

10-1360

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

**On Appeal from the United States District Court
For the District of New Hampshire**

BRIEF OF PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

The plaintiffs-appellants (“plaintiffs”) are a minor political party, its chairman, one of its supporters, and its nominees for President and Vice President of the United States in the November 2008 election. The candidate-plaintiffs qualified to be listed on the New Hampshire ballot under the “Libertarian” designation, as did a rival set of candidates for president and vice president who were not nominated by the Libertarian Party. On cross motions for summary judgment, the district court ruled that the defendant-appellee’s (“defendant’s”) refusal to substitute the Libertarian Party nominees for the rival candidates, and his refusal to list the Libertarian Party nominees on the ballot as the sole “Libertarian” candidates for president and vice president, did not violate plaintiffs’ First and Fourteenth Amendment rights to freedom of political speech and association or to equal protection of law.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, in that this is a civil action arising under the Constitution of the United States, and pursuant to 28 U.S.C. § 1343(a), in that plaintiffs sought to redress the deprivation by defendant, acting under color of state law, of rights secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States.

A final judgment disposing of all claims with respect to all parties was

entered in the district court on February 18, 2010, Addendum p. 31, in favor of defendant against plaintiffs, pursuant to an Order, Addendum p. 1, granting defendant's motion for summary judgment and denying plaintiffs' cross motion for summary judgment. Plaintiffs timely filed a notice of appeal to this Court on March 20, 2010. Appendix p. 24.

Therefore, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issue presented for review is whether the rights of political speech, association and equal protection secured by the First and Fourteenth Amendments to a minor party, its nominee for president and their supporters were violated by defendant's refusal to list the nominee on the ballot as the party's sole candidate for president, where the nominee and a rival candidate for president had each met New Hampshire's requirements for being listed on the ballot with the party's appellation.

STATEMENT OF THE CASE

The plaintiffs commenced this action for declaratory and injunctive relief on September 11, 2008, seeking to have the candidate for President of the United States nominated at the Libertarian National Convention listed on the November

2008 New Hampshire ballot as the sole candidate for that office with the “Libertarian” appellation and to substitute that candidate for another who had also qualified to be listed on the ballot with the “Libertarian” appellation. Complaint, Appendix p 7.

Plaintiffs subsequently withdrew their request for a preliminary injunction. Dkt. # 7. Defendant and plaintiffs filed motions for summary judgment on August 8 and September 29, 2008, respectively. Docs. 12 and 19. By decision (“Order”) dated February 18, 2010, the district court granted defendant’s motion and denied plaintiffs’. Addendum p. 1. Plaintiffs timely filed a notice of appeal to this Court on March 20, 2010. Appendix p. 24.

STATEMENT OF THE FACTS

Plaintiff Bob Barr was nominated at the Libertarian national convention in May 2008 as the party’s candidate for President of the United States. Doc. 19, Pl. Mot. for Summary Judgment, Att. 1, ¶ 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 the state. Complaint, Appendix p. 9, ¶ 12; Answer, Appendix p. 17, ¶ 12.

On or about September 3, 2008 plaintiff Barr qualified to be listed on the

New Hampshire ballot for the November 4, 2008 general election as a candidate for President of the United States with the appellation “Libertarian,” having caused nomination papers to be completed and submitted to defendant pursuant to N.H. Rev. Stat. Ann. §655:40 (requiring 3,000 signatures of registered voters to nominate a candidate for president). Complaint, Appendix p. 9, ¶¶ 17, 18; Answer, Appendix p. 17, ¶ 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 containing the requisite number of signatures to be completed and submitted to defendant. Complaint, Appendix p. 9, ¶¶ 15, 16; Answer, Appendix p. 17, ¶ 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. Complaint, Appendix p. 9, ¶¶ 21, 24, 29. Plaintiffs subsequently informed the Court and the defendant that they no longer sought preliminary injunctive relief. Dkt. # 7.

Defendant listed both Bob Barr and George Phillies on the ballot as candidates for president with the appellation “Libertarian.” Doc. 14, Def. Mot. for Summary Judgment, Ex. B. The district court accurately described the configuration of the ballot as follows:

New Hampshire's ballot ... was divided into a grid of five columns, with the far left column labeled "Offices" and listing the public offices to be filled, and then the next four columns designating the candidates competing to fill the respective positions. [Citations omitted.] The columns were labeled, in order from left to right across the ballot, first "Republican Candidates," then "Other Candidates," next "Democratic Candidates," and lastly "Write-In Candidates."

* * *

... candidates representing the Libertarian Party appeared on the new Hampshire ballot in the "Other Candidates" column.

In the "Other Candidates" column, several names appeared. Running for the offices of President and Vice President of the United States in that column were three sets of candidates: (1) Ralph Nader and his running mate, Matt Gonzalez, ran as Independent candidates; (2) George Phillies and his running mate, Christopher Bennett, ran as Libertarian candidates; and (3) plaintiffs Barr and his running mate Root also ran as Libertarian candidates.

Addendum pp. 2-4.

Barr was listed on the ballots of 43 states with the designation "Libertarian" and was listed on the ballots of two additional states with no party designation.

Doc. 19, Pl. Mot. for Summary Judgment, Att. 1, ¶ 4. New Hampshire is the only state in which an additional candidate for president was listed on the ballot along with Barr, with the designation "Libertarian." Id.

Plaintiffs sought a declaratory judgment affirming that they have the right to substitute a candidate selected by the Libertarian Party for another candidate for the same office who has also qualified to be listed on the ballot, and that only the candidate selected by the Libertarian Party may be listed on the ballot with the

“Libertarian” appellation. The district court denied plaintiffs this relief by decision (“Order”) dated February 18, 2010. Addendum p. 1.

SUMMARY OF THE ARGUMENT

The controversy that gave rise to this litigation is not moot, notwithstanding the fact that the 2008 presidential election has been held, because like many other disputes concerning elections it is “capable of repetition yet evading review.”

Plaintiffs’ First and Fourteenth Amendment rights to speak and associate politically and to have equal protection of law were severely burdened by the defendant’s refusal to substitute the Barr candidacy for the Phillies candidacy or, in the alternative, to permit only Barr to be listed on the ballot with the “Libertarian” designation. Accordingly, under the balancing test articulated by the Supreme Court, strict scrutiny must be applied to defendant’s refusal and to the statutory framework in which it was grounded. The refusal does not survive strict scrutiny because it was not justified by a state interest of compelling importance. Nor does it survive even minimal constitutional scrutiny, because it was not justified by any articulated state interest.

Most states have recognized a right to substitute presidential and/or vice presidential candidates for other such candidates under appropriate circumstances. Denying plaintiffs the right to substitute Barr for Phillies undermined the right of

New Hampshire voters to cast their votes effectively for the Libertarian Party's chosen candidate and to associate politically with him and with the party. The state's interests in safeguarding the integrity of its electoral process and avoiding voter confusion were subverted by listing a second candidate with the "Libertarian" designation.

Permitting any candidate who attains access to the general election ballot by petition to select the appellation "Libertarian" irrespective of the candidate's relationship, or lack thereof, to the Libertarian Party impairs the ability of the party's voters and supporters to know which "Libertarian" candidates have been endorsed by the party. The major parties are protected by New Hampshire law from the unauthorized use of their names by candidates for public office. This disparate treatment of major and minor parties and their candidates and supporters violates the Equal Protection Clause.

ARGUMENT

Plaintiffs initially sought to substitute the Barr candidacy for the Phillies candidacy and to have Barr listed as the sole Libertarian Party candidate for president on the November 2008 New Hampshire general election ballot. In seeking post-election declaratory relief, plaintiffs made it clear that vindication of their rights did not require the district court to determine that Phillies should have

been removed from the ballot entirely. Doc. 24, Pl. Reply to Def. Objection to Pl. Mot. for Summary Judgment. After all, Phillies met the requirements for being listed on the New Hampshire ballot as an independent candidate for president. Plaintiffs rights could have been vindicated by a determination that Barr was properly listed on the ballot with the appellation “Libertarian” and that Phillies was also properly listed on the ballot, but should not have had that appellation. In other words, Barr should have been listed on the ballot as the sole Libertarian Party candidate for president.

Plaintiffs submit that the district court erred in not considering this possible outcome. Instead, the court focused on plaintiffs’ early quest to have Phillies removed from the ballot.

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 was not rendered moot by the holding of the November 2008 election:

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).

At the heart of the present case is New Hampshire's refusal, exercised by defendant secretary of state, to allow substitution of the Barr candidacy for the Phillies candidacy and the state's refusal to list Barr on the ballot as the sole Libertarian Party candidate for president. Unless this refusal is invalidated, the instant controversy will be "capable of repetition, yet evading review" within the meaning of the foregoing authorities. 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 actual nominee.¹

II. THE STANDARD OF REVIEW

The district court's denial of plaintiffs' motion for summary judgment is subject to *de novo* review by this Court. See, e.g., Schrader v. Blackwell, 241 F.3d

¹The controversy could not have been 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. N.H. Rev. Stat. Ann. §§ 655:46 and 655:38.

783, 787 (6th Cir. 2001).

Plaintiffs assert that their First Amendment speech and associational rights, together with their right 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, was 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 Ohio 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

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).²

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.

* * *

* * *

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

²The 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, 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).

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, 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 list Barr on the ballot as the sole Libertarian Party candidate for president, 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 rights wought to be vindicated.

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, see Norman v. Reed, 502 U.S. 279, 288 (1992), were seriously impaired by the inclusion on New Hampshire's ballot of a "Libertarian" candidate (Phillies) who was not the party's nominee and whom

Barr had defeated at the party's nominating convention. Doc. 19, Pl. Mot. for Summary Judgment, Att. 3, ¶ 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 either exclusive access to the ballot or exclusive use of the "Libertarian" designation, the defendant, together with the requirements of New Hampshire election law, 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 were impaired.

The severity of these injuries indicates that the applicable standard of constitutional review is strict scrutiny; the state is required to demonstrate that its refusal to permit candidate-substitution or exclusive use of the Libertarian designation 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 simply asserted that "New Hampshire's current system serves significant state interests without violating the 1st and 14th Amendments," Doc. 12, Def. Mot. for Summary Judgment, Att. 1 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 did not identify any particular state interests that are served by its prohibitions against substitution or against control by minor parties over the use of their names. Even if these prohibitions 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 prohibitions for them to be upheld. Norman v. Reed, supra at 289. The state did not do so.

In the absence of any advice to the contrary, it can be assumed that the interest sought to be justified by the twin prohibitions is New Hampshire's interest

in administering its election processes as it sees fit. But this wholly legitimate state interest cannot justify listing a minor party's presidential nominee on the ballot alongside a defeated competitor who is also designated as a Libertarian candidate for president. The prohibitions simply do not pass the Anderson-Burdick test.

III. THE RIGHT TO SUBSTITUTE CANDIDATES

Most states have recognized a right to substitute presidential and/or vice presidential candidates for other such candidates under appropriate circumstances. This subject is treated at length in a Declaration of Richard Winger found at Doc. 19, Pl. Mot. for Summary Judgment, Att. 3. 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. An abundance 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) (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 plaintiff Barr was ultimately selected by the Libertarian Party as its candidate for president. Yet the ballot did not indicate that he, not Phillipies, was the candidate chosen by the party. Denying plaintiffs the right to substitute Barr for Phillipies, and to have Barr listed as the party's sole nominee,

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" another candidate for president who was not the party's nominee. Indeed, the state's interests in safeguarding the integrity of its ballot and avoiding voter confusion were subverted, not advanced, by listing a second candidate with the "Libertarian" designation.

IV. THE RIGHT TO USE 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).

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. N.H. Rev. Stat. Ann. §§ 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 N.H. Rev. Stat. Ann. § 655:42(III). The procedure is sufficiently burdensome that it has been used only once since it was enacted in 1996. Winger Decl., Doc. 19, Pl. Mot. for Summary Judgment, Att. 3, ¶ 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 this Court should reverse the Order of the district court and rule that defendant should have substituted the Barr candidacy for the Phillies candidacy or, in the alternative, that only Barr should have been listed on the ballot with the "Libertarian" appellation.

Respectfully submitted,

s/Gary Sinawski

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(s) Gary Sinawski

Attorney for Plaintiffs-Appellants

Dated: June 1, 2010

CERTIFICATE OF SERVICE

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/s/ Gary Sinawski

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**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Libertarian Party of
New Hampshire, et al.

v.

Civil No. 08-cv-367-JM

William M. Gardner, in his
official capacity as Secretary
of State of New Hampshire

O R D E R

Plaintiffs, the Libertarian Party of New Hampshire ("LPNH") its chairman Brendan Kelly, Libertarian Party supporter Hardy Macia, and Libertarian candidates for the 2008 presidential election "Bob" Barr and his running mate, Wayne A. Root, brought this 42 U.S.C. § 1983 action contending New Hampshire's statutory scheme for placing names of candidates on the general election ballot violates their First and Fourteenth Amendment rights. They initially sought both injunctive and declaratory relief but now seek only a declaration that the challenged statutes are unconstitutional restrictions on their rights to freedom of association, of speech in the form of voting, and to due process and equal protection. Before the court are cross motions for

summary judgment. For the reasons set forth below, defendant's motion (document no. 12) is granted and plaintiffs' motion (document no. 19) is denied.

Background

New Hampshire's ballot for the 2008 general election was divided into a grid of five columns, with the far left column labeled "Offices" and listing the public offices to be filled, and then the next four columns designating the candidates competing to fill the respective positions. See Def.'s Mot. for Summ. J. ("Def.'s Mot."), Ex. B (November 4, 2008 General Election ballot for Nashua, New Hampshire, Ward 1). The columns were labeled, in order from left to right across the ballot, first "Republican Candidates," then "Other Candidates," next "Democratic Candidates," and lastly "Write-In Candidates." See id. Pursuant to New Hampshire law, the ballot was arranged so that the names of candidates nominated for the various offices were in successive party columns, so that each party's candidates were presented in a separate column. See New Hampshire Rev. Stat. Ann. ("RSA") 656:5 (2008).

To secure a distinct "party column" on the ballot, a political organization must either satisfy the definition of a

"party" under New Hampshire law by having received at least four percent of the votes at the preceding state general election for governor or United States senator, see RSA 652:11 (2008), or it must petition to be placed on the ballot by submitting a sufficient number of signatures in support of its nomination to the ballot. See RSA 655:40-a (2008) (allowing a political organization ballot access if nominating papers are signed by 3% of registered voters from the previous general election).¹ In 2008, the Libertarian Party was not entitled to its own column on the ballot because it failed to satisfy either the statutory definition for a party or the statutory process for nomination to the ballot. See RSA 652:11 & 655:40-a; see also Def.'s Mot., Ex. A, ¶¶ 4-6. As a result, in the 2008 presidential election, candidates representing the Libertarian Party appeared on the New Hampshire ballot in the "Other Candidates" column.

In the "Other Candidates" column, several names appeared. Running for the offices of President and Vice President of the United States in that column were three sets of candidates: (1)

¹A political organization with a column on the ballot then places its nominated candidates in that column. See RSA 655:14, 655:17, 655:43, I, & 656:5 (providing how parties place their nominated candidates on the ballot); RSA 655:40-b, 655:17-c, 655:43, III, & 656:5 (providing how political organizations nominated to the ballot get their candidates' names on it).

Ralph Nader and his running mate, Matt Gonzalez, ran as Independent candidates; (2) George Phillies and his running mate, Christopher Bennett, ran as Libertarian candidates; and (3) plaintiffs Barr and his running mate Root also ran as Libertarian candidates. These candidates appeared on the New Hampshire ballot pursuant to the statutory provisions for a candidate "who intends to have his name placed on the ballot for the state general election by means other than nomination by party primary." RSA 655:14-a (2008).² Since the LPNH was not a recognized party under New Hampshire law in 2008, its candidates had to access the ballot by means other than nomination by party. See Def.'s Mot., Ex. A, ¶¶ 5 & 6, and Ex. C, ¶ 3. In fact, both Phillies and Barr got onto the ballot by filing the requisite number of signatures from New Hampshire supporters. See RSA 655:40 & 655:42, I (requiring 3,000 registered voters sign nomination papers to nominate a candidate for president); see

²New Hampshire law enables anyone to access the ballot even if the person is not nominated by a political organization, provided certain statutory requirements are met. See RSA 655:14-a; see also RSA 655:40 (2009 Supp.) (allowing a candidate access to the ballot by submitting the requisite number of nomination papers); RSA 655:17-a (2008) (providing for a nonparty or other candidate to declare an intent to run for public office in the general election) & 655:17-b (providing same specifically for the offices of president and vice president).

also Def.'s Mot., Ex. C, ¶¶ 4 & 5.

Yet Barr also was nominated as the Libertarian candidate for president at the Libertarian Party convention on May 22-26, 2008. See Pl.'s Mot. for Summ. J. ("Pl.s Mot."), Ex. 2 (Aff. of Bill Redpath), ¶ 3. Because the Libertarian Party nominated Barr and Root as its presidential and vice presidential candidates at its convention, plaintiffs believed Barr and Root alone should have appeared on the New Hampshire 2008 general election ballot as the Libertarian Party candidates for president and vice president. Plaintiffs asked defendant New Hampshire Secretary of State William Gardner to remove Phillipies and Bennett from the ballot, but he refused to do so. Plaintiffs brought this action claiming they have a constitutional right to have Barr and Root be the sole nominees on the ballot and to have had the names of Phillipies and Bennett, who were defeated at the Libertarian Party convention, removed from the New Hampshire general election ballot.

Discussion

1. Mootness

Defendant argues this action should be dismissed as moot, because plaintiffs no longer seek a preliminary injunction and

there is no evidentiary basis to conclude that Phillies and Barr will be competing in future presidential elections, obviating the need for a permanent injunction to remove from the ballot Phillies/Bennett as Libertarian candidates. Plaintiffs' challenge is to New Hampshire's statutory scheme for enabling candidates for the presidency and vice presidency to get on the general election ballot and to designate their party affiliation, even if the political organization does not support those candidates. Plaintiffs' challenge to that process, regardless of who the individual candidates may be, is "capable of repetition yet evading review" and is not, therefore, moot. See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Ramirez v. Ramos, 438 F.3d 92, 100 (1st Cir. 2006) (citing authority to explain this exception to the mootness doctrine).

2. Summary Judgment Standard of Review

The parties agree that there are no genuine issues of material fact, rendering the matter appropriate for summary disposition. See Fed. R. Civ. P. 56(c) (allowing for summary judgment when the record is undisputed); see also Quinn v. City of Boston, 325 F.3d 18, 28 (1st Cir. 2003). Summary judgment provides the means to "pierce the boilerplate of the pleadings"

and “dispos[e] of cases in which no trialworthy issue exists.” Id. The party moving for summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, Celotex Corp. v. Catrett , 477 U.S. 317, 323 (1986), with the court construing the evidence and all inferences reasonably drawn therefrom in the light most favorable to the nonmovant. See Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001). Once the moving party has met its burden, the burden shifts to the nonmovant to “produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted.” Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 94 (1st Cir. 1996) (citations omitted). Neither conclusory allegations, improbable inferences, nor unsupported speculation are sufficient to defeat summary judgment. See Carroll v. Xerox Corp., 294 F.3d 231, 236-37 (1st Cir. 2002); see also Price v. Canadian Airlines, 429 F. Supp. 2d 459, 461 (D.N.H. 2006). On cross motions for summary judgment, the standard of review is applied to each motion separately. See Am. Home Assur. Co. v. AGM Marine Contrs., 467 F.3d 810, 812 (1st Cir. 2006); see also Mandel v. Boston Phoenix, Inc., 456 F.3d

198, 205 (1st Cir. 2006) (“The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review.”).

3. Test for Constitutionality

Plaintiffs contend New Hampshire’s statutory scheme for placing candidates’ names and party affiliations on the general election ballot is unconstitutional. Although several statutes regulate the election process in New Hampshire, plaintiffs have not clearly identified which statutes unconstitutionally preclude them from effectively exercising their claimed “right to substitute” Barr and Root for Phillies and Bennett. Plaintiffs challenge generally the provisions that enable statutorily recognized parties to control which names appear on the ballot, arguing they should be allowed to control which Libertarian candidates appear on the ballot just like those political organizations which have secured a party column on the ballot do.³ Though plaintiffs challenge the provisions that give a “party” different treatment on the ballot than the Libertarian Party received, they concede that the statutory definition of

³See RSA 652:11 & 655:40-a (providing access to the ballot for political organizations) and RSA 656:5 (allowing recognized parties their own column on the ballot to list their candidates).

"party" is constitutional and that they were not a statutorily recognized party in 2008. See Pl.'s Reply to Def.'s Mot. (document no. 24) ("Pl.'s Reply") at 2.⁴

Despite this concession, plaintiffs argue the Libertarian Party has a "right to substitute candidacies in appropriate situations and to control use of the 'Libertarian' designation by candidates for public office in situations where the party nominates or otherwise endorses candidates." Id. Plaintiffs assert that defendant's refusal to let them modify the ballot as they wanted impeded their right to vote effectively and "to associate for the advancement of political ideas" for no legitimate reason, and rendered the ballot, with its candidates' names and party affiliations, unconstitutional.

Though plaintiffs contend that the severe burdens on their

⁴Had they not made this concession, plaintiffs would have been collaterally estopped from litigating the constitutionality of the definition here, because that issue and New Hampshire's ballot access statutory scheme have already been found to be constitutional. See Libertarian Party N.H. v. State, 154 N.H.. Merrill, 84 F.3d 479, 484 (1st Cir. 1996) (finding definition of 376, 383-86, 910 A.2d 1276, 1282-84 (2006); see also Werme v. Merrill, 84 F.3d 479, 484 (1st Cir. 1996) (finding definition of party constitutional in the context of selecting ballot clerks because it depends on the neutral criterion of success at the polls); Geiger v. Foley Hoag LLP Ret. Plan, 521 F.3d 60, 66 (1st Cir. 2008) (discussing preclusive effect of state court judgments); In re Zachary G., 159 N.H. 146, 151, 982 A.2d 367, 371-72 (2009) (explaining collateral estoppel under New Hampshire law).

First and Fourteenth Amendment rights require strict scrutiny of New Hampshire's ballot access provisions, the level of scrutiny in ballot access cases depends on "the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983). The test for whether or not election regulations are constitutional depends on a variety of factors which the Supreme Court has described as a "flexible framework." See Werme, 84 F.3d at 483 (citing Burdick v. Takushi, 504 U.S. 428, 432-34 (1992) and Anderson, 460 U.S. at 789). That framework balances the state's constitutional duty to execute fair elections, see U.S. Const. Art. I, § 4, cl. 1, with individuals' First Amendment rights to associate and vote in a politically effective manner. See Werme, 84 F.3d at 483 (citing authority).

The test for constitutionality measures the burden imposed by the challenged regulation against the state's asserted need for that regulation, as follows:

The level of scrutiny to be applied corresponds roughly to the degree to which a challenged regulation encumbers First and Fourteenth Amendment rights. Consequently, a court weighing a challenge to a state election law must start by assessing "the character and magnitude of the asserted injury"

to the plaintiff's constitutionally protected rights and then "evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule."

Id. (quoting Anderson, 460 U.S. at 789). If plaintiffs' rights are severely restricted, then the regulation must be narrowly drawn to advance a compelling state interest, but if the rights are only reasonably restricted in a nondiscriminatory manner, then the state's important regulatory interests are enough for the regulation to pass constitutional muster. See id. (citing Burdick, 504 U.S. at 434); see also McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004) (applying the "sliding scale approach" to assess a state's election law).

4. Analysis

a. Plaintiffs' Asserted Injuries

Plaintiffs claim that by denying them "exclusive access to the ballot" defendant has diluted their voting strength, impaired their freedom of political speech and association, and denied them equal protection of the law because the major parties' rights are not similarly restricted. See Pl.'s Mot. at 9. As set forth below, I do not find the challenged regulations to severely burden either plaintiffs' First or Fourteenth Amendment rights.

(i) Right to Substitute

As an initial matter, plaintiffs' alleged "right to substitute" is really a euphemism for a purported "right to remove" the names of candidates from the ballot who were legally entitled to be on the ballot. There is no constitutional right to substitute one candidate's name for another. To the contrary, under New Hampshire law, individuals have an explicit constitutional right to run for public office. See N.H. Const. Part I, Art. 11 (providing that "[e]very inhabitant in the state, having the proper qualifications, has an equal right to be elected into office."). Based on this provision, it would have been unconstitutional for defendant to have removed Phillies and Bennett from the general election ballot because they were qualified to be there and had cleared the statutory hurdles to get there. See id.; see also RSA 655:40 & 655:42, I. Barr and Root accessed the ballot the same way that Phillies and Bennett did, and there is no basis under New Hampshire law to justify removing Phillies and Bennett while keeping Barr and Root.

Plaintiffs argue that most states recognize a right to substitute presidential and vice presidential candidates under appropriate circumstances, so New Hampshire should conform to

this general rule. See Pl.'s Mot. at 11-12. New Hampshire law in fact does allow for substitution of candidates in appropriate circumstances. See RSA 655:37-39 (providing party the right to fill in names on a ticket in the event of a vacancy following a primary, or the disqualification or death of a candidate). None of those circumstances applied in 2008 to justify substituting Root/Barr in place of Phillies/Bennett.

The cases plaintiffs cite in support of their claim that the right to substitute names has been upheld by many jurisdictions are neither controlling nor apposite to the instant matter. See Pl.'s Mot. at 11-12.⁵ In these cases, the candidates who sought to be removed from the ballot were voluntarily ceding their

⁵See e.g. Barr v. Galvin, 584 F. Supp. 2d 316 (D. Mass. 2008), and id., ___ F. Supp. 2d ___, No. 08-11340-NMG, 2009 WL 3062317 (D. Mass. Sept. 17, 2009) (enjoining enforcement of substitution statute found to be void for vagueness because it did not clearly provide for presidential nominees); Anderson v. Firestone, 499 F. Supp. 1027 (N.D. Fla. 1980) (requiring independent candidates to name running mate months before major party candidates do is discriminatory, so unconstitutional to prevent surrogate running mate from voluntarily substituting his name for chosen running mate's name); In re: the Substitution of Bob Barr, 956 A.2d 1083 (Commw. Ct. Pa. 2008), aff'd 598 Pa. 558, 958 A.2d 1045 (2008) (allowing substitution where nominee voluntarily withdraws); cf. El-Amin v. State Bd. of Elections, 721 F. Supp. 770 (E.D. Va. 1989) (finding unconstitutional statutory scheme that gave major party candidates but not independent candidates a second chance to qualify for placement on the ballot).

position. Nothing in the record supports the inference that Phillies and Bennett wanted to be taken off the general election ballot, yet defendant would not remove them. I decline to express an opinion or supposition about the legal consequences of such a possible exchange since those facts are not before me.

To find that plaintiffs have a right to remove Phillies and Bennett from the ballot requires a finding that the New Hampshire statutes that enable "other candidates" to access the ballot are unconstitutional. The crux of plaintiffs' complaint is that they wanted Root and Barr to be the only Libertarian candidates listed on New Hampshire's 2008 ballot because they were nominated at the Libertarian Party's convention. Plaintiffs repeatedly state what they want, but fail to justify the relief sought by demonstrating how the statutory scheme that got both Phillies/Bennett and Root/Barr on the ballot as Libertarian Party candidates is unconstitutional. Though plaintiffs speak in sweeping terms that this denial of their "right to substitute" deprives them of equal protection of the law and deprives them of the First Amendment rights to vote effectively and associate for the advancement of political ideas, see Pl.'s Mot. at 9, they have failed to connect the dots to show how New Hampshire's general election ballot is

unconstitutional.

(ii) Right to Vote

Nothing in the ballot format violates plaintiffs' right to cast an effective or meaningful vote. Though the right to vote is fundamental to our system of democracy, it is well-settled that the right to vote in any manner is not absolute. See Burdick, 504 U.S. at 433 (citing Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) and Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)). Ironically, rather than creating a barrier that precluded plaintiffs' choice and thereby blunted their right to cast a meaningful vote, see id. (discussing when regulatory barriers may be constitutional), New Hampshire's 2008 general election ballot expanded the choice of candidates beyond what plaintiffs wanted. Plaintiffs present no evidence that they were unable to vote for the candidate of their choice. They also fail to support their claim of voter confusion with any evidence that even suggests voters mistakenly cast their vote for Phillies/Bennett when they intended to vote for Root/Barr. The ballot clearly designated the choices, enabling voters to cast their votes for the Libertarian candidate they preferred, much like what happens in a primary election.

Further, I do not see how New Hampshire's general election ballot scheme for "other candidates" hinders the cumulative voting strength of either the Libertarian Party or any other minor party. The system appears to potentially strengthen the voting power of minor parties and their supporters. As occurred in 2008, the choice of Root/Barr and Phillies/Bennet presumably prompted supporters of each set of candidates to vote, yet it is the aggregate number of votes for the Libertarian Party, not the individual candidates, that determines whether the 4% threshold has been crossed to be a recognized party in the next election. See RSA 652:11. Based on the record before me, I find that plaintiffs have failed to demonstrate how New Hampshire's ballot or its ballot access statutory scheme have burdened their First Amendment right to vote.

(iii) Right to Political Association

Plaintiffs next assert that their freedom of association rights entitle them to control the use of their party name. They argue this control is necessary to prevent voter confusion about who the party endorses and to prevent dilution of their political power, which allegedly occurred when both Phillies/Bennett and Barr/Root were listed on New Hampshire's ballot as Libertarian

candidates. They take particular issue with the fact that listing both sets of candidates did not convey that the Libertarian Party had nominated Root and Barr as its candidates for president and vice president, rather than Phillies and Bennett. Plaintiffs now contend that the ballot's "Other Candidate" column, which allows any candidate to designate his or her party affiliation regardless of whether the party endorses the candidate, infringes on the freedom of political association.

Plaintiffs are correct that the Libertarian Party has a First Amendment right to determine who best represents the party and to elect that standard bearer as the party's nominee for president and vice president. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (explaining how the First Amendment protects political freedom); see also id. at 371 (Stevens, J. dissenting) (stating that recognized political parties "unquestionably have a constitutional right" to select their nominees and to communicate that choice to the voting public); Colo. Republican Fed. Campaign Comm'n v. FEC, 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity. . ."). The right to nominate candidates, however, does not translate into a

right to control whose name appears, or how the name appears, on an election ballot. Further, the right to nominate is not a right to exclude other candidates, who legitimately get onto the ballot by representing voters who happen to be affiliated with a party that may have nominated another candidate. It is the state, or defendant here, not plaintiffs, that has the right to regulate the ballot to ensure fair elections. See Timmons, 520 U.S. at 357 (citing authority).

Plaintiffs' complaint is really that the ballot prevents them from communicating a campaign message, which in 2008 was that Root and Barr, not Phillies and Bennett, were the better leaders for the Libertarian movement. But the ballot is not the party's platform to advertise its political position. See Burdick, 504 U.S. at 438 (upholding Hawaii's ban on write-in ballots because "the election process is . . . not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently" (internal quotation omitted)). As the Supreme Court has explained:

We are unpersuaded, however, by the party's contention that it has a right to use the ballot

itself to send a particularized message, to its candidates and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Timmons, 520 U.S. at 362-63. The fact that New Hampshire's ballot hindered plaintiffs' ability to send the message of who the Libertarian Party's nominees were in 2008 does not mean it severely burdened their associational rights as plaintiffs claim, because the ballot is not a platform for campaigning. See id. at 363 (upholding Minnesota's fusion ban even though it prevented plaintiffs' from selecting as their nominee a candidate already representing another party).

New Hampshire's ballot "does not restrict the ability of the [Libertarian] Party and its members to endorse, support, or vote for anyone they like." Id. Nothing in New Hampshire's election code infringed upon the Libertarian Party's right to elect Root and Barr as its 2008 presidential candidates. And nothing in New Hampshire's election code denied them access to the ballot; they were on the 2008 general election ballot. Had the Libertarian Party satisfied the statutory requirements to acquire its own column on the New Hampshire ballot in 2008, New Hampshire's election laws would have enabled them to designate Root and Barr

in that column as their sole nominees.

Plaintiffs, however, were not on the ballot as a recognized party entitled to its own column. Instead they, like Phillies and Bennett, appeared as "Other Candidates," chosen by the supporters who selected them as the best representatives of those voters. In such circumstances, the rights of the voters to associate for political purposes were protected and advanced by New Hampshire's ballot and its equal recognition of both the Phillies/Bennett and the Root/Barr tickets. See Burdick, 504 U.S. at 44 n.10 ("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."). Plaintiffs' associational rights are not greater than the associational rights of Phillies and Bennett or their supporters, whose numbers were substantial enough to hoist those candidates onto the ballot as well. Plaintiffs have not demonstrated any constitutional or statutory basis to justify removing Phillies and Bennett from the ballot while keeping themselves on it.

Plaintiffs' First Amendment right to freedom of political association does not give rise to a corresponding right to remove

other candidates from the ballot who had sufficient electoral support to be nominated to it. In 2008, plaintiffs exercised their right to select their "standard bearer" and succeeded in getting their nominee on New Hampshire's ballot. Cf. Timmons, 520 U.S. at 359 (explaining how the right to chose a nominee is not an absolute right to have that choice appear on the ballot). I find that the challenged ballot, with its "Other Candidates" column, imposes only a very minimal burden on plaintiffs' right to associate politically. See Burdick, 504 U.S. at 438 (upholding Hawaii's ban on write-in votes because its election laws provided adequate access to the ballot).

(iv) Right to Equal Protection

Finally, plaintiffs contend that New Hampshire's ballot, with its two sets of Libertarian Party candidates in the "Other" column, discriminated against them by interfering with their right to control whose names were affiliated with their party, while parties with their own column on the ballot can control which candidates appear as their nominees. Plaintiffs' argument appears to be that since the major parties are allowed to designate their candidates for the respective public offices on the ballot, they also should be allowed to do so. The fallacy of

plaintiffs' argument is twofold.

First, as plaintiffs concede, they were not a recognized party under New Hampshire law in 2008 and therefore, as discussed supra, they were not entitled to avail themselves of the statutory provisions that enable parties to designate their nominees in their own column. Nothing in New Hampshire's ballot access statutory scheme distinguishes between major and minor parties in a way that unconstitutionally burdens the rights of minor parties. See Libertarian Party NH, 154 N.H. at 382-83, 910 A.2d at 1281-82 (holding ballot access statutes RSA 652:11, 655:40, and 655:40-a constitutional). Plaintiffs do not challenge any of these statutes and, in fact, availed themselves of these provisions to get their names onto the 2008 general election ballot. See RSA 655:40. Minor parties like the Libertarian Party certainly can have a party column and control the names of candidates in it by garnering sufficient electoral support from registered voters. See RSA 652:11 & 655:40-a.

Simply because plaintiffs did not take advantage of either provision to obtain their own column on the ballot does not mean that the statutes discriminate against them or other minor parties. Like the Republican and Democratic parties, they have

the opportunity to meet, and in the past have met, the statutory requirements to obtain their own column on the general election ballot. See RSA 652:11 & 655-40-a; see also Def.'s Mot, Exs. A & C (stating Libertarian Party's history of being on the New Hampshire ballot). "Equality of opportunity exists, and equality of opportunity - not equality of outcomes - is the linchpin of what the Constitution requires in this type of situation." Werme, 84 F.3d at 485.

Second, the "Other Candidate" provision, RSA 655:40, which Root and Barr used to get onto the ballot, does not differentiate between party affiliations and requires all "other candidates" to file nomination papers at the same time and in the same manner as the major party candidates. See RSA 655:14-a (requiring other candidates to file declarations of intent during the same time period in which party candidates must file) & 655:43 (providing filing deadlines). My reading of RSA 655:40 indicates that plaintiffs construe its provisions too narrowly. Nothing in the plain language of the statute would prevent a disgruntled member of the Democratic or Republican party from acquiring the requisite voter support and getting on the ballot as an "other candidate" pursuant to the provisions of RSA 655:40, like both

Barr and Phillies did here.⁶ In that event, the major parties are susceptible to the exact, same alleged potential voter confusion and vote dilution as plaintiffs claim they suffer. The statutory scheme applies equally to all parties and all potential candidates, including the requirement that all candidates declare their party affiliations. See RSA 656:4 (providing that every state general election ballot shall contain the names of the candidates and their party appellations). There is no distinction between major and minor parties in the "Other Candidates" column to support the conclusion that the ballot violates plaintiffs' equal protection rights.

Plaintiffs have not identified any basis for them, unlike any other party, to trump New Hampshire's nondiscriminatory ballot access scheme and control what the general election ballot looks like. The statutory scheme does not unfairly discriminate against minor parties simply because they, like plaintiffs, may not have their own column and must then appear in the "other candidates" column on the general election ballot.

⁶The statutes do prevent someone who ran unsuccessfully in the primary from then filing nomination papers as an other candidate. See RSA 655:43, IV (precluding someone who ran as a candidate in the primary from also running in the general election by submitting nomination papers) & 655:47 (declaration of candidacy for primary).

b. State's Interests

As the foregoing analysis demonstrates, New Hampshire's ballot and the statutory scheme supporting it do not violate plaintiffs' rights to vote or to equal protection and only very minimally burden their right to political association. "Because . . . the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction." Burdick, 504 U.S. at 438. Accordingly, New Hampshire's election regulations will be upheld as long as they reasonably advance important state interests. See id. at 434 ("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." (internal quotation omitted)); see also McClure, 386 F.3d at 45 (declining to speculate "as to all of the other conceivable ways in which the state could have set up its framework").

To justify New Hampshire's election regulations, defendant has identified the state's interest in administering its elections, including controlling the number of candidates and parties on the ballot, and maintaining stability in the

democratic process. Both of these interests have long been recognized as reasonable justifications for regulating the "Times, Places and Manner of holding Elections," U.S. Const., Art. I, § 4, cl. 1, even though the regulations may infringe on First Amendment rights. See Timmons, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); see also Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (explaining state's broad power over elections).

Plaintiffs primarily challenge the state's refusal to give them their own column on the ballot, and the corresponding control over their party name, like the major parties have. A state's interest in maintaining the stability of its political system, however, can justify imposing regulations that, while not banning competition from minor or third party candidates, may erect hurdles that they must clear before gaining access to the ballot. See id. at 367 (discussing how broad-based political stability is a legitimate state interest that can justify regulations that favor a two-party system). New Hampshire's requirements for a distinct party column on the ballot erect such

a hurdle. These type of regulations, that require candidates or the parties they represent to have a sufficient level of support before allowing them onto the ballot, are fair and reasonable limits on First Amendment freedoms, "because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." Anderson, 460 U.S. at 788-89 n.9; see also Am. Party of Tex. v. White, 415 U.S. 767, 789 (1974) (legitimate to require a party to show "a significant modicum of support" before getting on the ballot). New Hampshire's statutory scheme, that placed plaintiffs in the "Other Candidates" column because they had not consolidated the electoral support needed to get their own column, advances the state's interest in maintaining political stability by ensuring the ballot properly reflects the voting public.

Plaintiffs' related challenge is to the state's refusal to remove Phillies and Bennett from the ballot. Plaintiffs take considerable issue with New Hampshire's law that enables competing candidates to each appear on the ballot as representing a single party when that party has only endorsed one of the candidates. Without repeating the lengthy analysis of New Hampshire's "Other Candidate" column set forth above, suffice

here to say that there was nothing unconstitutionally burdensome about having both the Barr/Root and the Phillies/Bennett tickets on the 2008 ballot. Whatever minimal burden the ballot's dual presentation of these candidacies may have had on plaintiffs' associational rights was offset by the state's valid and important interest in protecting equally the rights of plaintiffs and of the Phillies/Bennett supporters to associate politically and to have equal access to the ballot.⁷ The state's interest in administering elections fairly is advanced by this election code, which provides equal access to New Hampshire's ballot.

Finally, plaintiffs argue unpersuasively that the State's decision to keep Phillies and Bennett on the ballot resulted in the "unauthorized use" of their party name. As discussed above, Phillies and Bennett had as much right as Root and Barr to appear on New Hampshire's 2008 ballot as Libertarian candidates because they got onto the ballot as "Other Candidates" by representing

⁷Although not explicitly identified by defendant, states also have a legitimate interest in ensuring that intra-party competition is resolved in a democratic fashion. See Cal. Democratic Party v. Jones, 530 U.S. 567, 572 (2000) (discussing state's right to regulate primaries). While such competition is usually resolved before the general election, when it is not, as occurred in 2008 with the Libertarian Party, New Hampshire's general election ballot fairly and democratically provides the mechanism for voters to choose their preferred candidate in a manner much like that employed in a primary election.

voters who were affiliated with the Libertarian Party. New Hampshire's requirement that all candidates declare their party affiliation furthers the state's interest in administering fair elections as well, because "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." Timmons, 520 U.S. at 375 (Stevens, J., dissenting (internal quotation omitted)).

The function of elections is to elect candidates, and the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." Burdick, 504 U.S. at 438. New Hampshire's general election ballot and its ballot access statutory scheme are politically neutral regulations that advance its interests in administering fair, honest and efficient elections and maintaining political stability. The state's interests advanced by its ballot access statutory framework outweigh the very minimal infringement on plaintiffs' political associational rights.

Conclusion

I find, based on the undisputed record before me, that neither plaintiffs' First nor Fourteenth Amendment rights were violated by defendant's refusing to remove Phillies and Bennett and to list Barr and Root as the sole Libertarian Party candidates on the 2008 general election ballot. The statutory scheme that effected that result is constitutional. Accordingly, plaintiffs' motion for summary judgment (document no. 19) is denied, and defendant's motion for summary judgment (document no. 12) is granted.

SO ORDERED.

James R. Muirhead
United States Magistrate Judge

Date: February 17, 2010

cc: Evan Feit Nappen, Esq.
Gary Sinawski, Esq.
Nancy J. Smith, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Libertarian Party of New Hampshire et al.

v.

Civil No. 08-cv-367-JM

William M. Gardner

J U D G M E N T

In accordance with the court's order dated February 18, 2010, signed by Magistrate Judge James R. Muirhead, judgment is hereby entered.

By the Court,

/s/ James R. Starr

James R. Starr, Clerk

February 18, 2010

cc: Evan Feit Nappen, Esq.
Gary Sinawski, Esq.
Nancy J. Smith, Esq