IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 34,431

THE CONSTITUTION PARTY OF NEW MEXICO and JON ROSS BARRIE,

Petitioners,

SUPREME COURT OF NEW MEXICO
FILED

DEC 16 2013

v.

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

Respondent.

RESPONSE TO VERIFIED EMERGENCY PETITION FOR WRIT OF MANDAMUS

Petitioners seek to overcome the black letter application of New Mexico law by asking this Court to order the certification of the Constitution Party of New Mexico for the 2014 election cycle. New Mexico law provides a mechanism by which a minor party may be certified for an election, and Petitioners seek to avoid compliance with that mechanism. Because the Constitution Party was decertified by operation of law, and because it has not otherwise taken the steps necessary for certification, it is not entitled to certification under the statute.

However, in light of a New Mexico federal court ruling on December 9, 2013, which declared Section 1-7-4 unconstitutional, both the Secretary of State and the three minor parties disqualified in 2013 by the operation of Section 1-7-2

stand in a position of uncertainty with regard to the upcoming 2014 election cycle. The April deadline for minor parties to file qualifying petitions has been declared unconstitutional, and the federal court has declined to provide any guidance as to a specific date that it would consider to be constitutional. If the Court upholds the automatic disqualification of the minor parties under Section 1-7-2, in light of the federal ruling, the Secretary and the minor parties will be placed in the untenable position of not knowing when the minor party petitions are due.

On the other hand, if the court grants the Petitioners' request for the 2014 election cycle, the minor parties would have certainty as to ballot access, and the legislature would have the opportunity to address the provisions of Section 1-7-4 in the 2015 60-day legislative session. The Secretary of State acts in a ministerial capacity and stands ready to stipulate to and operate under this Court's ruling in either case.

BACKGROUND

On November 6, 2012, New Mexicans took to the polls to elect, among other offices, the President of the United States. In that election, the Constitution Party ran Virgil Goode and Jim Clymer for the offices of President and Vice-President, respectively. Mr. Goode and Mr. Clymer received 982 votes out of a

total of 783,758 votes cast for that office. Mr. Goode accordingly received .13% of the votes cast for the office of President.

In March, 2013, the Secretary of State's office initially did not notify the minor parties of disqualification, operating under the interpretation of Section 1-7-2 relied upon by the Petitioner. However, in July, the office reviewed additional historical evidence and requested the advice of the Attorney General's Office. The Attorney General's office advised that the party was disqualified by operation of law and that the Secretary of State's office should proceed with the notification letters. Thereafter, by letter dated July 18, 2013, the Secretary of State notified the Constitution Party of New Mexico that it had been decertified by operation of NMSA 1978, § 1-7-2(C). By letter dated November 1, 2013, the Secretary of State also provided notification of the Constitution Party's decertification to those New Mexico voters registered as members of the party.

ARGUMENT AND AUTHORITIES

Though Petitioners correctly note that Respondent did not provide notification of the Constitution Party's decertification by the March deadline set forth in NMSA 1978, § 1-7-2(D), Petitioners incorrectly assert that such notification is somehow a condition precedent to such decertification. It is not. To the extent Petitioners are entitled to any kind of mandamus relief from the

Secretary of State, it is relief they have already obtained, *i.e.*, the notification that the Secretary has already provided.

I. DECERTIFICATION OF A POLITICAL PARTY DOES NOT TURN ON ANY NOTIFICATION FROM THE SECRETARY OF STATE.

The decertification of political parties is governed by Section 1-7-2(C), which provides two mechanisms for such decertification. First, a party is decertified if it fails to run any candidates for any office in two successive general election cycles. Second, the statute provides that a party "shall cease to be qualified" as a political party 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.

NMSA 1978, § 1-7-2(C).

There is no dispute that the Constitution Party ran a candidate for the office of President of the United States in 2012. There is likewise no dispute that the party's candidate for that office, Virgil Goode, failed to receive a number of votes equal to one-half of one percent of the total votes cast for the office. Thus, by the mandatory language of Section 1-7-2, which provides that a party "shall" be decertified under those conditions, the Constitution Party of New Mexico "cease[d] to be qualified" by operation of law.

The second sentence of Section 1-7-2, using the same mandatory language, provides that the Secretary of State shall provide notice of such decertification to the decertified party no later than March 15 of the following year. Section 1-7-2(D) further requires the Secretary of State to provide similar notification to the registered members of the party within 45 days of the notification provided to the party itself.

The language directing the Secretary of State to provide such notification is not a condition precedent to the decertification of a political party. That decertification occurs based solely on the results of the election, and not on the provision of notice. So what, then, is the Secretary of State's obligation? What non-discretionary duty does the Secretary of State have in the context of a political party's decertification? The answer is simple – it is the ministerial duty to provide notice of the decertification. A party seeking to enforce through mandamus the Secretary's non-discretionary duty is entitled to the performance of that duty, and nothing more.

In other words, the Constitution Party is entitled to notice from the Secretary of State of the party's decertification. As Petitioners concede, the Secretary has already provided that notification. When Petitioners ask this Court to "overturn" the Secretary's "determination" (Petition, ¶ 1) that the Constitution Party is not

qualified for the 2014 election cycle, they misunderstand the process. There is nothing to overturn; the Secretary of State performed the ministerial task of providing notice of the results of the 2012 presidential election, and the operation of the statute, and made no determination of any kind. What Petitioners really seek is a ruling from this Court overturning Section 1-7-2(C) – it is that provision, and that provision alone, that caused the Constitution Party's decertification.

Petitioners, however, make no case for such a result. They make no argument that the mechanism set forth in Section 1-7-2(C) is somehow unconstitutional or otherwise unenforceable. To the extent they have any complaint about the lateness of the Secretary's notice, they are legally entitled only to an order requiring the Secretary to provide that notice.

This is not the first time a court in New Mexico has considered the effect of late notification (or the complete absence of notification) from the Secretary of State to a party decertified by reason of its candidate's performance. In *Woodruff, et al. v. Herrera*, Case No. 1:09-cv-449 in the United States District Court for the District of New Mexico, the plaintiffs sought precisely the relief Petitioners seek here – the recertification of a minor party decertified when its presidential candidate received less than one-half of one percent of the votes cast for the office. Like Petitioners, the plaintiffs argued that they were entitled to recertification

because the Secretary of State had not complied with the notice provisions of Sections 1-7-2(C) and (D). There, the Secretary of State provided no notice of any kind. The district court disagreed that the failure to provide that notice provided adequate grounds to recertify the minor party.

The same result obtains here. Petitioners are not entitled to the relief they seek, and any relief to which they are legally entitled has already been given. The Court should accordingly deny the Petition.

II. ANY RELIEF CONNECTED TO THE DEADLINE FOR SUBMISSION OF PETITION SIGNATURES IS MOOT.

Petitioners assert the party, Petitioner Barrie, and other of its members have been harmed by the lateness of the Secretary's notification concerning the party's decertification. *See* Petition, ¶¶ 33-35. Petitioners, however, provide neither a description of that harm nor an explanation for how the Secretary has caused it. At best, Petitioners seem to suggest that, because the party did not receive notification of its decertification in March, it has not had a "reasonable length of time" to obtain the signatures required for recertification. (Petition, ¶ 31.)

The party's deadline for submitting the petition signatures required by NMSA 1978, ¶ 1-7-2(A) has already been extended by the United States District Court for the District of New Mexico. In *Constitution Party of New Mexico, et al. v. Duran*, Case No. 1:12-cv-00325, the federal District Court has issued an order

declaring unconstitutional the April deadline for minor party petition signatures. A copy of the order is attached as Exhibit 1. While the order does not establish an alternative deadline (the court expects the legislature to do so), it undoubtedly has the legal effect of extending the Constitution Party's time for filing the petition signatures it must file.[1] Accordingly, to the extent the Constitution Party is entitled to additional time to file its petition signatures, that time has already been allotted by a federal court order under which the Secretary is now operating.

Historically, the Constitution Party has received no such notice. As such, Petitioners have a difficult case to make that they have been disadvantaged by receiving notice of the party's decertification from the Secretary of State in July. In 2008, the Constitution Party ran Chuck Baldwin for the office of President of the United States. He received 1,597 votes. The total number of votes cast for the office of President in 2008 was 830,149. Mr. Baldwin thus received .19% of the total votes cast for the office, and the Constitution Party was automatically decertified. The Secretary of State provided no notice – not even late notice – of that decertification. Nonetheless, the Constitution Party managed to gather the required number of signatures to qualify as a party for the 2012 election cycle, and it did so by the April deadline provided by law.

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1 Petitioners do not challenge those petition signature requirements, and are right not to do so, as they have been upheld in the face of multiple constitutional attacks.

In 2004, the Constitution Party ran Michael Peroutka for the office of President of the United States. He received 771 of the 756,304 votes cast for the office, a total of .1%. The Constitution Party then gathered the requisite number of petition signatures to be recertified. The party also ran a candidate in 2000 who failed to gather one-half of one percent of the votes cast for the office of President.

The Constitution Party has thus been automatically decertified in each of the last four presidential election cycles and has complied with New Mexico law to obtain recertification each time. Although the party contends that it required notice that the performance of its presidential candidate has resulted in its decertification, it has not historically received such notice and has nonetheless requalified. Petitioners have had no problems in the past taking the steps legally required for recertification.

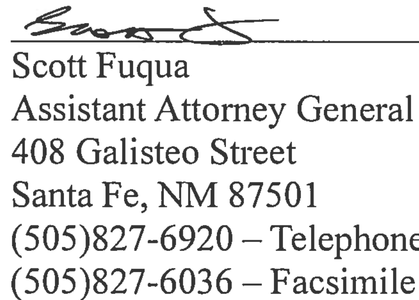
CONCLUSION

For the foregoing reasons, Respondent acknowledges that the court may issue a ruling based on the black letter wording of Section 1-7-2, declaring the Petitioner to be disqualified by operation of the statute. Respondent further acknowledges that the court may fashion a different, equitable, remedy which allows Petitioner to remain ballot qualified, and which removes the uncertainty surrounding the applicable date for Petitioner to file petitions to requalify as a

qualified political party. Either way, the Secretary of State stands ready to perform the ministerial duty required by this Court's order.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL



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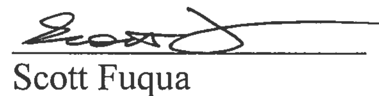
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on counsel of record via first class mail on December 16, 2013.



Scott Fuqua

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE CONSTITUTION PARTY OF
NEW MEXICO,

Plaintiff,

vs. Civ. No. 1:12-325 KG/LFG

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

Defendant.

MEMORANDUM OPINION AND ORDER

On November 30, 2012, Plaintiff filed Plaintiff's Motion for Summary Judgment arguing that it should prevail in this lawsuit.[1] (Doc. 26). Defendant opposes the Motion for Summary Judgment. (Doc. 32). Plaintiff filed a reply to Defendant's opposition to the Motion for Summary Judgment as well as a notice of additional authority. (Docs. 38 and 47). Defendant also filed a response to the notice of additional authority. (Doc. 48). Having reviewed the Motion for Summary Judgment, the accompanying briefs, the notice of additional authority, and the response to the notice of additional authority, the Court grants, in part, the Motion for Summary Judgment. Accordingly, the Court will enter summary judgment in Plaintiff's favor on its 42 U.S.C. Section 1983 claims and will enter a judgment declaring that NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) (1969) violate the First and Fourteenth Amendments of the United States Constitution to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is

[1] Former Plaintiffs Green Party of New Mexico and Estevan Trujillo had joined in Plaintiff's Motion for Summary, but they later withdrew from the case. *See* (Doc. 31).

Exhibit 1

authorized to participate." The Court will also enter a permanent injunction enjoining Defendant from enforcing Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate." The Court, however, will not, at this time, grant Plaintiff's request to order Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year.[2]

A. Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[3] When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996) (citation omitted). The non-moving party may not avoid summary judgment by

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[2] Although Plaintiff requests in the Verified Complaint for Injunctive and Declaratory Relief (Verified Complaint) that the Court order Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year, Plaintiff asks in the memorandum supporting Plaintiff's Motion for Summary Judgment that the Court order Defendant to accept minor party qualifying petitions until the first Tuesday in August of a general election year. *See* (Doc. 1) at 7; (Doc. 27) at 18. The Court will defer to the request for relief which Plaintiff makes in the Verified Complaint.

[3]Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

B. Background

Plaintiff brings this election law case under Section 1983 for violations of the First and Fourteenth Amendments. This lawsuit arises from the application of New Mexico election laws during the 2012 presidential election. Plaintiff, a minor political party, must be qualified as a political party before Defendant will place Plaintiff's candidates on a New Mexico ballot. To qualify as a political party, a minor party must file with Defendant a petition with signatures "of a least one-half of one percent of the total votes cast for the office of governor at the preceding general election who declare by their signatures on the petition that they are voters of New Mexico and that they desire the party to be a qualified political party in New Mexico." NMSA 1978, § 1-7-2(A). Section 1-7-2(A) refers to Section 1-7-4(A) for the time to file qualifying petitions. Section 1-7-4(A) requires that filings be made "no later than the first Tuesday in April before any election in which it is authorized to participate." Prior to 1995, the deadline for filing qualifying petitions was the second Tuesday in July of a general election year. *See* 1995 N.M. Laws Ch. 124, § 9.

The Court takes judicial notice that the primary elections in New Mexico take place "on the first Tuesday after the first Monday in June of each even-numbered year." NMSA 1978, § 1-8-11 (1969). In addition, the general election takes place "on the Tuesday after the first Monday in November of each even-numbered year." N.M. Const. art. XX, § 6.

Plaintiff alleges in the Verified Complaint that the April deadline "unconstitutionally impinge[s] on the associational rights of a minor politically [sic] party, its candidates, supporters and voters and freeze[s] the status quo in favor of the two dominant political parties in the state."

(Doc. 1) at ¶ 26. Plaintiff also maintains that the April deadline is unduly burdensome and discriminatory to minor parties because it restricts Plaintiff's right "to place candidates on the ballot" and restricts Plaintiff's members from voting for the candidate of their choice. *Id.* at ¶ 28. Plaintiff specifically alleges that "[r]equiring minor political parties to gather signatures on their petitions so early, when the mind of the general public and the attention of the media is not focused on the general elections, is unduly burdensome." *Id.* at ¶ 21. In addition, Plaintiff alleges that "[i]t is more difficult to recruit volunteers to collect petition signatures in the sometimes adverse weather of the early months of the year...." *Id.* at ¶ 22. Plaintiff further contends that it has paid consultants "to come to New Mexico to consult with local organizers and assist the parties in collecting the requisite number of signatures by the early deadline." *Id.* at ¶ 23. Even with the assistance of consultants, Plaintiff maintains that it "may not be able to muster the required number of signatures on petitions by the early April deadline." *Id.* at ¶ 24. Finally, Plaintiff alleges that Defendant lacks a compelling state interest in having an April deadline for minor parties seeking qualification as a political party. *Id.* at ¶ 29.

Plaintiffs seeks a declaratory judgment that Sections 1-7-2(A) and 1-7-4(A) are unconstitutional, and asks the Court to temporarily and permanently enjoin Defendant from enforcing the April deadline. *Id.* at 7. Moreover, Plaintiff requests that the Court order Defendant to accept minor party qualification petitions until the first Tuesday in July of a general election year. *Id.*

C. Plaintiff's Statement of Undisputed Material Facts

Plaintiff filed a Statement of Undisputed Material Facts comprised of summaries from various affidavits. The Statement of Undisputed Material Facts concerns Plaintiff as well as former Plaintiffs, the Green Party of New Mexico and Estevan Trujillo. (Doc. 28). Because the

Green Party of New Mexico and Trujillo are no longer parties to this lawsuit, the Court will consider only the statements regarding Plaintiff. The Court notes that Defendant did not submit any of her own facts to counter Plaintiff's Statement of Undisputed Material Facts, but she contests several paragraphs in the Statement of Undisputed Material Facts.

First, Defendant contests Paragraphs 21, 22, 23, and 26 of the Statement of Undisputed Material Facts. In Paragraph 21, Plaintiff contends that "[i]n the early part of a year of a presidential election, the mind of the general public and the attention of the media is not focused on the election, so it is more difficult for a minor party to recruit volunteers to gather signatures for minor party qualifying petitions by the early April deadline in New Mexico." In Paragraph 22, Plaintiff states that "[o]ften minor parties attract additional supporters who supported major party candidates who lose in the June primaries and supporters who are disappointed with winning major party candidates." In Paragraph 23, Plaintiff asserts that "[i]t is more difficult to recruit volunteers to collect qualifying petition signatures in the sometimes adverse weather of the early months of the year." Finally, Plaintiff maintains in Paragraph 26 that "[a]fter a minor party has a nominated candidate, there is often a groundswell of support and an increase of party membership and volunteers."

Defendant argues that the Court should reject these paragraphs because they are broad, conclusory, and mere opinions without specific factual support. Defendant also argues that Paragraphs 22 and 23 are immaterial. Plaintiff contends that Paragraphs 21, 22, 23, and 26 are supported by affidavits sworn to by witnesses experienced in these matters. Plaintiff further contends that other courts have recognized the general observation made in Paragraph 21 and that other courts have found the statement in Paragraph 23 to be material.

The Tenth Circuit Court of Appeals has "long held that 'conclusory allegations without specific supporting facts have no probative value'" and cannot support summary judgment. *See, e.g., Ftizgerald v. Corrections Corp. of America*, 403 F.3d 1134, 1143 (10th Cir. 2005) (citation omitted). Even if Paragraphs 21, 22, 23, and 26 are material to the Motion for Summary Judgment and based on the opinions of experienced witnesses, the Court is troubled by the conclusory and even speculative nature of those paragraphs. Plaintiff's use of "often" or "more difficult" fail to convey the extent and severity of the situations presented in Paragraphs 21, 22, 23, and 26. Plaintiff simply does not present any specific facts to support the opinions reflected in those paragraphs. Moreover, the Court is reluctant to rely on general facts which other courts have found to be material. As a federal district court recently observed in a minor party ballot access case, "[r]eferences to previous cases, which conducted their own factual findings to unique election cycles and localities, are distinguishable at best and are most likely inapt to the current situation." *Stein v. Chapman*, 2012 WL 2935637 *8 (M.D. Ala. 2012). The Court will, therefore, disregard Paragraphs 21, 22, 23, and 26 in its analysis of the Motion for Summary Judgment. *See City of Shawnee, Kan. v. Argonaut Ins. Co.*, 546 F.Supp.2d 1163, 1178 (D. Kan. 2008) (court gave no weight to defendant's "conclusory and self-serving" affidavit when deciding motion for summary judgment).

Next, Defendant argues that Paragraphs 29, 32-33, and 35 are immaterial. In Paragraph 29, Plaintiff states that it paid approximately $15,459 for the costs and services of two consultants to collect signatures prior to the April 2012 deadline. In Paragraphs 32-33, Plaintiff contends that it would have spent the money it paid to the consultants on various activities like media coverage and public relations. In Paragraph 35, Plaintiff concludes that the money paid to

the consultants and canvassers to collect signatures "severely" burdened Plaintiff's resources and Plaintiff's attempt to be a viable party in New Mexico.

Defendant contends that she did not require Plaintiff to spend any money on consultants and that Plaintiff exercised its discretion in spending over $15,000 on consultants. Plaintiff argues that these Paragraphs are material because the April 2012 deadline caused it to spend money on consultants which would have otherwise been spent on other activities. The Court agrees with Plaintiff that it is material that Plaintiff spent over $15,000 on consultants in order to meet the April 2012 deadline. However, it is immaterial what Plaintiff would have spent that money on. In addition, Paragraph 35 is an unsupported conclusory statement which does not deserve any weight. Consequently, the Court will consider Paragraph 29, but not Paragraphs 32-33 and 35.

Defendant also asserts that Paragraph 28 is immaterial because it refers to the June deadline for independent candidates to submit qualifying petitions which require more signatures than minor party qualifying petitions. Plaintiff notes that Paragraph 28 "demonstrates that Defendant can handle the administration of qualifying petitions much later within the election cycle without disrupting the election cycle and undercuts any claim that the deadline set by [the] NMSA 1978, § 1-7-4(A) deadline is narrowly tailored or even legitimate." (Doc. 38) at 7. The Court agrees with Plaintiff and will consider Paragraph 28.

Furthermore, Defendant contends that Paragraph 34 is not a fact. Plaintiff indicates in Paragraph 34 that it "had to neglect other states in which it wanted to develop a presence because it had to concentrate its efforts in New Mexico." Defendant argues that she did not require Plaintiff to concentrate its efforts in New Mexico, but rather Plaintiff chose to do so. Plaintiff contends that Paragraph 34 is based on a sworn statement made by Plaintiff's national chairman.

The issue in this case is what the effect of the April deadline has on Plaintiff's ability to access ballots in this state. Whether efforts in New Mexico adversely affected Plaintiff's presence on ballots in other states is simply not material. Hence, the Court will disregard Paragraph 34.

Finally, Defendant observes that Paragraph 19 is an incorrect statement of the law. Plaintiff states in Paragraph 19 that "[m]inor parties do not nominate their candidates in June primary elections in New Mexico. They select their candidates at nominating conventions, which can be held as late as the month of July of the year of the general elections. NMSA 1978 § 1-8-2." Plaintiff does not object to Defendant's observation that Paragraph 19 is incorrectly stated. Accordingly, the Court will disregard Paragraph 19 and directly refer to Section 1-8-2 when necessary.

Defendant does not object to Paragraphs 1-6, 12-18, and 20 which provide background information on Plaintiff and on New Mexico law regarding minor party qualifying petitions. Defendant also does not object to Paragraph 24 wherein Plaintiff states that it nominated its presidential and vice-presidential candidates at a convention in late April 2012. Lastly, Defendant does not dispute Paragraph 31 which states: "With a later deadline, it would have been easier for Plaintiff[] to collect the required amount of signatures on qualifying petitions using minor party volunteers."

D. Discussion

1. Plaintiff's First and Fourteenth Amendment Claims

Plaintiff argues that it is entitled to summary judgment on its First and Fourteenth Amendment claims based on the balancing test articulated by the United States Supreme Court in *Anderson v. Celebreeze*, 460 U.S. 780 (1983). Although *Anderson* involved an early qualifying petition deadline for independent candidates, courts have applied *Anderson* to cases addressing

the constitutionality of early qualifying petition deadlines for minor parties. *See, e.g., Chapman*, 2012 WL 2935637 *2; *American Ass'n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1195 (D.N.M. 2010) (use *Anderson* test for inquiries "into the propriety of a state election law...."). The Court in *Anderson* noted that when a state election law 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. *Anderson*, 460 U.S. at 788. The Court went on to hold that for a court to resolve a constitutional challenge to a state's election law, a court

> 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 justification 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 provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

Id. at 789-90 (internal citations omitted).

In 1992, the United States Supreme Court discussed *Anderson* in *Burdick v. Takushi*, a state election law case involving a ban on write-in voting in Hawaii. 504 U.S. 428 (1992). The Court explained that when First and Fourteenth Amendment "rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" 504 U.S. 428, 433 (1992) (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The Court then applied the principles in *Anderson* and determined that the "ban on write-in voting imposed[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote." *Id.* at 438-39. The Court stated that because they "concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional

scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate." *Id.* at 439. The Court concluded that "when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights—as do Hawaii's election laws—a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Id.* at 441.

In 2008, the United States Supreme Court in *Crawford v. Marion County Election Bd.* confirmed that *Burdick* did not "identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, … it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288-89). Moreover, the Court emphasized that "[t]he *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*" and "did not create a novel 'differential important regulatory interests standard.'" *Id.* at 190 n.8 (citations and internal quotation marks omitted).

The first step in applying the *Anderson* test is to determine the character and magnitude of Plaintiff's asserted injury. Plaintiff notes that other courts have determined that early deadlines, similar to the one in this case, for filing minor party qualifying petitions impose severe burdens on minor parties. While that may be true, courts must apply the *Anderson* test on a case-by-case basis. *See Constitution Party of Kansas v. Kobach*, 695 F.3d 1140, 1144 (10th Cir. 2012). *See also Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) ("a particularized assessment of the restriction and the burden it imposes is required."); *Chapman*, 2012 WL

2935637 *7 (*Anderson* test requires examination of "present conditions" which "particular parties" face in the jurisdiction at issue). Consequently, the Court will not rely on the cases cited by Plaintiff to decide Plaintiff's Motion for Summary Judgment.

Defendant contends that to determine the extent of the injury caused by the April deadline the Court must look at the number of signatures required to be on the qualifying petition as well as the time period to collect those signatures. Defendant cites five cases which discuss whether the number of required signatures injures or burdens a minor party: *Williams v. Rhodes*, 393 U.S. 23 (1968); *Green Party of Tennessee v. Hargett*, 882 F.Supp.2d 959 (M.D. Tenn.), *reversed on other grounds*, 700 F.3d 816 (6th Cir. 2012); *Kelly v. McCulloch*, 2012 WL 1945423; *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991); and *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980). These cases, however, do not mandate that the number of signatures be considered in determining the constitutionality of an early filing deadline for minor party qualifying petitions. Moreover, in *Williams*, *Hargett*, *Kelly*, and *McLain*, the plaintiffs, unlike Plaintiff here, specifically challenged the signature numerosity requirement of their state election laws. Additionally, the court in *New Alliance Party* did not even consider the state's signature numerosity requirement in deciding that an early deadline for filing minor party qualifying petitions and candidate nomination certifications was unconstiututional. In fact, the court in *Hargett* decided that the deadline challenge alone unduly burdened the plaintiffs' First Amendment rights. 882 F.Supp.2d at 1013. Also, as Plaintiff correctly indicates, the Court in *Anderson* decided a challenge to an early qualifying petition deadline for independent candidates without considering the numerosity of signatures. No legal authority mandates that the Court consider the numerosity of signatures in deciding the character and magnitude of any injury caused by the April deadline.

Next, Defendant distinguishes cases Plaintiff cites, including *Anderson*, which concern qualifying petition deadlines for independent candidates. Defendant argues that "the burden imposed on an independent candidate is different in kind from that imposed on a party merely seeking qualification." (Doc. 32) at 8. Courts, however, have not made that distinction. As noted previously, courts have applied the *Anderson* test to cases involving qualifying petition deadlines for minor parties. *See, e.g., California Justice Committee v. Bowen*, 2012 WL 5057625 (C.D. Cal.).

Defendant also argues that since there is no restriction on when Plaintiff can begin collecting signatures, the April deadline does not impose a "time pressure" on Plaintiff. *See* (Doc. 32) at 9. Defendant cites two cases in which courts considered the lack of a beginning date for collecting signatures as factors in concluding that early qualifying petition deadlines for minor parties are constitutional. In *North Carolina Constitution Party v. Bartlett*, the plaintiffs argued that both the signature numerosity requirement and the early deadline for filing minor party qualifying petitions were unconstitutional. 2013 WL 785353 (W.D.N.C.) (slip copy). The court, however, found that the early deadline was immaterial and that the analysis should be directed to the burden associated with collecting signatures. *Id.* at *6. Consequently, the court found that the burden of collecting signatures was lessened significantly by six different factors including that there was "no time limit on the time period in which signatures could be gathered…." *Id. Bartlett*, however, is not particularly helpful here because (1) the *Bartlett* court did not directly address the deadline issue presented in this case; and (2) the lack of a beginning date to collect signatures was only one of six determining factors.

In *Stein v. Bennett*, the second case cited by Defendant, the court discussed, among other facts, how the plaintiffs could have collected signatures earlier in order to meet the Alabama

deadline for minor party qualifying petitions. 2013 U.S. Dist. Lexis 126667 *22-23 (M.D. Ala.). The court, however, stated that it could not "affirmatively conclude that Alabama's election law imposes minor burdens on Plaintiffs' rights; it finds only that Plaintiffs (who would bear the burden of proof at trial) have failed to prove otherwise." *Id.* at *27. Moreover, the court noted that because the Alabama deadline for minor party qualifying petitions is the date of the primary election, the Alabama election law does not discriminate against minor parties, unlike cases, similar to this one, where ballot access deadlines are well before the primaries and subject to constitutional scrutiny. *Id.* at *14-15. Although *Bennett* appears persuasive at first glance, the court did not actually conclude that the Alabama election law does not burden minor parties. Additionally, *Bennett* is distinguishable from this case on the facts. Accordingly, *Bennett*, an unpublished district court case from another district, simply carries little weight.

Even assuming Plaintiff could meet the April deadline if it starts collecting signatures earlier in the year, that fact alone does not necessarily mean that the April deadline does not burden Plaintiff. "The fact that an election procedure can be met does not mean the burden imposed is not severe." *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006)). The Court, therefore, rejects Defendant's argument that if Plaintiff starts collecting signatures earlier in the year, the April deadline must not be burdensome to minor parties like Plaintiff.

Finally, Defendant cites *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.* to support its assertion that the April deadline imposes at most a *de minimus* burden on Plaintiff. 844 F.2d 740 (10th Cir. 1988). Plaintiffs in *Rainbow Coalition* argued that an early deadline for filing minor party qualifying petitions combined with a high signature requirement made Oklahoma's ballot access law "one of the most restrictive in the country." *Id.* at 744. The Tenth

Circuit held that the early deadline was constitutional, "even in conjunction with the relatively high signature requirement." *Id.* at 747.

Rainbow Coalition, however, is easily distinguished from this case. First, the Tenth Circuit in *Rainbow Coalition* differentiated *Anderson* on the deadline issue by noting that the United States Supreme Court in *Anderson* decided that case with respect to a qualifying petition deadline for independent candidates in the context of a presidential election year while *Rainbow Coalition* did not involve Oklahoma's much more lenient ballot access law for presidential minority candidates. *Id.* at 746 n.9. This case, on the other hand, arose from the 2012 presidential election. As the Court stated in *Anderson*, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." 460 U.S. at 795. Moreover, as stated previously, subsequent caselaw indicates that *Anderson* should also apply to deadlines for qualifying minor party petitions. Second, unlike this case, Oklahoma law required the parties in *Rainbow Coalition* to select their candidates during the primary election. Consequently, the state needed an early deadline for minor party qualifying petitions so it could verify the petitions before the primary candidate filing deadline, and the state needed sufficient time between the primary candidate filing deadline and the primary election to process challenges to the candidates as well as "to print ballots, and to mail out and receive absentee ballots." 844 F.2d at 745. Since Plaintiff selected its 2012 candidates during the late April convention, prior to the June primary, the state's concerns in *Rainbow Coalition* do not apply

here.[4] Finally, *Rainbow Coalition* does not control the outcome of this case, because the Court must examine the particular facts of this case in applying the *Anderson* test.

The Court now turns to the undisputed material facts of this case to determine the character and magnitude of the injury caused by the April deadline. The Court finds that but for the April deadline, Plaintiff would not have paid consultants over $15,000 to complete the qualifying petition. Although Defendant claims that Plaintiff could have obtained the signatures for the qualifying petition without consultants if it had started collecting signatures earlier in the year, the parties agree that "[w]ith a later deadline, it would have been easier for Plaintiff[] to collect the required amount of signatures on qualifying petitions using minor party volunteers" at a, presumably, significant savings to Plaintiff. (Doc. 28) at ¶ 31. The expenditure of money to hire consultants is at least a substantial, if not a severe, burden on Plaintiff resulting from the April deadline. *See Crawford*, 504 U.S. at 205 (Scalia, J., concurring) ("Burdens are severe if they go beyond the merely inconvenient.").

Defendant argues, however, that the state's interests outweigh any burden which the April deadline might impose on Plaintiff. Specifically, Defendant claims that:

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[4] Plaintiff notes that the Tenth Circuit has commented that early deadlines for qualifying minor party petitions appear "to run counter to views" in United States Supreme Court cases, like *Anderson*, "which would permit independent political parties to organize after the conventions of the major parties have chosen their tickets and platforms." *Populist Party v. Herschler*, 746 F.2d 656, 661 (10th Cir. 1984). That reasoning certainly would have been relevant to the 2012 election year in which Plaintiff held its nominating convention in late April 2012, prior to the primary and the major parties' conventions. *See* (Doc. 28) at ¶ 24. However, Plaintiff could conceivably hold any future conventions as late as July in the year of the general election. *See* NMSA 1978, § 1-8-2(B) (1969) ("names [of minor party candidates] certified to the secretary of state shall be filed on the twenty-first day following the [June] primary election in the year of the general election...."). *See also Woodruff v. Hererra*, 623 F.3d 1103 (10th Cir. 2010) (other portions of Section 1-8-2 found unconstitutional.).

> [t]he State has a strong interest in conducting an orderly election. One of the keys to the orderly conduct of an election is a manageable ballot. This means that a State may require that a party show a modicum of support before giving that party ballot access.

(Doc. 32) at 10. This assertion of a state interest is woefully inadequate for several reasons. First, it lacks any factual basis, is merely conclusory, and lacks specificity. Accordingly, the April deadline appears arbitrary and does not advance any precise state interest. Second, the fact that Defendant does not present any evidence that the previous July deadline caused problems in the orderly conduct of elections supports a conclusion that the purpose of the April deadline is to discriminate against minor parties. As Plaintiff observes, Defendant is capable of processing independent candidate qualifying petitions without any difficulty "as late as three weeks after the June primary in New Mexico." (Doc. 28) at ¶ 28. Finally, a challenge to a filing deadline does not affect the requirement that a party show a modicum of support by collecting the required number of signatures on its qualifying petition. In fact, Plaintiff does not challenge the signature numerosity requirement imposed by the State of New Mexico. In sum, the April deadline is unreasonable and discriminates against minor parties. Consequently, the state has no relevant or legitimate interest "sufficiently weighty" to justify the April deadline.

Balancing the injury caused by the April deadline, whether that injury is characterized as merely substantial or as severe, against the state's lack of a precise interest in the April deadline, the Court concludes that the April deadline violates Plaintiff's First and Fourteenth Amendment rights as a matter of law. Plaintiff is, therefore, entitled to summary judgment on its Section 1983 claims.

2. Requested Relief

Since Plaintiff prevails on its Motion for Summary Judgment, the Court will enter a judgment declaring that Sections 1-7-2(A) and 1-7-4(A) violate the First and Fourteenth

Amendments to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate." Although Plaintiff originally sought both temporary and permanent injunctive relief, it is appropriate to consider only the request for permanent injunctive relief, because the 2012 presidential election has already occurred. For the Court to enter an order granting the permanent injunctive relief Plaintiff seeks, Plaintiff must prove "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *See Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009). The Court concludes that Plaintiff has proven these elements with respect to its request for a permanent injunction enjoining Defendant from enforcing the April deadline. Hence, the Court will permanently enjoin Defendant from enforcing Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate."

It is improper, however, for the Court to order, at this time, injunctive relief which mandates Defendant to accept minor party qualifying petitions until the first Tuesday in July of a general election year. A proper regard for federal-state relations requires that this Court allow the state legislature an opportunity to enact a lawful deadline for minor parties to file qualifying petitions. *See, e.g. Maryland Citizens for a Representative General Assembly v. Governor of Md.*, 429 F.2d 606, 609 (4th Cir. 1970) (allow state legislature to address constitutionally defective law unless state legislature had opportunity to cure defective law and did not do so); *Hellebust v. Brownback*, 884 F.Supp.436,438 (D. Kan. 1995) ("In the event the legislature does

not enact a new statutory scheme that comports with the Constitution of the United States, it appears appropriate for this court to order a permanent injunction."); *Blomquist v. Thomson*, 591 F.Supp. 768, 777 (D. Wyo. 1984) ("In the interest of harmonious federal-state relations, the Court will defer any ruling upon the remedial aspects of this action until the Wyoming Legislature has had an opportunity in that session to amend the Wyoming Election Code in light of the provisions of this order."). Accordingly, the Court denies, at this time, Plaintiff's request for an order requiring Defendant to change the April deadline to a July deadline.

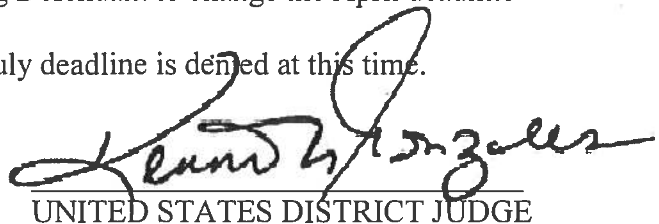
IT IS ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 26) is granted, in part, in that

1. summary judgment will be entered in Plaintiff's favor on its Section 1983 claims;

2. a judgment will be entered declaring that NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) violate the First and Fourteenth Amendments to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate;"

3. Defendant will be permanently enjoined from enforcing NMSA 1978, Sections 1-7-2(A) and 1-7-4(A) to the extent that those Sections require minor political parties to file qualifying petitions "no later than the first Tuesday in April before any election in which [a minor party] is authorized to participate;" and

4. Plaintiff's request for an order requiring Defendant to change the April deadline for minor parties to file qualifying petitions to a July deadline is denied at this time.



UNITED STATES DISTRICT JUDGE