

**10-1360**

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

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**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.**

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

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**REPLY BRIEF OF PLAINTIFFS-APPELLANTS**

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## ARGUMENT

### **I. PLAINTIFFS COULD NOT HAVE OBTAINED A SEPARATE LIBERTARIAN PARTY BALLOT COLUMN BY SUBMITTING A 3% PETITION UNDER RSA 655:40-a AND b AND 655:42, III**

The 2008 New Hampshire general election ballot is reproduced at Dkt. 14 as Exhibit B to Defendant's Motion for Summary Judgment. Throughout his brief the defendant relies heavily on the *mistaken* notion that the plaintiffs could have obtained a separate Libertarian Party column on the ballot if they had only submitted a petition signed by voters equaling at least 3% of the total votes cast in the last state general election pursuant to N.H. Rev. Stat. Ann. §§ 655:40-a and b and 655:42, III. See Defendant's Brief at pp. 3, 4, 6, 7, 9, 10, 14, 19 and 20. Defendant claims that if plaintiffs had submitted such a petition and obtained a separate ballot column, it would have been clear that Barr was the Libertarian nominee for president even though Phillies would still have been listed in the "Other Candidates" column with the "Libertarian" appellation.

To the contrary, plaintiffs could not have obtained a separate Libertarian Party column by submitting a "3%" petition. N.H. Rev. Stat. Ann. § 652:11 defines "party" as follows:

**652:11 Party.** - "Party" shall mean any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: The office of governor or

the offices of United States senators.

As defendant points out, the Libertarian Party met this 4% vote threshold to secure party status for the 1994 and 1996 general elections but lost party status in 1996.

Dkt. 13, Ex. A to Def. Mot. for Summary Judgment. The Libertarian Party was not a “party” under New Hampshire law for the 2008 general election, and no claim has been made that it was.

N.H. Rev. Stat. Ann. § 656:5 makes it clear that only a “party” (i.e., a political organization which received at least 4% of the vote for governor or U.S. senators in the last election as provided in § 652:11, above) is entitled to a “party column” on the ballot:

**656:5 Party Columns.** - The names of all candidates nominated in accordance with the election laws shall be arranged upon the state general election ballot in successive party columns. Each separate column shall contain the names of the candidates of one party; except that, if only a part of a full list of candidates is nominated by a political party, 2 or more such lists may be arranged whenever practicable in the same column. The party columns that list the names of candidates for offices that elect more than one person shall stagger the names of the candidates so that they do not line up evenly in a horizontal direction. The left-most column shall begin one line below the column to its right. The secretary of state shall determine the location of any additional columns that may appear on the ballot.

The Libertarian Party could have obtained its own column on the 2008 ballot *only* by polling at least 4% of the gubernatorial or U.S. senate vote in the preceding general election pursuant to N.H. Rev. Stat. § 652:11, and it did not do so. Had

the party submitted a 3% petition pursuant to N.H. Rev. Stat. Ann. §§ 655:40-a and b and 655:42, III, Barr would still have been listed on the ballot in the “Other Candidates” column with the “Libertarian” designation, just as Phillies was. There would still have been no way for voters to discern who the Libertarian Party’s nominee for president was. The principal advantages conferred by the 3% petition method are to enable a non-party organization to circulate the petition before it has chosen its nominees and to nominate candidates for multiple offices after the petition has been filed. The principal disadvantage is that the 3%-signature requirement vastly exceeds the 3,000-signature requirement met by Barr and Phillies under N.H. Rev. Stat. Ann. §§ 655:40 and 655:42, I. Upon information and belief, the 3% requirement was 12,524 valid signatures in 2008.

Defendant correctly states that the Libertarian Party used the 3% petition process in 2000 but incorrectly states that this enabled the party “to obtain a separate column on the New Hampshire ballot for its candidate.” Def. Brief, p. 3. The Court may take judicial notice that Harry Browne, the party’s 2000 presidential candidate, was listed in the “Other Candidates” column on the New Hampshire 2000 general election ballot, just as Barr and Phillies were in 2008.

## **II. THE SECRETARY OF STATE VIOLATED PLAINTIFFS' RIGHTS TO SPEAK AND ASSOCIATE POLITICALLY AND TO HAVE EQUAL PROTECTION OF LAW**

The inability of a political organization to obtain a separate column on the ballot without meeting the 4% vote threshold for governor or U.S. senate, even if it submits a 3% petition pursuant to N.H. Rev. Stat. Ann. §§ 655:40-a and b and 655:42, III, further underscores the state's differential and unfair treatment of minor parties and their candidates relative to their major party counterparts in the area of ballot access. The Republican and Democratic nominees for president and other offices are clearly identified on the ballot by their placement in the columns labeled "DEMOCRATIC CANDIDATES" and "REPUBLICAN CANDIDATES." See the 2008 New Hampshire ballot reproduced at Dkt. 14 as Ex. B to Def. Mot. for Summary Judgment. Plaintiff Barr, the Libertarian nominee for president, is not comparably identified as such. He was listed in the column labeled "OTHER CANDIDATES" along with Phillis, another candidate for president who was also identified as "Libertarian." Id. It is inevitable that this would generate confusion among voters.

The defendant has not proffered, and cannot proffer, any legitimate state interest that is served by this disparity in treatment of major and minor parties and their candidates. New Hampshire's entirely legitimate interests in "controlling the

number of candidates and parties on the ballot and maintaining the stability of the democratic process,” Def. Brief, p. 16, have nothing whatsoever to do with the case at bar: Had the defendant listed Barr on the ballot as the sole Libertarian Party candidate for president, as plaintiffs wished, his action would either have reduced the number of names on the ballot by removing Phillies or maintained the same number of names by listing Phillies without the Libertarian designation. Either way, there would have been no impact on the stability of the democratic process.

The difficulty could not have been obviated by the withdrawal of Phillies or Barr 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.

### **III. PLAINTIFFS DO NOT, AND NEED NOT, CHALLENGE THE CONSTITUTIONALITY OF PARTICULAR STATUTES**

As the trial court did, defendant accurately notes that plaintiffs do not identify particular New Hampshire statutes which they contend are unconstitutional, and claims that this a “deficiency.” Def. Brief p. 11; Order on motions for summary judgment, p. 8, Pl. Addendum p 1. It should go without



saying that constitutional claims such as those asserted in this case need not be grounded in particular statutes. Indeed, in this case the plaintiffs claim that what is unconstitutional was the defendant's refusal to substitute the Barr candidacy for the Phillies candidacy or, in the alternative, to list both candidates on the ballot with Barr alone having the "Libertarian" appellation. While the defendant's refusal was presumably grounded in New Hampshire's ballot access framework, plaintiffs are certainly not obligated to speculate as to which statutes or portions thereof the defendant relied on to justify his refusal.

In addition, or in the alternative, what is unconstitutional was the absence of any statutes giving the Libertarian Party and other minor parties the same rights to control the use of their names as major parties have. New Hampshire law protects major parties, but not minor parties, 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 major party's chairman can have their names placed on the ballot. N.H. Rev. Stat. Ann. §§ 655:43, III; 655:17-c; 655:14-a.

#### **IV. VOTES FOR BARR AND PHILLIES COULD NOT BE AGGREGATED TO MEET THE 4% THRESHOLD FOR ATTAINING "PARTY" RECOGNITION**

Oddly, as the trial court did, the defendant argues that listing Barr and Phillies in the "Other Candidates" column with the "Libertarian" appellation

enhanced the Libertarian Party's chances of attaining "party" status:

... contrary to Appellants' contention, the New Hampshire ballot scheme was likely to actually strengthen the Libertarian party position as all of the votes for any individual candidate identifying themselves (sic) as "Libertarian" would be counted towards the four (4) percent requirement for party recognition.

Def. Brief, p. 13; Order on motions for summary judgment, p. 16, Pl. Addendum

p. 1. This ignores the plain language of N.H. Rev. Stat. Ann. § 652:11, which defines "party" as "any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for *any one of the following: the office of governor or the offices of United States senators.*"

(Italics added.) Votes for president do not count toward the 4% threshold for party status under New Hampshire law.

### **CONCLUSION**

For the foregoing reasons and those stated in plaintiffs' principal brief, 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,

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**Certificate of Compliance With Rule 32(a)**

Certificate of Compliance With Type-Volume Limitation,  
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ✓ this brief contains less than 3,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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(s) Gary Sinawski

Attorney for Plaintiffs-Appellants

Dated: July 23, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2010 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: William Gardner, via Nancy J. Smith.

/s/ Gary Sinawski