

**IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

**THE CONSTITUTION PARTY
of NEW MEXICO and
JON ROSS BARRIE,
Petitioners,**

v.

**DIANNA J. DURAN, in her official capacity
as New Mexico Secretary of State,
Respondent.**

**SUPREME COURT OF NEW MEXICO
FILED**

NOV 25 2013



VERIFIED EMERGENCY PETITION FOR WRIT OF MANDAMUS

PETITIONERS the Constitution Party of New Mexico and Jon Ross Barrie, for their Verified Emergency Petition for Writ of Mandamus, state as follows:

Jurisdiction

1. This is an action to overturn the New Mexico Secretary of State's July 18, 2013 determination that the Constitution Party of New Mexico is not qualified as a minor political party in New Mexico for the 2014 election cycle, and to compel the New Mexico Secretary of State to recognize the Constitution Party of New Mexico as a qualified minor political party in New Mexico for the 2014 election cycle.

2. The New Mexico Supreme Court has constitutionally invested original jurisdiction in mandamus against all State officers, boards and commissions. Art. VI, § 3, Constitution of the State of New Mexico.
3. Due to the necessity of the Supreme Court resolving a disputed legal question concerning interpretation of provisions of New Mexico's Election Code, as applied in this instance, and the limited time in which to obtain relief and direct action to provide ballot access for the 2014 election cycle, this matter is addressed directly to the New Mexico Supreme Court.

Parties

4. Petitioner the Constitution Party for New Mexico is a recognized minor political party in the State of New Mexico.
5. Petitioner Jon Ross Barrie is a resident of the State of New Mexico.
6. Petitioner Jon Ross Barrie is a member of, and the chairman of, the Constitution Party of New Mexico.
7. Petitioner Jon Ross Barrie desires to be a declared candidate for public office in New Mexico during the 2014 election cycle, running for office under the Constitution Party.
8. Respondent Dianna J. Duran is the duly elected Secretary of State for the State of New Mexico.

9. In her capacity as Secretary of State, Respondent Dianna J. Duran is responsible for the administration of the New Mexico Elections Code [Chapter 1 NMSA 1978].
10. Petitioners have no plain, speedy and adequate remedy in the ordinary course of law, and the Supreme Court should issue a Writ of Mandamus compelling the New Mexico Secretary of State to recognize the Constitution Party of New Mexico as a qualified minor political party in New Mexico for the 2014 election cycle.

Facts

11. On January 30, 2012, in accordance with the New Mexico “Primary Election Law” [NMSA 1978, §§1-8-10 to 1-8-52] and the “Presidential Primary Act [NMSA 1978, §§ 1-15A-1 to 1-8-11], New Mexico Governor Susana Martinez issued a “Primary Election Proclamation.”
12. At the time of the Governor’s “Primary Election Proclamation” in January 2012, the Constitution Party was a qualified minor political party recognized by the State of New Mexico.
13. During the 2012 election cycle, the Constitution Party fielded Virgil Goode and Jim Clymer as candidates for President and Vice President of the United States.

14. During the 2012 election, the Constitution Party candidates Virgil Goode and Jim Clymer were listed as candidates for President and Vice President of the United States on the ballot in the State of New Mexico.

15. The Constitution Party candidates Virgil Goode and Jim Clymer received 982 votes out of a total of 783,757 total votes cast for President and Vice President of the United States in the November 2012 election.

16. On July 18, 2013, the New Mexico Secretary of State sent a letter to the then-chairman of the Constitution Party of New Mexico. (Exhibit 1).

17. The New Mexico Secretary of State's July 18, 2013 letter stated that because the Constitution Party's candidates for President of the United States did not receive .5% of the total votes cast, the Constitution Party no longer qualifies as a minor political party in New Mexico for the upcoming 2014 election cycle.

18. On November 1, 2013, the New Mexico Secretary of State sent a letter to individuals who are recognized as registered Constitution Party members in the State of New Mexico. (Exhibit 2).

19. The New Mexico Secretary of State's November 1, 2013 letter stated that:

- A. "In the 2012 General Election, the Constitution Party's candidate for president of the United States did not receive the required percentage

required by law for the Constitution Party to remain an active political party in New Mexico.”

B. “The Secretary of State’s office is required by law to notify all registered Constitution Party voters that the party is no longer a qualified political party.”

C. “To re-qualify, the Constitution party would be required to submit petition signatures and comply with the requirements under the Election Code for political parties.”

20. Under the New Mexico Election Code [Chapter 1 NMSA 1978], the deadline for the Constitution Party to submit requisite petitions to re-establish the party as a qualified minor political party in New Mexico is April 1, 2014.

21. Under the New Mexico Election Code [Chapter 1 NMSA 1978], the deadline for candidates of the Constitution Party to submit nominating petitions to run as candidates of the Constitution Party in New Mexico is June 26, 2014.

ISSUE

Improper Disqualification under NMSA §1-7-2(C)

22. Petitioners incorporate paragraphs 1 through 21 above as if set forth herein in full.

23. The New Mexico Election Code is set forth in Chapter 1 NMSA 1978.

24.NMSA 1978, Section 1-7-1 states:

“All nominations of candidates for public office in New Mexico made by political parties shall be made pursuant to the Election Code [Chapter 1 NMSA 1978]. No political party shall be permitted to have the names of its candidates printed on any election ballot unless and until it has qualified as provided in the Election Code.”

25.NMSA 1978, Section 1-7-2(C) states:

“A qualified political party shall cease to be qualified for the purposes of the Election Code [Chapter 1 NMSA 1978] if two successive general elections are held without at least one of the party's candidates on the ballot or if the total votes cast for the party's candidates for governor or president of the United States, provided that the party has a candidate seeking election to either of these offices, in a general election do not equal at least one-half of one percent of the total votes cast for the office of governor or president of the United States, as applicable. No later than March 15 of an odd-numbered year, the secretary of state shall send notice of nonqualification to the state chair of any political party that fails to remain qualified. The notice shall be delivered by registered mail to the last known address of the state

chair of the political party, and a copy shall be kept in the secretary of state's file of parties qualified in New Mexico.”

26.NMSA 1978, Section 1-7-2(D) states:

“The secretary of state shall then notify all county clerks of the removal and nonqualification of the political party and shall post the notice on the web site maintained by the secretary of state. The secretary of state shall within forty-five days notify by mail all voters registered as members of such party of the removal and nonqualification of the party.”

27.From the language of the Secretary of State’s two letters, it is readily apparent that the Secretary of State has based her determination the Constitution Party is no longer a qualified minor political party upon NMSA 1978, §1-7-2(C).

28.The New Mexico Election Code requires the Secretary of State to meet two unequivocal deadlines in notifying a qualified political party and its members if the party has been nonqualified under NMSA Section 1-7-2(C) for the failure of its candidate for president to obtain the requisite number of votes. These deadlines are:

A. “March 15 of an odd-numbered year” to notify the state chair of the political party, which would have been Friday, March 15, 2013 based upon the 2012 election cycle; and,

B. Within “forty-five days notify by mail all voters registered as members of such party,” or 45 days from March 15, 2013 based upon the 2012 election cycle, which would have been Monday, April 29, 2013.

29. The New Mexico Secretary of State did not notify the Constitution Party of her decision that the party “no longer qualifies as a minor political party in New Mexico” until July 18, 2013, which was more than four months after the statutory deadline.

30. The New Mexico Secretary of State did not notify the registered voters of the Constitution Party of her decision that their party “no longer qualifies as a minor political party in New Mexico” until November 1, 2013, which was more than six months after the statutory deadline.

31. The New Mexico Legislature’s intent in setting unequivocal deadlines for the Secretary of State to notify political parties and party members of the determination the party is “nonqualified” under NMSA 1978, §1-7-2(C) following a given general election cycle should be interpreted as ensuring a political party has an adequate and reasonable length of time to “requalify” under NMSA 1978, §1-7-2(A).

32. The New Mexico Secretary of State should be required to follow the clear requirements set by the Legislature in NMSA 1978, §§1-7-2(C) and (D) for

providing notice of nonqualification to the state chair of the Constitution Party and to its registered voter members.

33. Petitioner the Constitution Party has been injured as a minor political party in its ability to field qualified candidates for elected public office by the Secretary of State's failure to timely notify the Constitution Party of its "nonqualified" status.

34. Petitioner Jon Ross Barrie has been injured as a qualified candidate for elected public office by the Secretary of State's failure to timely notify the Constitution Party of its "nonqualified" status.

35. Other members of the Constitution Party have been injured as qualified candidates for elected public office by the Secretary of State's failure to timely notify the Constitution Party and its members of its "nonqualified" status.

36. "In construing election statutes, no construction of constitutional or statutory provisions is to be indulged which will defeat or unduly restrict or obstruct the free exercise of the elective franchise unless such is compelled by the strict letter of the law." 1963-64 Op. Att'y Gen. No. 63-139.

37. "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, *Williams v. Rhodes*, 393 U.S. 23,

30 (1968), and may not survive scrutiny under the First and Fourteenth Amendments.” *Munro, Secretary of State of Washington v. Socialist Workers Party*, 479 U.S. 189, 193 (1986).

38. “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975), and cases cited. In several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest, *American Party of Texas v. White*, 415 U.S. 767, 780-781 (1974), that is achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity.” *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976).

39. The New Mexico Secretary of State has no legitimate, compelling or vital interest in delinquently complying with the provision of NMSA §1-7-2(C) of the New Mexico Election Code, when doing so prejudices a minor party from being able to timely requalify for political party status in accordance with the New Mexico Election Code.

40. The New Mexico Secretary of State has no legitimate, compelling or vital interest in delinquently complying with the provision of NMSA §1-7-2(C) of the New Mexico Election Code, when doing so prejudices and unfairly & unnecessarily burdens a minor party's candidate's equally important interest in the continued availability of political opportunity.

41. The New Mexico Secretary of State has no legitimate, compelling or vital interest in delinquently complying with the provision of NMSA §1-7-2(D) of the New Mexico Election Code, when doing so prejudices register voters of a minor party from being able to timely assist their political party in requalifying for political party status in accordance with the New Mexico Election Code.

42. The Secretary of State's determination that the Constitution Party is disqualified based upon the delinquent application of NMSA 1978, §1-7-2(C) as stated in the Secretary of State's July 18, 2013 letter has violated the rights of the Constitution Party and its individual members to associate for political purposes.

43. The Secretary of State's determination that the Constitution Party is disqualified based upon the delinquent application of NMSA 1978, §1-7-2(D) as stated in the Secretary of State's November 1, 2013 letter has violated the rights of the individual members of the Constitution Party to associate for political purposes.

44. The Secretary of State's determination that the Constitution Party is disqualified based upon the delinquent application of NMSA 1978, §1-7-2(C) should be overturned, and the New Mexico Secretary of State should be required to place the name of Jon Ross Barrie and any other member of the Constitution Party upon the 2014 general election ballot as a candidate for political office, notwithstanding that all such Constitution Party candidates are required to meet all other requirements of the Election Code.

WHEREFORE, Petitioners the Constitution Party of New Mexico and Jon Ross Barrie respectfully request that the New Mexico Supreme Court:

- A. Issue a Peremptory Writ of Mandamus, compelling the Secretary of State to rescind its determination that the Constitution Party no longer qualifies as a minor political party in New Mexico for the upcoming 2014 election cycle, and;
- B. Determine that the New Mexico Secretary of State's application of NMSA §1-7-2(C), as applied in this matter, violated the legislative notice requirements, and;
- C. Determine that the New Mexico Secretary of State's application of NMSA §1-7-2(C), as applied in this matter, violated legislative intent, and;

- D. Issue a Writ of Alternative Mandamus requiring the Secretary of State to rescind its determination that the Constitution Party no longer qualifies as a minor political party in New Mexico for the upcoming 2014 election cycle, and;
- E. Under NMSA 1978, §44-2-12, and NMRA Rules 12-403(B) and 12-504(F), award Petitioners their costs and attorneys fees incurred, and;
- F. Issue such further and necessary relief as the Court deems just and appropriate.

Most Respectfully Submitted,
LAKINS LAW FIRM, P.C.



Charles N. Lakins, Esq.
PO Box 91357
Albuquerque, NM 87199
(505) 404-9377
Facsimile (877) 604-8340

Certificate of Service

I, Charles N. Lakins, do hereby certify that on the 25th day of November 2013, I served a copy of this *Verified Emergency Writ for Petition of Mandamus* on the New Mexico Secretary of State and the Attorney General for the State of New Mexico.



Charles N. Lakins, Esq.

I certify that in accordance with NMRA Rule 12-504(G), this Petition was prepared using Word 2007 with Times New Roman 14 point-type, and there are a total of 2,388 words in the pleading.



Charles N. Lakins, Esq.



STATE OF NEW MEXICO
DIANNA J. DURAN
SECRETARY OF STATE

July 18, 2013

Mr. Patrick M. McKinney
Constitution Party of New Mexico
8310 Krim, NE
Albuquerque, New Mexico 87109

Registered mail

RE: Constitution Party Ballot Access

Mr. McKinney:

In the 2012 General Election, the Constitution Party's candidate for president of the United States received 982 votes, or .13% of the total votes cast for that office.

In order to remain qualified as a political party, the Constitution Party candidate for president would have had to receive .5% of the total vote. As such, the Constitution Party no longer qualifies as a minor political party in New Mexico for the upcoming 2014 election cycle.

The Constitution Party may requalify as a political party by submitting a petition containing the names, signatures, addresses of registration, and counties of residence of at least one-half of one percent of the total votes cast for governor in the 2010 general election. That number is 3,014 voters. The petition must be submitted to our office no later than the first Tuesday in April, 2014. I enclose a petition form for your convenience.

If you have any questions or concerns please feel free to contact our office.

Best regards,



Bobbi Shearer
Director, Bureau of Elections

Exhibit
1



STATE OF NEW MEXICO
DIANNA J. DURAN
SECRETARY OF STATE

November 1, 2013

RE: Disqualification of Constitution Party

Dear Constitution Party registered voter:

In the 2012 General Election, the Constitution Party's candidate for president of the United States did not receive the required percentage required by law for the Constitution Party to remain an active political party in New Mexico.

The Secretary of State's office is required by law to notify all registered Constitution party voters that the party is no longer a qualified political party.

To re-qualify, the Constitution party would be required to submit petition signatures and comply with the requirements under the Election Code for political parties.

If you have any questions please feel free to contact our office.

Best regards,

A handwritten signature in black ink, appearing to read "Bobbi Shearer", with a long horizontal line extending to the right.

Bobbi Shearer
Director, Bureau of Elections

Exhibit
2

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Respondent.**

AFFIDAVIT OF JON ROSS BARRIE

**STATE OF NEW MEXICO)
)ss.
COUNTY OF BERNALILLO)**

COMES NOW the Affiant, Jon Ross Barrie, being first duly sworn upon his oath, and states as follows:

1. I, Jon Ross Barrie, am the Chairman of the Constitution Party of New Mexico, a Petitioner in this matter.
2. I, Jon Ross Barrie, am also the Individual Petitioner named in this matter.
3. I, Jon Ross Barrie, state and affirm that I have read the Petition for Writ of Mandamus and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NOT.

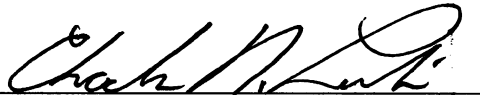


Jon Ross Barrie

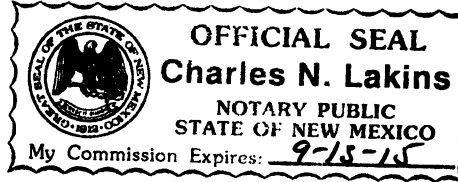
AFFIDAVIT OF JON ROSS BARRIE NOTARIZATION PAGE

The foregoing instrument was acknowledged before me this 22nd day of November 2013 by Jon Ross Barrie.

Witness my hand and official seal.



Notary Public



My Commission Expires: 9-13-15