UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 10-1360

LIBERTARIAN PARTY OF NEW HAMPSHIRE; BOB BARR; WAYNE A. ROOT; BRENDAN KELLY; 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 FOR THE APPELLEE WILLIAM M. GARDNER, SECRETARY OF STATE OF NEW HAMPSHIRE

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STATEMENT OF THE ISSUES

1. Did the trial court correctly find that there was no violation of appellants' First and Fourteenth Amendment rights when the Secretary of State refused to list Mr. Barr and Mr. Root as the sole official candidates identified as "Libertarian" on the 2008 New Hampshire general election ballot.

2. Did the trial court correctly find that a candidate running for office in an individual capacity does not have the right to compel the Secretary of State to remove the party appellation chosen by another individual candidate or to substitute the candidate that has received the nomination of an unrecognized party?

3. Should the trial court have found the case to be moot?

STATEMENT OF CASE

Appellants, Libertarian Party Of New Hampshire; Bob Barr; Wayne A. Root; Brendan Kelly; Hardy Macia (hereinafter "Appellants" or "Mr. Barr") sought declaratory and injunctive relief to compel the New Hampshire Secretary of State (hereinafter "Secretary of State" or "Secretary") to list Mr. Barr on the 2008 New Hampshire general election ballot as the sole Libertarian candidate for president. Appellants contend that the Secretary's failure to do so amounted to a violation of the Appellants' First and Fourteenth Amendment rights. While the matter was pending in the trial court, Appellants withdrew their request for injunctive relief, but continued to seek a ruling that the Secretary's refusal to list

Barr as the sole Libertarian candidate and to substitute him for George Phillies and his running mate (hereinafter "Phillies') was unconstitutional and violated 42 U.S.C. §1983.

The Secretary moved for summary judgment on August 3, 2009. Appellants objected to the Secretary's motion for summary judgment and moved for summary judgment themselves. On February 17, 2009, the trial court issued an order granting the Secretary's motion for summary judgment and denying Appellants' motion for summary judgment. Judgment was entered for Defendant on February 18, 2010 and this appeal followed.

STATEMENT OF FACTS

The rules governing the appearance and information that can and must be printed on ballots in New Hampshire elections is governed by statute. *See* RSA ch. 656, *et seq.* RSA 656:4 requires that only the candidates name and party appellation appear on the ballot. Recognized political parties have the right to place their party's choice or nominee in their own respective columns. *See* RSA 656:5. A political party is "recognized" if it received at least four (4) percent of the vote in the previous state general election in the races for either governor or United States senator. RSA 652:11. In 2008, only the Democratic and Republican parties qualified to be recognized as political parties with their own column under

New Hampshire law. Dkt. 13,[1] Ex. A to Defendant's Motion for Summary Judgment, ¶ 7.

An unrecognized political party may still obtain a separate party column with that organization's choice of candidate on the ballot in any particular year, but must formally petition, and meet the requirements set by RSA 655:40-a, b and RSA 655:42, III. This requires that the organization submit nomination papers signed by voters equaling at least three (3) percent of the total votes cast in the last state general election. *Id.* The Libertarian party used this process in 2000 to obtain a separate column on the New Hampshire ballot for its candidate. *See* Dkt. 13, Ex. A to Defendant's Motion for Summary Judgment, ¶ 4.

A person may also choose to run as an individual instead of a political organization's formal nominee by submitting sufficient nomination papers for his or her name to be listed in the "Other Candidates" column. *See* RSA 655:40; Dkt. 14, Ex. B to Defendant's Motion for Summary Judgment. The political organization or ideology identified by the candidate on the RSA 655:40 petition as his or her "party appellation" will be placed underneath the individual names on the ballot to reflect the political affiliation disclosed. *See* RSA 656:4.

[1] Documents referred to by "Dkt" number refer to the document or order of the court as it is identified in the Civil Docket sheet for this case, which is included in Appellants' Appendix at pp. 1-8.

Those appearing in the "Other Candidates" column are those who are not the official nominee of a recognized political party or a political organization given its own column through a formal petition. *See* RSA 656:5; RSA 655:40-b. All individuals seeking placement by nomination papers, must identify themselves by the political organization or ideology they espouse, but cannot also have run in any party's primary. RSA 655:43, IV and RSA 655:47. The party appellation in the "Other Candidates" column is provided only for the purpose of informing the voters of "…the political organization or principles the candidate represents," RSA 655:40. It does not indicate that the individual is that group's formal or endorsed nominee. The only way to be placed on the ballot as a formal nominee is either to be nominated by a recognized political party, or be nominated by a political organization that has formally petitioned, and met the requirements, for a party column on the ballot. *See* RSA 655:40-a, b; RSA 667:21.

The facts regarding the 2008 New Hampshire general election are not in dispute. A copy of the actual ballot used was introduced as evidence as Exhibit B to the Secretary's Motion for Summary Judgment. *See* Dkt. 14. Mr. Barr ran for President of the United States during the 2008 election. *See* Dkt. 1. He ran in an individual capacity, appearing on the ballot in the "Other Candidates" column with the party appellation of "Libertarian" appearing below his name. Appellants' Brief, p. 4; Dkt. 15, Ex C to Defendant's Motion for Summary Judgment, ¶¶ 4 and

5. Mr. Barr did not appear on the ballot representing any recognized political party as its endorsed or nominated candidate. Rather, he appeared on the ballot solely because he, as an individual, gathered enough nomination papers with the requisite number of signatures to qualify as an individual running for President in the "Other Candidates" column of the New Hampshire 2008 general election ballot. *See* Dkt 1. The party appellation of "Libertarian" was placed underneath his name because Mr. Barr placed the term "Libertarian" as his political affiliation on his RSA 655:40 petition. Dkt. 15, Ex C to Defendant's Motion for Summary Judgment, ¶¶ 4 and 5.

Mr. Phillies also ran in an individual capacity, appearing in the "Other Candidates" column with the party appellation "Libertarian" placed underneath his name as well. Appellants' Brief, p. 4; Dkt. 15, Ex C to Defendant's Motion for Summary Judgment, ¶¶ 4 and 5. This is because he, just as Mr. Barr had done, provided the required nomination forms with the requisite number of signatures to be placed alongside Mr. Barr. *See* Dkt. 1; Dkt. 15, Ex C to Defendant's Motion for Summary Judgment, ¶¶ 4 and 5. Additionally, Mr. Phillies, like Mr. Barr, also noted his political affiliation as "Libertarian" on his 655:40 petition, requiring the Secretary of State to place the designation "Libertarian" underneath his name on the ballot. Dkt. 15, Ex C to Defendant's Motion for Summary Judgment, ¶¶ 4 and 5.

SUMMARY OF THE ARGUMENT

There has been no violation of the Appellants' constitutional rights under the First or Fourteenth Amendments. The correct test applied to election regulations by the court requires a "flexible framework" that balances the state's duty to be sure elections are conducted fairly and individuals First Amendment rights to associate and vote in a politically effective manner. The trial court correctly concluded that the facts of this case demonstrated a minimal burden on Appellants' rights and that the State's regulations should be upheld as reasonable and non-discriminatory.

Regardless of Mr. Barr's nomination by the National Libertarian organization, Mr. Barr was not entitled to be the only candidate with the party appellation of "Libertarian" on the 2008 New Hampshire general election ballot. Appellants were not entitled to a separate column on the ballot for the Libertarian party, and the Secretary was not required or entitled to substitute Mr. Barr for Mr. Phillies based on the actions of a political organization that did not meet the requirements of New Hampshire election laws.

New Hampshire law dictates that only recognized political parties or political organizations that meet certain requirements and have formally petitioned for a separate party column may have their choice of candidate listed alone in a party column. In 2008, the National Libertarian organization did not meet the

requirements to be recognized and have its own party column. Further, no petition that met the necessary requirements enabled the Secretary of State to give the National Libertarian organization it's own party column. If Mr. Barr wished to be placed on the ballot as the National Libertarian organization's formal nominee, his party would have had to pursue a formal petition that met the requirements of New Hampshire law.

Minor parties are not being treated differently than major parties in regards to access to a party column. Further, the Secretary's determination of who may receive a party column and who will be placed in the "Other Candidates" column is dictated by the statutory definition of "party." Mr. Barr does not contend that the statute itself is unconstitutional. The Secretary of State is not entitled to simply ignore the statute that defines how a political party is recognized and place a party on the ballot at a candidate's request. Equality of opportunity exists and the requirements are therefore constitutional. Simply put, there is no right of substitution by reason of party nomination among those who choose to place themselves on the ballot in an individual capacity.

Finally, to the extent that the issue is raised in Appellants' brief, the Court should find that the issues raised in this case are moot. The 2008 election has passed and a decision in this case can have no impact on the outcome. This case

does not meet the criteria for cases that are likely to re-occur, yet are so brief they evade review.

ARGUMENT

I. Standard of Review

The denial of Appellants' Motion for Summary Judgment is reviewed *de novo*. *Maritime & Northeast Pipeline LLC v. Echo Easement Corridor LLC*, 604 F.3d 44, 47 (1st Cir. 2010). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Navarro v. Pfizer Corp*., 261 F.3d 90, 94 (1st Cir. 2001). Conclusory allegations, unsupported inferences and speculation are insufficient to defeat summary judgment. *Carroll v. Xerox Corp*., 294 F.3d 231, 236-37 (1st Cir. 2002).

II. The Trial Court Correctly Found That There Was No Violation Of Appellants' First Or Fourteenth Amendment Rights By The Secretary Of State's Refusal To List Mr. Barr And Mr. Root As The Sole Official Candidates Identified As "Libertarian" On The 2008 New Hampshire General Election Ballot

Appellants have no right to compel the Secretary to list Mr. Barr as the sole "Libertarian" candidate simply because he was nominated by the national Libertarian organization. The ability to be placed on the ballot as a nominated

candidate of a political organization is dictated by statute, and in Mr. Barr's case, neither of the alternative legal requirements that would have allowed the Secretary of State to place him on the ballot as the sole official "Libertarian" candidate were met.

Under New Hampshire law, the only way to be placed on the ballot as a political organization's endorsed choice or nominated candidate is to be placed in one of the ballot's "party columns." *See* RSA 656:5. For any political party to automatically receive a "party column" on the ballot, it must meet the statutory definition of "party." To be recognized as a "party," in the preceding state general election the political organization must have received "at least four 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." RSA 652:11. In 2008, because the Democratic and Republican Parties met the statutory definition of "party," they automatically received their own party column with their party's choice of candidate placed within it. Dkt. 13, Ex. A to Defendant's Motion for Summary Judgment, ¶ 7. The Libertarian party did not meet the statutory definition of "party" as of the 2008 general election and was therefore not entitled to automatically receive its own party column. *Id.*

However, even if an organization does not meet the definition of "party," New Hampshire law provides a method for political organizations, such as the

Libertarian party, to gain access to a party column with their choice of candidate placed within it. To do this, a party must submit a number of nominating papers equal to three (3) percent of the total votes cast in the previous state general election. RSA 655:42, III. Once this is done for a particular election, the political organization may choose any qualified person as its candidate. RSA 655:40-b. In the 2008 general election, there were no political organizations that completed this process. *See* Dkt. 13, Ex. A to Defendant's Motion for Summary Judgment, ¶¶ 5-7. The Libertarian party has at times, met the requirements to have a column of their own. *See* Dkt. 13, Ex. A to Defendant's Motion for Summary Judgment, ¶¶ 3-4.

Accordingly, because the Libertarian organization did not meet the definition of "party" and did not submit the requisite nominating papers to procure a separate party column for the Libertarian party, there was no legal right for a nominated candidate of the Libertarian party to appear on the 2008 New Hampshire general election ballot as that party's formal candidate.

Notwithstanding the requirements of New Hampshire election law, Appellants claim that the Secretary's refusal to remove the party appellation "Libertarian" from underneath Mr. Phillies's name on the ballot amounted to a violation of their 1st and 14th Amendment rights. The trial court correctly

concluded that this claim fails the applicable constitutional test. Dkt. 27, Order on Summary Judgment, p. 11.

The trial court correctly noted that the Appellants have failed to clearly identify which New Hampshire statutes they contend are unconstitutional. *Id.* at 8. This deficiency is not addressed by Appellants' Brief. The trial court also correctly rejected Appellants' argument that strict scrutiny is required and identified the correct constitutional analysis. *Id.* at 10.

The Secretary of State does not dispute that the ability to "engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This right necessarily implicates the ability of third parties to gain access to voters on the ballot. As the Court noted, "The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). Accordingly, a ballot restriction may be declared unconstitutional if it poses too severe a barrier for third parties to gain access to the ballot. *See Norman v. Reed*, 502 U.S. 279 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968).

However, the correct test, as identified and applied by the trial court, to analyze these types of challenges to ballot restrictions, is the "flexible framework" developed by the Supreme Court in *Anderson*. The test requires that the court;

> 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.

Anderson v. Celebrezze, 460 U.S. at 789; *see also Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992); *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996).

Under this standard, the Court has explained that "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 rights." *Burdick*, 504 U.S. at 434. Thus, "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." *Id.*

Under this flexible balancing test, a restriction will not be subjected to strict scrutiny and will be generally upheld if it is reasonable and non-discriminatory. *See Timmons*, 520 U.S. at 351; *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134 (1972). In other words, this standard does not automatically invalidate even "substantial

restriction(s) on the right to vote or to associate." *Storer*, 415 U.S. at 730. Furthermore, the Court has emphasized the importance of State regulation of elections, stating that "…as 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." *Id.*

Here, the trial court correctly found that the challenged restriction did not severely burden the Appellants' First or Fourteenth Amendment rights. Dkt. 27, Order on Summary Judgment, p. 11. The court found that the Appellants had presented no evidence that the 2008 ballot format interfered with their, or their supporters', right to vote; nor did it create voter confusion. *Id.* at 15.

It also found that, 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 as "Libertarian" would be counted towards the four (4) percent requirement for party recognition. *Id.* at 16. Likewise, Appellants' right to political association was not infringed because the right to nominate a candidate is not synonymous with and "does not create a right to control whose name appears, or how the name appears on an election ballot." *Id.* at 17-18 (*citing Timmons*, 520 U.S. at 357).

Finally, the court also correctly rejected Appellants' argument that they were being treated differently than any one else running as "other candidates."

Appellants had the same opportunity to avail themselves of access to a party column. Like anyone else they can have a party column and control the names of candidates in it by acquiring voter support. *Id.* at 22. The fact that they did not do so does not mean that the statute discriminates against them. Further, the statutes requiring all "other candidates" to file does not distinguish between political ideologies and requires all "other candidates" to file at the same time and manner as the major party candidates. *Id.* at 23. Therefore, the trial court correctly concluded that, as any restriction on Appellants was at best minimal, the State's ballot process would be upheld if it were reasonable and non-discriminatory. *Id.* at 24.

Indeed, the Appellants concede that the New Hampshire's statutory definition of a "party" is constitutional, as they must, having previously litigated this issue to final resolution. Applying the *Anderson* balancing test, the New Hampshire Supreme Court has upheld the State's statutory scheme for ballot access as reasonable and non-discriminatory. *See Libertarian Party of New Hampshire*, 154 N.H. 376 (2006). In that suit, the Libertarian party of New Hampshire alleged that the "...statutory scheme limits the access of minor parties, their candidates and independent candidates to the general election ballot, in violation of their state constitutional rights to equal protection, equal right to be elected, and free speech and association." *Id*. at 379. The Court disagreed, finding

that the statutes did not differentiate among the two major parties and the Libertarians, and that the Appellants had an equal opportunity to qualify for a place on the general election ballot. *Id*. at 381-2. Importantly, the Court also noted that the statutory restrictions were not severe, and that the threshold required for party status, four percent of the votes cast in the prior general election, did not impose a severe burden on associational rights. *Id.* at 382.

Similarly, the United States Supreme Court has upheld a statutory scheme that prevented an individual from receiving a ballot position as an "independent" if they had voted in a prior party primary or registered an affiliation with a party within the prior year. *Storer*, 415 U.S. at 736-7. Ultimately, the Court felt that the restrictions at issue reflected the reasonable "general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id*. at 733. The statute did not discriminate against independent candidates. Rather, the Court characterized the statute as a reasonable policy for ensuring that independents demonstrated a sufficient level of support. *Id*. at 733. Or, as the Court also put it, "…the independent candidacy route to obtaining ballot position is but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries." *Id*.

Like the statutory scheme at issue in *Storer*, the New Hampshire ballot access process at issue here is reasonable and non-discriminatory. It, too, simply

provides "an alternative to being nominated in one of the direct party primaries." As far as New Hampshire law was concerned, Mr. Barr was simply an individual who, rather than seeking a place on the ballot as a party nominee, chose to place himself on the ballot through the alternative method of running individually. As the New Hampshire Supreme Court noted, the law did not discriminate against him; he had as much of a right to be placed on the ballot and voted for as any other individual.

Furthermore, Appellants had just as much of a right to seek placement on the ballot in their own column for a formal nominee as anyone else. They chose not to do so. None of the statutes at issue here placed unfair and restrictive policies against third parties, new parties or independent candidates.

Contrary to Appellants' assertion (Brief p. 16) that the Secretary did not identify any specific state interest served by its ballot access statutes, as noted by the trial court (Dkt. 27, Order on Summary Judgment, p. 25), the Secretary did identify the State's regulatory interests. In the memoranda of law in support of his motion for summary judgment the Secretary stated that the State's interests were controlling the number of candidates and parties on the ballot and maintaining the stability of the democratic process. *See* Dkt. 12-2, Memorandum of Law, pp. 12-13. Such interests have been repeatedly upheld by the Supreme Court. *Timmons*, 520 U.S. at 364-6.

The State's measures to ensure that those who run in an individual capacity *all* have the right to place a party description underneath their name are reasonable measures to implement the "…general state policy aimed at maintaining the integrity of the various routes to the ballot." *Storer*, 415 U.S. at 734. Otherwise, voters would not know if an individual in the "Other Candidates" column is running as an independent, or if they have some other party affiliation. The purpose of requiring a party appellation in the "Other Candidates" column is so that individuals who are not a party's formal nominee have just as much of a right to be placed on the ballot and to be identified by their chosen ideology to their supporters in an effective way. Stripping Mr. Phillies of his right to place an accurate party label underneath his name would directly undermine the goals and purposes of the "Other Candidates" column and the ability of individuals to be fairly represented on the ballot to their supporters.

The Supreme Court has repeatedly held that regulations that ensure that political parties or candidates have a sufficient "modicum" of support before being placed on the ballot are reasonable, non-discriminatory and constitutional. *See Libertarian Party of Maine v. Diamond*, 992 F. 2d 365, 371 (1st Cir. 1993); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1987) ("modicum of support among the potential voters for the office"); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983) ("preliminary showing of substantial support");

American Party of Texas v. White, 415 U.S. 767, 782 (1974) ("significant, measurable quantum of community support"); *Lubin v. Panish*, 415 U.S. 709, 713-14 (1974) ("serious candidates with some prospects of public support"); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("significant modicum of support"). The importance of these rules are manifest, as the Court in *Lubin* describes,

> The 'support' requirement is meant to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process.

Lubin, 415 U.S. at 715.

For example, this Court upheld similar Maine ballot access rules that required a sufficient showing of party support. In that case, the Libertarian party challenged the ballot requirements that defined how a party candidate could qualify to be placed on the general election ballot. Specifically, it asserted that,

> …a Party candidate may be denied access to the general election ballot under the Maine election code, even if s/he commands the support of a plurality of the voters participating in the Party's district primary, unless s/he also shows that the Party itself has sufficient support, in the particular electoral subdivision…Appellants assert that these additional requirements are unnecessary and unconstitutionally burdensome…

Libertarian Party of Maine, 992 F. 2d at 370. The Court disagreed, stating that "[S]tates have a legitimate interest in 'protecting the integrity of the electoral process' by ensuring that 'all candidates for nomination make a preliminary

showing of substantial support' among voters in the relevant electoral districts." *Id*. at 371 (citing authority). The Court noted further that "[A]s far as the record shows, the Party has submitted no petitions, enrolled few members, and garnered little support for the candidates who ran under its banner in the 1992 and earlier elections." *Id.* Therefore, the Court felt that the "State retained a legitimate interest in ensuring that the Party *in fact* possessed a minimal level of support among the electorate, as a prerequisite to listing the appellant candidates on the primary and general election ballots." *Id.*

Similar to the ballot access rules in Maine, the New Hampshire statutory scheme for determining which parties automatically receive a "party column" and how other political organizations may procure a "party column" are methods to ensure that a political organization demonstrate a "significant modicum of support." As discussed above, achieving a "party column" depends on either showing sufficient support in a prior election, or demonstrating sufficient support through signatures on nomination papers. As the Supreme Court has repeatedly held, these types of election regulations are reasonable and constitutional. Therefore the trial court's findings should be upheld. Fortunately for Mr. Barr, New Hampshire provides alternatives routes to the ballot, so that he was still able to be placed on the ballot as an individual candidate with his party affiliation

clearly placed underneath his name for all his supporters to recognize; just as any other individual candidate would be entitled to do.

III. The Trial Court Correctly Found That A Candidate Running For Office In An Individual Capacity Does Not Have The Right To Compel The Secretary Of State To Remove The Party Appellation Chosen By Another Individual Candidate Or To Substitute The Candidate That Has Received The Nomination Of An Unrecognized Party

In New Hampshire, an individual who is not the candidate of a party and/or political organization that has a party column on the general election ballot and who wishes to be placed on the ballot, may be placed in an additional column labeled, "Other Candidates." To be placed on the general election ballot as an individual candidate for president (rather than a party nominee), a person must obtain 3,000 nominating papers. RSA 655:42. These papers must be signed by at least 1,500 voters from each congressional district in New Hampshire. *Id.*

Those who appear on the ballot as individuals have the statutory right to place a party appellation (label) underneath their name. Because those who get on the ballot through this method are appearing as individuals rather than the choice of a particular political party, their party affiliation appears underneath their name only to signify "…the political organization or principles the candidate represents…" RSA 655:40. The description provides information to the voters about how the candidates describe themselves, rather than representing an endorsement by any political party. Accordingly, more than one individual

describing themselves in the same way may appear with the same party appellation underneath their name.

Here, both Mr. Barr and Mr. Phillies completed the necessary requirements to be placed on the 2008 New Hampshire General Election ballot as individuals. *See* Dkt. 1. Both Mr. Barr and Mr. Phillies, by virtue of their right to appear on the ballot, exercised their right to place a party label underneath their name to signify "…the political organization or principles" with which they identified. As it happens, they both chose the word "Libertarian." *Id.*

Mr. Barr does not have the right, by virtue of his selection by the National Libertarian organization, to simply strip Mr. Phillies of his *statutory* right to place a party label underneath his name to inform the voters of his ideology. *Both* candidates, as individuals, had every legal right to be on the 2008 ballot with the party label of their choice underneath their name. *See* RSA 655:40; 656:5. As discussed above, the only way to appear as the official "Libertarian" candidate would have been to meet the necessary requirements for the Libertarian party to have its own column; the Appellants did not do this. *See* RSA 655:40-a. As the trial court concluded, the "right to nominate" is not the "right to exclude." Dkt. 27, Order on Summary Judgment, p. 18. To allow Mr. Barr to compel the Secretary of State to strip Mr. Phillies of his statutory right to place the party description of his choice underneath his name would be a violation of *his* associational rights under

New Hampshire law. *Id*. at 20. The trial court correctly concluded that the ballot is not a party's platform to advertise its political position. *Id.* at 18.

Ultimately, the Secretary's refusal to place Mr. Barr as the sole candidate appearing with the word "Libertarian" underneath his name was based on the requirements of New Hampshire election law; it was not discretionary. These requirements have been subject to constitutional challenge and been upheld by the New Hampshire Supreme Court. *See Libertarian Party of New Hampshire v. State of New Hampshire*, 154 N.H. at 383-86 (discussed more fully previously). The Secretary did not have the ability, by virtue of his position, to ignore the statutory right of Mr. Phillies to be placed on the ballot with the party appellation of "Libertarian," regardless of whether or not someone had received a nomination from the National Libertarian organization, an unrecognized party. RSA 656:4.

The trial court also correctly found that there is no constitutional "right to substitute" under these circumstances. Dkt. 27, Order on Summary Judgment, p. 12. As the court noted, what the Appellants sought at the trial level was to remove Mr. Phillies from the ballot entirely. *Id.* New Hampshire law provides methods for candidate substitution in appropriate circumstances, however, those circumstances were not presented here. A party may substitute a name on a general election ballot only if a candidate becomes disqualified, dies, or a vacancy occurs following a primary. *See* RSA 655:37-9. There is no right to substitution

by reason of party nomination when the individuals involved are all running in an individual capacity.

Appellants have failed to support the claim that New Hampshire must allow a substitution in these circumstances. None of the cases cited by the Appellants involve stripping another individual of a right granted to him by statute. Rather, the cases all involved a candidate choosing to withdraw *voluntarily*. *See, e.g., Barr v. Galvin*, 584 F. Supp. 2d 316 (D. Mass. 2008) (substitution statute void for vagueness because it did not clearly provide for presidential nominees); *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980) (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) (allowing substitution when a candidate withdraws voluntarily); *El-Amin v. State Bd. of Elections*, 721 F. Supp. 770 (E.D. Va. 1989) (law that allows a party to renominate a "new candidate" if its original candidate dies or withdraws unconstitutional for its unequal treatment of non-party candidates).

Appellants' argument that the trial court erred by focusing on their "early request to have Phillies removed from the ballot" (Appellants Brief, p. 8) should not be considered, as it was not the argument they presented in the trial court. It has been described as "crystalline" in this Circuit that arguments advanced for the first time on appeal will not be considered. *B & T Masonry Construction Co. Inc.*

v. Public Service Mutual Ins. Co., 382 F.3d 36, 40 (1st Cir. 2004). Therefore, for the reasons previously set forth herein, even if this argument were considered, Appellee contends that listing Mr. Phillies political appellation did not violate Appellants' constitutional rights and that Appellants had no right to force the Secretary to remove Phillies from the ballot or to prevent him from expressing the political appellation of his choice to the voters.

IV. This Matter Is Moot

Appellants included a section in their brief arguing that the case is not moot. *See* Appellants' Brief, pp. 8-9. It is unclear why they did so, as the trial court ruled in their favor on this issue. Dkt. 27, Order on Summary Judgment, pp. 5-6. However, if the appellate court is inclined to review this ruling, Appellee submits that the case below was moot for the following reasons.

To pursue a claim in Federal Court, there must be an actual case or controversy where the plaintiff possesses a personal stake in the outcome. *See* U.S. Const. art. III, § 2, cl. 1; *see also Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); *Allen v. Wright*, 468 U.S. 737 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Ramirez v. Sanchez Ramos*, 438 F.3d 92 (1st Cir. 2006); *Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005).

Here, Mr. Barr challenged the Secretary's refusal to place him on the 2008 general election ballot as the only individual with the party appellation

"Libertarian." However, events have transpired that would render the opinion "merely advisory." *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003). The election has already occurred, and any decision rendered in the Appellants' favor would not alter the outcome. At this point, the Appellants have no personal stake in the outcome of this lawsuit, as the relief sought is now impossible. Further, as demonstrated by the undisputed fact that the Libertarian party has satisfied the petition requirement in prior years (Dkt. 13, ¶¶ 3 and 4), it is entirely speculative that in any future election the Libertarian party would not be able to have a party column if they chose to follow the law. Therefore, a decision in this matter would serve as little more than advice for future candidates for office.

Further, the exception to the mootness doctrine commonly referred to as the "capable of repetition yet evading review" doctrine, is not applicable here. For a matter to be considered "capable of repetition, yet evading review," two requirements must be met. First, the challenged action must be too short to be fully litigated before its cessation. Second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *Ramirez*, 438 F.3d at 100; *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Here, there is no indication that Mr. Barr or Mr. Phillies plan on running for president again or that the Libertarian party will not be able to qualify for a "Party Column" in the next election, especially since the Libertarian party has

successfully petitioned for a column under New Hampshire law previously. Accordingly, there is no reasonable expectation that Mr. Barr or the Libertarian party will be subjected to the same action again.

CONCLUSION

For the foregoing reasons this Court should affirm the Order of the trial court granting the Secretary of State's motion for summary judgment.

If the Court desires oral argument on this case, Nancy J. Smith, Senior Assistant Attorney General will present the argument for the Appellee.

Respectfully submitted,

WILLIAM M. GARDNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NEW HAMPSHIRE

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CERTIFICATION Rule 32(a)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were delivered this 6th day of July 2010 to Gary Sinawski, Esquire 180 Mantague Street, 25th Floor, Brooklyn NY 11201 counsel for the Appellants via the Federal Court's ECF filing system.

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