UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LIBERTARIAN PARTY OF NEW HAMPSHIRE, BOB BARR, WAYNE A. ROOT, BRENDAN KELLY and HARDY MACIA,

Plaintiffs, **Civil Action No. 08-cv-367-JM**

v.

WILLIAM M. GARDNER, in his Official Capacity as Secretary of State of New Hampshire,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiffs submit this memorandum of law in opposition to defendant's motion for summary judgment and in support of plaintiffs' motion for summary judgment. Plaintiffs agree with defendant that "there are no material facts in dispute," Def. Mem. at 16, and submit that they, not defendant, are entitled to judgment as a matter of law.

Statement of Facts

Pursuant to LR 7.2(b), plaintiffs submit the following statement of material facts as to which they contend there is no genuine issue to be tried.[1]

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[1]Defendant does not appear to have provided a statement of facts in conformity with LR 7.2(b)(1), which states in relevant part that "[a] memorandum in support of a summary judgment motion shall incorporate a short and concise statement of material facts ... as to which the moving party contends there is no genuine issue to be tried."

Plaintiffs Bob Barr and Wayne A. Root were nominated at the Libertarian national convention in May 2008 as the party's candidates for President and Vice President of the United States, respectively. Declaration of Bill Redpath executed on September 28, 2009 ("Redpath Decl."), ¶ 3. At the time, plaintiff Brendan Kelly was the chairman of plaintiff Libertarian Party of New Hampshire and plaintiff Hardy Macia was one of its supporters. Id., ¶ 5. Defendant William M. Gardner was the Secretary of State of New Hampshire and, as such, was the chief election officer of New Hampshire. Pl. Compl., ¶ 12; Def. Answ., ¶ 12.

On or about September 3, 2008 plaintiff Barr qualified to be listed on the November 4, 2008 New Hampshire ballot as a candidate for President of the United States with the appellation "Libertarian," having caused nomination papers to be completed and submitted to defendant. Pl. Compl., ¶¶ 17, 18; Def. Answ., ¶ 18. On or about July 30, 2008 one George Phillies had also qualified to be listed on the New Hampshire ballot as a candidate for president with the appellation "Libertarian," having also caused nomination papers to be completed and submitted to defendant. Pl. Compl., ¶¶ 15, 16; Def. Answ., ¶ 16.

Plaintiffs sued defendant for declaratory and injunctive relief, seeking to substitute the Barr candidacy for the Phillies candidacy and to have Barr listed on the ballot as the sole Libertarian Party candidate for president. Pl. Compl., ¶¶ 21, 24, 29. Plaintiffs subsequently informed the Court and the defendant that they no longer sought injunctive

relief. Dkt. # 7.

Defendant listed both Bob Barr and George Phillies on the ballot as candidates for president with the appellation "Libertarian." Def. Mot., Ex. B. Barr was listed on the ballots of 43 states with the appellation "Libertarian" and was listed on the ballots of two additional states with no party appellation. Redpath Decl., ¶ 4. New Hampshire is the only state in which an additional candidate for president was also listed on the ballot with the appellation "Libertarian." Id.

Plaintiffs now seek a declaratory judgment affirming that they have the right to substitute candidates selected by the Libertarian Party for other candidates for the same offices who have qualified to be listed on the ballot.

Argument

I. THE CONTROVERSY IS NOT MOOT

For the reasons articulated by the Supreme Court in Storer v. Brown, 415 U.S. 724, 737 n. 8 (1974), this case is not moot:

> The ... election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the ... statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' [Citations omitted.] The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

See also New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8, 18 (1st Cir. 1992). The instant controversy over a party's right to substitute its nominees for other candidates who have qualified to be listed on the ballot with the party's name is certainly "capable of repetition, yet evading review" within the meaning of the foregoing authorities.

II. THE STANDARD FOR SUMMARY JUDGMENT

In Barr v. Galvin, No. 08-11340-NMG (D. Mass. 2008) (reproduced in plaintiffs' Appendix), a recent case vindicating the Libertarian Party's right to substitute plaintiff Barr for another presidential candidate who had qualified for the Massachusetts ballot, the United States District Court for the District of Massachusetts noted that

> [t]he role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When cross-motions are filed, the Court must apply that standard and determine which party, if either, deserves summary judgment. Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

Slip Op. at A5.

At the heart of the present case is New Hampshire' refusal, exercised by defendant secretary of state, to allow substitution of the Barr candidacy for the Phillies candidacy. Unless this refusal is invalidated, the instant controversy will be "capable of repetition, yet evading review." Id. There are likely to be future instances in which rival nonmajor party candidates such as Barr and Phillies qualify for the ballot, where each claims to

represent the party but only one is its nominee.[2]

III. THE STANDARD OF REVIEW

Plaintiffs assert that their First Amendment speech and associational rights, together with their rights to have equal protection of law, were severely burdened by defendant's refusal to allow substitution of the Barr candidacy for the Phillies candidacy and to list Barr on the ballot as the sole Libertarian Party candidate for president. The refusal, together with the state election laws in which it was grounded, were not justified by a sufficient state interest and for that reason was unconstitutional.

The Supreme Court has cautioned that while the administration of the election process is largely entrusted to the states, they may not infringe on basic constitutional protections. Kusper v. Pontikes, 414 U.S. 51, 57 (1974), citing Dunn v. Blumstein, 405 U.S. 330 (1972).

Williams v. Rhodes, 393 U.S. 23, 30 (1968) (holding that Ohio's election laws making it virtually impossible for a minor party to access the presidential election ballot were unconstitutional), one of the first cases in which the Supreme Court addressed the constitutional status of state ballot access restrictions, considered the nature of the rights implicated by such restrictions. The Court noted that such restrictions

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[2]The substitution problem could not be obviated by the withdrawal of one of the rival candidates from the ballot, as New Hampshire law effectively prohibits withdrawal by a candidate who has qualified for the ballot except where the candidate does not qualify for public office on account of age, domicile or physical disability. RSA 655.46 and 655.38

> place burdens on two different, although overlapping, kinds of 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. Both of these rights, of course, rank among our most precious freedoms.

Many ballot access restrictions are, of course, justified by the states' legitimate regulatory interests. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, supra at 730.

The Supreme Court has described the trial court's task in evaluating a constitutional challenge to a state-imposed restriction on access to the ballot as follows:

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

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (holding that Ohio's March filing deadline for independent presidential candidate petitions was unconstitutionally burdensome).[3]

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[3]The Anderson Court based its analysis on the First and Fourteenth Amendments generally and did not explicitly engage in a separate equal protection analysis. The Court stated, however, that it "rel[ied] ... on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment," id. at 786 n. 7, and indicated that those cases had been correctly decided. The earlier cases to which the Court referred employed traditional equal protection analysis but with varying levels of scrutiny. See Williams v. Rhodes,

In Burdick v. Takushi, 504 U.S. 428, 433-34 (1992) (upholding Hawaii's prohibition against write-in voting in the context of a regulatory framework providing for easy access to the ballot) the Supreme Court endorsed the Anderson methodology and examined the circumstances in which different levels of scrutiny should be applied:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends [citing Anderson at 788]. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently. * * *
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> Under [Anderson's "more flexible standard"], the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Norman v. Reed, 502 U.S. ___, ___, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions [citing Anderson at 788] ....

The Anderson approach, as informed by Burdick, has been characterized as "a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending upon the factual circumstances in each case." Duke v. Clelland, 5 F.3d 1399, 1405 (11th Cir. 1993), citing Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992). Barr v. Galvin,

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supra; Jenness v. Fortson, 403 U.S. 431 (1971); Storer v. Brown, supra; American Party of Texas v. White, 415 U.S. 767 (1974), rehearing denied, 417 U.S. 926; Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

584 F. Supp.2d 316, 320 (D. Mass. 1980) summarized the First Circuit's treatment of these considerations as follows:

> Actions of the state with implications on ballot access are subject to a sliding scale, with more searching review applied to more burdensome regulations. McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004). Voting regulations imposing "severe burdens" must be narrowly tailored to a compelling state interest, but "reasonable, nondiscriminatory restrictions" will usually be justified by "important regulatory interests." Id., citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed.2d 589 (1997).

The Anderson-Burdick balancing test is a judicial attempt to achieve an "equilibrium between the legitimate constitutional interests of the States in conducting fair and orderly elections and the First Amendment rights of voters and candidates." Libertarian Party of Maine v. Diamond, 992 F.2d 365, 370 (1st Cir. 1993).

While individual states certainly have a legitimate interest in including reasonable restrictions within their election frameworks, they have less of an interest in regulating presidential elections than statewide elections because the outcome of presidential elections will be largely determined outside the borders of particular states.

Here, plaintiffs employ the Anderson-Burdick form of analysis by evaluating the injuries to plaintiffs' constitutional rights caused by defendant's refusal to substitute Barr for Phillies and by New Hampshire's disparate treatment of minor party and major party candidates; the state interests asserted to justify those injuries; and in light of these considerations, the constitutionality of denying plaintiffs the right of substitution.

A. THE INJURIES TO PLAINTIFFS' RIGHTS ARE SEVERE

Plaintiffs' rights to have equal protection of law, to cast their votes effectively and to associate for the advancement of political ideas, including their right to form a new ballot-qualified party, were seriously impaired by the inclusion on New Hampshire's ballot of a "Libertarian Party" candidate (Phillies) who was not the party's nominee and whom Barr had defeated at the party's nominating convention, Redpath Decl., ¶ 3.

The plaintiffs in this action assert the "different, although overlapping kinds of rights," cf. Williams v. Rhodes, supra at 30, of minor parties, their candidates for public office and their voter-supporters. By denying plaintiffs exclusive access to the ballot the defendant, together with the requirements of New Hampshire election law, thoroughly undermined the First and Fourteenth Amendment rights of all three categories of plaintiffs. The Libertarian Party's voting strength was diluted and its candidates and supporters' freedom of political speech and association was impaired.

The severity of the injuries to the instant plaintiffs' rights means that the standard of review to be applied here is strict scrutiny; the state must demonstrate that its refusal to permit candidate-substitution in the circumstances presented was "... narrowly drawn to advance a state interest of compelling importance." Norman v. Reed, 502 U.S. 279, 289 (1992) (overturning decision of Illinois Supreme Court which, inter alia, had upheld an Illinois law requiring more petition signatures for a new party to access a countywide ballot than were required to access the statewide ballot).

B. THE STATE INTERESTS PUT FORWARD ARE INSUFFICIENT TO JUSTIFY PLAINTIFFS' INJURIES

Under the Anderson/Burdick test, "[o]nce a plaintiff has identified the interference with the exercise of her First Amendment rights, the burden is on the state to 'put forward' the 'precise interests' ... [that are] justifications for the burden imposed by its rule." Fulani v. Krivanek, supra at 1544, citing Anderson at 789.

The defendant, on behalf of the State of New Hampshire and in justification of its prohibition against substitution, asserts that "New Hampshire's current system serves significant state interests without violating the 1st and 14th Amendments," Def. Mem. at 12, and that "New Hampshire's election laws serve New Hampshire's legitimate interests in regulating its elections and are constitutional," id. at 15. However, the defendant has not identified any particular state interests that are served by the prohibition. Even if the state's prohibition against substitution were found not to be so unduly burdensome as to call for strict scrutiny, the state would still be required to put forward an "important regulatory interest" in the prohibition for it to be upheld. Norman v. Reed, supra at 289. The state has not done so.

In the absence of any advice to the contrary, it can be assumed that the state interest sought to be justified by the prohibition against candidate substitution is New Hampshire's interest in administering its election processes as it sees fit. But this wholly legitimate state interest, plaintiffs submit, cannot justify listing a minor party's presidential nominee on the ballot alongside a defeated competitor. The prohibition

against substitution simply does not pass the Anderson-Burdick test.

IV. THE RIGHT TO SUBSTITUTE CANDIDATES

Most states have recognized a right to substitute presidential and/or vice presidential candidates under appropriate circumstances. Declaration of Richard Winger executed on September 28, 2009 ("Winger Decl."). Every state, New Hampshire included, accepted the Democratic National Committee's substitution of Sargent Shriver for Thomas Eagleton as George McGovern's vice presidential running mate in 1972. Id., ¶ 7. A wealth of historical and contemporary information about presidential and vice presidential candidate substitution is provided in the Winger Declaration, to which the Court is respectfully referred.

The right to substitute names on a ballot under appropriate circumstances has been upheld by many forums in many jurisdictions as a right secured by the Equal Protection Clause to ensure that the actual candidate for an electoral office appears on the ballot. See, e.g., Barr v. Galvin, supra (substitution of Libertarian Party convention nominees for stand-in candidates named on petition was constitutionally required); Anderson v. Firestone, 499 F. Supp. 1027, 1030-31 (N.D. Fla. 1980) (substitution was constitutionally required where presidential candidate chose running mate different from the one on nomination petitions); See also, In Re: The Substitute Nomination Certificate of Bob Barr as the Libertarian Candidate for President of the United States, 956 A.2d 1083 (Commw. Ct. 2008), affirmed, 958 A.2d 1045 (Pa. 2008) (substitution of party nominee for stand-in

candidate named on nomination papers did not violate state law); Libertarian Party of Florida v. Mortham, No. 4:96 cv 258 (N.D. Fla. 1996) (reproduced in plaintiffs' Appendix) (state law required that minor party be permitted to substitute its presidential nominee for candidate named on petition, notwithstanding secretary of state's refusal to permit such substitution). Cf., El-Amin v. State Board of Elections, 721 F. Supp. 770 (E.D. Va. 1989) (statute permitting renomination of party candidates who were disqualified and/or withdrew but not permitting renomination of similarly situated independent candidates violated First and Fourteenth Amendments).

In the present case plaintiffs Barr and Root were ultimately selected by the Libertarian Party as its candidates for president and vice president. Yet the ballot did not indicate that they, not Phillies and his running mate, were the candidates chosen by the party. Denying plaintiffs the right to substitute Barr and Root for Phillies and his running mate, and to have Barr and Root listed as the party's sole nominees, undermined the right of New Hampshire voters to cast their votes effectively for the party's candidates and to associate politically with them and with the party. No cognizable state interest was served by denying the Libertarian Party the right of substitution, nor by listing on the ballot as "Libertarian" a set of candidates for president and vice president who were not the party's nominees. Indeed, the state's interests in safeguarding the integrity of its ballot and avoiding voter confusion were subverted, not advanced, by listing a second set of candidates with the "Libertarian" designation.

V. THE RIGHT TO PROTECTION OF A PARTY'S NAME

The defendant's refusal to list Barr on the ballot as the sole Libertarian party candidate for president enables unauthorized candidates, such as Phillies, to dilute the voting strength of a minor party by using its name. Under the present state of affairs any candidate who attains access to the general election ballot by petition can select the appellation "Libertarian" irrespective of the candidate's relationship, or lack thereof, to the Libertarian Party. This subverts the ability of voters and supporters of the party to know which "Libertarian" candidates have been nominated or otherwise endorsed by the party. See Bayer v. Meyer, 728 F.2d 471 (10th Cir. 1984); Curry v. Kennelly, No. H-80-403 (D. Conn. 1980) (reproduced in plaintiffs' Appendix).

In contrast, the major parties are protected by New Hampshire law from the unauthorized use of their names by candidates for public office. Only candidates who are covered by a declaration of intent filed by a party's chairman can have their names placed on the ballot. RSA 655:43(III), 655:17-c and 655:14-a. Plaintiffs contend that this disparate treatment of major and minor parties and their candidates and supporters violates the Equal Protection Clause. It should be of no consequence that a minor party can, at least in theory, attain access to the ballot together with exclusive rights to the use of its name by obtaining nomination papers signed by registered voters equaling three percent of the total votes cast at the previous state general election, pursuant to RSA 655:42(III). The procedure is sufficiently burdensome that it has been used only once

since it was enacted in 1996. Winger Decl., ¶ 14. State law provides no protection for minor parties that are unwilling or unable to expend the resources necessary to surmount the three-percent hurdle.

Conclusion

For the foregoing reasons the Court should deny the defendant's motion for summary judgment and grant the plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered on September 22, 2009 to James W. Kennedy, counsel for the defendant, via the federal court's ECF filing system.

/s/ Gary Sinawski
Gary Sinawski