

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES T. PARKER,

Plaintiff,

v.

Case No. 1:14-cv-00617-MV-GBW

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

Defendant.

**THE STATE OF NEW MEXICO'S RESPONSE TO MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF**

Plaintiff seeks to invalidate a nominating petition system for political candidates in New Mexico that has weathered multiple constitutional challenges. Because the signature requirement Plaintiff challenges is justified by the State's interest in requiring candidates to demonstrate a modicum of support before being placed on the ballot, thereby reducing voter confusion, Plaintiff cannot show any likelihood of success on the merits, and his motion for temporary restraining order fails.

ARGUMENT AND AUTHORITY

Plaintiff cannot meet three of the four standards necessary to obtain injunctive relief. While the State recognizes that, for purposes of the 2014 general election, Plaintiff would suffer irreparable injury if unjustly excluded from the ballot for Public Education Commission District 4, Plaintiff cannot show a substantial likelihood of success on the merits, cannot show that the harm to him of being left off the ballot outweighs any damage to the State of New Mexico, and cannot show that the requested injunction would be adverse to the public interest.

I. PLAINTIFF IS UNLIKELY TO PREVAIL ON THE MERITS.

This is not the first time New Mexico's petition signature requirements have faced constitutional challenge. And though it is, at least to the knowledge of undersigned counsel, the first time a putative candidate has challenged the signature requirement in NMSA 1978, § 1-8-51(E), the same interests that have sufficiently supported New Mexico's petition signature requirements in other contexts are adequate to the task here.

Though Plaintiff does not in his motion identify the constitutional rights he alleges the State has harmed, he does in his complaint seek a declaration that Section 1-8-51(E) violates the First and Fourteenth Amendments. His motion does not establish any likelihood of prevailing on the merits of either claim.

As a starting point, Plaintiff correctly notes that his challenge is to be analyzed through the balancing test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983).¹

The *Anderson* Court described that framework as follows:

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It 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 those interests; it must also 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.

¹ *Anderson* dealt with the Due Process clause, not the Equal Protection Clause, but there is nonetheless widespread recognition that the *Anderson* standard is appropriate for First and Fourteenth Amendment challenges to state election laws. See, e.g., *Crawford v. Marion County Election Board*, 553 U.S. 181, 190 (2008); *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (the case cited by Plaintiff for the application of the *Anderson* balancing test).

460 U.S. 780, 789 (1983) (citation omitted). This standard establishes a sort of sliding scale that requires a stronger and stronger state interest as the severity of the burden on a plaintiff's First or Fourteenth Amendment rights increases. *See Burdick*, 504 U.S. at 434 (“Under [the *Anderson*] standard, the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” In general, restrictions that impose a severe burden on such rights must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* (quoting *Norman*, 502 U.S. at 289). Conversely, “reasonable, nondiscriminatory restrictions” that impose less significant burdens are justified by a state's “important regulatory interests.” *Id.* Applying the test in this case leads to the conclusion that Section 1-8-51(E) is constitutional. The restriction of Plaintiff's First and Fourteenth Amendment rights is not substantial, and the restriction is justified by New Mexico's powerful interest in regulating elections to ensure that they are orderly, open, and fair.

A. Plaintiff's Injury Is Not Substantial.

The first step is to identify the “character and magnitude” of the alleged constitutional injury. Here, there is little dispute that the character of the alleged injury is substantial, though the magnitude of the injury is less clear. It would be a mistake to say that Plaintiff's injury is not getting on the ballot. Section 1-8-51(E) does not, on its face, bar his candidacy. The injury is, instead, the burden of collecting a sufficient number of petition signatures to appear on the ballot. That burden is easier to bear than Plaintiff would have the Court believe.

First, Plaintiff has several more months in which to gather petition signatures than major party candidates seeking to run in the primary election. All petition signature

forms are made available in October of odd-numbered years. *See* NMSA 1978, § 1-8-30(D). Major party candidates must submit petition signatures no later than the second Tuesday in February of an election year. *See* NMSA 1978, §§ 1-8-30(B) and 1-8-26(A). Independent candidates, on the other hand, have until the day after the primary election in which to turn in their petition signatures. *See* NMSA 1978, § 1-8-52(A).²

As a result, independent candidates have roughly four months more than major party candidates to gather petition signatures, even where major party candidates must gather the same total number of signatures. For example, a candidate of the Democratic Party seeking statewide office in the 2014 election cycle needed to obtain 2,186 valid signatures in order to appear on the ballot, and if that candidate did not receive the pre-primary designation of the Democratic Party, he or she needed to submit an additional 2,186 signatures (for a total of 4,372) to be a candidate in the primary election. The numbers for Republican Party candidates for statewide office were 2,445 and 4,890, respectively.

Plaintiff is not, of course, seeking statewide office, and must show a modicum of support among only those voters living in Public Education Commission District 4. But, as noted above, Plaintiff had four more months in which to gather his signatures than did major party candidates. Moreover, the signatures gathered by major party candidates are only valid if they are the signatures of registered voters in the candidate's party. *See* Section 1-8-30. Independent candidates may gather signatures from any registered voter. *See* NMSA 1978, § 1-8-51(F). And, while a signature gathered by a major party candidate is invalid if the same voter signed a petition for another major party candidate

² Minor party candidates admittedly have an additional twenty days beyond the deadline established for independent candidates. *See* NMSA 1978, § 1-8-2(B). Independent candidates nonetheless still have approximately six months in which to obtain signatures, four months more than major party candidates.

seeking the same office, an independent candidate may gather signatures from voters of major parties even if those voters had signed the form of a major candidate. The only restriction on independent candidates is that their signatories cannot have signed a petition for another independent candidate. *Id.*

Independent candidates also have the benefit of being able to gather petition signatures when the weather is more hospitable to such efforts and when voters are more generally engaged in the political process. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) (noting the difficulty in gather petition signatures “at a time when the major party candidates are not known and when the populace is not politically energized.”); *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994) (describing *Anderson* as recognizing the difficulty in gathering signatures in the fall and winter “because of voter apathy . . . at such an early date” and “because of adverse winter weather during the time signatures had to be collected.”).

The State does not contend that the Election Code treats independent candidates more solicitously than major party candidates. But in assessing the nature of the burden independent candidates must carry before earning a spot of the ballot, it is instructive to note that major party candidates carry similar burdens, and do so in spite of the fact that the major parties have consistently demonstrated significant support from the electorate. Gathering 2,196 signatures is admittedly difficult. But the Constitution does not require the State of New Mexico to make it easy – just realistically possible.

Plaintiff contends that the history of independent candidacies in New Mexico, and particularly in Public Education Commission District 4, “is highly relevant” to the Court’s analysis of his challenge. (Motion, pg. 6.) While that may sometimes be true,

the State submits that in this case the history is not illuminating. First, Plaintiff admits that the Public Education Commission “has had a hard time attracting candidates in general, and for District 4 in particular.” (Motion, pg. 4.) Since the position was created in 2004, this is the *first* year in which any candidate – major party, minor party, or independent – has appeared on the ballot. (*Id.* at 5.) This speaks not to onerous barriers to the ballot, but instead to a near total lack of interest on the part of potential candidates. That lack of interest is also reflected in the numbers Plaintiff provides for candidate participation in other Public Education Commission districts. (*Id.*)

Plaintiff also contends that “New Mexico is generally inhospitable to independent candidates,” noting that New Mexico has featured fewer independent and minor party candidates “than the voters of any other state except for Nebraska.” (*Id.* at 5-6.) Here Plaintiff both omits potentially relevant information and conflates two inquiries that require separate consideration. First, Plaintiff compares the number of both minor party and independent candidates in New Mexico to the numbers in other states. But Plaintiff cannot prevail by making out a general case that the major parties in New Mexico dominate the ballot. He must show an unconstitutional burden on the rights of *independent* candidates, and his evidence does not do so.

Second, Plaintiff fails to put in any real context the number of independent candidates who qualify in New Mexico as opposed to the numbers in any other state. It should not surprise the Court that New Mexico has fewer independent candidates than most other states; New Mexico simply has fewer candidates. Indeed, Plaintiff’s witness acknowledges that fact. *See* Declaration of Richard Winger, ¶ 8 (attached as Exhibit 2 to Plaintiff’s Complaint).

New Mexico has certainly had more independent candidates for office than Illinois, the state whose restrictions on independent candidates were invalidated in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), upon which Plaintiff relies. That reliance is misplaced because the ballot access restrictions in *Lee* are easily distinguishable from those at issue here.

First, the Illinois law under scrutiny in *Lee* required an independent candidate to gather the petition signatures equal to ten percent of the votes cast in the candidate's district in the preceding election. *Lee*, 463 F.3d at 765. As the Seventh Circuit noted, that requirement was the highest in the nation. Even comparing it to the requirement in Georgia and South Carolina that an independent candidate gather signatures equal to five percent of the voters registered in the candidate's district (as opposed to only those voters who actually cast a ballot), the court found the Illinois requirement to be more onerous. *Id.* at 766-67. This is a heavier burden than the one Plaintiff faces here.

Second, independent candidates were required to gather that large number of signatures 92 days before the primary, a full 323 days before the general election, which is the only election the candidate would run in. *Id.* at 765. As discussed above, Plaintiff faces a much less difficult deadline. Indeed, Plaintiff has seven more months in which to gather petition signatures than did independent candidates in Illinois.

Finally, the law in Illinois disqualified from voting in the primary election any voter signing a petition for an independent. *Id.* New Mexico, of course, has no such draconian provision in its Election Code.

Ultimately, the Plaintiff's burden is not severe. Focusing, as Plaintiff does, exclusively on the number of signatures he must collect paints an incomplete picture.

Taking into account the amount of time the Election Code gives independent candidates to gather signatures and the fact that gathering those signatures is typically easier during the time the Election Code provides (as opposed to the time during which major party candidates must gather them), the burden on Plaintiff's constitutional rights is insufficient to subject Section 1-8-51(E) to any form of heightened scrutiny.

B. The State's Interest In Running Orderly Elections Outweighs Any Alleged Harm to Plaintiff's Constitutional Rights.

Balanced against this is the State's interest in running an orderly election, an interest the U.S. Supreme Court has repeatedly vindicated. As a general matter, the Court has recognized the important role that state regulation of elections plays in guaranteeing that those elections conform to our democratic ideals. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court considered a challenge by independent Congressional candidates to a California statute prohibiting independent candidacy unless the candidate had been unaffiliated with a political party for one year before attempting to run for office. In rejecting the challenge, the Court noted that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer*, 415 U.S. at 730.

That interest finds specific expression here in requiring candidates to demonstrate a modicum of support before being placed on the ballot. In addition to recognizing generally the need for state regulation of elections, the Supreme Court has noted the primacy of a state's interest in such a requirement. In *Illinois State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 183-84 (1979), the Court declared that "[a] procedure inviting or permitting every citizen to present himself to the voters on the

ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process.”) (quoting *Lubin v. Panish*, 415 U.S. 709, 715 (1974)).

In *Bullock v. Carter*, 405 U.S. 134, 145 (1972), the Court indicated that it “has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.” Before that, in *Jenness v. Fortson*, 403 U.S. 431, 442 (1970), the Court upheld a Georgia petition signature requirement of five percent of the voters in a given district and noted that “[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” And in *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), the Court summed up its jurisprudence in this area by holding that “[w]hile there is no ‘litmus-paper test’ for deciding a case like this, it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office” (internal citation omitted).

The federal appellate courts have followed the Supreme Court's lead. In *Cartwright v. Barnes*, 304 F.3d 1138, 1140 (11th Cir. 2002), the court upheld the same

Georgia requirement at issue in *Jenness*, citing to *Storer* for the proposition that “[t]he requirement that candidates demonstrate some measure of support before their names appear on the ballot generally is viewed as a legitimate exercise of a state’s authority to regulate the manner in which elections are held.” *Cartwright*, 304 F.3d at 1142.

Here, New Mexico has an interest sufficient to justify the petition signature requirement Plaintiff challenges, namely to ensure that the candidates appearing on the ballot have shown adequate support to be there. Plaintiff would have this Court ignore that interest here because the ballot for Public Education Commission District 4 is hardly crowded; to the contrary, it has been empty until this year. But as tempting as it may be to adopt that reasoning, it is legally flawed. The question is not whether there is any historical risk to crowding this specific ballot. The question instead is whether the legislature may constitutionally require independent candidates to demonstrate a modicum of support to appear on the ballot for *any* elected office.

Approaching this issue otherwise unduly intrudes on the State’s authority to regulate elections. Either the State can require the petition signatures of Plaintiff that it requires or it cannot. The answer to that question cannot turn on whether the ballot in question has been overcrowded at some point in the past. The question turns, instead, on whether the State has a sufficient interest in running an orderly election and avoiding voter confusion. The lack of interest potential candidates have shown in the past for the office of Public Education Commissioner in District 4 does not determine the constitutionality of the State’s efforts to properly regulate its elections.

Because Plaintiff cannot show a severe burden to his constitutional rights, and because the State has a significant, legitimate interest in requiring of Plaintiff the petition

signatures he challenges, Plaintiff is unlikely to prevail on the merits of his claim. The Court should accordingly deny his request for injunctive relief.

II. THE HARM TO THE STATE OF NEW MEXICO OF INCLUDING A CANDIDATE FOR ELECTIVE OFFICE THAT HAS NOT MET THE LEGAL REQUIREMENTS FOR SUCH CANDIDACY OUTWEIGHS ANY HARM TO PLAINTIFF IN BEING LEFT OFF THE BALLOT.

Plaintiff suggests that the harm to him of not obtaining injunctive relief outweighs any harm to the State because the office he seeks has been historically unrepresented and there is only one other candidate for that office, meaning that including Plaintiff will not clutter the ballot. (Motion, pg. 10.) But Plaintiff misses the point. The harm to New Mexico in placing Plaintiff on the ballot is that, in doing so, the State will be forced to ignore the application of its own law. That injury far outweighs any harm to Plaintiff from being left off the ballot because he did not comply with that law.³

Plaintiff also suggests that he has demonstrated a sufficient modicum of support to appear on the ballot because he has collected signatures from more than one percent of the eligible voters in the district. (Motion, pg. 10.) In making this argument, Plaintiff compares himself to both a minor party candidate and to the major party candidate who has qualified to run in the election. Those comparisons are unhelpful because Plaintiff is not similarly situated to either his putative opponent or to a minor party candidate hypothetically seeking the same office.

Major party candidates simply and directly demonstrate the modicum of support to justify inclusion on the general election ballot by winning a primary election. Indeed,

³ It may be tempting to argue that this reasoning begs the question of whether the law at issue is constitutional in the first instance. Giving into that temptation, however, would conflate what should be separate inquiries. Plaintiff is not entitled to a presumption of unconstitutionality in arguing that he is harmed by being denied access to the ballot. To the contrary, the well established presumption is that the enactments of the legislature are constitutional. *See, e.g., Gillmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007).

it is hard to think of a better means of demonstrating such support. Even still, major party candidates must also collect petition signatures to appear on the ballot, albeit in advance of the primary election, not the general election. *See* NMSA 1978, § 1-8-33(C) (requiring major party candidates to submit petition signatures totaling three percent of the votes cast for all of the candidates in that party running for governor in the preceding primary election).

Minor party candidates are required to submit a greater number of signatures than major party candidates because they do not face the test of a primary election. Instead, minor party candidates are nominated by their parties “in the manner prescribed in [the party’s] rules and regulations.” NMSA 1978, § 1-8-1(B). Accordingly, minor party candidates must gather petition signatures totaling one percent of the total votes cast in the general election for either governor or president, depending on whether the preceding election cycle was a gubernatorial or presidential one. *See* NMSA 1978, § 1-8-2(B).

Importantly, in addition to these candidate petition signature requirements, minor parties must themselves submit petition signatures to qualify as a political party capable of running candidates in New Mexico’s general elections. Specifically, in order to qualify as a minor party, the party must submit petition signatures equal to one-half of one percent of the total votes cast at the last general election for the office of governor or president. *See* NMSA 1978, § 1-7-2(A).

Plaintiff ignores this additional (or prior, depending on one’s view) requirement minor parties and their candidates must meet in order to obtain access to the ballot, and his statement that he must produce three times as many petition signatures as a minor party candidate for the same office is incomplete as a result. Even though a minor party

candidate, who cannot run in a primary election, has not shown the kind of support a major party candidate has by winning such a primary election, the minor party itself has established a modicum of support by gathering the requisite signatures for qualification. Along this metric, the State is justified in requiring independent candidates – who have not shown support by either winning a primary election or representing a party that has gathered petition signatures to qualify as a party – to obtain a greater number of petition signatures than either major or minor party candidates. Accordingly, Plaintiff has not, contrary to his assertion otherwise, demonstrated “an equal or greater ‘modicum of support’ as a minor or major party candidate would be by law required to demonstrate.” (Motion, pg. 11.)

Finally, the harm to the State of being forced to include on the ballot a candidate that did not qualify for such inclusion pursuant to State law would be irreparable if plaintiff obtains his requested injunctive relief and, at some point after the election, the Court were to conclude that the challenged provisions of New Mexico law are constitutional. Just as there is no way for Plaintiff to be placed on the ballot after the election, there is no way to remove him from the ballot after the election in the event he never should have been there in the first place.

For this reason, the Court should give considerable weight to the notion that the status quo should obtain unless and until Plaintiff conclusively demonstrates otherwise. While both parties are certainly interested in a final resolution at the earliest opportunity of the constitutional challenge posed by the complaint, a TRO is a poorly-fitted mechanism for providing Plaintiff relief. In its place, the State respectfully suggests that an expedited ruling on the merits of Plaintiff’s complaint is the most appropriate means

of deciding this case. Such a proceeding would definitively answer the constitutional question presented by the complaint without either denying an otherwise legitimate candidate access to the ballot or forcing the State to place an unqualified candidate on the ballot.

III. PLACING A LEGALLY UNQUALIFIED CANDIDATE ON THE BALLOT IS CONTRARY TO THE PUBLIC INTEREST.

For similar reasons, Plaintiff cannot establish the final element of the injunctive relief he requests. Placing on the ballot a candidate who is not legally qualified to be there is directly contrary to the public interest. Plaintiff emphasizes that, unless he is a candidate for the Public Education Commission District 4 race, the citizens of that district will have “no choice whatsoever” as to their commissioner, and that issuing his requested injunction “will leave the decision to the people.” (Motion, pg. 11.) But in making this argument Plaintiff assumes the legitimacy of his candidacy. If he has not met the legal requirements for seeking office – and if those requirements are constitutional – the citizens of District 4 do *not* have the right to elect him. Accordingly, unless the Court conclusively determines that the petition signature requirement Plaintiff challenges is unconstitutional, Plaintiff is entitled to no relief.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Scott Fuqua
Scott Fuqua
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6920 – Telephone
(505)827-6036 – Facsimile
sfuqua@nmag.gov

*Attorney for Defendant Dianna J. Duran
and Intervenor State of New Mexico*

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on Plaintiff's counsel of record via filing with the CM/ECF system on July 21, 2014.

/s/ Scott Fuqua
Scott Fuqua