UNITED STATES COURT OF APPEALS

for the

EIGHTH CIRCUIT

Case No. 10-3212

THE LIBERTARIAN PARTY OF NORTH DAKOTA, RICHARD AMES, THOMMY PASSA and ANTHONY STEWART,

Appellants,

- v. -

ALVIN A. JAEGER,

Appellee.

ON APPEAL FROM THE ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION, AT NO. 3:10-CV-00064-RRE-KKK

REPLY BRIEF OF APPELLANTS

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Appellee Alvin A. Jaeger ("Secretary Jaeger") argues at length in his brief that North Dakota may enact "reasonable" ballot access restrictions, but that has never been in dispute in this case. Rather, the issue to be decided on this appeal is only whether the Constitution permits North Dakota to enact the particular restriction imposed by N.D.C.C. § 16.1-11-36 ("Section 16.1-11-36"), which requires that winners of partisan primary elections receive a minimum number of votes – equal to as much as 15 percent of the entire vote cast – in order to access the general election ballot. R11-R12. It does not. Appellants Libertarian Party of North Dakota ("LPND"), Richard Ames, Thommy Passa and Anthony Stewart (the "Candidates," and together with LPND, the "Libertarians") therefore submit the instant Reply Brief to make three main points: First, Secretary Jaeger fails to show that Section 16.1-11-36 furthers any legitimate state interest; Second, Secretary Jaeger fails to defend the constitutionality of the burden that Section 16.1-11-36 imposes; and Third, Secretary Jaeger fails to address the disparate impact that Section 16.1-11-36 imposes on the Libertarians.

ARGUMENT

I. SECRETARY JAEGER FAILS TO DEMONSTRATE THAT NORTH DAKOTA HAS A LEGITIMATE INTEREST IN REQUIRING THAT WINNERS OF PARTISAN PRIMARY ELECTIONS RECEIVE A MINIMUM NUMBER OF VOTES IN ORDER TO ACCESS THE GENERAL ELECTION BALLOT.

Secretary Jaeger contends that Section 16.1-11-36 furthers a legitimate state interest by excluding "frivolous" candidacies from North Dakota's general election ballot, Brief of Appellee at 7-9, but in fact, the statute is particularly *unsuited* to serve that purpose. By its own terms, Section 16.1-11-36 is specifically directed at candidates who 1) win their primary election races; 2) after successfully qualifying for inclusion on the primary election ballot; 3) of a political party that likewise successfully qualified for inclusion on the primary election ballot. N.D.C.C. § 16.1-11-36; Addendum ("Add.") at 14. As such, the statute exclusively targets candidates who, by definition, have already made a "preliminary showing of a significant modicum of support." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

In this case, the Candidates were only authorized to appear on North Dakota's primary election ballot because the Libertarians first submitted a nomination petition signed by 7,000 qualified electors, as required by law. R9-R10; *see* N.D.C.C. § 16.1-11-30. According to Secretary Jaeger, however, this petition "does not evidence voter support" for the Candidates, because the 7,000 electors who signed it were not "required" to vote for them. Brief of Appellee at 12. This contention simply misapprehends the purpose of a nomination petition, which is not to serve as a binding contract to vote for particular candidates, but rather to *nominate* them for inclusion on the ballot. Thus, as the statute itself specifies, the 7,000 electors who signed the LPND nomination petition were

"requesting the names of its candidates to be included" on North Dakota's ballot. N.D.C.C. § 16.1-11-30.

Despite the plain meaning of this statutory language, Secretary Jaeger nevertheless insists that the primary election returns measure the Candidates' level of electoral support "more accurately" than a nomination petition signed by 7,000 electors, which expressly requests their inclusion on the ballot. Brief of Appellee at 12. That is incorrect. As this Court has repeatedly recognized:

> The American political system is basically the two-party system with which all are familiar, and ordinarily popular dissatisfaction with the functioning of that system sufficient to produce third party movements and independent candidacies does not manifest itself until after the major parties have adopted their platforms and nominated their candidates.

MacBride v. Exon, 558 F.2d 443, 449 (8th Cir. 1977). Therefore, in *MacBride*, the Court held Nebraska's ballot access statutes unconstitutional and in violation of the First and Fourteenth Amendments insofar as they required the Libertarian Party to make "a showing of popular support" in advance of the primary election. *Id.* at 448-49. The very same rationale applies to Section 16.1-11-36, which also requires that minor party candidates demonstrate popular support before the major party nominees are even known. N.D.C.C. § 16.1-11-36; Add. at 14.

This Court expressly adopted the rationale of *MacBride* to strike down North Dakota's previous ballot access scheme in its entirety, on the ground that its relatively high signature requirement and early filing deadline were "unnecessarily

oppressive." *See McLain v. Meier*, 637 F.2d 1159, 1163-65 (8th Cir. 1980). Thus, the Court observed:

> While voters are not required to exercise their franchise or participate in the political process within the framework of organized political parties, most voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties. This dissatisfaction often will not crystalize until party nominees are known. Accordingly, *it is important that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary*.

Id. at 1164 (citations omitted) (emphasis added). Section 16.1-11-36 plainly violates this dictum by preventing voters from expressing support for minor party candidates after the primary election. R11-R12.

Contrary to Secretary Jaeger's unsupported assertion, therefore, *MacBride* and *McLain* demonstrate that primary election returns are an inherently *inaccurate* measure of support for minor party candidates, because primary elections occur before voters can possibly know who the major party nominees are, much less register dissatisfaction with them. *See MacBride*, 558 F.2d at 449; *McLain*, 637 F.2d at 1164. The record thus provides no support for Secretary Jaeger's subjective belief that the Candidates are "frivolous" – notwithstanding his repeated citation to their primary vote totals. Brief of Appellee at 9 n.3. Rather, the record is replete with examples from states that do not impose a minimum vote requirement, in which minor party candidates received only single-digit votes in primary elections,

but went on to receive a plurality or even a majority of the general election vote. R19-R20.

In sum, Section 16.1-11-36 does not serve any legitimate state purpose. It specifically targets candidates who have demonstrated a significant modicum of electoral support, and denies them ballot access on the basis of an inherently inaccurate and unreasonable standard. The statute is both superfluous and arbitrary, which explains why no other state in the nation, except North Dakota, imposes a minimum vote requirement on winners of partisan primary elections.[1] R17.

II. SECRETARY JAEGER FAILS TO PROVIDE ANY BASIS FOR UPHOLDING THE UNCONSTITUTIONAL BURDEN IMPOSED BY SECTION 16.1-11-36.

[1] Minnesota and Washington were the only other states that imposed such requirements, but courts struck down both states' statutes as unnecessary to further any legitimate state purpose. *See In re Candidacy of Independence Party Candidates v. Kiffmeyer*, 688 N.W.2d 854 (Minn. 2004) (striking down Minnesota minimum vote requirement); *Libertarian Party of Washington v. Reed*, No. 04-CV-2019742 (September 28, 2004) (unpublished opinion) (holding Washington minimum vote requirement unconstitutional and granting injunctive relief to Libertarian Party candidates for Governor and U.S. Senate). By contrast, the Hawaii case on which Secretary Jaeger relies is inapposite, Brief of Appellee at 21 (citing *Hustace v. Doi*, 588 P.2d 915 (Haw. 1978), because Hawaii's minimum vote requirement applies only to independent candidates, who may access the state's primary ballot with relative ease, and may advance to the general election provided that they receive more votes than a primary election winner. *See* Haw. Rev. Stat. § 12-41(b) (1985); *see also Burdick v. Takushi*, 504 U.S. 428 (1992) (discussing Hawaii's ballot access scheme).

In the proceedings below, Secretary Jaeger made no attempt to defend the constitutionality of the burden imposed by Section 16.1-11-36. The District Court likewise failed to identify or address that burden, but upheld the statute solely on the ground that "denial of access to the general election ballot for candidates without a substantial modicum of support is justified by compelling state interests." Add. at 13. As a matter of law, therefore, the District Court failed to provide any basis for its dismissal of the Libertarians' claim for a declaratory judgment holding Section 16.1-11-36 unconstitutional.[2] R12-R13.

In an attempt to remedy this deficiency, Secretary Jaeger now asserts, for the first time on appeal, that Section 16.1-11-36 is "not unconstitutionally burdensome," because its minimum vote requirement, as applied to the Candidates, was "equal to approximately 1.34% of the eligible voters." Brief of Appellee at 13. To arrive at this statistic, however, Secretary Jaeger invokes a standard that is neither recognized by nor consistent with the Supreme Court's ballot access jurisprudence. Specifically, Secretary Jaeger defines the pool of "eligible voters" as the entire adult population of a legislative district. Brief of Appellee at 5.

[2] The District Court entered its Opinion and Order granting Secretary Jaeger's Motion to Dismiss less than 24 hours after the Libertarians filed their Opposition to that Motion. R3. The District Court's effort to dispose of this election law matter "urgently," while commendable, thus resulted in a decision that fails to address the legal arguments on which the Libertarians primarily rely to establish that Section

As the Libertarians have demonstrated, Section 16.1-11-36 required that the Candidates receive a minimum number of votes in the primary election equal to as much as 15 percent of the pool of eligible voters. R11-R12; Brief of Appellants at 10-14. In arriving at that percentage, the Libertarians followed the Supreme Court's definition of "eligible pool" as the total number of voters in the election. *See Storer v. Brown*, 415 U.S. 724, 739 (1974). Secretary Jaeger protests that North Dakota "could not use" that definition, because the state does not require voter registration, Brief of Appellee at 11-12, but that is simply incorrect. Irrespective of its policy regarding voter registration, North Dakota could follow Supreme Court precedent by defining the "modicum of support" that candidates must show in order to access the ballot as a percentage of the total number of votes cast in an election. *See Storer*, 415 U.S. at 732, 739.

Moreover, if Secretary Jaeger wishes to expand North Dakota's definition of "eligible pool" to include the entire adult population of an electoral district, then his comparison of the relative burdens imposed by Section 16.1-11-36 and the statutes under consideration in *Storer* and the other cases cited by the Libertarians is not mathematically valid. Brief of Appellants at 10-14. The total number of actual voters in an electoral district is far smaller than the total number of adults

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16.1-11-36 is unconstitutional. Add. at 13; *see* Plaintiffs' Opp. to Def. Jaeger's Mot. to Dismiss at 1-2.

residing therein. It is axiomatic, therefore, that requiring candidates to show support from "X" percent of actual voters in an electoral district is not as burdensome as requiring them to show support from that same percentage of the district's entire adult population.

In sum, Secretary Jaeger has failed to defend the constitutionality of the burden imposed by Section 16.1-11-36, because his only attempt to do so relies on a redefinition of terms that is inconsistent with Supreme Court precedent. Further, the statute is plainly unconstitutional, because it requires a showing of support more than three times greater than the limit established by *Storer*, *Jenness* and the other cases cited by the Libertarians. *See Storer*, 415 U.S. at 739; *Jenness*, 403 U.S. at 442; Brief of Appellants at 10-14.

III. SECRETARY JAEGER FAILS TO ADDRESS THE UNEQUAL IMPACT THAT SECTION 16.1-11-36 IMPOSES ON MINOR PARTY CANDIDATES.

The entirety of Secretary Jaeger's discussion of the Equal Protection Clause consists of his assertions that Section 16.1-11-36 is "non-discriminatory" because it "applies equally to all primary election candidates and all political parties," and that he is obliged to "treat similarly situated people alike." Brief of Appellee at 17, 28. Secretary Jaeger thus fails to address the same constitutional infirmity that the District Court overlooked. Namely, as this Court has recognized,

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *MacBride*, 558 F.2d at 449 (citing *Jenness*, 403 U.S. at 441-42).

In this case, the invidious discrimination occasioned by Section 16.1-11-36 arises from the fact that minor parties such as LPND are not "similarly situated" with the older, established parties in the American two-party system. *See supra* Part I (citing *MacBride*, 558 F.2d at 449; *McLain*, 637 F.2d at 1164). Thus, "it is no defense to argue," as Secretary Jaeger does, "that all political parties face the same obstacles to ballot access," because therein lies the discrimination. *MacBride*, 558 F.2d at 449. Contrary to Secretary Jaeger's assertion, therefore, the Libertarians do not seek "favorable treatment," Brief of Appellee at 28, but rather a "reasonable" opportunity to access North Dakota's general election ballot, which is what the Constitution requires. *McLain*, 637 F.2d at 1165; *cf. Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (exempting minor party from campaign finance disclosure requirements because it was not similarly situated to major parties).

In this connection, the Court properly considers the past experience of minor parties, "which has not been particularly happy in North Dakota." *McLain*, 637 F.2d at 1165 (citing *Storer*, 415 U.S. 724). Just as in *McLain*, the record in this case "shows that third parties have not qualified for ballot position in North Dakota

with regularity, or even occasionally." *Id.* In fact, no minor party candidate for state legislature has appeared on North Dakota's ballot since 1976. R17. Secretary Jaeger contends that the record contains "no evidence" to prove "causation" – *i.e.*, that Section 16.1-11-36 is to blame for the dearth of such candidates, Brief of Appellee at 15-16 – but *Storer* does not require such proof. Rather, in that case the Supreme Court merely counseled that past experience will be "a helpful if not unerring guide to the constitutionality of access requirements." *McLain*, 637 F.2d at 1165 (citing *Storer*, 415 U.S. at 742).

Here, the complete failure of minor party legislative candidates to comply with Section 16.1-11-36 since 1976, contrasted with the relative ease with which major party candidates routinely comply with it, supports the conclusion that the statute imposes a disparate impact on minor parties, in violation of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, and those set forth in the Libertarians' Brief of Appellants, the decision below should be reversed, and this case should be remanded to the United States District Court for the District of North Dakota.

Dated: January 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 28A(h)

This brief complies with the word limit requirements of F.R.A.P. 32(a) because:

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This brief complies with the electronic filing requirements of L.A.R. 31.1(c) because:

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/s/ Oliver B. Hall
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2011, I served a copy of the foregoing Reply Brief of Appellant, on behalf of all Plaintiff-Appellants, by the Court's ECF system, upon the following:

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