

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**GREEN PARTY OF ARKANSAS;  
MARK SWANEY and REBEKAH  
KENNEDY**

**PLAINTIFFS**

**v.**

**NO. 4:09CV695 JLH/HLJ**

**CHARLIE DANIELS, in his official  
capacity as Secretary of State of the State of  
Arkansas**

**DEFENDANT**

**REPLY TO PLAINTIFFS' RESPONSE TO  
MOTION TO DISMISS**

Comes now Charlie Daniels, in his official capacity as Secretary of State for the State of Arkansas, by and through his attorneys, Arkansas Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for his *Reply to Plaintiffs' Response to Motion to Dismiss*, states:

**I. Plaintiffs Are Not Entitled to Discovery When They Haven't Pleaded a Claim**

All civil cases are subject to the rules of civil procedure and should be dismissed if they fail to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). In *Iqbal*, the Court emphasized the need to carefully analyze the claims made in a complaint against a public official. "If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed." *Id.* at 1953. While *Iqbal* dealt with qualified immunity, its analysis of the disruption caused by litigation applies with no less force to a public official sued in his official capacity

only. Plaintiffs cite no case, rule, or statute that hold that ballot access cases are exempt from any of the federal rules of civil procedure.

Plaintiffs cite *Mandel v. Bradley* for the odd proposition that this Court should not rely on prior precedent to weigh the sufficiency of the Green Party's Complaint. 432 U.S. 173, 97 S.Ct. 2238 (1977). The *Bradley* Court remanded that case, not because the three-judge district court panel failed to develop enough facts, but because the panel treated a prior *summary affirmance* as dispositive. *Id.* Justice Brennan, in his concurrence in *Mandel*, explained that that opinion illustrates better the precedential weight of a summary affirmance by the Supreme Court. *Id.* at 179. The rule from *Mandel v. Bradley* is that lower courts must not treat summary affirmances as dispositive, but must carefully weigh them in relation to the case with which the lower court is confronted. *Id.* Defendant has asked this Court to do nothing less than this but with prior decisions of the Supreme Court.

A plaintiff cannot avoid dismissal under Rule 12 by alleging that she may be able to prove a claim if allowed discovery. The Supreme Court in *Iqbal* addressed this very contention and specifically declined the "invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. . . . Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise." *Id.* at 1953-54.

In order to move beyond the pleading stage to the discovery stage, Plaintiffs must allege sufficient facts (not just conclusions) to push their claims of exclusion from the Arkansas general ballot "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 1269 S.Ct. at

1949. Conclusory statements must be disregarded; only factual statements may be given effect. *Id.* at 1949-50. The Court may also take judicial notice of facts in the public record that bear on the viability of the Plaintiffs' Complaint. *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, fn. 12, 2009 WL 2591267 (8<sup>th</sup> Cir. 2009)(relying on public school enrollment data in affirming motion to dismiss).

Here, the Plaintiffs do not give any indication what discovery they seek or what additional facts they would add to the facts recited in the Complaint and those available through the public record. Moreover, the Green Party's own factual allegations demonstrate the Complaint's failure to state a claim: the Green Party concedes that it has gained access to the Arkansas ballot each time such access has been sought. The Plaintiffs' Response does not cite any case where a ballot access law was struck down when a small party could gain access to the ballot by another route. The absence of citation to relevant case law is likely because Arkansas' ballot access laws reasonable access to small parties. Indeed, Arkansas ballot access rules are less restrictive than the laws of other states that have already been upheld by the courts. The available case law plainly demonstrates that Arkansas's ballot access restrictions are not "so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot." *American Party of Texas v. White*, 415 U.S. 767, 783, 94 S.Ct. 1296, 1307 (1974). Quite the contrary, small political parties and independent candidates have regularly participated in Arkansas's elections.

Plaintiffs' take issue with the Secretary's citation to the laws of other states by arguing that the Secretary's brief fails to take into consideration the fact that the cited states allow another alternative route to the ballot that is less onerous than the gubernatorial or presidential election vote requirement. As such, the Green Party appears to concede that an alternative, less

difficult route to the ballot can render the whole scheme constitutional. Arkansas has an alternative route for ballot access that allows a minor party (one that cannot secure the votes of three percent of the presidential or gubernatorial vote) to gain access to the ballot by a modicum of support from voters who wish to see the small party on the ballot. Arkansas's alternative route, the 10,000 signature petition requirement, equates to a petition requirement of 0.9% of the votes cast in the last presidential election, or 1.3% of the votes cast in the last gubernatorial election. A standard the Green Party alleges they have met each time they have sought it.

According to the Supreme Court in the *Bradley* case cited by the Plaintiffs, the appropriate inquiry for this case is:

In the context of [Arkansas] politics, could a reasonably diligent . . . candidate be expected to satisfy the (ballot access) requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if . . . candidates have qualified with some regularity and quite a different matter if they have not.

*Mandel*, 432 U.S. at 178 *quoting Storer v. Brown*, 415 U.S. 724, 742, 94 S.Ct., 1274, 1285 (1974). Plaintiffs' Complaint, and the public record noted in Defendant's Brief in Support of Motion to Dismiss, demonstrates that the Green Party and other parties have regularly gained access to the Arkansas ballot. Accordingly, Plaintiffs' Complaint should be dismissed.

## **II. The Court Should Not Change Arkansas Law Before Plaintiffs Plead a Claim**

Plaintiffs assert that their primary claim is that the Secretary of State has misinterpreted and misapplied Ark. Code Ann. § 7-1-101(21)(A) (repl. 2009) and that this interpretation works to their disadvantage. Neither Plaintiffs' Complaint nor their Response to the Motion to Dismiss explain what alternative interpretation of that statute the Plaintiffs believe would be a better. Presumably, Plaintiffs prefer some reading of the statute that would result in a more permissive ballot access law. In any event, the only present question for this Court is whether the Secretary

of State's allegedly more restrictive reading of the statute violates federal law. *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841 (1983)("A right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.") Only if Plaintiffs have stated a federal claim under current law should the Court go further to address the State's interpretation of her own laws. Because Plaintiffs have failed to state a claim for which relief may be granted, the Complaint should be dismissed.

WHEREFORE, Defendant Charlie Daniels in his official capacity requests that Plaintiffs' Complaint be dismissed with prejudice, and that he be granted all other relief to which he is entitled.

Respectfully submitted,

DUSTIN MCDANIEL  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 12, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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I hereby certify that on October 12, 2009, I mailed the document by United States Postal Service to the following non CM/ECF participants:

/s/ Scott P. Richardson  
SCOTT P. RICHARDSON