

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS**

GREEN PARTY OF ARKANSAS; MARK
SWANEY and REBEKAH KENNEDY,

Plaintiffs,

v.

SECRETARY OF STATE CHARLIE
DANIELS, in his official capacity,

Defendant.

NO. 4:09-CV-695 JLH/HLJ

PLAINTIFFS' RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS

The plaintiffs respectfully submit this brief in opposition to the defendant's motion to dismiss for failure to state a claim, filed September 16, 2009 (doc. no. 6). The central question for decision on this motion is a simple one: Do the cases upon which the defendant relies create a bright-line threshold for ballot access restrictions below which they can never be challenged regardless of the particular circumstances at issue? As explained below, the plaintiffs argue that the answer is "no," and, in fact, the Supreme has repeatedly emphasized that ballot-access cases are peculiarly dependent on the facts. They are ill-suited to resolution by a motion to dismiss and must be decided on a fuller examination of the facts that goes well beyond the pleadings. Accordingly, this Court should deny the defendant's motion to dismiss and issue a scheduling order forthwith.

BACKGROUND

This is a challenge to Section 7-1-101(18)(C) of the Arkansas Code, which provides as follows: "When any political party fails to obtain three percent (3%) of the total votes cast at an

election for the office of Governor or nominees for presidential electors, it shall cease to be a political party.”

The lead plaintiff here is the Green Party of Arkansas, which ran a number of candidates for public office as a certified political party in the 2008 election. The Party’s candidate for the United States Senate, plaintiff Rebekah Kennedy, earned 207,076 votes, or 20% of the 1,011,754 votes cast in that election. The party also ran three candidates for the United States House of Representatives, who earned 23%, 21%, and 14% of the vote, respectively, in their elections. And the party succeeded in electing a member of the Arkansas House of Representatives, Richard Carroll, who won his seat with more than 89% of the vote. The Party has been or will be decertified by the Secretary of State under Ark. Code Ann. § 7-1-101(18)(C), however, because the presidential candidate nominated by the national Green Party received less than 3% of the votes cast for president in Arkansas.

The plaintiffs have raised two claims. First, they claim, as a matter of state law, that the Party has met the threshold set forth in Section 7-1-101(18)(c) and that the Secretary of State has simply misinterpreted it. Second, they claim that Section 7-1-101(18)(c) violates rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983. In particular, they argue that, in light of Arkansas’ unique history of ballot access and their own struggles with the ballot-access process, the application of Section 7-1-101(18)(c) in this instance imposes unjustified burdens on their fundamental right to associate for the advancement of political beliefs by limiting the vote-test threshold to the presidential race.

The Secretary of State has filed a motion to dismiss the plaintiffs’ second claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Secretary also asks the Court to

decline to exercise supplemental jurisdiction over the plaintiffs' state law claim. The plaintiffs oppose on both points.

LEGAL STANDARD

A complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999) (quoting Fed. R. Civ. P. 8(a)). In ruling on a Rule 12(b)(6) motion to dismiss, the court must “accept as true all of the factual allegations contained in the complaint, and review the complaint to determine whether its allegations show that the pleader is entitled to relief.” *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). All reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *Crumpley-Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 590 (8th Cir. 2004).

DISCUSSION

A. The Court should not decline to exercise supplemental jurisdiction.

There is no dispute in this case that the plaintiffs have stated a claim for relief under state law. The defendant does not ask this Court to dismiss that claim. Rather, he asks this Court to decide a complex question of federal constitutional law before reaching a simple question of state statutory interpretation. In essence, he is asking this Court to abstain. This request, however, is inconsistent with the law of supplemental jurisdiction and the doctrine of constitutional avoidance.

Federal courts have supplemental jurisdiction over claims that are so related to claims giving the court the original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 42 U.S.C. § 1367. Supplemental jurisdiction allows the Court to exercise jurisdiction over plaintiffs' pendant state law claim. *Id.* The Court

“may decline to exercise supplemental jurisdiction” over a state law claim if: (1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances where there are other compelling reasons to do so. *Id.* at (c)(1)-(4).

Section 1367 supports the exercise of supplemental jurisdiction in this case. First, the claim does not raise any novel or complex issues of state law – it involves mere reading of state statute. Second, the state law claim does not predominate over the other claims. The federal constitutional claim is much more complex in legal analysis and evidence than is the state statutory claim. The state law claim does not even involve joinder or intervention of additional parties, as permitted under supplemental jurisdiction. Third, as set forth below, the plaintiffs' complaint sets forth a *prima facie* case for violations of their constitutional rights. Finally, there are compelling reasons for the Court to exercise supplemental jurisdiction.

Declining to exercise supplemental jurisdiction would cause delay which would result in the plaintiffs being delayed and therefore denied their fundamental rights to associate with and form political parties, campaign for office, and possibly to vote for those candidates. The plaintiffs need a swift determination of this action so that they know if they must undertake yet another costly and labor intensive signature collection. The right to vote freely for the candidate of one's choice is the essence of a democratic society and any restrictions on that right strike at the heart of representative government and is a fundamental right. *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Since delay itself may deprive the plaintiffs of their fundamental rights, compelling circumstances in this case favor the Court exercising supplemental jurisdiction.

As a general rule, federal courts have a “virtually unflagging obligation” to exercise their jurisdiction in proper cases. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). It is the solemn responsibility of the federal courts to ‘guard, enforce, and protect every right granted or secured by the constitution of the United States.’ ” *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (quoting *Robb v. Connolly*, 111 U.S. 624, 637(1884)).

Though the Defendant has not sought abstention in this case, voting rights cases involving abstention are particularly illuminating as to why the Court should exercise supplemental jurisdiction. “Voting rights cases are particularly inappropriate for abstention.” *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000). This is because of the crucial importance of voting in the American democracy. *Forssenius*, 380 U.S. at 537. In *O’Hair v. White*, 675 F.2d 680, 694 (5th Cir. 1982), the Fifth Circuit noted the high costs involved in abstaining when the constitutional challenge includes allegations of restrictions on the right to vote. In *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. Unit B 1981), the Fifth Circuit held that while an alleged denial of voting rights does not preclude federal abstention, Supreme Court precedent indicates that a federal court should be reluctant to abstain when voting rights are at stake. *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1972) also states the general rule that abstention is not appropriate “in cases involving such a strong and national interest as the right to vote.”

The doctrine of constitutional avoidance also supports the exercise of supplemental jurisdiction in this case. As the Supreme Court recently noted, “[o]ur usual practice is to avoid the unnecessary resolution of constitutional questions.” *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504, 2508 (2009). It is “a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a

constitutional question if there is some other ground upon which to dispose of the case,” *Id.* at 2513, (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984)). The doctrine of constitutional avoidance “avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.” *Id.* at 2518. (quoting C. Wright, *The Law of Federal Courts* § 19, p. 104 (4th ed.1983)).

In this case, the state-law claim may allow the Court to avoid the constitutional question. Because the Plaintiffs’ claims are part of the same case or controversy, the factors under supplemental jurisdiction support its exercise, and the claims are inextricably intertwined by the doctrine of constitutional avoidance, the Court should exercise jurisdiction over both issues to resolve the case.

B. The plaintiffs do not fail to state a claim.

The gravamen of the Secretary’s argument is that the plaintiffs fail to state a claim for which relief can be granted because other courts have upheld stricter ballot-access requirements than the party-decertification statute at issue here. There are at least three fatal flaws in this argument.

First, the Secretary’s argument flies in the face of more than thirty-five years of well-established Supreme Court precedent. *See, e.g., Norman v. Reed*, 502 U.S. 279 (1992); *Munro v. Socialist Workers’ Party*, 479 U.S. 189 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Illinois State B.d of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). It is now axiomatic that a plaintiff states a claim upon which relief can be granted if the plaintiff alleges that a state’s ballot-access scheme places unreasonable or unnecessary burdens on its First and Fourteenth Amendment rights. Because the plaintiffs have so alleged here, *see* Complaint, filed Aug. 11,

2009 (doc. no. 1), at 3-5, the plaintiffs do not fail to state a claim upon which relief can be granted.

Second, it is also well established that ballot-access cases are peculiarly dependent on the facts. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) (observing that decisions in ballot-access cases are “very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification”) (internal quotation and alteration marks omitted); *see, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589-90 (6th Cir. 2006); *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 197-201 (2d Cir. 2006), *rev’d on other grounds*, 552 U.S. 196 (2008); *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). A thorough examination of the facts is essential to determine both the extent of the burdens imposed by a challenged statute, on the one hand, and the reasonableness and necessity of those burdens, on the other.

Indeed, in *Mandel v. Bradley*, the Supreme Court reversed the judgment of the district court because it had treated an earlier ballot-access case as dispositive without undertaking “an independent examination of the merits.” 432 U.S. at 177. In the earlier case, *Tucker v. Salera*, 424 U.S. 959 (1976) (mem.), *aff’g* 399 F.Supp. 1258 (E.D.Pa. 1975), the Supreme Court had affirmed a judgment striking down as unconstitutional a Pennsylvania law setting the deadline for an independent candidate to gather signatures to obtain a place on the ballot 244 days before the general election in a Presidential election year. Under the Pennsylvania law, independents had to submit signatures of only 2% of the largest vote cast for any candidate in the preceding statewide general election, but they had to gather the required signatures within a 21-day period prior to the filing deadline. *Id.* In *Mandel*, the district court relied on *Salera* to strike down a Maryland statute that required independent candidates to submit signatures of 3% of the state’s

registered voters by the deadline approximately 240 days before the general election. 432 U.S. at 173-74. The Supreme Court, noting that Maryland's law did not contain a 21-day signature-gathering period, vacated the judgment and sent the case back to the district court for further fact-finding. *Id.* at 178; *see also Storer*, 415 U.S. at 740 (vacating and remanding to the district court for further fact-finding).

In this case, the Secretary's argument is virtually identical to the reasoning rejected in *Bradley*. He argues that the various cases cited in his brief mean that this Court can avoid any kind of fact-finding and rule strictly on the allegations set forth in the plaintiffs' complaint. But the Supreme Court has rejected this argument time and again. As result, dismissal on the current record would not be appropriate even if it were true that binding authorities had upheld more onerous requirements than the one at issue here.

Third, it is simply not true that binding authorities have upheld more onerous requirements than the one at issue here. The Secretary cites only three binding authorities, *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party v. White*, 415 U.S. 767 (1974), and *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985), none of which support the proposition that the plaintiffs in this case have failed to state a claim for relief. The Secretary's brief, moreover, is replete with errors, misstatements of law, and arguments apparently designed to mislead this Court.

For example, the Secretary relies heavily on *Jenness v. Fortson*, 403 U.S. 431 (1971), claiming that the Supreme Court upheld a Georgia statute "which is more onerous than the law in Arkansas." (Br. Supp. Mot. Dismiss 11.) While the Supreme Court did uphold Georgia's petition requirements for minor parties and independent candidates in that case, Georgia's

decertification statute was not at issue. None of the plaintiffs had been a certified political party, and so none of them would have had standing to challenge it.

The Secretary also relies on *American Party v. White*, 415 U.S. 767 (1974), in which the Supreme Court upheld petition requirements for minor parties in Texas. The plaintiffs in that case, however, did not challenge Texas' decertification provisions. *See id.* at 779-80 (identifying the parts of Texas' ballot-access statute that the plaintiffs had challenged). As in *Jenness*, none of the plaintiffs had been a certified political party in the previous election and therefore would not have had standing to challenge the decertification provisions.

The only other binding authority upon which the defendant relies is *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985), in which the Eighth Circuit upheld the petition requirements for new political parties in Missouri. That case was about the requirements for becoming a certified political party. As in *American Party* and *Jenness*, Missouri's decertification statute was not at issue, and the plaintiffs would not have had standing to challenge Missouri's decertification statute, even if they had wanted to do so, because the Libertarian Party had been unable to collect enough signatures to become a certified political party. *See id.* at 539.

Two of the nonbinding authorities upon which the defendant relies also had nothing to do with a decertification statute. *See Libertarian Party v. Diamond*, 992 F.2d 365 (1st Cir. 1993) (upholding Maine's ballot access requirements for new political parties); *Socialist Workers Party v. Davoren*, 378 F. Supp. 1245 (D. Mass. 1974) (upholding petition requirements for new political parties in Massachusetts).

Only two of the nonbinding authorities upon which the defendant relies actually addressed a decertification statute, and those cases are so easily distinguished from this case that they would not be controlling even if they were decided by a binding authority. In *Green Party*

v. Alaska, 147 P.3d 728 (Alaska 2006), the Alaska Supreme Court upheld its decertification statute against a state-law challenge by the Green Party of Alaska. Unlike Arkansas' decertification statute, however, Alaska's statute was not tied to the presidential election and, more importantly, it offered political parties a meaningful alternative to the vote-threshold test: political parties could remain on the ballot by registering voters. *See id.* at 729, 734. Arkansas' statute offers no such alternative and is tied to the presidential election over which the Green Party of Arkansas has virtually no control.

And, finally, in *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982), the Tenth Circuit upheld Oklahoma's decertification statute against a challenge by the Libertarian Party to the statute's 10% vote-threshold test. Unlike the plaintiffs in this case, the plaintiffs in *Arutunoff* did not challenge the use of the presidential election as the basis for the threshold; they merely challenged the threshold, claiming that 10% was too high. None of the Libertarian Party's candidates for any office met that threshold. In this case, by contrast, several of the Green Party's candidates exceeded the threshold by a very large margin, placing the statute's use of the presidential election squarely at issue.

There is thus no support in the case law, in binding authority or elsewhere, for the proposition that the plaintiffs in this case have failed to state a claim upon which relief can be granted. The defendant's argument to the contrary is overreaching.

The defendant also overreaches when he argues that Arkansas' laws are "in line with or less restrictive than the ballot access restrictions in many other states." (Br. Supp. Mot. Dismiss at 18.) The source of this error is apparent: the defendant has simply misstated the laws of other states. He cites only ten states that use either the presidential or gubernatorial election to

determine a party's ability to stay on the ballot, but those citations include at least four serious errors or omissions.

Whereas the defendant states that Arizona uses a 5% threshold in the presidential or gubernatorial election, he omits the fact that Arizona also allows a party to stay on the ballot if it can claim two-thirds of one percent of the total voter registration in the state. *See* Ariz. Rev. Stat. § 16-804(B). This is a very low threshold, and the Green Party of Arkansas would almost certainly be able to meet it if Arkansas allowed for registration by party.

The defendant states that Georgia uses a 20% threshold in the presidential or gubernatorial election. It does not. Under Georgia law, a party can remain on the ballot if it receives votes in any statewide race totaling 1% of the number of registered voters in the state. *See* O.C.G.A. § 21-2-180. The Green Party of Arkansas exceeded that threshold by a large margin in the 2008 election.

The defendant states that Maine uses a 5% threshold in the presidential or gubernatorial election. That law has been repealed. Maine now allows a party to remain on the ballot if it has 10,000 registrants who voted in the last general election. *See* M.R.S.A. Tit. 21-A § 301(1)(E) (2009). The Green Party of Arkansas would almost certainly be able to meet this threshold if Arkansas allowed for registration by party.

The defendant states that New Mexico uses a 5% threshold in the presidential or gubernatorial election. That threshold, however, only applies to nomination by primary election. Under New Mexico law, a party can nominate by convention if it polls .5% for president or governor in either of the last two elections, a test that the Green Party would clearly satisfy. *See* N.M.S.A. § 1-7-2(C).

The truth is that there are only a small number of states that use the presidential election as the test for party-decertification and do not have some alternative means of staying on the ballot. The overwhelming majority of states use tests that the Green Party of Arkansas would be able to satisfy.

At the end of the day, neither the case law nor the laws of other states support the defendant's argument that the plaintiffs have failed to state a claim and should have their complaint dismissed.

CONCLUSION

The facts matter in this case. As in all ballot-access cases, the Court must conduct a thorough examination of the facts before rendering its ultimate judgment. The defendant is nonetheless asking this Court to end this case before it has even begun – before the plaintiffs have had the opportunity to develop a record.

This is not likely to be a case with extensive discovery or numerous factual disputes, but the plaintiffs deserve an opportunity to make their case. They will introduce lay and expert testimony on the extent of the burdens imposed by Arkansas' decertification statute. They will also offer evidence casting doubts on the reasonableness and necessity of the state's justifications for the statute. This evidence will be essential to the Court's evaluation of the merits.

For all of the foregoing reasons, this Court should deny the defendant's motion to dismiss.

Dated: October 5, 2009

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 5th day of October 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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