No. _____

In the Supreme Court of the United States

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

v.

WILLIAM M. GARDNER, in his official capacity
as Secretary of State of New Hampshire,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit erred in declining to rule that petitioners had a constitutionally-protected right to have the Libertarian Party's nominees for president and vice president listed on the 2008 New Hampshire general election ballot as the sole candidates for those offices with the "Libertarian" designation.

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The decision of the court of appeals is reported at 638 F.3d 6 and is reproduced in the Appendix at 1a-24a. The decision of the district court is reported at 759 F. Supp. 2d 215 and is reproduced in the Appendix at 27a-50a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on February 24, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The petitioners are the Libertarian Party, its candidates for President and Vice President of the United States in 2008, and representative supporters of the party and of those candidates. Petitioners Barr and Root were nominated as the party's candidates for president and vice president at the Libertarian National Convention in May 2008. They and a rival set of candidates for those nominations qualified to be listed on the New Hampshire ballot with the "Libertarian" appellation by obtaining the signatures of New Hampshire voters on nomination petitions, and both sets of candidates were ultimately listed on the ballot as "Libertarian" candidates for president and vice president.

On cross motions for summary judgment, the district court ruled that the respondent secretary of state's refusal to list the Libertarian Party nominees on the ballot as the sole "Libertarian" candidates for president and vice president did not violate petitioners' rights to freedom of political speech and association or to equal protection of law. The court of appeals affirmed.

Petitioner Bob Barr was listed on the ballots of 43 states with the designation "Libertarian" and was listed on the ballots of two additional states with no party designation. District Court Document No. ("Doc.") 19, Att. 1, ¶ 4. New Hampshire is the only state in which an additional candidate for president

was listed on the ballot along with Barr, with the designation "Libertarian." *Id*.

REASONS FOR GRANTING THE PETITION

The Court's attention is respectfully drawn to the sample ballot reproduced in the court of appeals' opinion as an Appendix (refer to page 24a hereof). New Hampshire voters could not help but be confused about the relationship, if any, of the two sets of "Libertarian" candidates for president and vice president (Barr/Root and Phillies/Bennett) to the Libertarian Party and its candidate-selection process. This point may be underscored by considering the confusion that voters surely would have experienced if Ron Paul or another contender for the Republican nomination had sought access to the New Hampshire ballot not by running in the Republican primary election but by circulating nominating petitions, as the Libertarian candidates did, and being listed in the "Other Candidates" column with the designation "Republican."

A court which is tasked with evaluating a constitutional challenge to a state-imposed restriction on access to the ballot

> . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each

> of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged [restriction] is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). This Court explained that

> [u]nder [the *Anderson* standard], the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. ___, ___ 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions [citing *Anderson* at 788] . . . .

Burdick v. Takushi, 504 U.S. 428, 433-34 (1992).

Under the *Anderson/Burdick* test, "[o]nce a plaintiff has identified the interference with the exercise of her First Amendment rights, the burden is on the state to 'put forward' the 'precise interests' . . . [that are] justifications for the burden imposed by its rule." *Anderson* at 789 (internal citations omitted).

Instead of identifying any such "precise interests," the secretary of state simply asserted that "New Hampshire's current system serves significant state interests without violating the 1st and 14th Amendments," Doc. 12, Att. 1 at 12, and that "New Hampshire's election laws serve New Hampshire's legitimate interests in regulating its elections and are constitutional," *id.* at 15. The secretary did not identify any particular state interests that are purportedly served by its limitations on control by minor parties over the use of their names. Even if such limitations were found not to be so unduly burdensome as to call for strict scrutiny, the state would still be required to put forward some important regulatory interest in the limitations for them to be upheld. The state did not do so.

In the absence of any advice to the contrary, it can be assumed that the interest sought to be justified by the limitations is New Hampshire's interest in administering its election processes as it sees fit. But this wholly legitimate state interest cannot justify listing a minor party's presidential nominee on the ballot alongside a defeated competitor who is also designated as a Libertarian candidate for president. The limitations do not pass the *Anderson/Burdick* test.

Impediments to ballot access for minor party and independent candidacies are commonly justified by the state's interests in minimizing voter confusion, *see, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971); discouraging factionalism, *see, e.g., Storer v. Brown,* 415 U.S. 724 (1974); avoiding vote dilution, *see, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); preserving order in the electoral process, *see,*

e.g., Storer v. Brown, supra; avoiding ballot overcrowding, *see, e.g., Lubin v. Panish,* 415 U.S. 709 (1974); and discouraging frivolous candidacies, *see, e.g., id.* In contrast, permitting rival sets of candidates for president and vice president to be listed with the "Libertarian" appellation in the "Other Candidates" column on the New Hampshire ballot operates to *encourage* factionalism, to *foster* vote dilution, to *diminish* order in the electoral process, and to *promote* frivolous candidacies.

Far from minimizing confusion, it can only *exacerbate* voter confusion to list on the general election ballot, with the designation "Libertarian," candidates who were rivals for the party's nomination without explaining their relationship to the party or to its nomination process. How this could possibly promote the orderly administration of elections in New Hampshire is unfathomable. Further, placing the Libertarian nominees and their unsuccessful rivals for the nomination on the same footing by identifying them only as "Libertarian" subverts the political and associational message inherent in listing a candidate on the ballot as a representative of his or her party.

The petitioners' equal protection rights are violated because major parties and their nominees are not subjected to such distortions of their political communications and associations. Indeed, courts have taken pains to accord equal rights to major and minor parties and to their candidates. *See Libertarian Party of New Hampshire v. Secretary of State*, 965 A.2d 1078 (N.H. 2008) (lists of voters must be provided to ballot-qualified and non-qualified parties on the same terms); *see also Green Party of Michigan v. Land,* 541 F. Supp. 2d 912 (E.D. Mich. 2008) (same); *Shultz v. Williams*,

44 F.3d 48 (2d Cir. 1994) (same); *Baer v. Meyer,* 728 F.2d 471 (10th Cir. 1984) (affiliation with non-qualified parties must be permitted on the same terms as with qualified parties); *Green Party of New York v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004) (same).

Baer v. Meyer, supra, is particularly instructive. Like the New Hampshire ballot access framework challenged here, the Colorado framework invalidated by the 10th Circuit in *Baer* entitled only the major political parties to name-protection on the general election ballot and enabled any candidate who qualified for that ballot by petition to select the designation "Libertarian Party" irrespective of the candidate's relationship to the Libertarian Party of Colorado. The district court in *Baer* held the Colorado framework unconstitutional because it permitted unauthorized candidates to dilute the strength of minor parties by using their names. The 10th Circuit found it unnecessary to reach the constitutional issue, relying instead on a decision of the Colorado Supreme Court which accorded minor parties the same name protection given to major parties under Colorado law.

The principal drawback of allowing candidates who qualify for listing in the "Other Candidates" column to select "Libertarian" (or another such designation) for political identification purposes is that it forces the petitioners and similarly situated parties to adulterate their candidate-selection process by throwing it open to persons who are not affiliated with the Libertarian Party and who might even have views that are incompatible with the party's views. The resulting burden on the petitioners' freedom of political associational is particularly severe and is

unconstitutional unless it is narrowly tailored to serve a compelling state interest. No such compelling interest was proffered by the respondent in the lower courts. It was the absence of any sufficiently weighty state interest which led this Court to hold unconstitutional the proposition converting California's primary election from a closed to a blanket primary in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). As in *Jones*, the First Amendment in the case at bar protects the right of the petitioners and others who are similarly situated to associate in furtherance of shared political beliefs. In the case at bar, as in *Jones*, this right is entitled to special protection in the context of a political association's candidate-selection process.

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

In sum, the secretary of state's refusal to list only Barr and Root on the ballot with the "Libertarian" designation does not survive strict scrutiny because it was not justified by a state interest of compelling importance. It does not survive even minimal constitutional scrutiny because it was not justified by

any articulated state interest. Barr and Root were the only Libertarian Party candidates for president and vice president in 2008. The secretary could have, and should have, listed them on the ballot as such. No state interest whatsoever was served by also listing on the ballot a rival, unsuccessful, set of contenders for the party's nominations as "Libertarian" candidates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 10-1360

[Filed February 24, 2011,
Amended March 7, 2011]

LIBERTARIAN PARTY OF NEW HAMPSHIRE ET AL.,

Plaintiffs, Appellants,

v.

WILLIAM M. GARDNER, in his official capacity as Secretary of State of New Hampshire,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. James R. Muirhead, U.S. Magistrate Judge]

Before

Lynch, Chief Judge,
Selya and Howard, Circuit Judges.

Gary Sinawski on brief for appellants.
Nancy J. Smith, Senior Assistant Attorney General, and Michael A. Delaney, Attorney General, on brief for appellee.

February 24, 2011

LYNCH, Chief Judge. This appeal raises constitutional election law issues regarding the listing of political affiliations next to the names of candidates on a state general election ballot.

On New Hampshire's 2008 ballot, in a column headed "Other Candidates," in the row for the offices of President and Vice President, two pairs of candidates were identified as "Libertarian." One pair was Bob Barr and Wayne Root, who had received the Libertarian Party's nomination at its May 2008 National Convention, and the other pair was George Phillies and Christopher Bennett, who had failed to secure the nomination at this convention.

There were also columns on the ballot headed "Republican Candidates" and "Democratic Candidates," and under these headings were listed only the names of the nominees of those parties. At no point did the term "nominee" appear on the ballot, but the ballot may be read as indicating that the names

listed under "Republican Candidates" and "Democratic Candidates" were those respective parties' nominees.

On September 11, 2008, the Libertarian Party of New Hampshire and associated individuals (hereinafter, "the Libertarian Party")[1] brought suit in federal court arguing that the ballot's identification of "Libertarian" candidates who were not the party's nominees violated their First Amendment rights by causing voter confusion, vote dilution, and interference with their associational rights, and also their Fourteenth Amendment rights of equal protection.[2]

Before the election, the Libertarian Party sought declaratory and injunctive relief requiring that the Secretary of State of New Hampshire, William M. Gardner, remove from the ballot the names of the

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[1] Although New Hampshire election law defines the term "party" narrowly as "any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: the office of governor or the offices of United States senators," N.H. Rev. Stat. § 652:11, we will refer to the plaintiffs as the lead plaintiff has described itself, "Libertarian Party." No meaning under state law is to be attached to this name; during the 2008 election, the Libertarian Party was not a recognized political party under state law.

[2] As in Werme v. Merrill, 84 F.3d 479 (1st Cir. 1996), we will not categorically "distinguish between the burdens placed on the rights of the Libertarian Party and those placed on the rights of voters who wish to cast their ballots for that party's candidates," because as "a general matter, political parties purport to represent the interests of their supporters, and 'the rights of voters and the rights of candidates do not lend themselves to neat separation.'" Id. at 484 n.4 (quoting Burdick v. Takushi, 504 U.S. 428, 438 (1992)).

Libertarian non-nominees, Phillies and Bennett, even though they had received the requisite number of petition signatures to qualify for ballot placement. The Libertarian Party argued that it had the right to "substitute" candidates, but what it sought was in effect the removal of the non-nominees from the ballot. The district court scheduled an evidentiary hearing on the preliminary injunction request, but the day before the hearing the Libertarian Party informed the court that it was no longer seeking a preliminary injunction and the court granted its motion to dispense with the hearing.

After the election, in a cross-motion for summary judgment, the Libertarian Party switched gears, stating that its request for relief could also be met by striking the affiliation "Libertarian" from the names of the two Libertarian non-nominees. It explained that it only sought to vindicate the Libertarian Party's right "to control the use of the 'Libertarian' designation by candidates for public office in situations where the party nominates or otherwise endorses candidates," and "to substitute candidacies in appropriate situations."

After finding that the case had not become moot by virtue of the passing of the election, the district court granted summary judgment for the Secretary.

We affirm. The Libertarian Party has failed to identify an unconstitutional burden on its First Amendment rights, having put forward no evidence of actual voter confusion, vote dilution, or other harm to its associational interests. As to the Libertarian Party's Fourteenth Amendment claims, the various distinctions that New Hampshire draws between

candidates who appear on the ballot as nominees of recognized political parties and organizations, and those who appear on the ballot in their individual capacities, are plainly constitutional.

I.

New Hampshire's general election ballot on November 4, 2008 contained five columns. A copy of that ballot submitted to the district court by the Secretary is attached to this opinion as an Appendix. The first column was headed "Offices" and listed vertically the contested offices in the election: President and Vice President of the United States, Governor, United States Senator, and Representative in Congress. The remaining four columns were headed, in order from left to right, "Republican Candidates," "Other Candidates," "Democratic Candidates," and "Write-In Candidates." Listed vertically in these columns were the names of the candidates. In the row corresponding to the offices of President and Vice-President, the Republican and Democratic columns each contained one pair of candidates: John McCain and Sarah Palin, and Barack Obama and Joe Biden, respectively. The Other Candidates column, located between the Republican and Democratic columns, contained the names of three pairs of candidates listed in this order: (1) Ralph Nader and Matt Gonzales, (2) George Phillies and Christopher Bennett, and (3) Bob Barr and Wayne A. Root. The ballot identified Nader and Gonzales as "Independent," and identified each of the remaining two pairs of candidates as "Libertarian." No names were listed in the Write-In Candidates column.

We first describe how candidates qualify to appear on the ballot under New Hampshire law, and then discuss how the listing of their names and party affiliations on the ballot and other pertinent features of elections are regulated by the state.

New Hampshire provides potential candidates with three avenues to placement on the general election ballot. The New Hampshire Supreme Court has described this scheme. See Libertarian Party of N.H. v. New Hampshire, 910 A.2d 1276, 1278-79 (N.H. 2006).

First, a candidate may be placed on the ballot as the nominee chosen in the primary of a state recognized "party." A "party" is defined as a "political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: the office of governor or the offices of United States senators." N.H. Rev. Stat. § 652:11.

Second, a candidate may be placed on the ballot as the nominee of a state recognized "political organization." A political organization may gain state recognition and "have its name placed on the ballot for the state general election by submitting the requisite number of nomination papers." Id. § 655:40-a. It must submit "the names of registered voters equaling 3 percent of the total votes cast in the previous state general election." Id. § 655:42(III).

Third, as an alternative to nomination by party or political organization, "a candidate may have his or her name placed on the ballot for the state general election by submitting the requisite number of

nomination papers." Id. § 655:40. In the case of candidates for President, this avenue requires the signatures of 3,000 registered voters--1,500 from each congressional district in the state. Id. § 655:42(I). These nomination papers must state "the political organization or principles the candidate represents." Id. § 655:40. Both Phillies and Bennett as well as Barr and Root followed this third avenue, gathering the requisite number of signatures and listing "Libertarian" as the political organization or principles that they represented.

Inherent in New Hampshire's statutory scheme for ballot qualification is another set of pertinent distinctions, these going to the appearance of the ballot and the listing of "party columns" and "additional columns." See id. § 656:5(I). There are two ways in which a column on the ballot may be obtained. Any party recognized under state law (that is, one that received at least 4 percent of the prior vote for the pertinent offices) is able to obtain a column and choose the candidates who appear in it; these candidates "shall be arranged upon the state general election ballot in successive party columns," and in general, "[e]ach separate column shall contain the names of the candidates of one party." Id.[3] Any political organization that is recognized under state law (that is, one that obtained nomination signatures equaling at least 3 percent of the total votes cast in the prior state general election) has the same entitlement to a column,

[3] However, "if only a part of a full list of candidates is nominated by a political party, 2 or more such lists may be arranged whenever practicable in the same column." N.H. Rev. Stat. § 656:5(I).

according to the affidavit of the Deputy Secretary of State David M. Scanlan. See also id. §§ 655:40-b, 656:5(I).[4] In the 2008 election, only the Republican and Democratic parties qualified for party columns. The Libertarian Party did not qualify for a party column or a political organization column; if it had done so, its nominees could have been listed under its party name.

Significantly, the Secretary is authorized by state law to list the party affiliations of candidates on the ballot, but that authorization is limited:

> Every state general election ballot shall contain the name of each candidate who has been nominated in accordance with the election laws, except as hereinafter provided, and shall contain no other name except party appellations.

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[4] Although a political organization's entitlement to a column is not clearly stated in the law, Scanlan's affidavit is consistent with the statutory provision referring to "[t]he names of the candidates to be listed on the state general election ballot under the political organization nominated pursuant to RSA 655:40-a," N.H. Stat. § 655:40-b (emphasis added), as well as the provision stating that "the secretary of state shall determine the vertical location of any additional columns that may appear on the ballot," id. § 656:5(I). That the New Hampshire statutory scheme does not use the term "party column" to refer only to recognized parties is also indicated by a provision requiring that the "names of all candidates nominated in accordance with the election laws," not just those nominated by parties, "shall be arranged upon the state general election ballot in successive party columns." Id. (emphasis added).

Id. § 656:4 (emphasis added).[5] The Secretary must comply with this limit on his ability to place information other than "party appellations" on the ballot.[6] The Libertarian Party has not specifically challenged, either on its face or as applied, the limitation in this provision, but rather says its challenge is to the overall scheme that produced the result here.

A third feature of New Hampshire's election law that is worth highlighting has to do with the limits it places on a potential candidate's ability to appear on the ballot by filing individual nomination papers. This avenue of placement on the ballot is not available to an individual who "filed as a candidate in the state primary election." Id. § 655:43(IV). With this disqualification provision, New Hampshire protects recognized party nominees from challenge by primary losers. In the case before us, this provision did not protect Barr and Root from challenge by Phillies and Bennett because the Libertarian Party is not recognized by the state and did not participate in the state primary election. We note that the provision also does not protect a recognized party from challenge by

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[5] At no time did the Libertarian Party propose that the Secretary add the term "nominee" after the term "Libertarian" to the appropriate set of candidates when the different sets of candidates were listed in the Other Candidates column. Because the issue was never raised, we consider it no further.

[6] For a candidate who is not nominated by a party or political organization, the Secretary apparently interprets this provision as requiring or permitting the placement on the ballot of "the political organization or principles the candidate represents," which the candidate is required to list on his or her nomination papers. N.H. Rev. Stat. § 655:40.

a candidate who is affiliated with the party but was not a candidate in the party's primary. And again, the Libertarian Party has not challenged this specific provision of New Hampshire's law.

A final pertinent distinction in New Hampshire's election law has to do with its provisions for the substitution of candidates. A recognized party may, in the event of a vacancy for any office on its party ticket following its primary, designate a new candidate to fill this vacancy. Id. § 655:37. In addition, if a party's nominated candidate dies, or makes an oath of disqualification based on age, domicile, or incapacitating physical disability acquired subsequent to the primary, a new candidate may be substituted by the appropriate party committee. Id. §§ 655:38, 39.[7]

II.

We review de novo the question of whether this case became moot when the election finished, "accepting as true the material factual allegations contained in the complaint and drawing all reasonable inferences therefrom in the plaintiff's favor." Ramírez v. Sánchez Ramos, 438 F.3d 92, 96-97 (1st Cir. 2006). This is a close question. Cf. Barr v. Galvin, 626 F.3d 99, 104-06 (1st Cir. 2010).

If a case is moot, even if it becomes moot on appeal, we cannot hear it because "Article III of the Constitution restricts federal courts to the resolution of actual cases and controversies." Chico Serv. Station,

[7] It appears that all of these substitution provisions apply only to candidates nominated by recognized parties.

Inc. v. Sol P.R. Ltd., No. 10-1200, 2011 WL 228048, at *12 (1st Cir. Jan. 26, 2011) (quoting Overseas Military Sales Corp. v. Giralt-Armada, 503 F.3d 12, 16 (1st Cir. 2007)) (internal quotation marks omitted). "[W]hen the issues presented are no longer live or when the parties lack a legally cognizable interest in the outcome . . . a case or controversy ceases to exist, and dismissal of the action is compulsory." Id. (quoting Cruz v. Farquharson, 252 F.3d 530, 533 (1st Cir. 2001)) (internal quotation mark omitted).

The question here is whether this case falls within the narrow exception to general principles of mootness for cases that raise issues that are "capable of repetition, yet evading review." Cruz, 252 F.3d at 534 (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)) (internal quotation marks omitted). Election cases often fall within this category, Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 18 (1st Cir. 1996), but "not every election case fits within its four corners," Barr, 626 F.3d at 105.

The Supreme Court has placed on the party asserting that a case is not moot the burden of showing "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action again." FEC v. Wis. Right To Life, Inc., 551 U.S. 449, 462 (2007) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)) (internal quotation marks omitted); see also Barr, 626 F.3d at 105.

As to the first prong of this test, it is highly likely that the merits of the constitutional challenge

presented by this case could not have been fully resolved between the time it became ripe and the election. Cf. Barr, 626 F.3d at 106. Here, Phillies and Bennett qualified to be listed on the ballot on July 30, 2008, and Barr and Root qualified on September 3, 2008, which was the deadline. The Libertarian Party filed suit on September 11, 2008. The travel of this case, including appeal, could not have been totally concluded before the election (let alone before the date on which the general election ballot was printed). Indeed, had the Libertarian Party attempted to put on evidence of voter confusion affecting the election, it would have relied in part on post-election analysis. Moreover, as the deadline for qualification by nomination papers is the Wednesday one week before the state office primary election, N.H. Rev. Stat. § 655:43(I), which is the second Tuesday in September, id. § 653:8, the situation complained of could again emerge only two months before the November elections as it did here.

The more difficult question is whether there is a reasonable expectation that what happened here will in fact happen again. This precise situation--the listing of two pairs of names in the Other Candidates column with the same party affiliation--has apparently never come up before in New Hampshire. There is little reason to doubt that there will be a candidate supported by the Libertarian Party in future elections in New Hampshire. The Libertarian Party has had sufficient support in New Hampshire to have its candidates listed on the ballot for at least two decades, so much so that in the 1992 and 1994 elections, the Libertarian Party received enough votes to qualify, under section 652:11, as a "party" in the 1994 and 1996 general elections.

The same issues presented here will only recur, however, if the Libertarian Party does not achieve party or political organization status and resorts, as it did here, to the individual petition process of section 655:40 to get its nominees on the ballot. Although the Libertarian Party qualified as a "party" for the 1994 and 1996 general elections, it lost this status when it received insufficient votes in the 1996 election. In 2000, it received enough signatures to qualify, under section 655:40-a, as a political organization in the 2000 general election, but it has not met this requirement since. It is reasonable to expect that the Libertarian Party will again face a situation in which it does not qualify as a recognized party or political organization, but its nominee succeeds in receiving enough nomination petition signatures to be listed individually on the ballot. Cf. Barr, 626 F.3d at 106. There is, however, more to the equation.

The "problem" complained of only occurs if a qualifying Libertarian individual decides to put his or her name on the ballot despite the Libertarian Party naming another individual as the party nominee. While apparently that had not happened before 2008, it has now happened. That alone may encourage individual Libertarians--or others--who do not end up being nominees to qualify by submitting nomination papers in the future. The state's constitution enshrines the concept that every individual has a right to run for office. See N.H. Const. pt. 1, art. 11 ("Every inhabitant of the state, having the proper qualifications, has an equal right to be elected into office."). Here, Phillies and Bennett knew that they had not won the nomination of the May 2008 Libertarian National Convention when they qualified for placement on the New Hampshire ballot at the end of July 2008. Some

evidence from the Libertarian Party about why it expects its nominees to be challenged by other Libertarian candidates in the future would have been helpful, but none was offered. While the question is close, we conclude that the case is not moot.

III.

Our review of the dismissal of the case is de novo, both because we are reviewing entry of summary judgment and because, in the end, the case presents only issues of law. Chiang v. Verizon New England Inc., 595 F.3d 26, 34 (1st Cir. 2010).

We review all of the First and Fourteenth Amendment claims under the sliding scale approach announced by the Supreme Court in Anderson v. Celebrezze, 460 U.S. 780, 789-90 (1983), and Burdick v. Takushi, 504 U.S. 428, 434 (1992). See Barr, 626 F.3d at 109 (discussing the sliding scale approach); Werme v. Merrill, 84 F.3d 479, 483 (1st Cir. 1996) (same). This method of analysis for election regulations requires an assessment of the burdens, if any, placed on a plaintiff's constitutionally protected rights, followed by an evaluation of the precise interests put forward by the state as justifications for the burdens. Werme, 84 F.3d at 483. If a regulation places "severe restrictions" on a plaintiff's First and Fourteenth Amendment rights, "the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. at 484 (quoting Burdick, 504 U.S. at 434). By contrast, "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. (quoting Burdick, 504 U.S. at 434).

Unlike many election cases, this case is not about denial of access to the ballot or a party's inability to vote for its nominee.[8] See, e.g., Barr, 626 F.3d 99; McClure v. Galvin, 386 F.3d 36 (1st Cir. 2004); Torres-Torres v. Puerto Rico, 353 F.3d 79 (1st Cir. 2003). Rather, this is a case about a state's regulation of what is said on a ballot about the party affiliation of a candidate. See, e.g., Dart v. Brown, 717 F.2d 1491 (5th Cir. 1983) (finding constitutional a state's decision to provide party affiliation on ballot for candidates of parties recognized by the state but not for candidates of unrecognized parties). We consider the asserted First and Fourteenth Amendment "rights" in turn.

A. First Amendment Claims

1. Right of Exclusive Access

The Libertarian Party argued to the district court that it had a right of "exclusive access to the ballot" which was denied by the state. It sought relief that would have removed the names of the non-nominee qualifying Libertarian candidates, Phillies and Bennett.

The Libertarian Party cites no case holding that a political organization or party not recognized as such

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[8] Nor has the Libertarian Party alleged that New Hampshire interfered with its constitutionally protected interest in how it structures its nominating process under Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

by a state has the right to remove from a ballot the names of candidates who otherwise meet state ballot law qualifications and who identify themselves with that organization's philosophy.[9]

The Libertarian Party's cause is not advanced by its attempt to characterize its request to remove the names of Phillies and Bennett as a mere request for "substitution." New Hampshire law provides recognized parties with the right to substitute candidates in limited circumstances. See N.H. Rev. Stat. §§ 655:37-39. But the Libertarian Party makes no argument that these statutory rights are required by the First Amendment. And in any event, none of the conditions under which parties can substitute candidates under New Hampshire law provided the basis for the Libertarian Party's claimed right of substitution. The Libertarian Party was not seeking substitution to fill a vacancy caused by the withdrawal, disqualification, or death of its nominee.

Furthermore, even if the Libertarian Party had demonstrated a burden on its constitutionally protected rights, the state's policy of limiting substitution rights to party candidates is based on its "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." Anderson, 460 U.S. at 789 n.9. "Logically, this interest is advanced by the Secretary's refusal to grant to non-party candidates the right to substitution . . . . Granting such

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[9] There is no question but that Phillies and Bennett are in fact Libertarians and have been active participants in the efforts of the Libertarian Party.

substitution would effectuate an end-run around the signature requirement--a requirement that allows the state to ascertain whether a given candidate has enough support to warrant inclusion on the ballot." Barr, 626 F.3d at 111.

The Libertarian Party's claimed right to deny ballot access to Libertarian candidates it does not endorse, via removal or "substitution" of Phillies and Bennett, fails.

2. Right to Exclusive Use of Name

The Libertarian Party's next claim is that it has a right to exclusive use of its name and that the state was at least obligated to remove the affiliation "Libertarian" from the names of Phillies and Bennett. It contends that the state's failure to do so interfered with its members' rights of association and political speech, and that the use of the Libertarian name by Phillies and Bennett diluted the party's voting strength.

States may grant recognized political parties and organizations the right to control the use of their names. See, e.g., Norman v. Reed, 502 U.S. 279, 290 (1992) ("To prevent misrepresentation and electoral confusion, [a state] may, of course, prohibit candidates running for office in one subdivision from adopting the name of a party established in another if they are not in any way affiliated with the party."); Mass. Gen. Laws ch. 53 § 8 ("If a candidate is nominated otherwise than by a political party the name of a political party shall not be used in his political designation . . . ."). But the Libertarian Party cites no case holding that a political organization or party not recognized as

such by the state has this right under the First Amendment.

What the Libertarian Party appears to be arguing is that it had a free speech right to use the ballot to advertise who its nominees were. But the Supreme Court in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), expressly rejected the argument that a party "has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate." Id. at 363.

In Timmons, the Court upheld a state "fusion" ban that prohibited a candidate from appearing on the ballot as the candidate of more than one party. Id. at 369. The plaintiff, a party that wanted to place on the ballot a candidate who was already representing another party, claimed that the ban burdened the party's right "to communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information." Id. at 362. The Court rejected this argument, explaining that "[b]allots serve primarily to elect candidates, not as forums for political expression." Id. at 363; see also Dart, 717 F.2d at 1499 ("Although the words 'Libertarian Party' did not appear under [its candidate's] name, the Libertarian Party was not denied access to the ballot. . . . It was a candidate, not a party, ballot. . . . As [the party's candidate] was granted access to the ballot, so was the Libertarian Party.").

Timmons built on earlier holdings to similar effect. In Burdick, for example, the Court had explained that "[a]ttributing to elections a more generalized

expressive function would undermine the ability of States to operate elections fairly and efficiently." Burdick, 504 U.S. at 438. And the Court has since returned to the theme, stating not only that the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot," but also that "[p]arties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 453 n.7 (2008).

Even if we assume arguendo that the Libertarian Party has some interest in preventing voter confusion of its nominated candidates with other candidates who also espouse Libertarian ideals, the question of whether it may enlist state officials to prevent such confusion is one we need not reach on the facts before us. Here, the Libertarian Party has made no claim that Phillies and Bennett were not in fact Libertarians or that the ballot was otherwise inaccurate. And it has provided no evidence that the ballot misled voters in any way.[10] On its face, the ballot did not itself indicate that Phillies and Bennett were the nominees of the Libertarian Party. It identified them, as well as Barr and Root, merely as Libertarian. "There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee

[10] There is no requirement that a state show the existence of voter confusion before it imposes reasonable restrictions on ballot access. Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986).

or representative or that the party associates with or approves of the candidate." Id. at 454.

As to the state interests at stake, New Hampshire has a strong interest in identifying candidates in the Other Candidates column with the political organization or principles that they represent. The inclusion of this information helps prevent uninformed voting by giving voters pertinent information about the politics of all candidates on the ballot, not just those listed in the columns of parties. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." Anderson, 460 U.S. at 796.

Further, under the New Hampshire Constitution, "[e]very inhabitant of the state . . . has an equal right to be elected into office." N.H. Const. pt. 1, art. 11. The state's ballot format serves this goal, providing candidates running as individuals with the same opportunities as nominees of recognized parties or political organizations to be identified by their chosen ideology to voters in an effective way.

We reject the Libertarian Party's claim that it had a constitutional right to remove the Libertarian label from the names of Phillies and Bennett.

B. Fourteenth Amendment Claims

We see no viable claim of differential treatment under the Equal Protection Clause and repeat what the Supreme Court said 40 years ago:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.

Jenness v. Fortson, 403 U.S. 431, 441-42 (1971); see also Werme, 84 F.3d at 485.

It is well established that a state may base its recognition of a party, and the benefits of recognition, on the party's past electoral strength or demonstrated support. See Barr, 626 F.3d at 109-10; Werme, 84 F.3d at 484-85. New Hampshire has done so in several ways.

New Hampshire prohibits candidates who participated in the state primary election from qualifying for ballot placement through the submission of independent nomination papers, but it does not place similar prohibitions on candidates who have sought the nomination of unrecognized parties. See N.H. Rev. Stat. § 655:43(IV).

The Supreme Court has made it clear that states have a legitimate interest in preventing "party raiding and 'sore loser' candidacies by spurned primary contenders." Clingman v. Beaver, 544 U.S. 581, 596 (2005); see also Burdick, 504 U.S. at 439 ("The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies."). A state may also insist "that intraparty competition be settled before the general election." Am. Party of Tex. v.

White, 415 U.S. 767, 781 (1974); see also Storer, 415 U.S. at 733-36.

It is entirely rational for a state to conclude, as New Hampshire has done, that it has a stronger interest in preventing "sore-loser" challenges to recognized parties than to unrecognized parties. In the case before us, the Libertarian Party National Convention at which Phillies and Bennett lost was not a state primary, and the winners of that vote, Barr and Root, did not appear on the New Hampshire ballot by virtue of having won. Rather, both sets of Libertarian candidates appeared on the ballot in the same way--by submitting the requisite number of signatures. Unlike the winners of party primaries who are protected by the "sore loser" provision, neither set of Libertarian candidates had demonstrated greater support than the other in the state.

New Hampshire also creates distinctions on the basis of demonstrated support by allowing recognized parties and political organizations to obtain a column for their candidates on the ballot, while providing no such opportunity for candidates who appear on the ballot in their individual capacities. The Libertarian Party does not directly challenge this aspect of New Hampshire's election law, and in any event, this differentiation is plainly constitutional. See, e.g., McLain v. Meier, 637 F.2d 1159, 1168 (8th Cir. 1980) (listing similar cases).

Finally, although New Hampshire allows recognized parties--but not unrecognized parties--to substitute candidates under certain circumstances, those circumstances simply are not involved in this as applied challenge, so the Libertarian Party has no

viable claim of disparate treatment.[11] And even if the Libertarian Party had shown a modest burden on its Fourteenth Amendment rights, New Hampshire has legitimate interests that justify its decision not to provide a substitution mechanism for non-party candidates. See Barr, 626 F.3d at 102.

The Libertarian Party's Fourteenth Amendment claims fail.

IV.

The Libertarian Party has put no material fact in dispute, and there was no error in the use of summary judgment procedure. Nor was there error in the conclusion that its constitutional rights were not violated. Judgment for the Secretary is affirmed.

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[11] The Libertarian Party also alleged that New Hampshire allows a recognized party to prevent candidates in the Other Candidates column from using its name, but this is not the case; candidates who appear in the Other Candidates column may in fact list Republican or Democratic as their affiliation, so there is no disparate treatment here either.

Appendix

ABSENTEE
OFFICIAL BALLOT FOR
NASHUA – WARD 1
GENERAL ELECTION
NOVEMBER 4, 2008

SECRETARY OF STATE

INSTRUCTIONS TO VOTERS

1. **To Vote.** Completely fill in the oval ● to the right of your choice. For each office vote for not more than the number of candidates stated in the sentence: "Vote for not more than ____." If you vote for more than the stated number of candidates, your vote for that office will not be counted.

2. **To Vote by Write-in.** To vote for a person whose name is not printed on the ballot, write in the name of the person in the "write-in" space. Completely fill in the oval ● to the right of your choice.

OFFICES	REPUBLICAN CANDIDATES	OTHER CANDIDATES	DEMOCRATIC CANDIDATES	WRITE-IN CANDIDATES
For President and Vice-President of the United States Vote for not more than 1	John McCain Sarah Palin ○	Independent Ralph Nader "Matt" Gonzalez ○ Libertarian George Phillies Christopher Bennett ○ Libertarian "Bob" Barr Wayne A. Root ○	Barack Obama "Joe" Biden ○	President and Vice-President ○
For Governor Vote for not more than 1	Joseph D. Kenney ○	Libertarian Susan M. Newell ○	John Lynch ○	Governor ○
For United States Senator Vote for not more than 1	John E. Sununu ○	Libertarian "Ken" Blevens ○	Jeanne Shaheen ○	U.S. Senator ○
For Representative in Congress Vote for not more than 1	Jennifer Horn ○	Libertarian Chester L. Lapointe II ○	Paul W. Hodes ○	Rep. in Congress ○

United States Court of Appeals
For the First Circuit

No. 10-1360

[Filed February 24, 2011]

LIBERTARIAN PARTY OF NEW HAMPSHIRE ET AL.,	)
Plaintiffs, Appellants,	)
v.	)
WILLIAM M. GARDNER, in his official capacity as Secretary of State of New Hampshire,	)
Defendant, Appellee.	)

JUDGMENT

Entered: February 24, 2011

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of New Hampshire.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment for the Secretary of State of New Hampshire is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. Nappen, Mr. Sinawski, Mr. Blevens and Ms. Smith.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 08-cv-367-JM

[Filed February 18, 2010]

Libertarian Party of New Hampshire, et al.	)
v.	)
William M. Gardner, in his official capacity as Secretary of State of New Hampshire	)

O R D E R

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

rights to freedom of association, of speech in the form of voting, and to due process and equal protection. Before the court are cross motions for summary judgment. For the reasons set forth below, defendant's motion (document no. 12) is granted and plaintiffs' motion (document no. 19) is denied.

Background

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

To secure a distinct "party column" on the ballot, a political organization must either satisfy the definition of a "party" under New Hampshire law by having received at least four percent of the votes at the preceding state general election for governor or United States senator, see RSA 652:11 (2008), or it must petition to be placed on the ballot by submitting a sufficient number of signatures in support of its

nomination to the ballot. See RSA 655:40-a (2008) (allowing a political organization ballot access if nominating papers are signed by 3% of registered voters from the previous general election).[1] In 2008, the Libertarian Party was not entitled to its own column on the ballot because it failed to satisfy either the statutory definition for a party or the statutory process for nomination to the ballot. See RSA 652:11 & 655:40-a; see also Def.'s Mot., Ex. A, ¶¶ 4-6. As a result, in the 2008 presidential election, candidates representing the Libertarian Party appeared on the New Hampshire ballot in the "Other Candidates" column.

In the "Other Candidates" column, several names appeared. Running for the offices of President and Vice President of the United States in that column were three sets of candidates: (1) Ralph Nader and his running mate, Matt Gonzalez, ran as Independent candidates; (2) George Phillies and his running mate, Christopher Bennett, ran as Libertarian candidates; and (3) plaintiffs Barr and his running mate Root also ran as Libertarian candidates. These candidates appeared on the New Hampshire ballot pursuant to the statutory provisions for a candidate "who intends to have his name placed on the ballot for the state general election by means other than nomination by

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

party primary." RSA 655:14-a (2008).[2] Since the LPNH was not a recognized party under New Hampshire law in 2008, its candidates had to access the ballot by means other than nomination by party. See Def.'s Mot., Ex. A, ¶¶ 5 & 6, and Ex. C, ¶ 3. In fact, both Phillies and Barr got onto the ballot by filing the requisite number of signatures from New Hampshire supporters. See RSA 655:40 & 655:42, I (requiring 3,000 registered voters sign nomination papers to nominate a candidate for president); see also Def.'s Mot., Ex. C, ¶¶ 4 & 5.

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

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

constitutional right to have Barr and Root be the sole nominees on the ballot and to have had the names of Phillies and Bennett, who were defeated at the Libertarian Party convention, removed from the New Hampshire general election ballot.

Discussion

1. Mootness

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

2. Summary Judgment Standard of Review

The parties agree that there are no genuine issues of material fact, rendering the matter appropriate for summary disposition. See Fed. R. Civ. P. 56(c) (allowing for summary judgment when the record is

undisputed); see also Quinn v. City of Boston, 325 F.3d 18, 28 (1st Cir. 2003). Summary judgment provides the means to "pierce the boilerplate of the pleadings" and "dispos[e] of cases in which no trialworthy issue exists." Id. The party moving for summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), with the court construing the evidence and all inferences reasonably drawn therefrom in the light most favorable to the nonmovant. See Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001). Once the moving party has met its burden, the burden shifts to the nonmovant to "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 94 (1st Cir. 1996) (citations omitted). Neither conclusory allegations, improbable inferences, nor unsupported speculation are sufficient to defeat summary judgment. See Carroll v. Xerox Corp., 294 F.3d 231, 236-37 (1st Cir. 2002); see also Price v. Canadian Airlines, 429 F. Supp. 2d 459, 461 (D.N.H. 2006). On cross motions for summary judgment, the standard of review is applied to each motion separately. See Am. Home Assur. Co. v. AGM Marine Contrs., 467 F.3d 810, 812 (1st Cir. 2006); see also Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review.").

3. Test for Constitutionality

Plaintiffs contend New Hampshire's statutory scheme for placing candidates' names and party affiliations on the general election ballot is unconstitutional. Although several statutes regulate the election process in New Hampshire, plaintiffs have not clearly identified which statutes unconstitutionally preclude them from effectively exercising their claimed "right to substitute" Barr and Root for Phillies and Bennett. Plaintiffs challenge generally the provisions that enable statutorily recognized parties to control which names appear on the ballot, arguing they should be allowed to control which Libertarian candidates appear on the ballot just like those political organizations which have secured a party column on the ballot do.[3] Though plaintiffs challenge the provisions that give a "party" different treatment on the ballot than the Libertarian Party received, they concede that the statutory definition of "party" is constitutional and that they were not a statutorily recognized party in 2008. See Pl.'s Reply to Def.'s Mot. (document no. 24) ("Pl.'s Reply") at 2.[4]

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

[4] Had they not made this concession, plaintiffs would have been collaterally estopped from litigating the constitutionality of the definition here, because that issue and New Hampshire's ballot access statutory scheme have already been found to be constitutional. See Libertarian Party N.H. v. State, 154 N.H. 376, 383-86, 910 A.2d 1276, 1282-84 (2006); see also Werme v. Merrill, 84 F.3d 479, 484 (1st Cir. 1996) (finding definition of party constitutional in the context of selecting ballot clerks because it depends on the neutral criterion of success at the polls); Geiger v.

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

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

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Foley Hoag LLP Ret. Plan, 521 F.3d 60, 66 (1st Cir. 2008) (discussing preclusive effect of state court judgments); In re Zachary G., 159 N.H. 146, 151, 982 A.2d 367, 371-72 (2009) (explaining collateral estoppel under New Hampshire law).

effective manner. See Werme, 84 F.3d at 483 (citing authority).

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

> The level of scrutiny to be applied corresponds roughly to the degree to which a challenged regulation encumbers First and Fourteenth Amendment rights. Consequently, a court weighing a challenge to a state election law must start by assessing "the character and magnitude of the asserted injury" to the plaintiff's constitutionally protected rights and then "evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule."

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

4. Analysis

a. Plaintiffs' Asserted Injuries

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

(i) Right to Substitute

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

justify removing Phillies and Bennett while keeping Barr and Root.

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

The cases plaintiffs cite in support of their claim that the right to substitute names has been upheld by many jurisdictions are neither controlling nor apposite to the instant matter. See Pl.'s Mot. at 11-12.[5] In

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

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

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

(ii) Right to Vote

Nothing in the ballot format violates plaintiffs' right to cast an effective or meaningful vote. Though the right to vote is fundamental to our system of democracy, it is well-settled that the right to vote in

any manner is not absolute. See Burdick, 504 U.S. at 433 (citing Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) and Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)). Ironically, rather than creating a barrier that precluded plaintiffs' choice and thereby blunted their right to cast a meaningful vote, see id. (discussing when regulatory barriers may be constitutional), New Hampshire's 2008 general election ballot expanded the choice of candidates beyond what plaintiffs wanted. Plaintiffs present no evidence that they were unable to vote for the candidate of their choice. They also fail to support their claim of voter confusion with any evidence that even suggests voters mistakenly cast their vote for Phillies/Bennett when they intended to vote for Root/Barr. The ballot clearly designated the choices, enabling voters to cast their votes for the Libertarian candidate they preferred, much like what happens in a primary election.

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

access statutory scheme have burdened their First Amendment right to vote.

(iii) Right to Political Association

Plaintiffs next assert that their freedom of association rights entitle them to control the use of their party name. They argue this control is necessary to prevent voter confusion about who the party endorses and to prevent dilution of their political power, which allegedly occurred when both Phillies/Bennett and Barr/Root were listed on New Hampshire's ballot as Libertarian candidates. They take particular issue with the fact that listing both sets of candidates did not convey that the Libertarian Party had nominated Root and Barr as its candidates for president and vice president, rather than Phillies and Bennett. Plaintiffs now contend that the ballot's "Other Candidate" column, which allows any candidate to designate his or her party affiliation regardless of whether the party endorses the candidate, infringes on the freedom of political association.

Plaintiffs are correct that the Libertarian Party has a First Amendment right to determine who best represents the party and to elect that standard bearer as the party's nominee for president and vice president. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (explaining how the First Amendment protects political freedom); see also id. at 371 (Stevens, J. dissenting) (stating that recognized political parties "unquestionably have a constitutional right" to select their nominees and to communicate that choice to the voting public); Colo. Republican Fed. Campaign Comm'n v. FEC, 518 U.S. 604, 616 (1996) ("The independent expression of a

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

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

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidates and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

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

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

Plaintiffs, however, were not on the ballot as a recognized party entitled to its own column. Instead they, like Phillies and Bennett, appeared as "Other Candidates," chosen by the supporters who selected them as the best representatives of those voters. In such circumstances, the rights of the voters to associate for political purposes were protected and advanced by New Hampshire's ballot and its equal recognition of both the Phillies/Bennett and the Root/Barr tickets. See Burdick, 504 U.S. at 44 n.10 ("It seems to us that limiting the choice of candidates to those who have complied with state election law

requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable."). Plaintiffs' associational rights are not greater than the associational rights of Phillies and Bennett or their supporters, whose numbers were substantial enough to hoist those candidates onto the ballot as well. Plaintiffs have not demonstrated any constitutional or statutory basis to justify removing Phillies and Bennett from the ballot while keeping themselves on it.

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

(iv) Right to Equal Protection

Finally, plaintiffs contend that New Hampshire's ballot, with its two sets of Libertarian Party candidates in the "Other" column, discriminated against them by interfering with their right to control whose names were affiliated with their party, while parties with their own column on the ballot can control which candidates appear as their nominees. Plaintiffs'

argument appears to be that since the major parties are allowed to designate their candidates for the respective public offices on the ballot, they also should be allowed to do so. The fallacy of plaintiffs' argument is twofold.

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

Simply because plaintiffs did not take advantage of either provision to obtain their own column on the ballot does not mean that the statutes discriminate against them or other minor parties. Like the Republican and Democratic parties, they have the opportunity to meet, and in the past have met, the statutory requirements to obtain their own column on the general election ballot. See RSA 652:11 & 655-40-a; see also Def.'s Mot, Exs. A & C (stating Libertarian Party's history of being on the New

Hampshire ballot). "Equality of opportunity exists, and equality of opportunity – not equality of outcomes – is the linchpin of what the Constitution requires in this type of situation." Werme, 84 F.3d at 485.

Second, the "Other Candidate" provision, RSA 655:40, which Root and Barr used to get onto the ballot, does not differentiate between party affiliations and requires all "other candidates" to file nomination papers at the same time and in the same manner as the major party candidates. See RSA 655:14-a (requiring other candidates to file declarations of intent during the same time period in which party candidates must file) & 655:43 (providing filing deadlines). My reading of RSA 655:40 indicates that plaintiffs construe its provisions too narrowly. Nothing in the plain language of the statute would prevent a disgruntled member of the Democratic or Republican party from acquiring the requisite voter support and getting on the ballot as an "other candidate" pursuant to the provisions of RSA 655:40, like both Barr and Phillies did here.[6] In that event, the major parties are susceptible to the exact, same alleged potential voter confusion and vote dilution as plaintiffs claim they suffer. The statutory scheme applies equally to all parties and all potential candidates, including the requirement that all candidates declare their party affiliations. See RSA 656:4 (providing that every state general election

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

ballot shall contain the names of the candidates and their party appellations). There is no distinction between major and minor parties in the "Other Candidates" column to support the conclusion that the ballot violates plaintiffs' equal protection rights.

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

b. State's Interests

As the foregoing analysis demonstrates, New Hampshire's ballot and the statutory scheme supporting it do not violate plaintiffs' rights to vote or to equal protection and only very minimally burden their right to political association. "Because . . . the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction." Burdick, 504 U.S. at 438. Accordingly, New Hampshire's election regulations will be upheld as long as they reasonably advance important state interests. See id. at 434 ("when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." (internal quotation omitted)); see also McClure, 386 F.3d at 45 (declining to speculate "as to

all of the other conceivable ways in which the state could have set up its framework").

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

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

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

Plaintiffs' related challenge is to the state's refusal to remove Phillies and Bennett from the ballot. Plaintiffs take considerable issue with New Hampshire's law that enables competing candidates to each appear on the ballot as representing a single party when that party has only endorsed one of the candidates. Without repeating the lengthy analysis of New Hampshire's "Other Candidate" column set forth above, suffice here to say that there was nothing unconstitutionally burdensome about having both the Barr/Root and the Phillies/Bennett tickets on the 2008 ballot. Whatever minimal burden the ballot's dual presentation of these candidacies may have had on plaintiffs' associational rights was offset by the state's valid and important interest in protecting equally the rights of plaintiffs and of the Phillies/Bennett supporters to associate politically and to have equal access to the ballot.[7] The state's interest in

[7] Although not explicitly identified by defendant, states also have a legitimate interest in ensuring that intra-party competition is

administering elections fairly is advanced by this election code, which provides equal access to New Hampshire's ballot.

Finally, plaintiffs argue unpersuasively that the State's decision to keep Phillies and Bennett on the ballot resulted in the "unauthorized use" of their party name. As discussed above, Phillies and Bennett had as much right as Root and Barr to appear on New Hampshire's 2008 ballot as Libertarian candidates because they got onto the ballot as "Other Candidates" by representing voters who were affiliated with the Libertarian Party. New Hampshire's requirement that all candidates declare their party affiliation furthers the state's interest in administering fair elections as well, because "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." Timmons, 520 U.S. at 375 (Stevens, J., dissenting (internal quotation omitted).

The function of elections is to elect candidates, and the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of

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

channeling expressive activity at the polls." Burdick, 504 U.S. at 438. New Hampshire's general election ballot and its ballot access statutory scheme are politically neutral regulations that advance its interests in administering fair, honest and efficient elections and maintaining political stability. The state's interests advanced by its ballot access statutory framework outweigh the very minimal infringement on plaintiffs' political associational rights.

Conclusion

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

SO ORDERED.

/s/ James R. Muirhead
James R. Muirhead
United States Magistrate Judge

Date: February 17, 2010

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

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 08-cv-367-JM

[Filed February 18, 2010]

Libertarian Party of New Hampshire et al.	)
	)
v.	)
	)
William M. Gardner	)
	)

J U D G M E N T

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

By the Court,

/s/ James R. Starr

James R. Starr, Clerk

February 18, 2010

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