB
v.	)	
MARY HERRERA, in her official capacity as New Mexico Secretary of State,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Scott Fuqua
Assistant Attorney General
New Mexico Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6000 – Telephone
(505)827-6036 – Facsimile

Attorney for Defendant Mary Herrera

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BACKGROUND

This is the second time in three years that a minor party in New Mexico has challenged the constitutionality of the petition signature requirements for minor parties and their candidates. In *Libertarian Party of New Mexico, et al. v. Herrera*, 506 F.3d 1303 (10th Cir. 2007), the Libertarian Party unsuccessfully pressed some of the same claims it brings in this action, and those claims and any related claims are now barred. Plaintiffs' remaining claims rest on infirm legal bases. Defendant thus files this motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In 2006, the Libertarian Party of New Mexico sued the Secretary of State ("SOS") alleging that the petition signature requirements for minor political parties and minor political party candidates violated the First and Fourteenth Amendments to the United States Constitution. The District Court granted the SOS's Motion for Summary Judgment, and the Tenth Circuit upheld that decision on appeal. Among other things, the Libertarian Party in that case argued that the pertinent provisions of the Election Code unfairly discriminated between major and minor parties as well as major and minor party candidates. Here, joined by the New Mexico Green Party, the Libertarian Party is making that same argument a second time.

Plaintiffs also challenge other provisions of the Election Code on the ground that those provisions violate the New Mexico Constitution and the Qualifications Clause and Elections Clause of the United States Constitution. Plaintiffs served their complaint on Defendant on May 29, 2009, and Defendant filed her answer on June 18, 2009.

ARGUMENT AND AUTHORITIES

Plaintiffs assert ten counts in their Complaint. Four of those counts – counts four, five, six, and seven – are barred by principles of res judicata and claim preclusion. Three more – counts eight, nine, and ten – fail to state a cognizable claim because Plaintiffs have failed to do

anything more than make the bald assertion that the provisions at issue in those counts are unconstitutional without identifying any provision of either the New Mexico or United States Constitution that those provisions ostensibly violate. In addition to these legal deficiencies, all ten counts lack merit, and the Court should dismiss the entirety of the Complaint.

I. COUNTS I, II, AND III FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In their first three claims, Plaintiffs contend that those provisions of the Election Code dealing with nominating petition signatures for minor parties and minor party candidates violate both the New Mexico and United States Constitutions. These claims are premised on a misunderstanding not only of the scope of the constitutional provisions involved, but also of the role played by the targeted statutory provisions and by the SOS in enforcing those provisions. None of these counts state a cognizable legal claim, and the Court should dismiss them in their entirety.

A. No Identified Provision Of The Election Code Violates Article II, Section 8 Of The New Mexico Constitution.

Plaintiffs seek in Count I a blanket declaration that "all provisions of the Election Code that impose nominating petition signature requirements on candidates as a condition for [ballot access] for general elections" are unconstitutional. Complaint, ¶ 26(A). Plaintiffs contend that Article II, Section 8 of the New Mexico Constitution "precludes **any** statutory restriction on ballot access by **any** otherwise qualified candidate." Complaint, ¶ 25 (emphasis added). This absolute reading of Article II, Section 8 is untenable.

That provision provides: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." N.M. CONST. art. II, § 8. This provision, on its face, is concerned principally with the right to vote in state elections. *See State ex rel. Walker v. Bridges*, 27 N.M. 169, 174, 199 P. 370, 375 (1921)

("It remains true, nevertheless, that the supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections."). Moreover, the language of Article II, Section 8 does not prevent the legislature from restricting ballot access. Elections can be "free and open" in the face of State regulation of those elections. Indeed, regulation of elections, including ballot access, is instrumental to ensuring free and open elections. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). As the Supreme Court has declared:

> The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. . . . Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.

Bullock v. Carter, 405 U.S. 134, 145 (1972) (internal citations omitted).

In order to show that any provision of the Election Code violates Article II, Section 8, Plaintiffs must show that the identified provision substantially impairs their right to an honest, open, and fair election. New Mexico's ballot access restrictions cause no such impairment, and Plaintiffs have not pled that they do. To the contrary, the Supreme Court has repeatedly recognized that the types of ballot access restrictions found in the Election Code are legitimate measures the States are empowered to enact to *ensure* honest, open, and fair elections. Accordingly, Count I of Plaintiffs' Complaint is without merit.

Moreover, Plaintiffs have not stated any cognizable claim in Count I of their Complaint. Plaintiffs have failed to identify any particular provision of the Election Code that allegedly violates Article II, Section 8 and have failed to describe with any detail exactly how their rights have allegedly been violated. Instead, Plaintiffs simply claim that Article II, Section 8 precludes any statutory restriction on ballot access and ask for a declaration that "all provisions of the

Election Code that impose nominating petition signature requirements on candidates" are unconstitutional, without ever identifying the provisions under attack. Complaint, ¶¶ 25, 26.

This is not enough to state a cognizable claim for relief. While the facts pled in a complaint need only "place a defendant on notice as to the type of claim alleged and the grounds upon which it rests," *Mountain View Pharm. v. Abbott Labs*, 630 F.2d 1383, 1388 (10th Cir. 1980), a complaint that fails to do so is subject to dismissal under Rule 12(b)(6). *See Monroe v. Owens*, 38 Fed. Appx. 510, 515, 2002 WL 437964, * 3 (10th Cir. 2002). Here, Plaintiffs have neither identified which provisions of the Election Code they find objectionable nor explained the basis on which they seek a declaration that those unidentified provisions are unconstitutional. Dismissal of Count I is thus appropriate on this independent ground.

B. Count II Rests On A Fundamentally Unsound Interpretation Of Both Article I, Section 2, Clause 2 Of The United States Constitution And The Election Code.

Plaintiffs contend that the State of New Mexico has, through particular provisions of the Election Code, added requirements to the qualifications for federal office in violation of Article I, Section 2, clause 2 of the United States Constitution ("the Qualifications Clause"). This contention fails for two reasons. First, the challenged rules and forms are not qualifications for anything. They are, instead, administrative responsibilities qualified candidates must meet. Second, the State of New Mexico, through the SOS, has a strong, legitimate interest in limiting ballot access in the manner in which the challenged laws limit such access.

1. Count II-A fails because the requirement that a candidate be a registered member of the party he or she seeks to represent in advance of an election is not a qualification for any federal office.

Plaintiffs first attack NMSA 1978, § 1-8-18(A), which provides in pertinent part:

> A. No person shall become a candidate for nomination by a political party or have his name printed on the primary election ballot unless his voter registration shows:

> (1) his affiliation with that political party on the date of the governor's proclamation for the primary election.

Plaintiffs argue that this provision violates the Qualifications Clause because a candidate cannot run for any particular party without first being a registered voter affiliated with that party and the United States Constitution does not require that a candidate for Senator or U.S. Representative be a registered voter. Complaint, ¶¶ 29-37. This argument fails because the requirement that a candidate representing a party be a registered member of that party is only a qualification for representation of the party – not a qualification for office.

Nearly every federal case analyzing a Qualifications Clause challenge to ballot access restrictions balances the requirements of the Qualifications Clause against the powers granted to the States in Article I, Section 4, Clause 1 – the Elections Clause – of the United States Constitution. That provision reads, in its entirety:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Supreme Court has recognized that the Elections Clause gives "broad power" to the States to regulate the procedural mechanisms for congressional elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ; *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections."). That authority, however, does not extend to requirements that "exclude classes of candidates from federal office." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995).

Courts have struck down as violations of the Qualifications Clause some state laws that hinder federal candidate's access to ballots. In each case, the analysis turns on whether the ballot

access restriction is a legitimate exercise of authority under the Elections Clause or is, instead, an additional, unconstitutional qualification for office disguised as an administrative procedure. *Id.* at 829 (holding that a regulation is unconstitutional "when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."). Here, there is no question that the requirement a candidate purporting to represent a particular party actually be a registered member of that party is a legitimate exercise of the State's authority under the Elections Clause.

The Supreme Court has, on several occasions, recognized the legitimacy of a State's interest in governing ballot access. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court considered a challenge by independent candidates for Congress to a California statute prohibiting independent candidacy unless the candidate had been unaffiliated with a political party for one year before attempting to run for office. In rejecting the argument that the statute violated the Qualifications Clause, the Court noted that "as 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*, 415 U.S. at 730.

The restrictions on ballot access for independent candidates at issue in *Storer* are similar to the restrictions on ballot access for minor party candidates at issue here. In both cases, the State is limiting access to the general election ballot along the metric of party representation. The California statute at issue in *Storer* sought to prevent candidates who failed to win their party's nomination (or, more insidiously, candidates of one party attempting to clog the general election ballot in an attempt to confuse voters) from appearing on the general election ballot as independent candidates. The effectuation of this legitimate state interest "prevent[s] the losers from continuing the struggle and [limits] the names on the ballot to those who have won the

primaries and those independents who have properly qualified." *Id.* at 735. The Court concluded by stating: "The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively." *Id.*

Here, the provisions that require minor party candidates to be registered members of the party they purport to represent serve the same function. The Libertarian and Green Parties would certainly take issue with a slate of Democratic and Republican candidates appearing on a general election ballot as Libertarians and Greens. Nothing would prevent such interparty raiding if a candidate could seek office as a Libertarian or Green without first demonstrating that he or she was, in fact, a member of the appropriate party. New Mexico's Election Code prevents exactly this behavior, an interest the legitimacy of which the Supreme Court has clearly established. *See, e.g., Storer*, 415 U.S. at 731 (recognizing the "States' strong interest in maintaining the integrity of the political process by preventing interparty raiding."). *See also Term Limits*, 514 U.S. at 834 (same).

The provisions Plaintiffs challenge in Count II-A do not constitute qualifications for federal office. The cases in which Qualifications Clause violations have been found featured regulatory systems that differ materially from the Election Code. In *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000), for example, the court held that a Colorado provision requiring candidates to be registered Colorado voters violated the Qualifications Clause. This case is easily distinguishable, as the Election Code does not require voter registration to be a candidate – it only requires voter registration to represent a party.

The plaintiff in *Campbell* "sought access to the ballot as an *unaffiliated candidate* for the United States House of Representatives for the Second Congressional District of Colorado through nomination by petition." *Campbell*, 233 F.3d at 1231 (emphasis added). The State

interest in preventing interparty raiding is absent in such a case, and the *Campbell* opinion does, in fact, omit any discussion whatsoever of such an interest. In *Campbell*, the plaintiff was flatly denied access to the ballot. Here, Woodruff and Fenton are only potentially denied access to the ballot as representatives of the Libertarian and Green Parties, respectively.[1] While a State cannot justify the first candidate prohibition, it can easily justify the second. *See Storer*, 415 U.S. at 731; *Term Limits*, 524 U.S. at 834; *Bullock*, 405 U.S. at 145.

The same facts distinguish this case from *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), in which the court declared unconstitutional a California statute requiring residency and voter registration in California in advance of a Congressional election. As with *Campbell*, the California statute was not justified by the State's interest in preventing interparty raiding. Instead, the statute operated to bar any out of state resident from running for Congress in California. The Election Code, by contrast, only operates to bar out of state residents who purport to represent a political party from appearing on the ballot unless those candidates can show legitimate representation of that party through their voter registration. This is, again, a valid State interest that the Supreme Court has vindicated on multiple occasions, and the burden it places on minor party candidates is negligible.

2. Count II-B fails because the filing of a declaration of candidacy in advance of an election is not a qualification for any federal office.

Plaintiffs next contend that the declaration of candidacy for minor party candidates published by the SOS impermissibly adds residency and registered voter qualifications to the office of U.S. Representative. This count fails for precisely the same reason that Count II-A fails. The declaration of candidacy is only concerned with ensuring that a minor party candidate

[1] Woodruff has not pled that he is unregistered as a voter in New Mexico. Fenton has not pled that he seeks to represent the Green Party in the 2010 general election, but if he seeks to run as an independent, he lacks standing in this case as all of the allegations Plaintiffs make relate to various ballot access restrictions applicable only to minor political parties.

in fact legitimately represents the party he or she purports to represent. While it is true that demonstrating such legitimate representation requires proof of residency and voter registration with the party, those are requirements for representing the party, and not requirements for holding the office of U.S. Representative.

As with Plaintiffs' Count II-A, the State has a strong, valid interest in restricting ballot access in this manner, and it places virtually no burden on minor party candidates. Just as the Court should dismiss Count II-A, the Court should dismiss Count II-B as well.

3. Count II-C fails because the filing of candidate petition signatures is not a qualification for any federal office.

Plaintiffs' third Qualification Clause count alleges that NMSA 1978, § 1-8-2 imposes an unconstitutional qualification for federal office by requiring minor party candidates for federal office to file nominating petition signatures as a condition of placement on the general election ballot. The petition requirement found in Section 1-8-2 is a constitutional method of limiting ballot access in New Mexico – it is not a qualification for federal office.

In *Cartwright v. Barnes*, 304 F.3d 1138, 1140 (11th Cir. 2002), the court upheld a Georgia statute requiring candidates of a "political body" (the equivalent of a minor political party under New Mexico law) seeking federal office to obtain a petition "signed by a number of voters equal to 5% of the total number of registered voters eligible to vote in the last election for such office." After noting that the same Georgia law had been upheld in the face of First and Fourteenth Amendment challenges thirty years before by the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431 (1971), the court examined the plaintiff's claim that the challenged law violated the Qualifications Clause. Citing to *Storer*, the court stated that "[t]he requirement that candidates demonstrate some measure of support before their names appear on the ballot

generally is viewed as a legitimate exercise of a state's authority to regulate the manner in which elections are held." *Cartwright*, 304 F.3d at 1142.

The court also noted that *Storer* used signature requirements (or their equivalent) as an example of a legitimate ballot access restriction by holding that "a nonaffiliation requirement was no more an additional requirement for office than the requirement 'that the candidate win the primary to secure a place on the general ballot or otherwise *demonstrate substantial community support*.'" *Cartwright*, 304 F.3d at 1144 (quoting *Storer*, 415 U.S. at 746).

Ultimately, the court held:

> Georgia's 5% requirement . . . does not "even arguably impose" any substantive qualification. Instead, it requires that a candidate "demonstrate substantial community support" before obtaining a place on the ballot, an interest that the Supreme Court recognized over thirty years ago when it upheld Georgia's 5% requirement. . . . Therefore, we conclude that Georgia's 5% requirement is not a "qualification," but a permissible procedural regulation of the manner in which candidates may obtain ballot placement.

Id. (internal citations omitted).

The Seventh Circuit has also reached this conclusion. In *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997), the court observed in upholding an Illinois statute requiring new political parties to meet a 5% petitioning requirement to place a congressional candidate on the general election ballot that "where requirements are procedural in nature and do not add substantive qualifications, they do not violate the Qualifications Clause."

Cartwright is squarely on all fours with the case at bar. The Qualifications Clause challenge raised by the plaintiff in that case is identical to that raised in Count II-C by Plaintiffs here. The same reasoning that compelled the *Cartwright* court to uphold Georgia's minor party

candidate petition signature requirement supports the same conclusion in this case. The Court should accordingly dismiss Count II-C.[2]

C. Count III Is Predicated On A Faulty Understanding Of Both Article I, Section 4, Clause 1 Of The United States Constitution And The Role Of The Secretary Of State In Administering The Election Code.

Article I of the United States Constitution affirmatively grants to the states the power to govern the elections conducted in those states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST., art. I, § 4, cl. 1. The New Mexico legislature has, by passing certain provisions of the Election Code, exercised this authority. It has also delegated a portion of that authority to New Mexico's chief election officer – the Secretary of State. The regulations promulgated by the SOS that Plaintiffs challenge, discussed in detail below, are not usurpations of the legislature's authority to set the times, places, and manner of elections for federal office.

1. Count III-A fails because the SOS's petition signature forms do not infringe on the legislature's prerogative in fixing the time, place, and manner of elections for federal office.

Plaintiffs first contend that the petition signature form created by the SOS adds requirements regarding those signatures that the legislature did not include in the operative statute, NMSA 1978, § 1-8-2(A). Specifically, Plaintiffs argue that Section 1-8-2(A)[3] does not require that: (1) petitions be signed by registered voters; (2) those signing a petition also write their printed name on the petition; (3) the candidate identify his or her party affiliation; and (4) those signing a petition use their registered address. Complaint, ¶¶ 68-75. Plaintiffs contend that

[2] Additionally, Plaintiffs' attack on Section 1-8-2 is prohibited by the same principles of claim preclusion that operate to bar Counts V through VII discussed below.

[3] While the Complaint focuses on NMSA 1978, § 1-8-2(A), it appears that Plaintiffs mean to attack NMSA 1978, § 1-8-2(B). It is the latter provision that includes the petition signature requirements.

the minor party candidate petition form required by the SOS does all four of these things, thereby invading the legislative prerogative under the Elections Clause. These arguments fail.

Plaintiffs' first argument, that Section 1-8-2(B) does not require signatures of registered voters, is belied by the language of the provision itself:

> The names certified to the secretary of state shall be filed on the twenty-first day following the primary election in the year of the general election and shall be accompanied by a petition containing a list of signatures and addresses ***of voters*** totaling not less than one percent of the total number of votes cast at the last preceding general election for the office of governor or president of the United States, as the case may be.

NMSA 1978, § 1-8-2(B) (emphasis added). Plaintiffs do not allege any relevant difference between a voter and a registered voter. Indeed, there is no such difference. One cannot become a voter without registering to vote. The absence of the word "registered" before the word "voter" in Section 1-8-2(B) is wholly irrelevant. *See State v. Chama Land & Cattle Co.*, 111 N.M. 317, 318, 805 P.2d 86, 87 (1990) (holding that a voter is a qualified elector who has completed the voter registration process).

Plaintiffs' second argument, that the SOS has acted inappropriately by requiring those who sign petitions to print their names, rests on a misunderstanding of the import of legislative silence. As the chief election officer of New Mexico, the SOS has broad authority to implement the provisions of the Election Code. *See* NMSA 1978, § 1-2-1(A) (designating the SOS as "the chief election officer of the state."); *see also Weldon v. Sanders*, 99 N.M. 160, 164, 655 P.2d 1004, 1008 (1982) (holding that the SOS is the chief election officer of the State with authority to apply the Election Code but "cannot negate mandatory provisions" thereof). While it is true that Section 1-8-2(B) does not mention the inclusion of a printed name, it hardly prohibits such inclusion. The reasons for requiring a printed name are obvious – in the event petition signatures are challenged, it is imperative to know the identity of the signer. Moreover, in constructing the

minor party candidate petition signature form, the SOS simply copied the form prescribed by the legislature for use by major parties in the primary election. That form, set forth in NMSA 1978, § 1-8-30(C), is identical to the form Plaintiffs' challenge, including the requirement that a petitioner signer include his or her printed name.[4] Finally, Plaintiffs cannot allege even a minimal burden – either to themselves or to those signing their candidate petitions – arising from the inclusion of a petitioner signatory's printed name. The SOS, as the chief election officer of the State of New Mexico, has clear authority to promulgate forms and regulations giving effect to the Election Code. The form Plaintiffs challenge in Count III-A is an entirely permissible exercise of that authority.

2. Count III-B fails because the Secretary of State's policy regarding the date on which minor party nominating petitions are made available to minor party candidates does not infringe on the legislature's power to fix the time, place, and manner of elections for federal office.

Plaintiffs' next allege that the SOS has violated the Elections Clause by failing to make nominating petition forms available to minor party candidates until October of each odd-numbered year without any constitutional authority for such action. Complaint, ¶¶ 89-92.[5] This allegation is entirely without merit.

Plaintiffs correctly note that the Election Code does not establish a date on which the SOS must make nominating petition forms available to minor party candidates. Plaintiffs erroneously assume, however, that such silence is tantamount to a prohibition, either legislative or constitutional, on the SOS's policy. As with the requirement that petition signers include their printed name, this is not the case.

[4] The nominating petition form to be used by independent candidates in the general election, set forth in NMSA 1978, § 1-8-50(C), also requires the inclusion of a petitioner signer's printed name.

[5] Count III-B appears to apply only to Woodruff. While the Complaint claims that both Woodruff, Fenton, and the Libertarian Party have been harmed by the SOS's conduct (Complaint, ¶¶ 93, 94), only Woodruff alleges that he has attempted to obtain nominating petition signature forms before the SOS's release date of such forms.

Because the Election Code is silent as to the date on which nominating petition forms are to be made available to minor party candidates, it is legally impossible for the SOS to set such a date that is contrary to "mandatory provisions of the Election Code." Establishing that date in the face of legislative silence on the issue is a quintessential example of the proper exercise of the SOS's constitutional and statutory authority. *See, e.g., Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (holding that when the legislature is silent on a specific issue related to the exercise of an agency's authority, an agency's interpretation of a statute that "fills a gap or defines a term in a reasonable way in light of the Legislature's design" is given controlling interpretive weight). The SOS, by making minor party candidate nominating petitions available on the same date that nominating petitions are made available to major party candidates, has not infringed on the legislature's authority under the Elections Clause, and Count III-B fails.[6]

3. Count III-C fails because the Secretary of State's policy requiring minor party candidates to file a declaration of candidacy does not usurp legislative authority to fix the time, place, and manner of elections for federal office.

Plaintiffs next argue that the SOS has violated the Elections Clause by requiring minor party candidates to file a Declaration of Candidacy even though the Election code does not contain such a requirement. This claim suffers from the same legal infirmity that plagues Counts III-A and III-B. The SOS has sufficient authority, in the face of legislative silence on whether minor party candidates – like major party and independent candidates – must file a Declaration of Candidacy, to enact rules containing such a requirement. The legislature has fixed the time, place, and manner of elections for federal office by requiring major party and independent candidates to file a Declaration of Candidacy. The SOS, by enacting rules and regulations that

[6] Although not wholly relevant to an Elections Clause analysis, it bears noting that Plaintiffs have not alleged (and cannot credibly demonstrate) any prejudice resulting from the policy challenged in Count III-B. Indeed, by allowing all candidates seeking the same office to acquire the requisite materials at the same time, the SOS is treating those candidates as even-handedly as possible.

require minor party candidates to do the same, has not usurped the legislature's authority, and Count III-C fails.

4. Count III-D fails because allowing straight party voting does not violate the Equal Protection Clause of the United States Constitution.

Finally, Plaintiffs argue that the straight party voting option made available to New Mexico voters violates the Equal Protection Clause of the Fourteenth Amendment because it is prejudicial to decertified minor parties and their candidates. Because candidates of decertified minor parties and candidates of major parties are not similarly situated, this claim fails.

Although there is some confusion in this area, it appears that Fourteenth Amendment challenges to state election laws are typically analyzed through the framework established by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983).[7] The *Anderson* Court described that framework as follows:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, 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 those interests; it must also 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.

460 U.S. 780, 789 (1983) (citation omitted). This standard establishes a sort of sliding scale which requires a stronger and stronger state interest as the severity of the burden on a plaintiff's Fourteenth Amendment rights increases. Applying the *Anderson* balancing test here leads to the

[7] *Anderson* dealt with the Due Process clause, not the Equal Protection Clause, but there is nonetheless widespread recognition that the *Anderson* standard is appropriate for First and Fourteenth Amendment challenges to state election laws. *See, e.g., Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 (2008); *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986); *Timmons*, 520 U.S. at 358-59; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

inescapable conclusion that Plaintiffs cannot make out a viable equal protection claim on the basis of New Mexico's straight party voting option.

a. New Mexico's straight party voting option does not burden any protected right of Plaintiffs.

The first step in the *Anderson* analysis is to identify the Fourteenth Amendment right at issue and the severity of any burden on that right presented by the challenged law. Here, Plaintiffs cannot establish any such Fourteenth Amendment right. In order to state a claim for a violation of the Equal Protection Clause, a plaintiff must, at a minimum, explain how he or she is treated differently from other similarly situated parties. *See Trujillo v. Williams*, 465 F.3d 1210, 1228 (10th Cir. 2006) ("Equal protection is essentially a direction that all persons *similarly situated* should be treated alike."); *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (holding that "equal protection only applies when the state treats two groups, or individuals, differently.").

Plaintiffs cannot meet this burden, because major and decertified minor political parties (and their respective candidates) are not similarly situated. Major political parties have, by virtue of the votes their candidates have garnered in previous elections, demonstrated a sufficient basis of support to justify their continued appearance on general election ballots. A decertified minor party, on the other hand, has not. A candidate wishing to represent a decertified party cannot appear on the general election ballot because the party has not demonstrated sufficient support. That candidate must instead appear as an independent. By virtue of the vastly different support a major party has shown and a decertified minor party has not, their candidates are not similarly situated for purposes of any equal protection analysis.

Moreover, Plaintiffs fail to identify what right of theirs is burdened by New Mexico's straight party voting option. Accordingly, it is nearly impossible to determine how significant

that right is and the degree to which it is allegedly burdened. *See Trujillo*, 465 F.3d at 1228 (noting that a plaintiff "must state exactly to which group" he or she is allegedly similarly situated). Plaintiffs Woodruff and Fenton, as potential candidates of the decertified Libertarian and Green Parties, can appear on the general election ballot as independent candidates if they meet the petition signature requirements of NMSA 1978, § 1-8-51, and can appear on the general election ballot as the Libertarian and Green party candidates if both parties meet the petition signature requirements of NMSA 1978, § 1-7-2(A).[8] They have thus not been denied, in any meaningful sense, access to the ballot. Plaintiffs therefore have no protectable Fourteenth Amendment interest at stake, and to the extent they do, the burden on that interest is virtually non-existent.

b. The State has a valid interest in allowing straight party voting.

Even assuming that Plaintiffs have an identifiable right burdened in some way by New Mexico's straight party voting option, there is a sufficiently strong interest supporting that voting option to justify it. Plaintiffs misidentify that interest as "promoting, endorsing or publicizing" political parties. Complaint, ¶ 108. The State's interest is far different, and concerns the electoral process, not party politics. In *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Ok. 1996), the court considered an Oklahoma law that required Democratic candidates for any particular office to be identified on the general election ballot above Republican candidates for that same office. The court held that the statute violated the Equal Protection Clause because it treated similarly situated candidates differently and because the State of Oklahoma could provide no legitimate justification for that differential treatment. *Id.* at 1581-82.

[8] Indeed, to the extent Count V depends on neither the Libertarian nor the Green Party achieving minor party certification before the 2010 election (and Plaintiffs Woodruff and Fenton thus being forced to run as independents), there is a real question about whether Plaintiffs have suffered any definitive injury relative to Count V such that they have appropriate standing to assert it.

The court also considered the remaining provisions of the challenged statute, including the use of an office block system and straight party voting. The court expressly held these provisions to be constitutional:

> Considering the analysis described above, it is clear that, to the extent the State of Oklahoma wishes to save money, protect the efficiency of the electorial [sic] process, avoid voter confusion, and permit straight party voting, any small burden upon citizens' constitutional rights which occurs as a result of the State's choice to utilize a uniform office block ballot system in Oklahoma's General Elections is outweighed by the importance of the State's interest in achieving these purposes. . . . Accordingly, to the extent the State desires to maintain a uniform office block ballot system, and to retain the capability for straight party voting in General Elections, the Court holds section 6-106 is constitutional.

Id. at 1581.

Thus, more than holding that Oklahoma had a valid interest in permitting straight party voting, the court identified straight party voting itself as an interest justifying Oklahoma's chosen ballot design. The interests supporting the availability of straight party voting overlap significantly with those the *Graves* court identified as supporting the use of a uniform office block ballot system. First, straight party voting increases electoral efficiency, by expediting both the voting process and the vote-tallying process. Second, it helps decrease voter confusion because a voter choosing to vote for all of the candidates in a single party need not parse through the ballot to make those individual choices. The Supreme Court has, on several occasions, recognized the validity of these interests. *See, e.g.*, *Timmons*, 520 U.S. at 352 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as a means for electing public officials.").

New Mexico's straight party voting provisions do not infringe on any valid Fourteenth Amendment interest of Plaintiffs. Even if such infringement occurs, it represents a minimal burden on that interest that is amply justified by a weighty state interest. Plaintiffs' equal protection challenge thus fails, and the Court should dismiss Count III-D of the Complaint.

II. COUNTS IV, V, VI, AND VII ARE BARRED BY RES JUDICATA AND CLAIM PRECLUSION AND ALSO FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Counts IV through VII, Plaintiffs bring claims that that have either already been adjudicated or that the Libertarian Party of New Mexico should have brought when it first attacked the petition signature requirements in the Election Code. Even if these claims are not barred by res judicata and on claim preclusion, Counts IV through VII fail as a matter of law.

A. The Libertarian Party Of New Mexico Has Already Attacked, In This Court, The Provisions At Issue In Counts IV Through VII, And Those Counts Are Thus Barred By Res Judicata And Claim Preclusion.

In 2006, the Libertarian Party of New Mexico and four of its candidates challenged New Mexico's petition signature requirements, seeking a declaration that those requirements violated the Party's and candidates' First and Fourteenth Amendment rights. Judge Martha Vazquez granted the Secretary of State's motion for summary judgment, and the Tenth Circuit affirmed on appeal. *See* Memorandum Opinion and Order, Case No. 06-cv-0615 (attached as Exhibit 1). While neither the individual Plaintiffs nor the Green Party of New Mexico were parties to this earlier action, the Libertarian Party was. Consequently, the Libertarian Party is barred from bringing further challenges to New Mexico's petition signature requirements.

Claim splitting, sometimes called claim preclusion, is designed to prevent "the parties or their privies from relitigating issues that were or ***could have been*** raised in" an earlier action. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992) (emphasis added). In order for claim preclusion to apply, there must be: "(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999).

The Tenth Circuit employs the transactional approach of the Restatement (Second) of Judgments in determining whether claims share identity. Under that approach, claims are

precluded when they arise from the same transaction or series of connected transactions as a previous lawsuit. "What constitutes the same transaction or series of transactions is 'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Yapp*, 186 F.3d at 1227 (quoting Restatement (Second) of Judgments § 24 (1982)).

Here, all three elements are met as to Plaintiff Libertarian Party of New Mexico concerning Counts IV through VII of the Complaint. First, the Libertarian Party's 2006 lawsuit was resolved on the merits when the District Court granted the SOS's motion for summary judgment. *See* Exhibit 1, pg. 24 ("New Mexico's political party and candidate nominating petition requirements, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, do not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of Plaintiffs."). The same parties here – the Libertarian Party and the SOS – were involved in the previous lawsuit. Finally, Counts IV through VII all allege some constitutional infirmity related to the statutes governing the petition signature requirements for minor parties and their candidates – Sections 1-7-2 and 1-8-2. In Count VI, Plaintiffs also challenge the constitutionality of NMSA 1978, § 1-8-18, which requires that a candidate purporting to represent a political party be a member of that party as a condition of placement on the ballot as the party's candidate. These constitutional claims arise from the same motivation (ballot access), would have made a convenient trial unit, and are factually and legally related. Simply put, the Libertarian Party should have brought these claims in its 2006 case. Because it did not, it is precluded from bringing them now, even if the Libertarian Party is asserting a new legal theory in this case. *See Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257

(10th Cir. 1997) ("It is immaterial that the legal basis for the relief sought in the two complaints is different; it is the occurrence from which the claims arose that is central to the 'cause of action' analysis.").

B. Counts IV Through VII Fail To State A Claim Upon Which Relief Can Be Granted.

In addition to being barred by claim preclusion, at least as to Plaintiff Libertarian Party, Counts IV through VII rest on legally unsupportable bases. Dismiss is thus proper.

1. Count IV fails because the use of the words "voters" in Sections 1-7-2 and 1-8-2 and "address" in Section 1-8-2 are not unconstitutionally vague.

In Count IV, Plaintiffs allege that the nominating petition requirements in NMSA 1978, §§ 1-7-2 and 1-8-2 are unconstitutional because the words "voters" and "address" as used in those provisions are unconstitutionally vague. In order to succeed on such a claim, Plaintiffs must demonstrate that the language in the challenged statute will "foster 'arbitrary and discriminatory application.'" *Buckley v. Valeo*, 424 U.S. 1, 41 n. 48 (1976) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Plaintiffs cannot meet this burden.

Plaintiffs contend that the word "voter" in Section 1-7-2, which requires minor parties to collect petition signatures in order to qualify as minor parties, is vague because the SOS has interpreted the word to mean "qualified electors." Complaint, ¶ 126. While the phrase "qualified electors" does appear on the minor party petition signature form, *see* Complaint, Exhibit D ("We, the undersigned qualified electors…."), the form promulgated by the SOS has no bearing on the interpretation of the statute. The legislature has clearly defined the word "voter" as it is used throughout the Election Code: "As used in the Election Code, 'voter' means any qualified elector who is registered to vote under the provisions of the Election Code."

NMSA 1978, § 1-1-5. "Qualified elector" is, in turn, defined as any person who is constitutionally qualified to vote in New Mexico. *See* NMSA 1978, § 1-1-4.

Accordingly, every single time the word "voter" appears in the Election Code, including its appearance in Sections 1-7-2 and 1-8-2, it means registered voter. Thus, in order for the signatures on a minor party petition form to have any effect, the law unambiguously requires that they be the signatures of registered New Mexico voters. Given the clear definition of "voter" in the Election Code, there is no possibility of arbitrary or discriminatory application of that term in Sections 1-7-2 and 1-8-2, and Plaintiffs' constitutional vagueness challenge fails.

Plaintiffs also allege that Section 1-8-2(A) requires petition signers to list their address, but does not specify whether that address should be the voter's residency or the address appearing on the voter's registration card. Plaintiffs then argue that the minor party candidate petition form promulgated by the SOS requires petitioner signers to include their address as registered contrary to the language of NMSA 1978, § 1-8-31(B), which requires petitioner signers to use their residence as their address. Complaint, ¶¶ 129-134.

It is unclear, at best, what constitutional infirmity arises from the juxtaposition of Section 1-8-31(B) with the minor party candidate petition signature form promulgated by the SOS. As an initial matter, that form is, in all relevant respects, identical to the form set forth in NMSA 1978, § 1-8-30(C) for use by major party candidates seeking placement on the primary election ballot. Both forms, in the blanks to be filled in by the petition signer, include the phrase "address as registered." The form Plaintiffs' challenge is based directly on the form the legislature has set forth for use by major party candidates. Moreover, Plaintiffs fail to identify *any* constitutional right threatened by the use of the phrase "address as registered" on the challenged SOS form. Plaintiffs have no constitutional right to list their residential address rather than their registered

address on such a form. Finally, as with the definition of "voter" provided by Section 1-1-5, Section 1-8-31(B) describes what address a petition signer shall use when signing a petition. There may be some conflict between that definition and the forms prescribed by the legislature and the SOS, but the statute itself is not vague.

2. Count V fails because the petition signature requirements at issue do not impermissibly discriminate against minor parties and minor party candidates.

Plaintiffs contend in Count V that the Election Code discriminates against minor parties because: (1) minor parties and their candidates face more onerous petition signature requirements than major parties and their candidates; and (2) the Election Code requires minor parties to qualify statewide in order to run candidates in county and municipal elections. These contentions fail.

As with Count III-D, the burden New Mexico's dual petition requirement places on Plaintiffs is properly evaluated through the *Anderson* balancing test. Here, Plaintiffs assert that they are burdened because they are treated differently than major parties, which do not need to gather petition signatures in order to present a slate of candidates. While there is no doubt that acquiring additional petition signatures requires some effort, that is insufficient to support a finding that the petition requirements violate the Constitution.

Balanced against this alleged burden is the State's interest in ensuring that a political party (and individual candidates) demonstrate a sufficient modicum of support to justify inclusion on the ballot. This interest is, in turn, animated by the more general interest in avoiding voter confusion with a crowded ballot and ensuring participation in the political process. The Supreme Court has repeatedly recognized the validity of these interests, often in the context of challenges to the same kinds of petition signature requirements Plaintiffs challenge here. *See Illinois State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 183-84) (1979)

("A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process.") (quoting *Lubin v. Panish*, 415 U.S. 709, 715 (1974)); *Bullock*, 405 U.S. at 145 ("The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections."); *Jenness*, 403 U.S. at 442 ("There is surely 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."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("While there is no 'litmus-paper test' for deciding a case like this, it is now clear that 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.") (internal citation omitted).

Importantly, the requirement that a party and candidate demonstrate a sufficient modicum of support as a precondition to ballot access is applicable to both major and minor parties in New Mexico. A party does not become a major party unless its candidates for governor or president garner at least 5% of the votes cast for those offices and its membership equals at least one-third of 1% "of the statewide registered voter file on the day of the governor's primary election proclamation." NMSA 1978, § 1-1-9. Thus, in order to qualify as a major party, a party must

demonstrate through its membership and the votes its candidates receive that it has a modicum of support. Similarly, major party candidates must demonstrate a sufficient modicum of support to appear on the general election ballot by winning the primary. Before that, in order to justify inclusion on the primary ballot, they must gather enough petition signatures to demonstrate a modicum of support as a candidate.

Minor parties and their candidates are treated no differently. The petition signatures they must gather operate as a proxy for the votes received by major parties and their candidates. Both systems serve the same purpose – ensuring that parties and candidates do not needlessly appear on the ballot. The Supreme Court has affirmed the constitutionality of minor party petition signature requirements far more burdensome than the ones imposed by the Election Code. In *Jenness*, for example, the Court upheld a requirement that independent and minor party candidates gather petition signatures equal to 5% of the voters eligible to vote in the last election for the office at issue. *Jenness*, 403 U.S. at 442. In *American Party of Texas v. White*, 415 U.S. 767, 782 (1974), the Court upheld a Texas law requiring minor party candidates to gather signatures totaling at least 1% of the total vote cast for governor at the last preceding general election – the same number of signatures required by the Election Code.

It is thus beyond peradventure that the State of New Mexico has a powerful interest supporting the petition signature requirements Plaintiffs challenge in Count V. Because that interest, repeatedly affirmed by the Supreme Court, outweighs any burden Plaintiffs may bear as a result of the petition signature requirement, Count V fails as a matter of law.

3. Count VI fails because the petition signature requirements at issue legitimately restrict ballot access to those candidates who have demonstrated a modicum of support for their candidacy.

In Count VI, Plaintiffs argue that requiring minor party candidates to meet petition signature requirements on top of those required of minor parties impermissibly interferes with

the rights of minor parties to nominate the candidates of their choice. This claim fails for the same reason that Count V fails. The State has a legitimate and powerful interest in limiting ballot access through primary elections and petition signature requirements, and the Supreme Court has repeatedly validated that interest against the burdens the petition signature requirements may impose on minor parties and their candidates. Because the State can legitimately require minor party candidates to individually demonstrate a modicum of support before placing them on the ballot, the petition signature requirements in Section 1-8-2 do not impermissibly interfere with any rights of any minor party.

4. Count VII fails because the statute at issue does not impose any undue burden on minor party candidates.

In Count VII, Plaintiffs allege that by setting a date certain on which nominating petition signatures must be filed with the SOS, Section 1-8-2(B) impermissibly burdens minor parties. In making this argument, Plaintiffs assume, without adequate support, that the SOS or a county clerk would reject nominating petition signatures that a candidate attempted to file before the date identified in Section 1-8-2(B).[9] *See* Complaint, ¶ 175. There is no legal basis for reading Section 1-8-2(B) so narrowly.

Moreover, Plaintiffs do not identify with any detail either the right allegedly burdened or the specific manner in which that unidentified right is burdened. Indeed, even assuming that Plaintiffs' restrictive reading of Section 1-8-2(B) is legitimate, it is hard to imagine how Plaintiffs are burdened by not being able to submit nominating petition signatures *before* the deadline set forth in the statute. Weighing against that burden is the State's interest in running an

[9] Plaintiffs quote in the Complaint from an older version of Section 1-8-2(B) which required nominating petition signatures to be filed "on the second Tuesday in July." *See* Complaint, ¶ 174. The current version of the statute requires petition signatures to be filed "on the twenty-first day following the primary election in the year of the general election." NMSA 1978, § 1-8-2(B). This difference is, however, inconsequential for purposes of the challenge Plaintiffs have lodged against the statute.

orderly election cycle predicated on uniform or equivalent deadlines and requirements for all candidates from all parties. Weighing that interest against the poorly defined interest minor parties may have in filing election documents early leads inexorably to the dismissal of Count VII. Plaintiffs have entirely failed to state a claim in Count VII, and this Court should so rule.

III. COUNTS VIII, IX, AND X FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In their final three counts, Plaintiffs allege that: (1) requiring candidates of a party to be a registered member of that party "unconstitutionally impairs the rights of minor parties"; (2) the provisions of the Election Code dealing with the disqualification of a minor party are unconstitutional; and (3) the ballot access restrictions in the Election Code violate the rights of New Mexico voters. These claims fail.

A. Count VIII Fails Because The Challenged Provision Is A Reasonable Exercise Of The State's Power To Regulate Elections.

Plaintiffs challenge the constitutionality of NMSA 1978, § 1-8-18(A)(1) which provides that no person may be a candidate of any political party unless that person's voter registration shows "affiliation with that political party on the date of the governor's proclamation for the primary election." Plaintiffs seek to invalidate this provision on two principal bases. First, Plaintiffs argue that the provision impermissibly prevents a candidate of one party from running as a candidate for another party after the date of the Governor's proclamation. Complaint, ¶ 187. Second, Plaintiffs contend that the statute impermissibly precludes parties from nominating a candidate who is not a registered voter. Complaint, ¶ 188.

As the Supreme Court held in *Timmons*, a State can constitutionally prevent candidates from representing more than one party on a ballot. In that case, the Minnesota New Party had challenged the constitutionality of Minnesota's prohibition on so-called "fusion candidacies," in which one candidate represents multiple parties for the same office in the same election. The

Court squarely rejected the argument that the New Party had an inviolable right to run the candidate of its choice:

> The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. That is, the New Party, and not someone else, has the right to select the New Party's "standard bearer." It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate. That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.

Timmons, 520 U.S. at 359 (citations and footnote omitted). *See also Burdick v. Takushi*, 504 U.S. 428, 440 (1992) ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.").

Section 1-8-18 does not significantly burden the Libertarian and Green Parties rights to run the candidates of their choice. Complying with Section 1-8-18 is a simple matter of timely registering as a member of the party one seeks to represent on the ballot. Moreover, the State has an interest in the orderly regulation of its elections. *See, e.g., Bullock*, 405 U.S. at 145; *see also Storer*, 415 U.S. at 736 ("A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system."). That interest outweighs any burden the challenged statute may place on Plaintiffs, and the statute does not, therefore, infringe on any of Plaintiffs' constitutional rights.

Plaintiffs' second attack on Section 1-8-18 likewise fails. As the *Timmons* Court made clear, Plaintiffs do not enjoy unfettered freedom to name the candidate of their choice to the ballot. The requirement that a candidate of a party be a registered voter in New Mexico is a by-

product of the requirement that the candidate legitimately demonstrate membership in the party he or she seeks to represent. Here again, compliance with Section 1-8-18 is a simple matter of registering to vote. That burden is easily outweighed by the State's interest in an orderly and efficient election. Count VIII thus fails.

B. Count IX Fails Because Plaintiffs Have Not Identified Any Right Burdened By The Challenged Statute And Because New Mexico Has An Interest In Running Orderly Elections.

In Count IX, Plaintiffs challenge both the process by which parties are decertified under the Election Code and the availability of straight-party voting in New Mexico. These challenges fail as a matter of law.

Defendant has already addressed Plaintiffs' challenge to straight-party voting in New Mexico, and will not repeat those arguments here. Defendant would simply point the Court to the discussion in Section I(C)(4) above relating to Claim III-D and note that Plaintiffs' allegations in Count IX regarding straight-party voting assert the same Equal Protection violation as the allegations in Count III-D. *See* Complaint, ¶¶ 202-205.

Plaintiffs have utterly failed to state a cognizable cause of action concerning the decertification process. Rather than identify the particular provision of either the New Mexico or the United States Constitution that NMSA 1978, §§ 1-7-2(C) and (D) allegedly violate, Plaintiffs simply make the blanket assertion that the challenged provisions are unconstitutional. Nor do Plaintiffs bother to identify what right of theirs the challenged statute allegedly violates. Dismissal is appropriate for this reason alone.

But even if Plaintiffs had set forth a colorable claim, it would ultimately lack merit. As discussed above, the State has broad discretion in ordering its elections. The exercise of that discretion is constitutional unless it severely burdens a fundamental right and is insufficiently supported by a legitimate State interest. Here, there is no conceivable right of Plaintiffs that

Sections 1-7-2(C) and (D) violate. Any party that is decertified pursuant to those provisions can qualify again at a later date by complying with the petition signature requirements of Section 1-7-2(A). To the extent those requirements are constitutional, as demonstrated above, the decertification of a party does not impermissibly burden Plaintiffs' rights. *See Arutunoff v. Oklahoma State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982) (upholding against First and Fourteenth Amendment challenge an Oklahoma law decertifying a minor party if the party's candidate for President failed to get at least 10% of the vote).

Moreover, the State has a strong interest supporting the decertification of a party whose candidates fail to garner adequate support at the polls.[10] That interest is fully explored in Section II(B)(2) of this brief. That interest outweighs any burden the decertification of a minor party may place on Plaintiffs' rights, and Count IX fails.

C. Count X Fails To State A Claim Upon Which Relief Can Be Granted.

Finally, in Count X Plaintiff Hillis alleges that New Mexico's ballot access limitations violate his rights as a voter to participate in a meaningful election. These allegations fail.

As an initial matter, Plaintiffs fail once again to identify with any particularity the Election Code provisions under attack in this Count. Rather than take the time to identify the relevant provisions, Plaintiffs simply ask this Court to declare unconstitutional "***all*** ballot access limitations established by the New Mexico Election Code" as burdens on the right to vote. Complaint, ¶ 200(A) (emphasis added). The scope of this request is breathtaking and wholly unsupportable. As detailed above, the Supreme Court has routinely upheld the legitimate

[10] In addition to the State's interest in limiting ballot access, the State has an interest in notifying the members of a minor party that their party has been decertified. Without such notification, those voters are deprived of important information that may bear on their choices as voters, such as the choice of registering as a member of a certified party. Plaintiffs' assertion in Paragraph 198 of the Complaint that "[n]o State interest is served by notifying the individual voters registered with a minor party that their party has been de-qualified" is thus demonstrably false.

authority of the States to regulate ballot access. The Court has *never* held that ballot access limitations violate the rights of voters to meaningfully participate in an election.

Plaintiffs' claim is, of course, fundamentally premised on the assumption that the two-party system limits voter choice such that those voters are disenfranchised in some way. No court has ever agreed with Plaintiffs' argument. The right to vote, like the right to ballot access, admits of limitations. Indeed, the principal means by which the right to vote is limited is through limitations on ballot access. The Supreme Court has, again and again and again, upheld reasonable ballot access restrictions like those in the Election Code. Plaintiffs cannot identify any specific provision that allegedly violates their rights, and Defendant has demonstrated that the challenged provisions of the Election Code are constitutional. Like Counts I through IX, Count X fails to state a claim upon which relief can be granted, and the Court should dismiss it.

CONCLUSION

Based on the foregoing, Defendant respectfully requests a judgment dismissing Plaintiffs' Complaint with prejudice, ordering all parties to pay their own fees and costs, and providing any additional relief to which Defendant may be justly entitled.

DATED: August 17, 2009.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Scott Fuqua
Scott Fuqua
Assistant Attorney General
New Mexico Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6000 – Telephone
(505)827-6036 – Facsimile

Attorney for Defendant Mary Herrera

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing answer on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on August 17, 2009.

/s/ Scott Fuqua
Scott Fuqua