

**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' REPLY TO DEFENDANT'S OBJECTION  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs submit this reply to defendant secretary of state's objection to plaintiffs' motion for summary judgment, and in support thereof, state as follows:

**Argument**

Plaintiffs claim that they were entitled to substitute the Bob Barr candidacy for the George Phillies candidacy and to have Barr listed on the ballot as the sole Libertarian Party candidate for president on the November 2008 New Hampshire general election ballot. The post-election declaratory relief that plaintiffs now seek need not include a determination that Phillies should have been removed from the ballot entirely, as defendant suggests. Def. Obj. to Pl. Mot. for Summary Judgment at 1. After all, Phillies met the New Hampshire requirements for being listed on the ballot as an independent candidate for president.

Plaintiffs seek only to vindicate the Libertarian Party's right to substitute candidacies in appropriate situations and to control the use of the "Libertarian" designation by candidates for public office in situations where the party nominates or otherwise endorses candidates. In the present case, this would have meant listing Barr on the ballot *as the sole Libertarian Party candidate for president*. After Barr won the party's nomination at its national convention in May 2008, defeating Phillies and other contenders, and after Barr himself met New Hampshire's ballot access requirements, he, like John McCain and Barack Obama, was entitled to be named on the ballot as his party's *only* candidate for president. This would not have prevented Phillies from also being listed on the ballot as a candidate for president, without the appellation "Libertarian."

Defendant asserts that "[p]laintiffs' fundamental challenge to the Secretary of State's refusal to substitute Phillies for Barr on the 2008 General Election ballot is with New Hampshire's determination of a recognized party under RSA 652:11." Def. Obj. to Pl. Mot. for Summary Judgment at 2. That statute defines "party" as "any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for ... governor or ... United States senators." To the contrary: Plaintiffs' quarrel is not with New Hampshire's definition of "recognized party" or with the state's right to determine its criteria for party recognition. Rather, plaintiffs object to the state's refusal to permit substitution of candidacies in the manner just

described and in the circumstances presented by this litigation.

Defendant correctly points out that in some contexts it is permissible for a state to treat major and minor parties differently on the basis of prior elections, citing cases upholding the appointment of election boards, election judges and ballot clerks based on their affiliation with the major parties. Id. at 2, 3. In many other contexts, however, courts have ruled that it is unconstitutional to treat major and minor parties differently. See, e.g., Libertarian Party of N.H. v. Secretary of State, 965 A.2d 1078, 158 N.H. 194 (N.H. 2008) (referring to lower court's ruling that it is unconstitutional for state to provide lists of registered voters to recognized parties but not to unrecognized parties); Green Party v. Land, 541 F. Supp.2d 912 (E.D. Mich. 2008) (same); Schultz v. Williams, 44 F.3d 48 (2d Cir. 1994) (same); Libertarian Party of Indiana v. Marion County Bd. of Voter Registration, 778 F. Supp. 1458 (S.D. Ind. 1991) (same); Baer v. Meyer, 728 F.2d 471 (10<sup>th</sup> Cir. 1984) (unconstitutional for state to permit voters to register into recognized parties but not into unrecognized parties); Atherton v. Ward, 22 F. Supp.2d 1265 (W.D. Okla. 1998) (same); Council of Alternative Parties v. State, 781 A.2d 1041 (N.J. Super. Ct. 2001) (same); Green Party v. New York State Bd. of Elections, 389 F.3d 411 (2d Cir. 2004) (same); Rhode Island Chapter of Nat'l Women's Political Caucus v. Rhode Island Lottery Commission, 609 F. Supp. 1403 (D. R.I. 1985) (unconstitutional for state to permit recognized parties, but not unrecognized parties, to hold lotteries).

It is simply not the case, as defendant seems to imply, that if it is permissible to

treat minor parties differently from major parties in some circumstances, it is permissible to do so in all circumstances. Plaintiffs urge that it is not permissible for New Hampshire to give recognized parties effective control over the use of their party names but to deny unrecognized parties similar control. See plaintiffs' principal brief at 13. This disparate treatment of major and minor parties is injurious to minor parties, their authorized candidates and their supporters. It is not justified by any legitimate state interest, including those identified by defendant, *viz*, the state's "legitimate interest in regulating the number of candidates on the ballot" and its interest in "protect[ing] the integrity of its political process from frivolous or fraudulent candidacies" [citations omitted]. Def. Obj. to Pl. Mot. for Summary Judgment at 5. Indeed, permitting the unauthorized use of minor party names by candidates for public office is bound to make it more difficult for New Hampshire to regulate the number of candidates on the ballot and to protect the integrity of its political process. The disparity in the state's treatment of major and minor parties with respect to the unauthorized use of party names, plaintiffs submit, is therefore unconstitutional.

### **Conclusion**

For the foregoing reasons and those stated in plaintiffs' principal brief, plaintiffs' motion for summary judgment should be granted and defendant's motion should be denied.

/s/Gary Sinawski  
Gary Sinawski  
180 Montague Street 25<sup>th</sup> Floor  
Brooklyn, NY 11201  
516 971-7783  
Fax: 347 721-3166  
Email: [gsinawski@aol.com](mailto:gsinawski@aol.com)

/s/Evan Feit Nappen  
Evan Feit Nappen  
Nappen Law Office  
E.F. Nappen Attorney at Law, PC  
280 Pleasant Street, Suite 2  
Concord, NH 03301  
603 223-0001  
Fax: 603 223-0007  
E-mail: [gunesql@verizon.net](mailto:gunesql@verizon.net)

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was delivered on November 6, 2009 to counsel for the defendant via the federal court's ECF filing system.

/s/ Gary Sinawski  
Gary Sinawski