

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**GREG DORSEY,**

*Plaintiff,*

v.

**LINDA H. LAMONE, et al.,**

*Defendants.*

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\* Civil Action 1:15-cv-2170-GLR

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**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

**INTRODUCTION**

In this suit for declaratory and injunctive relief against defendants Linda Lamone, the State Administrator of the Maryland State Board of Elections (the “State Board”), State Board members David J. McManus, Jr., Patrick J. Hogan, Kelly A. Howells, Bobbie S. Mack, and Michael R. Cogan, in their official capacities, the plaintiff Greg Dorsey requests this Court to declare invalid signature requirements for unaffiliated candidates who seek to run for statewide office. Mr. Dorsey claims that the requirement that an unaffiliated candidate gather 38,000 signatures in order to obtain ballot access “unfairly burdens and discriminates against unaffiliated candidates” and treats them unfairly as compared to minor political parties, which must gather only 10,000 signatures in order to form a party. Compl. ¶ 21, 23.

## STATEMENT OF FACTS

### The Parties

Plaintiff Greg Dorsey is a Maryland resident who has filed a certificate of candidacy for the 2016 United States Senate general election. (Compl. ¶¶ 8-9). Mr. Dorsey seeks access to the 2016 general election ballot as a candidate unaffiliated with any political party. (*Id.* ¶¶ 9-10.)

Defendant Linda H. Lamone is the State Administrator of the Maryland State Board of Elections (the “State Board”). Defendants David J. McManus, Jr., Patrick J. Hogan, Kelly A. Howells, Bobbie S. Mack, and Michael R. Cogan<sup>1</sup> are members of the State Board. Mr. McManus is the Chairman of the State Board and Mr. Hogan the Vice Chairman. All of the defendants are sued in their official capacities as Administrator or members of the State Board. (*Id.* ¶4.)

The State Administrator serves as the chief state election official in Maryland. Md. Code Ann., Elec. Law, § 2-103(b)(8). The State Board is the public body with responsibility to manage and supervise elections in the State and ensure compliance with the requirements of applicable state and federal law “by all persons involved in the elections process.” Elec. Law § 2-102(a).

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<sup>1</sup> The complaint names former State Board member Charles E. Thomann, who has ceased to hold office. His successor on the State Board is Michael R. Cogan. Under Federal Rule of Civil Procedure 25(d)(1), “the officer’s successor is automatically substituted as a party” if the officer “dies, resigns, or otherwise ceases to hold office.”

### **Alternative Methods for Gaining Ballot Access**

Maryland provides three alternative methods for an individual to qualify as a candidate whose name will appear on the general election ballot. Those who seek nomination as a candidate of a “principal political party” are chosen by party primary, Elec. Law § 5-701(1), which in a presidential election year is held on the first Tuesday in April; the 2016 primary will be held on April 5, 2016. Elec. Law § 8-201(a)(2)(i). The “principal political parties” are the two parties whose candidates for Governor received the highest and second highest number of votes of any party candidate at the preceding general election. Elec. Law § 1-101(dd), (jj), (kk). Other political parties may nominate candidates “in accordance with the constitution and by-laws of the political party,” Elec. Law § 5-703(3), evidenced by a “certificate of nomination signed by the officers of the political party.” Elec. Law § 5-703.1(e). Candidates not affiliated with any political party may be nominated by petition. Elec. Law § 5-703(2).

### **Nomination by Petition**

“A candidate who seeks nomination by petition may not have the candidate’s name placed on the general election ballot unless the candidate files with the appropriate board petitions signed by not less than 1% of the total number of voters who are eligible to vote for the office for which the nomination by petition is sought, except that the petitions shall be signed by at least 250 registered voters who are eligible to vote for the office.” Elec. Law § 5-703(e)(1). A petition containing the required number of signatures must “be filed

. . . by 5 p.m. on the first Monday in August in the year in which the general election is held.” Elec. Law § 5-703(f).

A nominating petition must comply with the provisions of Title 6 of the Election Law Article. Elec. Law § 5-703(e)(2); *see also* Elec. Law § 6-102(a). “To sign a petition, an individual shall:”

(1) Sign the individual’s name as it appears on the statewide voter registration list or the individual’s surname of registration and at least one full given name and the initials of any other names; and

(2) Include the following information, printed or typed, in the spaces provided:

(i) the signer’s name as it was signed;

(ii) the signer’s address;

(iii) the date of signing; and

(iv) other information required by regulations adopted by the State Board.

Elec. Law § 6-203(a)(1) – (2). Each signature must be witnessed by a petition circulator, who signs under oath that each of the signatures were affixed in the circulator’s presence.

Elec. Law § 6-204. Maryland law also permits “self-circulated petitions,” where an individual may validate the signer’s own signature by completing the circulator’s oath. *See Whitley v. Maryland State Bd. of Elections*, 429 Md. 132 (2012).

Any registered voter within the relevant electorate may sign nominating petitions for an unlimited number of different candidates, regardless of the voter’s party affiliation or participation in a primary election. A nominating petition does not require the signer to state an intent to vote for the petition candidate.

### **Formation of New Political Parties**

Any group of registered voters may form a new political party by filing a petition bearing the signatures of at least 10,000 registered voters and by adopting and filing an interim constitution and bylaws that comply with state law. Elec. Law § 4-102(a), (b), (e). All of the signatures must be dated within two years of the last qualifying signature. Elec. Law § 4-102(b)(2)(ii). A new party petition must include the name and signature of the party's state chairman and the names and addresses of 25 registered voters designated to serve as the initial governing body of the party. Elec. Law § 4-102(b). The party's constitution and bylaws, after review and approval of the State Board, must be adopted by the initial governing body within 90 days after the date of filing of the last qualifying signature on the new party petition. Elec. Law § 4-102(d), (e).

Once qualified, a political party retains that status until December 31 in the year of the second statewide general election following the party's qualification by petition. Elec. Law § 4-103(a). Recognition as a political party is extended through the next general election if the party's nominee for the highest office on the ballot in a statewide general election receives at least 1% of the total vote for that office. Elec. Law § 4-103(a)(2)(i). Alternatively, party status is retained for any year that, on the preceding December 31, at least 1% of the registered voters were affiliated with the political party. Elec. Law § 4-103(a)(2)(ii).

Before 2003, minor political parties with less than 1% of the State's registered voters could gain ballot access for their candidates only by submitting a nominating petition signed by 1% of the registered voters eligible to vote for the particular office. *See, e.g.*, Elec. Law § 4-102(f) (2003 Repl. Vol.) (limiting nomination by convention to a political party with at least 1% of registered voters). This “two-tiered petitioning requirement for minor parties” was invalidated by the Court of Appeals of Maryland as contrary to the equal protection component of Article 24 of the Maryland Declaration of Rights. *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127, 156-57 (2003). In 2006, the General Assembly of Maryland amended certain provisions of the ballot access scheme to eliminate the “two-tiered petitioning requirement” for any recognized political party and to permit nomination in accordance with the constitution and by-laws of the political party, rather than solely through a party convention. 2006 Md. Laws ch 120.

### **The Complaint**

Mr. Dorsey alleges that an unaffiliated candidate for Maryland's United States Senate seat in 2016 will need in excess of 38,000 petition signatures to gain access to the general election ballot. (Compl. ¶ 16). He further alleges that the signature requirement “unfairly burdens and discriminates against unaffiliated candidates” and treats them unfairly as compared to nominees of political parties. (*Id.* ¶ 21.) More specifically, Mr. Dorsey contends that, because Maryland requires 10,000 signatures to form a new

political party, the federal and state constitutions prohibit Maryland from requiring a higher number of signatures on a candidate nominating petition for statewide office. (*Id.* ¶ 23.)

Mr. Dorsey seeks a judgment declaring that Elec. Law § 5-703(e) violates the First and Fourteenth Amendments to the United States Constitution, on its face and as applied to himself and his supporters.<sup>2</sup> He requests a preliminary and permanent injunction to prohibit defendants from enforcing Maryland’s ballot access laws as to Mr. Dorsey’s run for the United States Senate and an order decreasing the number of signatures required for ballot access for himself and any other unaffiliated candidate for that seat “to a number which is fair, reasonable, ascertainable, and constitutionally permissible, with such number, in any event, being less than 10,000 signatures.” (Compl. 14).

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This “plausibility” standard demands “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. That is, “[w]here a complaint

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<sup>2</sup> Although Mr. Dorsey mentions Article 24 of the Maryland Declaration of Rights in his complaint (Compl. ¶¶ 23, 39) he does not assert any claim under the Maryland Constitution (Compl. ¶¶ 36-39) nor does he request any relief for any purported violation of the Maryland Constitution (Compl. 14).

pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’ *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court is “not bound to accept as true a legal conclusion couched as a factual allegation,” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and “are not entitled to the assumption of truth.” *Id.* at 678-79.

## **II. MARYLAND’S BALLOT ACCESS REQUIREMENTS IMPOSE ONLY A SLIGHT BURDEN ON UNAFFILIATED CANDIDATES AND THUS DO NOT TRIGGER STRICT SCRUTINY.**

When state ballot-access restrictions are challenged, the Supreme Court has directed courts to weigh “‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’” against “‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’” while “taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Pisano v Strach*, 743 F.3d 927, 932-33 (4th Cir. 2014) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). As the Fourth Circuit recently has explained, under “the *Anderson/Burdick* framework,” only election laws that impose a “severe burden” on ballot access are subject to strict scrutiny.<sup>3</sup> *Id.* at 933. “On the other hand, ‘if a statute imposes

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<sup>3</sup> As the Court also explained, when applying the *Anderson/Burdick* analytical framework, it is unnecessary to engage in a separate Equal Protection Clause analysis.



only modest burdens, then a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.’” *Id.* (quoting *South Carolina Green Party v. South Carolina State Election Comm’n*, 612 F.3d 752, 756 (4th Cir. 2010) (internal quotation marks omitted)).

In assessing the magnitude of the burden on plaintiffs’ rights, courts must consider a State’s ballot-access scheme in its entirety. *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000). Considered in its entirety, Maryland’s ballot-access scheme for unaffiliated candidates is lenient, imposing a burden that courts in this circuit and others have characterized as “modest.” *See Pisano*, 743 F.3d at 935 (citing cases); *see discussion infra* at 10. Maryland grants ballot access to unaffiliated candidates for the United States Senate based on a 1% signature requirement and an August petition filing deadline, which is approximately four months after the Democratic and Republican parties will have held their primary elections. Elec. Law § 8-201(a)(2)(i). Also of importance, signature collection is unencumbered by any onerous restrictions: all registered voters are free to sign nominating petitions for as many different candidates as they wish, whether or not the signers are affiliated with a political party or vote in primary elections; no geographical minimums or limits require candidates to obtain signatures from any particular area of the

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*Pisano*, 743 F.3d at 934 (citing cases); *see also Green Party of Tennessee v. Hargett*, 791 F.3d 684, 691 (6th Cir. 2015) (*Anderson/Burdick* test applies to all ballot access cases).

State; signatures are not required to be notarized and even “self-circulating” petitions are permitted. *See Whitley*, 429 Md. at 163.

By comparison, in *Pisano*, candidates of unrecognized political parties challenged North Carolina’s May 17 deadline for filing petition signatures in the context of a requirement that the petitions contain the signatures of 2% of the total number of voters who voted in the most recent general election for Governor. 743 F.3d at 930. Despite a deadline only nine days after the May 8 primary, which plaintiffs said prevented them from gathering signatures “at the height of the presidential election season,” *id.* at 934, the Court rejected the notion that the burden was “severe,” observing that “[e]lection law schemes with modest signature requirements and filing deadlines falling close to or after the primary election are the relevant points of comparison. We, and several of our sister circuits, have found that such schemes do not impose severe burdens.” *Id.* at 935 (citing *Swanson v. Worley*, 490 F.3d 894, 905–06, 910 (11th Cir. 2007) (upholding Alabama’s primary-day filing deadline, in combination with a three percent signature requirement, for unaffiliated candidates in local and statewide elections); *Lawrence v. Blackwell*, 430 F.3d 368, 370, 375 (6th Cir. 2005) (upholding Ohio’s primary-eve filing deadline for unaffiliated congressional candidates, in combination with a one percent signature requirement); *Wood*, 207 F.3d at 713–14, 717 (upholding Virginia’s primary-day filing deadline, in combination with a 0.5% signature requirement, for unaffiliated candidates in local and statewide elections) (parenthetical descriptions provided by the court of appeals). Maryland’s ballot-

access scheme for unaffiliated candidates is less restrictive than that considered in *Pisano* and thus clearly falls within the range of requirements that courts have deemed “modest.” Accordingly, strict scrutiny is unwarranted and the State’s “important regulatory interests” are generally sufficient to justify reasonable, non-discriminatory restrictions. *Id.* at 933.

**II. THE STATE MAY TREAT PARTY CANDIDATES AND INDEPENDENT CANDIDATES DIFFERENTLY BECAUSE THEY ARE NOT SIMILARLY SITUATED.**

Mr. Dorsey’s contention that the ballot access requirements applicable to independent candidates are more burdensome than the requirements for major and minor party candidates must also be rejected. Courts have generally recognized that party candidates and independents are not similarly situated and so the requirements for ballot access need not be identical. *Nader v. Connor*, 332 F. Supp. 2d 982, 990 (W.D. Tex. 2004), *aff’d*, 388 F.3d 137 (5th Cir. 2004); *Konst v. New York*, 92-CV-615E(H), 1992 WL 281092, at \*3 (W.D.N.Y. Oct. 7, 1992). Rather, the Constitution requires only that the burdens placed on independent candidates be “reasonable” and “similar in degree” to those imposed on party candidates. *Wood*, 207 F.3d at 712; *see also Libertarian Party of Washington v Munro*, 31 F.3d 759, 765 (9th Cir. 1994) (“Unless a difference in treatment makes it substantially easier for major party candidates to get on the ballot than for minor party candidates to do so, there is no equal protection violation.”). Maryland’s ballot access scheme, which places only modest burdens on both minor party and independent

candidates, meets this test.<sup>4</sup> Indeed, from the perspective of an individual seeking to appear on the general election ballot, none of the alternative methods for gaining ballot access “can be assumed to be inherently more burdensome than the other.” *Jenness v. Fortson*, 403 U.S. 431, 441 (1971).

Mr. Dorsey’s contention that the path to ballot access for unaffiliated candidates is more burdensome than that for major and minor political party candidates is wrong. None of the three alternative methods for gaining ballot access is inherently more burdensome than the others because candidates seeking a party nomination must satisfy requirements not faced at all by unaffiliated candidates, specifically, the vetting and winnowing processes inherent in selecting a single nominee to represent the party.

Political parties in Maryland are subject to requirements that independent candidates are not. For a political party that does not select its nominees by primary election, those requirements include certain organizational duties—adopting a constitution and bylaws that must be approved by the State Board (Elec. Law § 4-102(d)), establishing a State party central committee (Elec. Law § 4-201)—and the obligation to select candidates through an established nomination process. *See* Elec. Law § 4-102(f) (authorizing political party to nominate its candidates “in accordance with the constitution and bylaws adopted by the

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<sup>4</sup> Additionally, Mr. Dorsey’s assumption that signature collection for purposes of forming or maintaining a political party is the same as collecting signatures on behalf of a single candidate should not be accepted uncritically. The need for party organizers and others who wish to have a say in choosing the party’s candidates to change their party affiliation similarly cannot be ignored, nor the organizational tasks involved.

political party and submitted to the State Board.”). From a candidate’s perspective, this means that the prospective nominee must win the support of the party in order to appear on the general election ballot. Realistically, the difficulty of competing in and winning a primary election or a party’s nomination cannot be said to be easier, more certain, or inherently less burdensome than collecting petition signatures from one percent of registered voters. Certainly, any prospective candidate unable to garner the volunteers, resources, or popular support to obtain that number of signatures would be extremely unlikely to win, or even to have a significant impact upon, a primary election for either the Democratic or Republican party. Unlike either major or minor party candidates, the independent candidate’s route to ballot access is uncomplicated by any need to survive any form of competitive winnowing or vetting by party members. The independent candidate can, in fact, attain access to the general election ballot without any prior demonstration that he or she is the preferred candidate of *any* voter.

Maryland’s petition signature requirements for independents promote the State’s important interests in preventing ballot overcrowding, deterring frivolous candidates, avoiding party splitting, and “discouraging independent candidacies prompted by short-range political goals, pique, or personal quarrel.” *Storer v. Brown*, 415 U.S. 724, 735 (1974); *see also Cromer v. South Carolina*, 917 F.2d 819, 825 (4th Cir. 1990) (recognizing state interest in political stability through prevention of party-splitting candidacies); *Swanson*, 490 F.3d at 911 (reasonable ballot access regulations promote important state

interests in preserving political stability by “temper[ing] the destabilizing effects of party-splintering and excessive factionalism.” (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997)). It is neither unreasonable nor discriminatory to place modest signature requirements on independents seeking to appear on the general election ballot without also subjecting candidates who have emerged from a party’s candidate selection process to the same requirements.<sup>5</sup>

Political parties and independent candidacies are distinct. Voters and candidates who choose to affiliate as a political party generally have the long term goal to influence the political process through building a party organization, expanding membership in the party, nominating and supporting multiple candidates, and promoting a particular philosophy. *See, e.g., Storer*, 415 U.S. at 745 (“A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office.”).

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<sup>5</sup> “Party candidates have the support of their respective parties. Even if this does not translate automatically into party votes for them, it does show that the candidates have an organization backing and campaigning for them, which normally translates into more support and votes for them. In general, party support shows that the candidate has ‘a significant modicum’ of support. The independent candidate is not in this position. The only indication that he or she has mustered any support is the signatures on the submitted petition, and there is no guarantee that the people who signed will, in fact, vote for the candidate or that they will take the more significant step of actually campaigning for the candidate.” *Konst*, 1992 WL 281092, at \*3.

A party's long-term interest in promoting its political brand offers reasonable assurances that the party's chosen candidate is not frivolous, lacking support, or motivated by inappropriate or non-political goals. Similarly, a political party is unlikely to lend itself to party-splitting schemes or efforts to bring intra-party rivalries to the general election. An independent candidacy, by contrast, offers no such assurances, except through the 1% signature requirement. Because this modest restriction on ballot access is reasonable and necessary to advance the State's important interests, the signature requirement is valid.

A ballot access scheme resembling Maryland's was recently upheld in *Parker v. Duran*, No. 14-cv-617MV-GBW, 2014 WL 7653394 (D.N.M., Aug. 7, 2014). New Mexico grants ballot access to independent candidates who submit a nominating petition with signatures of 3% of the total votes cast in the district for governor in the most recent election. Minor political parties, on the other hand, need signatures equal to 1% of such votes to nominate a candidate.<sup>6</sup> The plaintiff in *Parker* argued that the disparity in signatures required was unconstitutionally burdensome.

The district court rejected the disparity argument, relying on the party-formation and nomination processes "to which an independent candidate is not subjected, before he or she even reaches the stage of gathering signatures to qualify for a place on a general

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<sup>6</sup> Qualifying as a minor political party requires petition signatures equal to 0.5% of the total votes cast statewide for the Office of Governor. Assuming an even distribution of signatures, the showing of support for a party or its candidate within any given district is, at best, 1.5%, less any double-counting of voters signing both petitions.

election ballot.” *Id.*, 2014 WL 7653394, at \*6. In light of those additional requirements, the court reasoned, “the imposition of a more stringent signature requirement on independent candidates rationally serves the State’s legitimate interest” in ensuring a modicum of support. *Id.*, at \*9.

In *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C.), the district court took a contrary view in considering signature disparity of 90,639 for independents as compared to 58,841 for minor parties, but the court reached that result by applying the strict scrutiny standard of review, a standard that should not be applied in the present case. 370 F. Supp. at 378. The existence of a disparity between candidates not similarly situated does not warrant strict scrutiny where, like here, the ballot restrictions at issue are not severe. *See, e.g., Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010) (declining to apply strict scrutiny because, despite a disparity between signature requirements of 0.1% of registered voters for new parties as compared to 1% of ballots cast in latest presidential election for independents, “we cannot say that the burden on independent candidates for president” was severe). Because strict scrutiny does not apply to Mr. Dorsey’s claim, there is a presumption that the State’s important regulatory interests are sufficiently weighty to justify the restriction. The district court in *Delaney* also did not appear to consider (perhaps because the State did not articulate it) the other state interests promoted by the signature requirement over and above the necessity to demonstrate adequate public support. Lastly, the district court’s assessment of the relative burdens relies almost entirely upon a



comparison between independent candidates and a hypothetical “sham” party, for which the burdens associated with winning a party nomination were assumed not to exist.

Maryland’s ballot access scheme imposes only a modest burden on non-party candidates seeking election to the United States Senate. Maryland has articulated other state interests promoted by the signature requirements for unaffiliated candidates; and the threat from hypothetical sham political parties is entirely speculative. Even assuming the speculative threat from sham political parties gaining ballot access, moreover, the Constitution does not require that the Maryland General Assembly control that risk by further reducing Maryland’s already reasonable, non-burdensome ballot access requirements for independent candidates. *See Langguth v. McCuen*, 30 F.3d 138, at \*2 (8th Cir. 1994) (unpublished) (holding that the equal protection clause did not mandate that independent candidate be treated the same as political parties or initiated acts).

## **CONCLUSION**

The defendants’ motion to dismiss should be granted and the plaintiffs’ complaint dismissed with prejudice.

Respectfully submitted,

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/s/ Julia Doyle Bernhardt

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