No. 15,2088

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES T. PARKER,

Plaintiff-Appellant,

vs.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable Judge Martha Vazquez
No. 1:14-CV-00617-MV-GBW

APPELLANT'S REPLY CHIEF

Oral Argument Requested

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INTRODUCTION

What is most telling about Defendant Intervenor-Appellee the State of New Mexico's Answer is what it does not discuss or dispute. The Answer repeats the reasoning in the District Court's opinion without grappling with the defects Parker described in his Brief-in-Chief ("Brief"). It does not attack the Tenth Circuit precedent Parker cited in which the Court reasoned there should be higher signature requirements for minor parties and their candidates than for independent candidates, the converse of what the District Court ruled. Brief at 18-19. It does not discuss the election laws of most other states, which have ballot access requirements that treat minor party and independent candidates equally or have more stringent requirements for minor party candidates. The Answer contains an argument based on a New Mexico statute that has been amended, making the argument meaningless. For these and other reasons set forth below, the Answer does little to refute Parker's argument, and the decision below should be reversed.

ARGUMENT

I. The Answer Does Not Dispute Much Less Address Parker's Strongest Arguments.

The State does not dispute, much less address, many of Parker's arguments. It does not argue that the District Court properly ignored Parker's evidence that, unlike New Mexico, 44 other states have ballot

qualification laws for independent candidates that are equal to or less stringent than those states' ballot qualification laws for minor party candidates. *See* Brief at 5. Parker cited Supreme Court decisions in election cases that refer to and are informed by the election schemes in other states, *Id.* at 23-24. The Answer does not defend the District Court for stating this precedent was irrelevant, disregarding the laws of most other states, and instead following cases from a few states in the minority.

Although 44 other states which *at the least* treat independent and minor party candidates equally as to signature requirements often have additional organizational requirements for minor parties more stringent than New Mexico's requirements, *id.* at 5, the State did not sufficiently explain how the District Court could conclude that New Mexico's minimal additional requirements for minor parties evened the playing field, so that the New Mexico statute making Parker gather triple the signatures a minor party candidate had to collect was nondiscriminatory and did not require strict scrutiny.

As Parker explained, most of the cases the District Court opinion relied on actually involved state election laws that treated independent candidates and minor party candidates *equally* and required the *same amount* of signatures from each. *See* Brief at 15-20. The Answer does not dispute

Parker's summary of these cases, but nevertheless argues that different and more stringent requirements for minor parties and their candidates compared to independent candidates justifies the converse so that the District Court's decision should be affirmed. Answer at 14. This argument makes no sense.

Parker explained that the District Court misread New Mexico minor party qualification statutes and appeared to be unaware that a minor party could remain on the New Mexico ballot for many election cycles without being subject to even the minimal additional requirements of the minor party qualification statutes. Brief at 21-23. He established that several minor parties have remained on the ballot or still remain on the ballot during several election cycles, and for them the additional "burdens" the District Court used to justify New Mexico's discriminatory signature requirement are nonexistent. *Id.* The Answer does not dispute this reading of the statutes or the hypothetical that a minor party could stay on the New Mexico ballot forever without having to meet any other requirements if it ran one candidate for sheriff every four years.

II. The State Quotes an Outdated Version of NMSA 1978, § 1-8-2 to Argue that Independent Candidates Are Not Severely Burdened Compared to Minor Party Candidates.

The State contends throughout the Answer that Parker miscalculated the number of petition signatures a minor candidate running for District 4

PEC position would have needed to gain access to the ballot. *See* Answer at 1, 11, note 1, and 15, note 5. Throughout the Answer it asserts that New Mexico requires a minor party candidate to gather signatures equal to one per cent of the votes cast in the last *presidential* election, while the requirement for independent candidates is three per cent of the last *gubernatorial* election, and that because of the "higher turnout for presidential elections," Parker understated the number of signatures required for a minor candidate. *Id.* at 1.This is wrong. NMSA 1978, § 1-8-2 was modified by the legislature (NM SB 125 and HB 128 2014) in early 2014, so that *both* minor party and independent candidates must gather a percentage of signatures based on the votes cast in the previous *gubernatorial* elections. *Compare* NMSA 1978, § 1-8-2 (B) with NMSA 1978, § 1-8-51 (B). Therefore, a minor party candidate only needs to get a third of the number of signatures that an independent candidate must gather, and Parker's calculations are correct. There is some inconsistency in both briefs about the statutory language; at any rate, the State's argument that Parker miscalculated is incorrect.

III. The State Musters Little Authority to Support Its Claim That Section 1-8-51 Does Not Impose Severe and Discriminatory Burdens on Parker's Constitutional Rights

In pages 4-12, the State argues that the District Court was correct to decide that NMSA 1978 § 1-8-51 is not facially discriminatory. But after it agrees with Parker about the proper tests set out by the Supreme Court, Answer at 4-5, the precedent it cites is thin support for its contention that the District Court rightly refused to apply strict scrutiny.

A. The State Is Wrong that Parker "Abandoned" An Argument.

The State says that Parker has "abandoned any argument that Section 1-8-51's petition signature requirement was unconstitutional because of the absolute number of signatures it requires…" *Id.* at 5. This is a red herring. Like the District Court, the State misunderstands Parker's claims; he never made this argument about the absolute number of signatures below and therefore cannot abandon it. Brief at 16. Curiously, the District Court spent many more pages rejecting the argument Parker didn't make than the one page of the opinion dismissing the argument he made. *Id.* at 18. Both the State's and the District Court's confusion about Parker's argument need not be addressed again in this Reply.

B. The State Cites A Few Cases Involving Significantly Different Election Schemes That Provide Little Support for its Contention that New Mexico's Ballot Access Requirements Do Not Discriminate Against Independent Candidates.

The State spends eight pages arguing that New Mexico statutes that require an independent candidate to gather three times as many signatures as a minor party candidate are not facially discriminatory. Answer at 4-12. But it cites only four cases in these eight pages to back its contentions; none provide much support. Although the Answer asserts that the District Court cited "a wealth of authority that minor party candidates and independents are not similarly situated, " *Id.* at 6, it leaves it at that. It ignores Parker's contention about this "wealth" of cases: that they actually "involved state election law schemes that treat minor parties and independent candidates equally and require the same amount of signatures from each" or cases that involved minor party and major party ballot qualification disputes that lend little support to the State in this case. Brief at 18; *see* discussion at 18-20. The State does not dispute Parker's interpretation of these cases, nor can it rationally deny his contention that they do not justify the decision below.

The State relies explicitly on four cases to make its argument. Answer at 4-12. No case is on point. *Jenness v. Fortson*, 403 U.S. 431 (1971) (Answer at 7) dealt with the constitutionality of different ballot access

requirements for major party nominees as opposed to minor party and independent candidates and does not support the constitutionality of unequal ballot access requirements between minor party candidates and independents. As Parker pointed out, under the Georgia election law at issue in *Jenness v. Fortson*, Parker would not have had to submit a petition at all. Brief at 23. *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010) (Answer at 8), involved a challenge by a independent presidential candidate, but the challenged Hawaiian election scheme was significantly different from New Mexico's. In Hawaii, a minor party presidential candidate's petitions were due in February while an independent presidential candidate's petitions were due in September, seven months later. *Id.* at 1215-1216. More than a half year's additional time for signature collection was obviously to the independent's advantage, and the court reasoned that the statutes were therefore not discriminatory. Parker had no deadline advantage at all under New Mexico's election law. He had to gather triple the number of signatures in the same time period as a minor candidate. In Hawaii, the highest percentage involved for presidential petitions was one per cent, not the three per cent required of Parker. *Id.* Moreover, under Hawaiian law, a candidate for local office like Parker would only have to gather 15 to 25 signatures (depending on the office) to gain access to the primary ballot.

Haw. Rev. Stat. § 2-12-5. Parker would have been on a primary ballot in Hawaii. Given these differences, *Nader v. Cronin* is hardly compelling support.

Likewise, the two North Carolina district court cases the Answer cites in this section do not buttress its argument. Answer at 12. *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004) squarely supports the application of strict scrutiny and reversal of the decision below. *See* Brief at 16-17, 19 and 25. *Greene v. Bartlett*, 2010 WL 3326672 (W.D. N.C. Aug. 24, 2010), aff'd 449 Fed Appx. 312 (4th Cir. Oct. 13, 2011) hardly undercuts *Delaney*. It likewise held that strict scrutiny must be applied to consider the constitutionality of facially discriminatory signature requirements. 2010 WL 3326672 at 6. One issue in *Greene* was the different number of signatures required for state independent candidates as opposed to local independent candidates. *Id.* at 5. This disparate treatment issue is not present in this case, and the State's citation of this discussion is unhelpful – New Mexico does not have a different percentage of signature requirements for its statewide and local independent candidates. In *Greene*, independent candidates were given a year and a half to collect their higher number of signatures; this additional time was noted as a factor in the decision. *Id.* at 6. Furthermore, the court in *Greene* noted that 80 independent candidates for local positions

had gained a place on the North Carolina ballot since 1992, and one independent Congressional candidate had also done so. *Id.* at 7. The absence of independent candidates in New Mexico's ballot history is in stark contrast and supports a contrary finding of severe discrimination in New Mexico's election law.[1]

IV. New Mexico Election Law's Minimal Organizational Requirements for Minor Parties Do Not Justify the Severe Burden Placed on Independent Candidates.

The State next argues the District Court appropriately ruled that minor party and independent candidates are not so similarly situated in New Mexico that strict scrutiny was required, Answer at 12-18, but most of the authority it relies upon does not justify New Mexico's harsh treatment of independent versus minor party candidates. The Answer persists in citing cases that rule on the constitutionality of the disparate treatment of major parties as opposed to minor parties and/or independents under a state's elections laws. *See Jenness v. Fortson*, 403 U.S. 431 (1971)(discussed

[1] At page 12 of the Answer, the State suggests that strict scrutiny should not be applied to ballot access requirements for local officials, contrary to *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-86 (1979) and *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), which applied strict scrutiny to state ballot access restrictions for candidates for local office. Moreover, *Greene V. Bartlett's* explanation of how North Carolina's state law is narrowly tailored to support a compelling state interest is almost non existent compared to the analysis in the two Supreme Court cases.

above at page 6), Answer at 13; *Hagelin for President Comm. of Kansas v. Graves* (10th Cir. 1994) (independent candidate attacking an August deadline for filing petitions compared to later deadline for major party candidates), Answer at 14; *Stevenson v. State Bd. of Elections*, 638 F. Supp. 547 (N.D. Ill. 1986) (different petition deadlines for major party and independent candidates), Answer at 14; *Miller v. Lorain County Bd. of Elections*, 141 F.3d 252 (6th Cir. 1998) and *Kuntz v. N.Y. State Senate*, 113 F.3d 326 (2d. Cir. 1997). Answer at 15, note 4. *Miller* and *Kuntz* implicitly support equal signature requirements for independent candidates and minor party candidates for the same office: Ohio and New York did not require more signatures for an independent candidate than for a new party candidate, and these two cases involve whether a state can require more signatures for an independent candidate than for a *major* party candidate, not an issue in this lawsuit. *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1380 (10th Cir. 1982) carefully explains why requirements can be ***higher*** for minor party candidates than for independents; nevertheless, the State asserts the case supports the converse. Answer at 13. *Arutunoff* further contradicts the State's argument because it applied strict scrutiny to the challenged Oklahoma ballot access restrictions. *Id.* at 1379. *See also Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014) (reversing district court,

ruling that it incorrectly applied rational scrutiny to Colorado election statutes setting lower contribution limits for unaffiliated candidates compared to those set for major party candidates, and that when fundamental First Amendment rights were at issue, a higher level of scrutiny is necessary).

The State cites one additional case[2] to support its contention that minor party and independent candidates in New Mexico are not similarly situated. But *Nader v. Connor*, 332 F.Supp. 2d 982 (W.D. Tex. 2004) dealt with the constitutionality of a Texas election law which set heavier burdens only for an independent presidential candidate. *Id.* at 985. Under Texas election law, the ballot access qualifications for all other minor party and independent candidates are even-handed. An independent candidate for statewide office other than president is required to collect the same number of signatures as a minor party candidate – one percent of the last gubernatorial vote. *Compare* Tex. Bus. & Com. Code § 181.006 with §142.007. An independent candidate for county office would likewise have to collect the same number of signatures as a minor party candidate for that same office. *Id.* The court's narrow holding about the constitutionality of a heavier burden for an independent presidential candidate and Texas's

[2] *Greene v. Bartlett*, 2010 WL 3326672 (W.D. N.C. Aug. 24, 210 is distinguished above at page 8.

evenhanded ballot access laws for all other independent and minor party candidates lends little support to a finding that New Mexico's discriminatory treatment of all independent candidates is constitutional.

V. Neither Important Nor Compelling State Interests Justify NMSA 1978, § 1-8-51

The State repeats the District Court's reasoning that there is a rational basis for the discriminatory statute. It does not try to argue that the statute can survive strict scrutiny. Answer 19-21.

A. Crowded, Confusing Ballots Have Never Been An Issue in New Mexico

The State claims that NMSA 1978, § 1-8-51 serves the important regulatory interests of assuring that independent candidates have a modicum of support so as to insure that "ballots are not too crowded, discouraging and confusing voters [sic.]." Answer at 20. But it does not explain why, in a sparsely populated state, and in sparsely populated districts of that state, more than 1,000 signatures[3] isn't a sufficient modicum of support for a citizen running for local office. Compared to the requirements for local candidates in cases the State relies upon – Hawaii's 15 to 25 signatures on qualifying petitions for local candidates' access to a primary ballot,

[3] Parker submitted 1,379 signatures. Aplt. App. 000009 (Complaint ¶ 13).

Georgia's requirement of none at all for incumbents like Parker[4] – the number Parker gathered more than adequately shows popular support for his candidacy. The State doesn't explain why a minor party candidate whose party qualified for the ballot several elections ago would have to do *nothing more* than gather one third the number of signatures Parker was required to collect to show a modicum of support. Brief at 21. Sparse ballots – not crowded or confusing ones – are and have always been the actual problem in New Mexico. Aplt. App. 000018-22 (Declaration of Richard Winger ¶¶ 8 and 10. The State discounts Parker's expert's opinion for "lumping together" minor party and independent candidates and that it therefore should be disregarded as irrelevant. Answer at 22. But this undisputed factual evidence unequivocally demonstrates that there has never been much chance of a crowded, confusing ballot in New Mexico, and that often no candidate at all runs for PEC commissioner. Aplt. App. 000021-22 (Winger Decl. ¶ 10). This is pertinent, compelling evidence that the State's rational interest for not overcrowding the ballot, articulated in cases from much more populous states, is not one that can justify New Mexico's facially discriminatory treatment and the severe burden it placed on Parker. See *Anderson v. Celebrezze,* 460 U.S. 780, 789, (1983) (In balancing the asserted

[4] See discussion of *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010), above at page 7, and *Jenness v. Fortson*, 403 U.S. 431 (1971), above at page 6.

injury to the plaintiff with the interests of the State, "the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."); *Common Cause Indiana v. Indiana Sec'y of State*, 60 F. Supp. 3d 982, 991 (S.D. Ind. 2014) *aff'd sub nom. Common Cause Indiana v. Individual Members of the Indiana Election Comm'n,* 800 F.3d 913 (7th Cir. 2015). When voters have no choice on a ballot at all, their First Amendment rights are severely burdened. *Common Cause Indiana*, 800 F.3d at 920.

B. Parker's Evidence Establishes a Type of History of Discrimination Recognized By the Supreme Court.

The State does not dispute that Richard Winger is one of the country's leading authorities on ballot access. Instead it argues that Winger's opinion together with his chart about the election history of minor party and independent candidates in each state is irrelevant because it did not distinguish between the two types of non-major party candidates. Answer at 21-24. As noted above, Winger's conclusions and his fact chart, none of which the State disputed, demonstrate that the rationale for the discriminatory treatment of independent candidates (preventing overcrowded and confusing ballots) was not and is not reasonable in New Mexico. Moreover, as Winger explained, he had no choice in grouping

these non-major party candidates in his national survey; in over half the states "there is no clear distinction between them in the law." Aplt. App. 000021 (Winger Decl. ¶ 10). Contrary to the State's contentions, Winger's opinion, which included the statement and proof that no independent candidate has ever been on the ballot for PEC Commissioner, and that sometimes there is no candidate at all for this position, is highly relevant. *Id.* It answers the "inevitable question for judgment" the Supreme Court asks in ballot access cases for independent candidates: whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer v. Brown*, 415 U.S. 724, 742 (1974). The State's contention that retrospective analysis is unnecessary in ballot access cases, Answer at 23, contradicts this Supreme Court precedent and is wrong. Its contention that Parker was required to submit evidence of candidates who ran and failed to gain ballot access and that a court should not also consider the likelihood of potential independents who were discouraged from running for local office by the discriminatory signature requirement is also wrong. *See Lee v. Keith*, 463 F. 3d 763, 769 (7th Cir. 2006) (quoting *Storer v. Brown* and holding that Illinois ballot access restrictions impermissibly burden the freedom of political association and

noting that "[n]ot only are unaffiliated candidacies rare in Illinois, in the last 25 years they have been nonexistent."); *see Fishbeck v. Hechler,* 85 F.3d 162, 164–65 (4th Cir.1996) (examining historical data to determine severity of burden on minor party candidates).

Parker's expert discussed highly relevant ballot access history -- that no independent candidates existed for PEC Commissioner since 1977, when independent candidate ballot access was first legislated in New Mexico, and that the total of independent candidates in New Mexico was unquestionably rare -- the smallest compared to the totals in all other 49 states with partisan legislatures. Aplt. App. 000018 (Winger Decl. ¶ 8). The State does not suggest that Parker's efforts were not diligent; despite them, he was denied access to the ballot. New Mexico's ballot history and the facts of this case establish that Parker's First Amendment rights were severely burdened and that the District Court should have applied strict scrutiny to rule that NMSA 1978, § 1-8-51 was unconstitutional.

CONCLUSION

The Answer does not argue that NMSA 1978, § 1-8-51 can survive strict scrutiny, because it can't. Brief at 27-29. For all the reasons Parker set forth, strict scrutiny should have been applied, and the decision below should be reversed.

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/s/ *Roberta M. Price*
Roberta Price

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/s/ *Roberta M. Price*
Roberta M. Price

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