UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Libertarian Party of North Dakota, Richard Ames, Thommy Passa and Anthony Stewart,	)	
Plaintiffs-Appellant,	)	**Case No. 10-3212**
v.	)	
Alvin A. Jaeger,	)	
Defendant-Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHEASTERN DIVISION

BRIEF OF DEFENDANT/APPELLEE

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SUMMARY OF THE CASE

On July 20, 2010, Plaintiffs filed a Complaint challenging the constitutionality of N.D.C.C. § 16.1-11-36. Plaintiffs are the Libertarian Party of North Dakota (LPND) and three LPND state legislative candidates who were on North Dakota's June 8, 2010 primary election ballot.

To be placed on the general election ballot, N.D.C.C. § 16.1-11-36 requires a candidate on the primary election ballot receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. The plaintiff candidates did not receive the statutorily required number of votes to be placed on the general election ballot, one receiving only 4 votes, one receiving only 6 votes, and the other receiving only 8 votes. Because they did not receive the minimum number of votes required by N.D.C.C. § 16.1-11-36 to be placed on the general election ballot, North Dakota Secretary of State Al Jaeger (Secretary Jaeger) declined to include the plaintiff candidates' names on the general election ballot. Plaintiffs subsequently brought this action.

Plaintiffs filed a Motion for Preliminary Injunction; Secretary Jaeger opposed Plaintiffs' Motion for Preliminary Injunction and filed a Motion to Dismiss. On September 3, 2010, the district court granted Secretary Jaeger's Motion to Dismiss, Denied Plaintiffs' Motion for Preliminary Injunction, and entered Judgment dismissing the Complaint with prejudice. The district court found N.D.C.C. § 16.1-11-36 constitutional as applied, explaining states may condition access to the general election ballot upon a showing of a substantial modicum of support in the primary election and that the plaintiff candidates failed

to demonstrate a substantial modicum of support. Plaintiffs appeal the September 3, 2010 Judgment.

Defendant/Appellee Secretary Jaeger does not request oral argument. Oral argument is unwarranted because the issues before the Court are legal and are not complex.

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STATEMENT OF THE ISSUES

I. The United States Supreme Court has held states can constitutionally require candidates demonstrate, through their ability to secure votes at the primary election, that they enjoy a significant modicum of community support. N.D.C.C. § 16.1-11-36 requires a candidate on the primary election ballot to receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less, to have the candidate's name included on the general election ballot. Is N.D.C.C. § 16.1-11-36 constitutional? The most apposite case is Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

II. The Equal Protection Clause requires similarly situated people be treated alike. The minimum vote requirement in N.D.C.C. § 16.1-11-36 applies the same to all candidates and to all political parties. Does N.D.C.C. § 16.1-11-36 comply with the Equal Protection Clause? The most apposite case is Bogren v. Minnesota, 236 F.3d 399 (8th Cir. 2000).

STATEMENT OF THE CASE

On July 20, 2010, Plaintiffs Libertarian Party of North Dakota (LPND), Thommy Passa (Passa), Anthony Stewart (Stewart), and Richard Ames (Ames) filed a Complaint with the United States District Court for the District of North Dakota. App. R7-R15; Doc. 3.[1] The Complaint names Alvin A. Jaeger, North Dakota Secretary of State (Secretary Jaeger), as defendant. App. R7, R9 (Caption, ¶¶ 4, 10). The Complaint is against Secretary Jaeger in his official capacity. Id. at

[1] "App." refers to the Appellants' Appendix; "Doc." refers to the district court docket number.

R9 (¶ 10). The Complaint challenges the constitutionality of N.D.C.C. § 16.1-11-36. Id. at R12-R14.

Plaintiffs filed a Motion for Preliminary Injunction and supporting memorandum. Docs. 5, 6. Secretary Jaeger filed a Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, a Motion to Dismiss, and a Memorandum in Support of Motion to Dismiss. Docs. 9, 10, 11.

On September 3, 2010, the district court issued its Memorandum Opinion and Order Granting Defendant's Motion to Dismiss and Denying Plaintiffs' Request for a Preliminary Injunction and Judgment in a Civil Case. Add. 2-14; Docs. 16, 17. Plaintiffs timely filed Plaintiffs' Joint Notice of Appeal. App. R5-R6; Doc. 18.

STATEMENT OF THE FACTS

North Dakota law provides two ways for candidates for state legislative office to have their name placed on the primary election ballot. First, candidates may file a Petition of Nomination with their county auditor that contains signatures equal to 1% of the total population of the legislative district. However, no more than 300 signatures are required. See N.D.C.C. § 16.1-11-11(2). Alternatively, candidates endorsed by established political parties in North Dakota may file a Certificate of Endorsement with their county auditor. See N.D.C.C. § 16.1-11-11(1).

Under N.D.C.C. § 16.1-11-36, the challenged statute, candidates for legislative office who receive the highest number of votes within their political party designation at the primary election are automatically placed on the general

election ballot unless the candidate does not receive a number of votes equal to the number of signatures required, or which would have been required, to have the candidate's name placed on the primary election ballot by filing a Petition of Nomination. In other words, a candidate on the primary election ballot receiving the highest number of votes within the candidate's political party will not be placed on the general election ballot if the candidate does not receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. This requirement applies equally to all candidates and all political parties.

According to the Complaint, Passa, Stewart, and Ames are the LPND's 2010 nominees for the North Dakota House of Representatives, 43rd and 17th districts, and the North Dakota State Senate, 25th district. App. R8-R10 (¶¶ 7, 8, 9, 17). Passa, Stewart, and Ames won their primary election races. Id. at R10, R13, R14 (¶¶ 18, 31, 37). However, to be eligible to be placed on the general election ballot, Passa was required to receive 132 votes, Stewart was required to receive 130 votes, and Ames was required to receive 142 votes. Id. at R11 (¶ 23). Passa received only 4 votes; Stewart received only 6 votes; and Ames received only 8 votes. See http://results.sos.nd.gov/. Secretary Jaeger declined to include Passa, Stewart, and Ames on the general election ballot because they did not receive the minimum number of votes required by N.D.C.C. § 16.1-11-36. App. R11-R14 (¶¶ 20, 28, 32, 38).

SUMMARY OF ARGUMENT

Reasonable, generally applicable restrictions on election laws are constitutional if they further important regulatory interests. Requiring candidates make a preliminary showing of substantial support prior to the candidate's name being placed on the general election ballot is an important state interest. Requiring a preliminary showing of support before a candidate's name is put on the general election ballot helps preserve the integrity of the electoral process by preventing the clogging of the ballot with frivolous, fraudulent, or confusing candidacies.

To have the candidate's name included on the general election ballot, N.D.C.C. § 16.1-11-36 requires a candidate on the primary election ballot receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. The United States Supreme Court has held states can constitutionally require candidates demonstrate, through their ability to secure votes at the primary election, that they enjoy a significant modicum of community support.

N.D.C.C. § 16.1-11-36 is reasonable because the minimum vote requirement ties directly to the statute's purpose – to require primary election candidates demonstrate a minimum degree of support to be placed on the general election ballot. The amount of community support required under N.D.C.C. § 16.1-11-36 for a candidate to be eligible for placement on the general election ballot is also minimal, only requiring a candidate in the primary election receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. Basing the minimum number of required votes on a

percentage of the population of the legislative district is reasonable because there is no voter registration in North Dakota, meaning using a percentage of registered or eligible voters is not feasible.

N.D.C.C. § 16.1-11-36 did not place an undue burden on the plaintiff candidates. The plaintiff candidates were only required to receive the number of votes equal to 1% of the population of their legislative districts, which was only 130, 132, and 142 votes. Those amounts are approximately 1.3% of the number of eligible voters in the legislative districts (members of the population 18 years of age or older). The plaintiff candidates in fact received only 4, 6, and 8 votes, which is less than 1% of the actual votes cast.

Under N.D.C.C. § 16.1-11-36, every candidate on the primary election ballot must receive the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less, to have the candidate's name included on the general election ballot. Because N.D.C.C. § 16.1-11-36 applies the same to all candidates and to all political parties, it does not violate the Equal Protection Clause.

STANDARD OF REVIEW

The Court reviews de novo the district court's decision granting a motion to dismiss. Kuelbs v.Hill, 615 F.3d 1037, 1040 (8th Cir. 2010); Crooks v. Lynch, 557 F.3d 846, 848 (8th Cir. 2009).

ARGUMENT

Plaintiffs bear a heavy burden when attempting to prove the unconstitutionality of a state statute. "Since a presumption of constitutionality

attaches to state legislative enactments, a party seeking to challenge a statute under this standard bears a heavy burden." Fitz v. Dolyak, 712 F.2d 330, 333 (8th Cir. 1983) (citations omitted); see also Branson v. O.F. Mossberg & Sons, Inc., 221 F.3d 1064, 1065 n.4 (8th Cir. 2000) (stating "state statutes are presumed constitutional, and the plaintiff has the burden to show otherwise"). Plaintiffs did not and cannot meet their burden in this case.

I. The district court correctly held N.D.C.C. § 16.1-11-36 does not violate the First Amendment.

A. Restrictions on election laws are constitutional if they reasonably and non-discriminatorily achieve important state interests.

The Supreme Court has explained that "voting is of the most fundamental significance under our constitutional structure." Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." Burdick v. Takushi, 504 U.S. 428, 433 (1992). "[T]he rights of voters to associate or to choose among candidates are fundamental, but reasonable election restrictions which are generally applicable and evenhanded are justified by the state's important regulatory interests in protecting the integrity and reliability of the electoral process itself." Coal for Sensible & Humane Solutions v. Wamser, 771 F.2d 395, 399 (8th Cir. 1985). Thus, reasonable, nondiscriminatory restrictions on election laws are constitutional if they further important regulatory interests. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). As explained by this Court, to pass constitutional muster, restrictions on the right of candidates to run for office "must be reasonable and

must be justified by reference to a compelling state interest." MacBride v. Exon, 558 F.2d 443, 448 (8th Cir. 1977).

N.D.C.C. § 16.1-11-36 is constitutional because it is a reasonable, nondiscriminatory way of achieving the State's important regulatory interests.

B. Requiring candidates show substantial support to be placed on the ballot is a compelling state interest.

North Dakota, like other states, has the right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. As explained by the Supreme Court:

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.

Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983).

Requiring those who seek ballot access to make a preliminary showing of support is an important state interest. See Jenness v. Fortson, 403 U.S. 431, 442 (1971) (stating "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot"); Am. Party v. White, 415 U.S. 767, 782-83 (1974) (stating "the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support"); Lee v. Keith, 463 F.3d 763, 769 (7th Cir. 2006) (explaining states "have a strong interest in preventing voter confusion by limiting ballot access to serious candidates who can demonstrate at least some level of political viability"); Lendall v. Bryant, 387 F. Supp. 397, 402 (E.D. Ark. 1975) (stating a state "has the right to keep its ballots

clear of spurious or frivolous candidates, and in that connection to require one who would run as an independent to demonstrate by nominating petitions that he has at least some substantial public support for his candidacy"). Requiring a preliminary showing of support before a candidate's name is placed on the ballot helps avoid "confusion, deception, and even frustration of the democratic process at the general election." Jenness, 403 U.S. at 442; see also Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986) (stating "the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot was compelling" and that "a State may require a preliminary showing of significant support before placing a candidate on the general election ballot"). "The State may understandably and properly seek to prevent the clogging of its election machinery with frivolous, fraudulent or confusing candidacies." McLain v. Meier, 637 F.2d 1159, 1165 (8th Cir. 1980); see also MacBride, 558 F.2d at 448 (stating "the state has a right to protect its ballot from unreasonable congestion, voter confusion and fraudulent or frivolous candidacies").[2] Simply put, a state is not required "to give ballot access to any and all persons who may want to run" for elected office. MacBride, 558 F.2d at 449. Rather, a "state has a perfectly legitimate and compelling interest in requiring of a would-be candidate a showing . . . that his candidacy is not frivolous . . . and that his candidacy has a satisfactory level of

[2] In Munro, the Supreme Court explained a state is not required "to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." 479 U.S. at 194-95.

popular support." Id.[3]

N.D.C.C. § 16.1-11-36 requires a candidate show a minimal amount of support at the primary election to be included as a candidate on the general election ballot. Because requiring a candidate show a "significant modicum" of support before the candidate's name is placed on the ballot is undisputedly an important state interest, N.D.C.C. § 16.1-11-36 is constitutional because it achieves that interest in a reasonable and nondiscriminatory manner.

C. N.D.C.C. § 16.1-11-36 is reasonable and nondiscriminatory.

N.D.C.C. § 16.1-11-36 is reasonable because the minimum vote requirement ties directly to the statute's purpose – to require primary election candidates demonstrate a minimum degree of support to be placed on the general election ballot. Only candidates who do not to have a minimum degree of support, as shown by the primary election, are not placed on the general election ballot.

The amount of community support required under N.D.C.C. § 16.1-11-36 for a candidate to be eligible for placement on the general election ballot is minimal. To be placed on the general election ballot a candidate need only receive in the primary election the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. One percent of the population equals approximately 1.3% of the eligible voters.[4] Thus, to advance to

[3] "[F]rivolous" means "[u]nworthy of serious attention." The American Heritage Dictionary 535 (2d coll. ed. 1991). Candidates who only garner 4, 6, or 8 votes at the primary election are not worthy of serious attention.

[4] Approximately 75% of North Dakota's population is over 18. See http://www.ndsu.nodak.edu/sdc/data/profiles/profilesDP1to4/ND.pdf. The voting requirements in North Dakota are that the individual be a United States citizen, a North Dakota resident, and have attained the age of eighteen years. N.D. Const. art. II, § 1; see also N.D.C.C. § 16.1-01-04 (providing qualifications of electors).

the general election, a candidate at the primary election only needs to receive the number of votes equal to 1.3% of the eligible voters, or 300 votes, whichever is less. Requiring a candidate receive the number of votes equal to 1.3% of the eligible voters or 300, whichever is less, is imminently reasonable. A candidate who does not receive sufficient votes to meet that low threshold has not shown a "satisfactory level of popular support", MacBride, 558 F.2d at 449, much less "a preliminary showing of substantial support," Anderson, 460 U.S. at 788 n.9.

Case law demonstrates requiring a candidate receive the number of votes equal to 1.3% of the eligible voters is not unconstitutionally burdensome. Jenness upheld a law that required a nominating petition be signed "by at least 5%" of the number of registered voters. 403 U.S. at 432. Storer v. Brown, 415 U.S. 724, 739 (1974), was remanded for further factual findings because it was possible the "available pool of possible signers" could be "substantially more than 5% of the eligible pool . . . ." The dissent was concerned the law required signatures from approximately 9.5% of the eligible pool of voters. Id. at 764 (Brennan, J., dissenting). And in Williams v. Rhodes, 393 U.S. 23, 33 n.9 (1968), the Court noted a signature requirement of 1% of the electorate was "relatively lenient." Plaintiffs apparently concede that requiring a showing of support of "5 percent of the eligible pool of voters" is constitutional. See Br. of Appellants 20. N.D.C.C. § 16.1-11-36's requirement the plaintiff candidates receive the number of votes equal to 1.3% of the eligible voters is significantly less than the 5% found constitutional in Jenness and the "substantially more than 5%" questioned in

Storer. Rather, it is essentially the same amount as the 1% the Court referred to as "relatively lenient" in Williams.

N.D.C.C. § 16.1-11-36's reasonableness is further evidenced by the fact it permits placement of a candidate on the general election ballot if the candidate receives in the primary election the number of votes equal to 1% of the population of the candidate's legislative district or 300 votes, whichever is less. By basing the threshold vote requirement on population and a set minimum number of votes, N.D.C.C. § 16.1-11-36 establishes a minimum number of votes, despite district population, that demonstrates a significant modicum of public support, i.e., 300 votes.[5] It is reasonable to require a candidate receive a minimum number of votes or a percentage of the population, whichever is less, to be placed on the general election ballot.

Plaintiffs assert the minimum vote requirement of N.D.C.C. § 16.1-11-36 is unreasonable because it is based on a percentage of the population of the legislative district, rather than a percentage of eligible voters. But there is no case law indicating popular support must be demonstrated based on the percentage of eligible voters rather than the legislative district's population. Furthermore, in light of North Dakota's election laws, it was reasonable for the North Dakota Legislative Assembly to use a percentage of the population of the legislative district rather than a percentage of eligible voters. North Dakota does not have voter registration. See N.D. Const. art. II, § 1; N.D.C.C. §§ 16.1-01-04, 16.1-05-

[5] The plaintiff candidates were required to receive significantly less than 300 votes to have their names placed on the general election ballot. Stewart was required to receive 130 votes, Passa was required to receive 132 votes, and Ames was required to receive 142 votes. App. R11 (¶ 23).

07. Because there is no voter registration, the North Dakota Legislative Assembly could not use a percentage of registered or eligible voters. Using a percentage of the population of the legislative district was a reasonable, quantifiable alternative.

Plaintiffs inaccurately assert that candidates on the primary election ballot have already demonstrated support among the electorate. A candidate may have his name placed on the primary election ballot by filing a "certificate of endorsement signed by the district chairman of any legally recognized political party . . . ." N.D.C.C. § 16.1-11-11(1). A Certificate of Endorsement does not evidence any specific degree of voter support. The fact a statewide political party exists does not evidence voter support for any specific candidate in any particular legislative district.

Furthermore, obtaining adequate signatures to file a Petition of Nomination does not sufficiently demonstrate voter support. The fact a resident signs a Petition of Nomination does not indicate a resident intends to, or require a resident in fact to, vote for that candidate. A resident can sign as many Petitions of Nomination for the same office as the resident chooses, yet the resident can only vote for one candidate for any given office. As evidenced by the facts of this case, the actual voting at the primary election more accurately demonstrates a candidate's level of voter support than a Certificate of Endorsement or Petition of Nomination.[6]

The North Dakota Legislative Assembly can constitutionally require candidates receive a threshold number of votes at the primary election to advance to the general election. As stated by the Supreme Court, "requiring candidates to

[6] It cannot be seriously argued that receiving only 4, 6, or 8 votes at the primary election demonstrates a candidate has a "significant modicum" of public support.

demonstrate," "through their ability to secure votes at the primary election, that they enjoy a modicum of community support" "is precisely what we have held States are permitted to do." Munro, 479 U.S. at 197-98. N.D.C.C. § 16.1-11-36 is a reasonable means of doing "precisely" what the United States Supreme Court has stated it is "permitted to do."

D. N.D.C.C. § 16.1-11-36 did not place an unconstitutional burden on the plaintiff candidates.

N.D.C.C. § 16.1-11-36's requirement the plaintiff candidates receive the number of votes equal to 1% of the population of their legislative district or 300 votes, whichever is less, was not unconstitutionally burdensome as applied to them. It only required they receive the number of votes equal to approximately 1.34% of the eligible voters (residents 18 years of age or older) in their legislative districts.

Passa was only required to receive 132 votes to have his name placed on the general election ballot. App. R11 (¶ 23). There were approximately 10,500 eligible voters in his district.[7] Thus, to get on the general election ballot, Passa only needed the number of votes equal to 1.25% of the eligible voters in his legislative district.

Stewart was only required to receive 130 votes to have his name placed on the general election ballot. Id. at R11 (¶ 23). There were approximately 9,700 eligible voters in his district. Thus, to get on the general election ballot, Stewart

[7] See http://mcdc2.missouri.edu/websas/dp3_2kmenus/us/SLDs/ND38.html for 2000 census data regarding the number of adults in each Senate or House district. 10,563 of North Dakota House District 43's population was over 18 years of age, 9,704 of North Dakota House District 17's population was over 18 years of age, and 10,888 of North Dakota Senate District 25's population was over 18 years of age.

only needed the number of votes equal to 1.34% of the eligible voters in his legislative district.

Finally, Ames was required to receive 142 votes to have his name placed on the general election ballot. Id. at R11 (¶ 23). There were approximately 10,800 eligible voters in his district. Thus, to get on the general election ballot, Ames only needed the number of votes equal to 1.31% of the eligible voters in his legislative district.

N.D.C.C. § 16.1-11-36 only required the plaintiff candidates receive the number of votes equal to approximately 1.34% or less of the eligible voters in their legislative districts. N.D.C.C. § 16.1-11-36 requirement the plaintiff candidates receive the number of votes equal to 1.34% or less of the eligible voters in their legislative districts was not unconstitutionally burdensome.

Significantly, the plaintiff candidates did not receive even a minimal showing of support based on actual voter turnout. Passa received votes equal to .24% of the votes cast (4 out of 1,654). Stewart received votes equal to .20% of the votes cast (6 out of 2,960). And Ames received votes equal to .86% of the votes cast (8 out of 933). See App. R11-R12 (¶¶ 23, 24, 25, 26); http://results.sos.nd.gov/resultsCountyList.aspx?eid=21&type=LEGALL. Thus, not only did the plaintiff candidates not receive the number of votes equal to 1% of the population of their legislative districts, and not only did they not receive the number of votes equal to 1% of the number of eligible voters in their legislative districts, they did not even receive 1% of the actual votes cast. Receiving less than 1% of the votes cast does not demonstrate a significant modicum of support.

E. Plaintiffs have not demonstrated N.D.C.C. § 16.1-11-36 has a history of burdening minor party state legislative candidates.

In an attempt to support their argument N.D.C.C. § 16.1-11-36 creates an undue burden for candidates to get on the general election ballot, Plaintiffs assert North Dakota has not had a minor party candidate for state legislature on the general election ballot since 1976. Br. of Appellants 13, 26. But Plaintiffs bring an as applied challenge. Thus, Plaintiffs must prove N.D.C.C. § 16.1-11-36 imposed an unconstitutional burden on them. See Republican Party v. Klobuchar, 381 F.3d 785, 790 (8th Cir. 2004). As demonstrated above, N.D.C.C. § 16.1-11-36 did not impose an unconstitutional burden on the plaintiff candidates; it only required they receive the number of votes equal to 1.34% or less of the eligible voters in their legislative districts.

Furthermore, Plaintiffs' assertion states results, not causation. Without any factual support, Plaintiffs assume the absence of a minor party candidate for state legislature on the general election ballot is due to N.D.C.C. § 16.1-11-36. Yet Plaintiffs fail to provide a single example, other than themselves, when a minor party candidate for state legislature was excluded from the general election ballot because of not meeting N.D.C.C. § 16.1-11-36's minimum vote requirement. Significantly, and ignored by Plaintiffs, the first step for a minor party candidate to get on the general election ballot is for a minor political party to fulfill the requirements of N.D.C.C. § 16.1-11-30. The second step is for the minor political party to actually have a candidate for state legislative office on the primary election ballot. N.D.C.C. § 16.1-11-36 does not come into play unless a minor political party fulfills the requirements of N.D.C.C. § 16.1-11-30 and has a candidate on the

primary election ballot. In other words, the minimum vote requirement in N.D.C.C. § 16.1-11-36 can only exclude a minor party candidate from the general election if the candidate is actually on the primary election ballot in the first place.

Plaintiffs have not demonstrated whether or how many minor political parties have existed in North Dakota since 1976.[8] More important, other than themselves, Plaintiffs have not demonstrated that a single minor political party candidate for state legislative office has been on the primary election ballot since 1976 to present.[9] Because they have not identified a single minor political party candidate for state legislative office that has been on the primary election ballot since 1976, Plaintiffs have also not demonstrated that, other than themselves, a minor political party candidate for state legislative office has been excluded from the general election ballot by application of N.D.C.C. § 16.1-11-36. Thus, the alleged lack of a minor party candidate for state legislative office on the general election ballot since 1976 in no way demonstrates N.D.C.C. § 16.1-11-36 creates an undue burden for minor political party candidates for state legislative office to be placed on the general election ballot.

Plaintiffs have provided no evidence that minor political party candidates for state legislative office have historically been excluded from the general election ballot by N.D.C.C. § 16.1-11-36. Although courts accept as true well-pleaded facts when considering a motion to dismiss, they do not accept as true factually and logically unsupported conjecture.

[8] LPND only qualified as a party in 2010, and was the only North Dakota recognized minor political party. App. R20-R21 (¶ 12).

[9] Minor political parties often have presidential and congressional candidates but not candidates for state offices.

F. N.D.C.C. § 16.1-11-36 is nondiscriminatory.

In addition to being reasonable, N.D.C.C. § 16.1-11-36 is nondiscriminatory. Its requirement applies equally to all primary election candidates and all political parties. Further, the number of votes required for a candidate to be placed on the general election ballot is based on the population of the candidate's legislative district, meaning the requirement does not discriminate based on the size of the legislative district. See also infra at Section II.

G. *Munro* strongly supports the constitutionality of N.D.C.C. § 16.1-11-36.

The United State Supreme Court's decision in Munro v. Socialist Workers Party strongly supports the constitutionality of N.D.C.C. § 16.1-11-36. Munro, unlike the cases relied upon by Plaintiffs, addressed the constitutionality of a statute requiring a primary election candidate receive a certain number of votes before the candidate's name would be placed on the general election ballot. The challenged statute required "a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot." 479 U.S. at 190. After noting associational rights "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively," id. at 193, the Court stated "it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office," id. The Court explained its prior opinions "establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in

order to qualify for a place on the ballot . . . .'" Id. (quoting Anderson, 460 U.S. at 788-89 n.9). It also stated a state "can properly reserve the general election ballot 'for major struggles' by conditioning access to that ballot on a showing of a modicum of voter support." Id. at 196 (quoting Storer, 415 U.S. at 735).

The Court rejected the appellees' position the "burdens imposed" on appellees' First Amendment rights by the statute "are far too severe to be justified by the State's interest in restricting access to the general ballot." Id. In doing so, the Court rejected the argument that requiring a certain number of "primary votes to qualify for a position on the general election ballot is qualitatively more restrictive than requiring signatures on a nominating petition." Id. at 197. Rather, the Court explained, states can require candidates demonstrate, "through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election." Id. at 197-98. In fact, "requiring candidates to demonstrate such support is precisely what [the Court has] held States are permitted to do." Id. at 198.

In finding the Washington statute constitutional, the Court also rejected Plaintiffs' argument N.D.C.C. § 16.1-11-36 is burdensome because of alleged lower voter turnout at primary elections. The Court wrote: "We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." Id. Washington, by enacting the statute, "has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates." Id. As if it was writing about

the plaintiff candidates in this case, who received only 4, 6, and 8 votes at the primary election, the Court explained states "are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." Id. "As we see it," the Court wrote, "Washington has done no more than to visit on a candidate a requirement to show a 'significant modicum' of voter support, and it was entitled to require that showing in its primary elections." Id.

The Court also noted the Washington statute actually promoted, rather than denied, First Amendment values because the statute permits candidates to campaign at the primary:

> Washington has chosen a vehicle by which minor-party candidates must demonstrate voter support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions. It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election. It is true that voters must make choices as they vote at the primary, but there are no state-imposed obstacles impairing voters in the exercise of their choices.

Id. at 199.

Like the Washington statute, found constitutional by the Supreme Court, N.D.C.C. § 16.1-11-36 permits a candidate "access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign . . . ." Id. Accordingly, like the Supreme Court did with the Washington statute, this Court should find that the magnitude of N.D.C.C. § 16.1-11-36's "effect on constitutional rights is slight" and that the statute is constitutional. Id.

Plaintiffs' attempts to distinguish Munro are futile. First, as demonstrated above, the plaintiff candidates were only required to receive votes equal in number

to approximately 1.3% of the eligible voters.

Second, under North Dakota law, the entire pool of eligible voters was available for the plaintiff candidates to persuade to vote for them. North Dakota does not have voter registration. Because voters do not have to register by party, any voter could have voted for the LPND candidates at the primary election. Plaintiffs' inability to persuade more than 8 of the approximately 10,000 available voters to vote for them simply demonstrates they lacked the requisite public support to get on the general election ballot. See Munro, 479 U.S. 198; Hustace v. Doi, 588 P.2d 915, 925 (Haw. 1978).

Finally, contrary to Plaintiffs' assertions, the plaintiff candidates had not already "demonstrated a substantial modicum of support just by qualifying for North Dakota's primary election ballot." Br. of Appellant 23. The Complaint inaccurately asserts that "[i]n order to be placed on the primary ballot as candidates," the plaintiff candidates "were required to submit a petition containing the signatures of at least one percent of the total resident population of their respective legislative districts, as determined by the most recent federal decennial census, but not more than 300 signatures." App. R11 (¶ 22). But the plaintiff candidates were not on the primary election ballot because they filed Petitions of Nomination with adequate signatures. Rather, the plaintiff candidates were on the primary election ballot because they submitted Certificates of Endorsement, see Declaration of Oliver B. Hall ¶¶ 3, 4, 5, which did not demonstrate any particular level of popular support. See supra at 12. However, even if the plaintiff candidates had qualified for North Dakota's primary election ballot by submitting

Petitions for Nomination, doing so would not demonstrate a substantial modicum of public support. As previously discussed, the fact a resident signs a Petition of Nomination does not indicate a resident intends to, or require a resident in fact to, vote for that candidate. A resident can sign as many Petitions of Nomination for the same office as the resident chooses, yet the resident can only vote for one candidate for any given office.

Hustace v. Doi also supports the constitutionality of N.D.C.C. § 16.1-11-36. Hustace held the requirement a primary candidate obtain 2,760 votes out of available voter pool of 8,500 registered voters was not an undue burden upon access to general election ballot. 588 P.2d at 296-97. Thus, to advance to the general election, the candidate was required to obtain the number of votes equal to over 32% of the available voter pool. In reaching its decision, the court distinguished signature requirement cases, like those relied upon by Plaintiffs, stating: "Different considerations from those which are relevant in the appraisal of a petition signature requirement have a place in appraising the burden imposed by a requirement of a percentage of the vote in a primary election in which the nonpartisan candidate is permitted to participate." Id. at 296. The court noted signatures require personal contact, while a candidate in a primary election "may address an appeal for support to the electorate generally." Id. Of significance, the candidate's voter pool was limited to 8,500 available voters because under Hawaii law "a nonpartisan candidate may seek votes only from voters who are designated nonpartisan or have not voted in a previous primary or have been freed from their previous affiliation by the disqualification of their party or by reregistration." Id.

at 918. This provided no concern to the court. "[T]he fact that appellant had the burden of persuading these voters to accept a nonpartisan ballot did not make it impracticable for appellant to secure sufficient votes to qualify for the general election. Her failure to do so demonstrated that she lacked the requisite "'significant modicum of support.'" Id. at 925.

As primary election candidates, the plaintiff candidates had the opportunity to campaign and persuade voters to support them by voting for them at the primary election. Whether they were running against another party candidate, or simply trying to garner enough public support to have their names placed on the general election ballot, is not constitutionally significant. The undisputed fact is they were only able to persuade 4, 6, and 8 voters, out of approximately 10,000 voters, to vote for them. The primary election results demonstrated the plaintiff candidates lacked a "significant modicum of support" and were not serious candidates entitled to have their names included on the general election ballot.

H. The cases cited by Plaintiffs do not support their position.

The ballot access restriction cases relied upon by Plaintiffs do not involve primary election minimum vote requirements. That fact alone distinguishes this case from the cases Plaintiffs rely upon. As explained in Munro, 479 U.S. at 199, statutes like N.D.C.C. § 16.1-11-36 serve "to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions." As stated in Hustace, 588 P.2d at 296, "[d]ifferent considerations from those which are relevant in the appraisal of a petition signature requirement have a place in appraising the burden imposed by a requirement of a percentage of the vote in a

primary election in which the nonpartisan candidate is permitted to participate." Although Plaintiffs attempt to compare apples to oranges through their cited cases, the cases cited by Plaintiffs are also distinguishable on other grounds.

Anderson v. Celebrezze offers Plaintiffs no support because it is so factually and legally different than the case at hand. In Anderson, the Court reviewed an Ohio election process whereby an independent candidate running for the office of President of the United States was prevented from appearing on the Ohio ballot, despite tendering a nominating petition containing the requisite amount of signatures, due to missing the state's early filing deadline. 460 U.S. at 782. The crux of the Anderson case was the unequal treatment of independent and majority parties with regard to the deadlines of the respective nominees to be placed on the presidential ballot. The Court placed much emphasis on the fact the Ohio process required independents to file early, in mid-to-late March, while candidates for the major-party nominations had five additional months to nominate their candidates for the ballot. Id. at 790-91.

But this case is not about filing deadlines. Furthermore, N.D.C.C. § 16.1-11-36 applies equally to all candidates and to all political parties. Additionally, Anderson focused on the fact that the nomination of the independent candidate was for the office of President. The Court explained that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." Id. at 795. The plaintiffs candidates in this case were candidates for state legislative offices. Those positions are determined solely

within the boundaries of North Dakota. Accordingly, North Dakota has a greater interest in regulating that election process.

The holding in Williams v. Rhodes also does not assist Plaintiffs. Williams concerned numerous aspects of Ohio's election laws, holding "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which . . . is an invidious discrimination, in violation of the Equal Protection Clause." 393 U.S. at 34. In a separate opinion, Justice Douglas described the then structure of Ohio's network of election laws, referring to them as "an entangling web of election laws" which "effectively foreclosed its presidential ballot to all but Republicans and Democrats." Id. at 35. In Jenness, 403 U.S. at 434-37, the Supreme Court discussed Williams. That discussion illustrates the many issues presented by Ohio's statutory election scheme, none of which concerned a preliminary election minimum vote requirement.

Socialist Labor Party v. Rhodes, 318 F. Supp, 1262, 1268 (S.D. Ohio 1970), aff'd, 409 U.S. 942 (1972), simply applied Williams in addressing multiple aspects of "the overall pattern of election laws governing third parties in Ohio." Thus, it is distinguishable from this case on the same grounds as Williams.

MacBride and McLain, which Plaintiffs rely on heavily in their brief, also do not support their position. MacBride addressed Nebraska's statutory scheme requiring a political party to organize and seek certification - 90 days before the state's primary election and nine months prior to the general election - in order to secure a position on the general election ballot. That issue in no way relates to the issue before this Court. However, MacBride is relevant to this case in two

respects. First, the MacBride court explained that to pass constitutional muster, restrictions on the right of candidates to run for office "must be reasonable and must be justified by reference to a compelling state interest." 558 F.2d at 448. This supports the State's assertion that the reasonable, nondiscriminatory standard applies in this case. Second, the MacBride court affirmed that a state is not required "to give ballot access to any and all persons who may want to run" for elected office; rather, a "state has a right to protect its ballot from unreasonable congestion, voter confusion and fraudulent or frivolous candidacies," and "has a perfectly legitimate and compelling interest in requiring of a would-be candidate a showing . . . that his candidacy is not frivolous . . . and that his candidacy has a satisfactory level of popular support." Id. at 448, 449. This language supports the constitutionality of N.D.C.C. § 16.1-11-36.

The issues addressed in McLain also shed no light on the issue before this Court. McLain dealt with ballot access for new political parties and the placement of parties on the ballot. Neither issue is before this Court. The only significance of McLain to this case is the statement "[t]he State may understandably and properly seek to prevent the clogging of its election machinery with frivolous, fraudulent or confusing candidacies." 637 F.2d at 1165. That is the compelling state interest served by N.D.C.C. § 16.1-11-36.

Storer v. Brown also does not assist Plaintiffs. Storer concerned a requirement an independent candidate "file nomination papers signed by voters not less in number than 5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run." 415 U.S. at 726-

27. The signatures had to be obtained "during a 24-day period following the primary and ending 60 days prior to the general election," and none of the signatures could be gathered from persons who voted at the primary election. Id. at 727. Absent the exclusion of signatures of persons who voted at the primary election, the Court noted the requirement "would not appear to be an impossible burden" or an "impractical undertaking" for one who desires to be a candidate. Id. at 740. But, because signatures could not be gathered from persons who voted at the primary election, it appeared "the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute . . . ." Id. Accordingly, the Court wrote, "[b]efore the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President." Id.

This case is not about petition requirements for independent candidates; it is about candidates already on the primary election ballot. It is also not about candidates for the offices of President and Vice President; it is about candidates for state legislative offices. Furthermore, the Court's language in Storer indicates ballot restrictions are constitutional as long as they do not impose "too great a burden," an "impossible burden," or an "impractical undertaking." Id. Of course, Plaintiffs have not demonstrated N.D.C.C. § 16.1-11-36 imposes a burden of that magnitude. Rather, N.D.C.C. § 16.1-11-36 simply and reasonably required the plaintiff candidates garner 130, 132, and 142 votes to demonstrate a minimum

degree of support before they could be placed on the general election ballot. Showing such minimal support at the primary election was not an onerous burden.

Other cases cited by Plaintiffs concern multiple facets of ballot access requirements, not simply signature requirements as implied by Plaintiffs. See, e.g., Lee, 463 F.3d at 770 (finding Illinois's early filing deadline for independents, in conjunction with Illinois's demanding signature requirement, "severely burden First and Fourteenth Amendment rights"); Greaves v. State Bd. of Elections, 508 F. Supp. 78 (E.D.N.C. 1980) (finding North Carolina's ballot access restrictions for independent candidates unconstitutional because they established disparate filing deadlines and required an independent candidate for President file written petitions signed by qualified voters equal in number of ten percent of those who voted for Governor in the last gubernatorial election); Lendall v. Jernigan, 424 F. Supp. 951 (E.D. Ark. 1977) (holding statutory requirement independent candidate for state office file petition signed by 10% of qualified electors unconstitutional when considered in connection with 60-day period allowed for obtaining signatures); Am. Party v. Jernigan, 424 F. Supp. 943 (E.D. Ark. 1977) (addressing petition requirements and filing deadlines for establishing new political parties); Bryant, 387 F. Supp. at 402 (finding ballot access restrictions unconstitutional because the "deadline provision must be read in conjunction with" the requirement the candidate present petitions with signatures of 15% of the voters of his district). Further, as previously stated, this case is not about petition signature requirements, but the requirement a candidate on the primary election ballot demonstrate a significant modicum of support prior to being placed on the general election ballot.

North Dakota "has done no more than to visit on a candidate a requirement to show a 'significant modicum' of voter support, and it was entitled to require that showing in its primary elections." Munro, 479 U.S. at 198.

N.D.C.C. § 16.1-11-36 serves the important state interest of requiring a candidate on the primary election ballot to show a minimal level of popular support before the candidate's name is placed on the general election ballot. It does so in a reasonable and nondiscriminatory manner. Accordingly, because the State's regulatory interests are sufficient to justify the primary election ballot threshold vote requirement, N.D.C.C. § 16.1-11-36 does not violate the First Amendment.

II. The district court correctly held N.D.C.C. § 16.1-11-36 does not violate the Equal Protection Clause.

"In general, the Equal Protection Clause requires that state actors treat similarly situated people alike." Bogren v. Minnesota, 236 F.3d 399, 408 (8th Cir. 2000). But Plaintiffs are not asking that they be treated the same as similarly situated candidates. Rather, they are demanding special treatment. Plaintiffs demand that N.D.C.C. § 16.1-11-36 be applied differently to them than it is to other candidates, i.e., that they not be required to demonstrate the same minimal level of support in the primary election that other candidates are required to demonstrate. Plaintiffs are not requesting equal treatment, but unconstitutionally favorable treatment.

Plaintiffs do not assert N.D.C.C. § 16.1-11-36 treats them differently than other candidates. Rather, they request that they be treated differently than other candidates because the LPND has fewer members and a lower voter turnout than the major political parties. Br. of Appellant 24-25. But LPND's fewer members,

and alleged lower voter turnout, is not a result of unequal treatment. Secretary Jaeger must apply N.D.C.C. § 16.1-11-36 evenhandedly; he cannot unconstitutionally favor the LPND political party or its candidates over other political parties or candidates simply because the LPND party or its candidates lack public support (as evidenced by its admitted "fewer numbers" and the number of votes received by the plaintiff candidates). As stated in Munro, there is "no more force to this argument" than "an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." 479 U.S. at 198. North Dakota is "not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." Id.

Plaintiffs were not placed on the general election ballot, not because of any unequal treatment by Secretary Jaeger or North Dakota law, but because Plaintiffs lacked a satisfactory level of popular support, as evidenced by the limited number of votes (4, 6, and 8) they received at the primary election. N.D.C.C. § 16.1-11-36 accomplished exactly what it was intended and constitutionally permitted to do – it furthered the State's admittedly important and vital interest in requiring candidates demonstrate a significant, measurable quantum of community support prior to their names appearing on the general election ballot. N.D.C.C. § 16.1-11-36 is not unconstitutional as applied to Plaintiffs because it did "no more than to visit on [them] a requirement to show a 'significant modicum' of voter support, and [North

Dakota] was entitled to require that showing in its primary elections." Munro, 479 U.S. at 198.

CONCLUSION

For the above reasons, Defendant/Appellee North Dakota Secretary of State Alvin A. Jaeger respectfully requests that this Court affirm the district court's September 3, 2010 Judgment dismissing the Complaint with prejudice.

Dated this 5th day of January, 2011.

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CERTIFICATE OF SERVICE

Case No. 10-3212

I hereby certify that on January 5, 2011, the following document: **BRIEF OF DEFENDANT/APPELLEE** was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing (NEF) to Oliver B. Hall.

/s/ Douglas A. Bahr
Douglas A. Bahr
Solicitor General

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