UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Libertarian Party of New Hampshire,	*	
Plaintiffs	*	Civil Action No. 08-CV-367-JM
v.	*	
William Gardner in his official capacity as Secretary of State of New Hampshire,	*	
Defendant	*	

DEFENDANT WILLIAM M. GARDNER, NEW HAMPSHIRE SECRETARY OF STATE'S OBJECTION TO PLAINTIFFS LIBERTARIAN PARTY OF NEW HAMPSHIRE'S MOTION FOR SUMMARY JUDGEMENT

NOW COMES William M. Gardner, in his official capacity as New Hampshire Secretary of State, by and through counsel, the Office of the Attorney General, and submits this objection to the Libertarian Party of New Hampshire's ("Plaintiffs") motion for summary judgment, and in support thereof, states as follows:

Plaintiffs argue that their First Amendment speech and associational rights were violated when the Secretary of State refused to substitute Bob Barr for George Phillies on New Hampshire's 2008 General Election ballot. Under Plaintiffs' argument, the Secretary of State was constitutionally required to remove George Phillies' name from New Hampshire's 2008 General Election ballot and required to replace his name with Bob Barr's, because Bob Barr was allegedly nominated at a national Libertarian Party convention.

Notwithstanding Plaintiffs' allegations, as set forth in the Secretary of State's motion for summary judgment Plaintiff Bob Barr and George Phillies gained access to New Hampshire's 2008 General Election ballot because they completed the process under RSA 655:40. There is no provision under New Hampshire law, nor is there any other federal requirement, constitutional or otherwise, that supports Plaintiffs' position that the Secretary of State was required to remove George Phillies' name from the 2008 General Election ballot – after he successfully completed the RSA 655:40 process to achieve ballot access.

Plaintiffs' fundamental challenge to the Secretary of State's refusal to substitute Phillies for Barr on the 2008 General Election ballot is with New Hampshire's determination of a recognized party under RSA 652:11. This statute provides:

> "Party" shall mean any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: the office of governor or the offices of United States senators.

RSA 652:11. When a political organization reaches this 4 percent threshold, then, in an election year, pursuant to RSA 656:5, the Secretary of State is charged with creating party columns. In 2008, the Secretary of State was charged with creating columns for the Democratic and Republican parties as they are recognized under New Hampshire law. See RSA 656:5.

The United States Supreme Court has long held that in the context of ballot access cases, it is permissible for a state to distinguish between political parties on the basis of prior elections. Bullock v. Carter, 405 U.S. 134, 147 (1972); Jenness v. Fortson, 403 U.S. 431, 439 (1971). Moreover, courts have upheld similar statutory schemes in other states. See, e.g., Vintson v. Anton, 786 F.2d 1023, 1025 (11th Cir. 1986) (Alabama's use

of bipartisan election boards whose members are chosen from two parties receiving most votes in the last election is an effective means to prevent fraud and ensure honest elections); Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 400 (8th Cir. 1985) (St. Louis election judge qualifications not discriminatory where based on membership in the two major political parties rather than affiliation with the Democratic or Republican parties specifically); MacGuire v. Houston, 717 P.2d 948, 953 (Colo. 1986) (Colorado's appointment of election judges from the two parties receiving most votes in last election resulted in a system of monitoring and gave an appearance of propriety to voters).

In fact, in 1996, in a challenge brought by the Libertarian Party, the First Circuit held that New Hampshire's regulation for appointing ballot clerks under RSA 658:2[1] from the recognized parties under RSA 652:11 is "nondiscriminatory, that is, it does not differentiate among Republicans, Democrats, and Libertarians." Werme v. Merrill, 84 F.3d 479, 484 (1st Cir. 1996). The Court went on to state that "the regulation conditions the right to appoint election inspectors and ballot clerks on a certain degree of success at the polls." Id. Consistent with United States Supreme Court precedent, the First Circuit observed, "[d]istinguishing between recognized political parties based on past electoral accomplishment is not per se invidiously discriminatory." See, e.g., American Party of Texas v. White, 415 U.S. 767, 781 (1974) (holding that it is not invidious discrimination for a state to grant minor parties official recognition, but deny them the right to hold primaries even though the main political parties are so entitled). The Court continued stating "[s]o here: the Libertarian Party has exactly the same opportunity to qualify as a

[1] RSA 658:2 provides in part that the inspectors of the election/ballot clerks are appointed by the two political parties that received the largest number of votes cast for governor in the state at the last previous general election. RSA 658:2; see also Werme v. Merrill, 84 F.3d 479, 484 (1st Cir. 1996).

source of election inspectors and ballot clerks under New Hampshire law as does any other party." Id. at 484-85.

Thus, in the context of RSA 658:2, the First Circuit has already ruled that RSA 652:11 is constitutional. Therefore, Plaintiffs' assertions to the contrary are without merit.

Moreover, in 2006, the Libertarian Party challenged the constitutionality of RSA 652:11. Libertarian Party New Hampshire v. State of New Hampshire, 154 N.H. 376 (2006). The New Hampshire Supreme Court held that the "threshold required for party status-four percent of the votes cast for the offices of governor or United States Senator-does not severely burden associational rights." See Libertarian Party New Hampshire, 154 N.H. at 382. In reaching this conclusion, the Court cited a United States Supreme Court 1971 determination upholding an electoral scheme that required an "organization to garner twenty percent support at a prior election in order to achieve the status of 'political party' with its attendant ballot position rights and primary election obligations." Id. (quoting Jenness, 403 U.S. at 439).

There is no question that the Libertarian Party did not receive at least 4 percent of the votes for the offices of governor or United States senator in New Hampshire's 2006 general election. See Aff. of Deputy Secretary of State David Scanlan. As such, in the 2008 general election, New Hampshire did not recognize the Libertarian Party as a party under RSA 652:11. Therefore, as set forth above, consistent with the United States Constitution, Bob Barr was not entitled to be listed as the sole Libertarian candidate on the general election ballot.

In sum, Plaintiffs' basis for claiming that the Secretary of State erred in refusing to substitute Bob Barr for George Phillies on the 2008 claim, *i.e.*, that RSA 652:11 is unconstitutional, is simply incorrect. The standard that Plaintiffs seek to have instituted is a standard without rules. That is, a standard that allows any organization to trump the right of any individual candidate who has secured ballot access pursuant to RSA 655:40. This of course would not be a fair and equitable standard for our democratic form of government. As the United States Supreme Court has opined, requiring candidates to demonstrate a 'significant modicum of support' is not unconstitutional. Id. at 789. In doing so, it serves the State's "legitimate interest in regulating the number of candidates on the ballot," Bullock, 405 U.S. at 145 (1972), and, more importantly fulfills the State's interest and duty "to protect the integrity of its political processes from frivolous or fraudulent candidacies." Id. (citing Jenness, 403 U.S., at 442).

Accordingly, Plaintiffs' motion for summary judgment must fail.

WHEREFORE, for the reasons set forth above and for the reasons articulated in the New Hampshire Secretary of State William M. Gardner's motion for summary judgment, he respectfully requests this Honorable Court to:

A. Grant summary judgment in his favor;

B. Deny Plaintiffs' motion for summary judgment; and

C. Grant such other and further relief as is equitable and just.

Respectfully submitted,

William M. Gardner, in his official capacity as Secretary of State of New Hampshire

By his attorney,

Michael A. Delaney
ATTORNEY GENERAL

/s/ James W. Kennedy
James W Kennedy
Bar No. 15849
Assistant Attorney General
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650
james.kennedy@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were delivered this 27th day of October 2009 to Gary Sinawski, Esquire and Evan F. Nappen, Esquire, counsel for the Plaintiffs, via the Federal Court's ECF filing system.

/s/ James W. Kennedy
James W. Kennedy

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