UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Libertarian Party of New Hampshire,	*	
	*	
Plaintiff	*	
vs.	*	
	*	Civil Case No. 1:14-cv-00322 - AJ
William Gardner, Secretary of State of the State of New Hampshire In his official capacity,	*	
	*	
Defendant	*	

DEFENDANT'S REPLY TO PLAINTIFF'S OBJECTION TO MOTION TO DISMISS

Defendant, William Gardner, Secretary of State of the State of New Hampshire, by and through counsel, the New Hampshire Department of Justice, submits this reply to Plaintiff's objection to Defendant's motion to dismiss, stating as follows.

1) **The State's Motion to Dismiss is not Premature**

Plaintiff argues that "[b]ecause discovery has not yet occurred, the Court simply does not have the evidence before it to make a final determination about the gravity of the burden on the Party's ballot access and whether rational basis review or strict scrutiny applies." Plaintiff's Memorandum of Law in Support of Objection to Defendant's Motion to Dismiss ("Pl.'s Mem."), Document 13-1, at 6. Defendant disagrees.

The balancing test adopted by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), does not require factual development through discovery before a motion to dismiss can be considered. Whether a regulation places "severe restrictions on a plaintiff's First and Fourteenth Amendment rights," or places "only reasonable, nondiscriminatory restrictions" on those rights, *see Libertarian Party v. Gardner,* 638 F.3d 6, 14

(1st Cir. 2011), is a question of law for this Court to determine based on the facts as alleged by Plaintiffs. While it is certainly true that the standard for a motion to dismiss under Federal Rule 12(b)(6) is distinct from the standard for a motion for summary judgment under Federal Rule 56, that difference does not foreclose a defendant from seeking dismissal where the facts alleged in the complaint are insufficient as a matter of law to establish a claim to relief.

Contrary to Plaintiff's assertions, the State is not asking the Court to "ignore the Plaintiff's factually-supported and verified allegations"; rather, the State has assumed those allegations to be true for purposes of this motion and argues that those allegations, as a matter of law, are insufficient to demonstrate a constitutional violation under the *Anderson* balancing test. The *Anderson* test "requires an assessment of the burdens, if any, placed on a plaintiff's constitutionally protected rights, followed by an evaluation of the precise interests put forward by the state as justifications for the burdens." *Libertarian Party*, 638 F.3d at 14. There is no prejudice to Plaintiff in applying this legal test at the motion to dismiss stage rather than the summary judgment stage, because all of the facts alleged by Plaintiff must be assumed true at this stage of the litigation.[1]

With regard to the burden imposed by the regulation at issue in this case, the facts are straight-forward: (1) Plaintiff must collect nomination papers signed by at least 3% of the total votes cast at the previous state general election, *see* RSA 655:40-a; RSA 655:42, III; (2) for the 2016 general election, the required number of nomination papers will be in excess of 13,600, *see*

[1] "A motion to dismiss addresses the plausibility of the claims in the complaint and assumes facts therein as true whereas a motion for summary judgment addresses whether genuine issues of material fact exist to support the claims." *Fin. Res. Network, Inc. v. Brown & Brown, Inc*.,754 F. Supp. 2d 128, 155(D. Mass.2010). While a plaintiff can rely entirely on the allegations stated in its complaint at the motion to dismiss stage, it is required to adduce evidence in support of its allegations in order to properly oppose a motion for summary judgment. *See Davila v. Corporacion De Puerto Rico Para La Difusion Publica*, 498 F.3d 9, 12 (1st Cir. 2007) (stating summary judgment is designed "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required"). As such, the inability to engage in discovery prior to responding to a motion to dismiss in no way prejudices a plaintiff.

Complaint (Document 1) at ¶ 2; (3) Plaintiff must wait until January 1 of the election year to begin collecting the nomination papers, *id.*; and (4) Plaintiff will have approximately 7 months (or 210 days) to collect the nomination papers, *id.* at ¶ 25. Applying those facts to the case law set forth in the State's previously filed memorandum of law, the burden imposed by the January 1 start date is not sufficiently severe, as a matter of law, to require the application of strict scrutiny.[2] *See* Defendant's Memorandum of Law in Support of Motion to Dismiss ("State's Mem."), Document 9-1, at 6-7.

2) Under Rational Basis Review, the State Need Not Produce Evidence to Support a Legislative Decision

Plaintiff next argues that factual development through discovery is required to assess the importance of the State's purported justifications for the regulation. Plaintiff asserts that pre-litigation right-to-know requests have revealed "no contemporaneous evidence (statistical or otherwise) prepared in conjunction with HB 1542's passage," *see* Pl.'s Mem. at 8, n. 3, and argues that discovery is therefore necessary in order to fully weigh the State's interests against the burdens the law places on Plaintiff. This argument fails because a State has no obligation to produce evidence to sustain the rationality of a regulation. *See Heller v. Doe*, 509 U.S. 312, 320-321 (1993).

[2] The cases cited by Plaintiff in which strict scrutiny did apply are distinguishable, because the regulations at issue in those cases placed severe restrictions on ballot access. For example, in *Cruz v. Melecio*, 204 F.3d 14, 17 (1st Cir. 2000), the regulation required each nomination petition to be notarized and filed within seven days. This requirement was prohibitively expensive because only attorneys could act as notaries in Puerto Rico, and too few were willing to take the time to validate the petitions. *Id.* Similarly, in *Libertarian Party of Oklahoma v. Oklahoma State Bd. of Elections*, 593 F. Supp. 118, 121 (W.D. Okla. 1984), the regulation allowed only a 90-day period for obtaining signatures, and prohibited plaintiffs from petitioning in shopping malls, campuses, or in other public areas. *Green Party of Arkansas v. Priest*, 159 F. Supp. 2d 1140 (E.D. Ark. 2001), is also distinguishable. In *Priest*, Arkansas law required all candidates not affiliated with a recognized political party to be labeled as "Independent" on the ballot regardless of their actual political affiliation. *Id.* at 1142. Because new political parties could not gain recognition in odd-numbered years, it was therefore impossible for a new party to have its nominee appear on a special election ballot with its party's label. *Id.* at 1142-43. The *Priest* court distinguished that process from other states, like New Hampshire, where a candidate could use the independent candidate procedure and choose a partisan label other than "independent" and thereby participate with its party label in odd-year elections. *Id.* at 1143.

> A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.

Id. (quotation marks and citations omitted). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *FCC v. Beach Communications*, 508 U.S. 307, 314-315 (1993) (citation omitted).

Here, the State's interest is ensuring that a political organization has a significant modicum of support in New Hampshire before running a full slate of candidates on the ballot. It is beyond debate that the State has a legitimate interest in regulating the number of candidates on the ballot and requiring some preliminary showing of support. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Barr v. Galvin*, 626 F.3d 99, 111 (1st Cir. 2010). Requiring a political organization to demonstrate that support during the year of the election ensures that that support is *current* rather than stale. The older the nomination paper, the greater the chance that the signer has moved from the state, passed away, or changed his or her mind about supporting the political organization. Contrary to Plaintiff's arguments, it is immaterial whether there is any actual empirical evidence that a specific percentage of nomination papers dated prior to January 1 of the election year would be invalid; for the January 1 start date to have a rational basis, it is sufficient that the legislature could reasonably believe that the regulation furthers the State's interest in ensuring that the political party currently has

support in this State.[3] *See Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 10 (1st Cir .2011) ("Rational basis review requires only that the state could rationally have concluded that the challenged classification *might* advance its legitimate interests").

Because the January 1 start date is rationally related to the State's legitimate objective of ensuring that a political organization has a significant modicum of support in New Hampshire before running a full slate of candidates on the ballot, Plaintiff's complaint fails to state a claim upon which relief may be granted and should be dismissed.

I. CONCLUSION

For the reasons stated above and in Defendant's Memorandum of Law in Support of Motion to Dismiss, this Court should grant the State's Motion to Dismiss.

Respectfully submitted,

WILLIAM M. GARDNER, SECRETARY OF STATE OF THE STATE OF NEW HAMPSHIRE, IN HIS OFFICIAL CAPACITY

By his attorneys,

JOSEPH A. FOSTER
ATTORNEY GENERAL

[3] Plaintiff complains that "New Hampshire law is among the most burdensome in the nation concerning the start date for obtaining access to the ballot, along with laws in Texas and Wisconsin." Pl.'s Mem. at 13, n. 6. Differences among the several states, however, do not betoken irrationality. *See Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 11 (1st Cir. 2011).

November 7, 2014

/s/ Laura E. B. Lombardi
Laura E. B. Lombardi, Bar No. 12821
Stephen G. LaBonte, Bar No. 16178
Assistant Attorneys General
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650
Laura.Lombardi@doj.nh.gov
Stephen.LaBonte@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed this day electronically and served electronically by operation of the Court's electronic filing system.

November 7, 2014

/s/ Laura E. B. Lombardi
Laura E. B. Lombardi (# 12821)