

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

LIBERTARIAN PARTY OF MAINE, INC.,)
JORGE MADERAL, SUSAN POULIN,)
SHAWN LEVASSEUR, CHRISTOPHER LYONS,)
ERIC GRANT, AND CHARLES JACQUES,)

Plaintiffs)

v.)

Civil No. 2:16-cv-00002

MATTHEW DUNLAP, Secretary of State for the)
State of Maine; JULIE FLYNN, Deputy Secretary)
of State for the State of Maine; TRACY WILLETT,)
Assistant Director, Division of Elections; and)
MAINE DEPARTMENT OF THE SECRETARY)
OF STATE,)

Defendants)

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Defendants Secretary of State Matthew Dunlap, Deputy Secretary of State Julie Flynn and Assistant Director of Elections Tracy Willett, in their official capacities, and the Maine Department of the Secretary of State¹ (collectively the “Secretary of State” or “defendants”), oppose the motion for preliminary injunction filed by Plaintiffs, the Libertarian Party of Maine (“LPME”) and several individuals who are affiliated with that organization, on the grounds set forth below.

INTRODUCTION

By this motion, Plaintiffs seek to reverse the consequences of their failure to meet the statutory deadline to enroll 5,000 voters in the Libertarian Party in order to qualify as a recognized party in this election cycle. They challenge the December 1, 2015 deadline

¹ The Department is not a proper party defendant to a claim under 42 U.S.C. § 1983.

as unreasonably burdensome, yet all the statute requires is that the party demonstrate a basic level of support by enrolling 5,000 members – only one half of one percent of Maine registered voters – over a 12-month period. This basic showing of support is necessary for the party to qualify to participate in the state-run primary election in June 2016, and to gain automatic access to the general election ballot for its presidential and vice presidential nominees. It appears that more than halfway through the 12-month period, Plaintiffs had barely begun to enroll voters. LPME, and not the statute, is responsible for its failure to qualify.

There is nothing unduly burdensome about Maine’s ballot access requirements for parties or the candidates who wish to run under the designation “Libertarian Party.” Maine’s statutory requirements should be upheld as reasonable, nondiscriminatory requirements necessary for Maine to run an orderly election process.

FACTUAL AND STATUTORY BACKGROUND

Maine’s election law provides two alternate routes to forming a qualified party that is authorized to nominate candidates for federal, state, and county offices through a primary election. 21-A M.R.S. §§ 302(1) & 303(1). One of those routes, termed “organization by party enrollment,” is the route which Plaintiffs pursued in this case. It requires a political organization seeking to form a party to ultimately enroll a minimum of 5,000 members (approximately one half of one percent of the registered voters in Maine) by December 1st of the odd-numbered year before an election year.² *Id.* § 303(2). To embark on this path, ten registered and unenrolled voters must file a Declaration of

² A total of 986,159 voters were registered in Maine as of the end of December 2014, just before Plaintiffs were authorized to begin enrolling voters in the Libertarian Party, and of those, 367,333, or approximately 37.2%, were not enrolled in any party. Flynn Aff. ¶ 28.

Intent with the Secretary of State (“SOS”) sometime between December 1st and December 30th of any even-numbered year. *Id.* § 303(1).

On December 22, 2014, ten registered voters (including three of the individual plaintiffs in this action) filed a Declaration of Intent to Form a Party by Party Enrollment with the Secretary of State’s Office (“SOS”). Ex. 1 - Affidavit of Deputy Secretary of State Julie Flynn (“Flynn Aff.”), ¶ 4. By statute, the SOS must certify whether the applicant has satisfied the ten unenrolled voter requirements within five business days and, if so, notify the applicants that they may begin enrolling voters in the proposed party. 21-A M.R.S. § 303(2). Two of the voters listed were ineligible to sign the Declaration because they were already enrolled in a qualified party, *see id.* § 303(2), so the group filed another Declaration on December 29, 2014. Flynn Aff., ¶ 4. The two forms, combined, contained enough unenrolled voters to meet the threshold requirements. Flynn Aff., ¶ 4.

On January 6, 2015, the SOS notified Plaintiff Jorge Maderal that the proposed party could begin enrolling voters. Flynn Aff., ¶ 5 & Ex. A. The staff provided him with a copy of the policy explaining how LPME could obtain up to 5,000 free voter registration cards to use for this purpose. *See* last page of Flynn Aff., Ex. A. LPME did not request any voter cards, however, until May, 2015. During the month of May, the Secretary of State’s office provided LPME with 4,000 voter registration forms to use for this purpose, along with a set of instructions for filling out the forms. Flynn Aff., ¶ 7 & Exs. C, D. The SOS provided another 1,000 cards between July 2 and August 7, 2015. Flynn Aff. ¶ 7 & Ex. C.

Voter applications to register and/or enroll in a proposed new party are processed at the local level by municipal registrars and clerks. *See* 21-A M.R.S. §§ 121-122, 141-

144; 151-152; Flynn Aff., ¶ 19. The proposed party may circulate and collect forms from voters and submit them to the local registrars of the towns where the voters reside. If the voter card has been properly completed, the registrar enters the new party enrollment in the voter's record in the Central Voter Registration System ("CVR"), which is a statewide database used by all local and state election officials. *Id.* §§ 142(2) & 144(2). On January 5, 2015, the SOS distributed a memorandum notifying the municipal registrars and clerks in Maine's approximately 500 voting jurisdictions that the Libertarian Party was now authorized to enroll voters and reminding the officials of the process for recording the enrollments in the CVR. *See* Flynn Aff. ¶ 6 & Ex. B.

On or before December 1st of the odd-numbered year following the year in which the Letter of Intent is filed, the applicant must file a form with the SOS certifying that it has enrolled at least 5,000 members. 21-A M.R.S. § 303(2). The SOS then has five business days in which to determine if this threshold has been met and to inform the proposed party whether it has qualified to participate in the statewide primary election in the coming election year. *Id.* If the party fails to qualify, then the voters who had enrolled in the party are thereafter deemed "unenrolled." *Id.* § 306. On November 20, 2015, the SOS sent a memorandum to municipal registrars and clerks, which highlighted the importance of processing all enrollments for the Libertarian Party before the December 1st deadline for the party to qualify, and enclosed a very specific set of guidelines for processing voter registration and enrollment applications. Flynn Aff., ¶ 9 & Ex. E.

CVR data shows that during the first six months of 2015, LPME succeeded in enrolling only 246 voters in the Libertarian Party – fewer than 5% of the 5,000 enrollments required to qualify. Flynn Aff. ¶ 18. It is common knowledge that

municipalities across the state hold town meetings and town elections during the late winter and spring of every calendar year. Although 2015 was an “off election” year for candidates, Maine held a statewide referendum election on November 3, 2015 to consider three ballot questions (one initiative and two bond issues). Flynn Aff., ¶ 9. Over 200,000 voters participated in that election.

On December 1, 2015, Plaintiff Maderal submitted a signed certification to the SOS, stating that the Libertarian Party had enrolled at least 5,000 voters. Ex. B to Plaintiff’s Complaint, Doc.1-2. To verify this, the SOS staff checked the CVR and found that only 4,248 voters were actually enrolled in the Libertarian Party. Flynn Aff., ¶ 11. SOS Director of Elections Melissa Packard communicated this fact to Mr. Maderal via email on the afternoon of December 1st, and transmitted an electronic copy of the “Enrolled and Registered” report from CVR showing the results. Flynn Aff., ¶ 11 & Ex. F. Mr. Maderal reported to SOS via email the next day that officials in Lewiston had not yet entered all the registration and enrollment applications into the CVR, apparently due to the upcoming run-off election for Mayor on December 8. Flynn Aff., ¶ 12 & Ex. G. His email included a list showing alleged differences between his tally of the number of enrollment applications that LPME had submitted to 23 different towns, and the number of enrollments “verified by Clerk” – i.e., recorded in the CVR. Flynn Aff. ¶ 13 & Ex. G. He asked SOS to investigate. *Id.*

The SOS staff offered to check with Lewiston and other larger cities and towns on Mr. Maderal’s list to determine whether any enrollment applications received on or before December 1, 2015, were still pending. Flynn Aff., ¶ 14. Lewiston and Auburn officials subsequently acknowledged to SOS staff that they had not yet processed a number of enrollment applications that were timely filed. *Id.* In addition, a number of

voters who wanted to change enrollment from another qualified party to the Libertarian Party remained in “pending” status as of December 1, meaning that their enrollment applications had been accepted but the 15-day period to qualify for participation in a primary election or party caucus had not yet elapsed. 21-A M.R.S. ¶ 144(2); Flynn Aff., ¶ 15. The SOS agreed to count all of these voters toward the threshold for the Libertarians to qualify. Flynn Aff., ¶ 15.

On December 8, 2015, Ms. Packard and Deputy Secretary of State Flynn met with Mr. Maderal to review their findings, including that the CVR still showed only 4,489 voters enrolled in the Libertarian Party. Flynn Aff., ¶ 15. By December 18, 2015, Lewiston and Auburn had finished processing all their applications and the 15-day “pending” period had elapsed for voters with completed applications received by December 1. The SOS ran a new CVR report on that day, which showed that 4,513 voters were enrolled in the Libertarian Party as of December 1st – 487 voters below the threshold to qualify. *Id.* ¶ 16.

Accordingly, the SOS “determined that the Libertarian Party of Maine has not enrolled at least 5,000 voters and thus does not meet the requirements to be a qualified political party in Maine and to participate in the primary election in 2016” and communicated this by letter from Deputy Secretary of State Julie Flynn emailed to the Chairman of LPME that day. *See* Ex. D to Pl. Compl. (Doc. 1-4.) The letter explained that because the party had failed to qualify, the 4,513 voters who had enrolled had to be “made unenrolled,” and the SOS would be notifying municipal election officials that “Libertarian is no longer an acceptable enrollment option.” *Id.* This notification was sent to all municipal registrars and clerks on December 22, 2015. *See* Ex. E to Pl. Compl. (Doc. 1-5).

On January 4, 2016, Plaintiffs filed a four-count complaint in this court, challenging the constitutionality of 21-A M.R.S. § 303 both facially and as applied, on the grounds that the December 1, 2015 deadline is “too early” (Count I), the 5-day verification period is “too short” (Count II), and the statute fails to provide parties and their members with an administrative hearing prior to determining that the party failed to qualify (Count III). Count IV alleges that state and local election officials failed to process enrollments in a timely manner and/or wrongfully rejected valid applications. Plaintiffs’ instant motion relates only to Counts I and II, and seeks a preliminary injunction requiring Defendants to (1) restore the Libertarian Party enrollment status of the 4,513 voters who were unenrolled on December 22, 2015; (2) allow LPME to continue to submit and for registrars to continue to process enrollment applications; and (3) allow LPME to certify that it has enrolled 5,000 voters at some “reasonable time” in advance of the June primary.

ARGUMENT

“A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 188 (D. Me. 2009) quotes and citations omitted. To succeed, Plaintiffs must show: “(1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest.” *Id.* quoting *Nieves-Marquez v. Puerto Rico*, 365 F.3d 108, 120 (1st Cir. 2003). The *sine qua non* of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity. *New Comm Wireless Services, Inc. v.*

Sprintcom, Inc., 287 F.3d 1, 9 (1st Cir. 2002); *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996).

The laws at issue are presumptively valid, *see Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944), and Plaintiffs have a heavy burden of proving the unconstitutionality of any of these laws. Particularly in facial challenges, courts should extend a measure of deference to the judgment of the legislative body that enacted the law. *Washington State Grange v. Washington State Repub. Party*, 552 U.S. 442, 456 (2008).

On the facts before this Court, Plaintiffs have failed to meet their heavy burden. They have failed to show any likelihood of success on the merits of either of the claims for which they seek injunctive relief, as Maine's liberal requirements for party qualification fall squarely within Constitutional bounds. Plaintiffs' alleged harms are, in turn, insubstantial, speculative or non-existent. The balance of hardships as well as the public interest tip in favor of denial of injunctive relief.

I. Plaintiffs have not shown a likelihood of success on the merits of Count I, challenging the constitutionality of the December 1 deadline to enroll 5,000 voters.

Plaintiffs' likelihood of success on the merits of their challenges to Maine's statutory requirements for party qualification must be assessed using the balancing test articulated by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 433-434 (1992). While the First and Fourteenth Amendments protect the rights of individuals to associate for the advancement of their beliefs and the right of qualified voters, regardless of political persuasion, to cast their votes effectively, *see Williams v. Rhodes*, 393 U.S. 23, 30 (1968), these rights are not absolute. The federal constitution expressly reserves to the states the power to prescribe

the time, place and manner of elections for Senators and Representatives, and the Supreme Court has long recognized that “as a practical matter, there must be 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 v. Brown*, 415 U.S. 724, 730 (1974); U.S. Const., Art. I, § 4, cl. 1. The *Anderson-Burdick* test is designed to strike a “constitutional equilibrium between the legitimate constitutional interests of the States in conducting fair and orderly elections and the First Amendment rights of voters and candidates.” *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 371 (1st Cir. 1993) (hereafter cited as “*Diamond*”).

Under this test the court must first “weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.” If the state’s requirements impose burdens that are severe, then the regulations at issue must be narrowly drawn to advance a state interest of compelling importance. If the burdens are reasonable and nondiscriminatory, however, then the State’s “important regulatory interests are generally sufficient to justify the restrictions.” *Libertarian Party of Maine v. Dunlap*, 659 F. Supp. 2d 215, 220 (D. Me. 2009) (cited hereafter as “*Dunlap*”), quoting *Burdick*.

This court has already held that Maine’s ballot access requirements for non-party candidates are not severe, *Dunlap*, 659 F.Supp.2d at 221, and the First Circuit has upheld elements of Maine’s party qualification requirements as not unduly burdensome. *Diamond*, 992 F.2d at 373 (addressing requirement for Libertarian Party candidates to obtain certain number of signatures from enrolled voters in their districts). The statutory provisions on party qualification challenged here are equally reasonable and

nondiscriminatory, and are justified by important state interests in conducting fair and orderly elections.

A. The burdens imposed by the December 1st deadline are not onerous when analyzed in the context of Maine’s regulatory framework.

Plaintiffs contend that Maine’s December 1st deadline for a party to qualify constitutes a severe burden simply because it occurs “so early” in the election cycle. They argue that the statute must be unconstitutional because other “less early” deadlines have been struck down by other courts outside of this circuit. *See* Pl. Br. at 16-18. None of those cases assessed the constitutionality of a state law based on a calendar date, alone, however. Viewed in isolation, a calendar date is meaningless. It has significance only when considered in connection with the number of voters the party must enroll, the overall period of time in which the party may enroll them, and the alternative routes to ballot access even if the party fails to qualify. In evaluating the degree of burden imposed by ballot access requirements, the court must look at the combined effect of all the relevant provisions in a state’s election law as well as the factual context.

Number of voters. Maine requires a political organization to enroll only 5,000 voters, which represents only one half of one percent (.5%) of Maine’s registered voters, .8% of the total vote cast in the last gubernatorial election, and only half the number of enrollees that the party will need to have vote in future general elections if it wishes to remain qualified. *See* 21-A M.R.S. § 301(2)(E) (to remain qualified, a party must show that 10,000 of its enrolled members voted in the general election); Flynn Aff. ¶¶ 27-29. This is a lower threshold than the signature requirements for party qualification petitions that Maine imposed before October 2013.

Prior to October 2013, in order to qualify as a party by enrollment in Maine, a political organization had to file a petition containing the signatures of registered voters equal to 5% of the total votes cast in the most recent gubernatorial election. From 2010-2013, this meant gathering signatures of 28,638 registered voters on petitions and submitting them to the Secretary of State (“SOS”) by the 180th day before the June primary, meaning in early to mid-December of the year before the election.³ See P.L. 2013, ch. 131 (eff. Oct. 9, 2013), amending 21-A M.R.S. § 303. By repealing the petition requirement and substituting the requirement to enroll a minimum of 5,000 voters, Maine substantially *lowered the bar* for new parties to qualify.

Maine’s current requirement that a party enroll 5,000 voters is well within the bounds approved by other courts. In *Barr v. Glavin*, 626 F.2d 99, 110 (1st Cir. 2010), for example, the First Circuit upheld Massachusetts’ requirement that parties enroll at least 1% of registered voters in order to qualify, finding it to be a reasonable “means by which the state can ascertain whether a political organization has demonstrated sufficient support to warrant official recognition as a party.” See also *Libertarian Party of New Hampshire v. Gardner*, 2015 WL 5089838 (Aug. 27, 2015), *appeal docketed* (upholding as not unduly burdensome the requirement for a proposed party to file petition within 210 days with signatures equaling 3% of the total vote cast in previous general election); *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) (upholding as not unduly burdensome Arkansas’s requirement that proposed party submit petition with signatures of 10,000 voters in a 90-day period); *American Party of Texas v. White*, 415 U.S. 767, 789 (1974) (signatures equal to 3% or 5% of vote in last election); *Rainbow Coalition of*

³ The party could enroll voters during the period in which it was circulating petitions, but those voters would have to be made “unenrolled” if the petition fell short of the 28,638 valid signatures.

Oklahoma v. Oklahoma State Election Bd., 844 F.3d 740 (10th Cir. 1988) (signatures equal to 5% of total vote cast in last general election).⁴

Time period. Maine gives political organizations *a full calendar year* in which to enroll 5,000 voters. By comparison, this court upheld as not unduly burdensome Maine's requirement that non-party presidential candidates collect at least 4,000 voter signatures over a 7-month period. *Dunlap*, 659 F.Supp. 2d at 221. *See also Barr*, 626 F.2d at 110 (upholding as not unduly burdensome a requirement that Libertarian presidential and vice presidential candidates obtain 10,000 voter signatures within a period of 60 days); *Rainbow Coalition*, 844 F.3d 740 (upholding requirement to submit petitions containing signatures equal to 5% of total vote cast in last general election within a one-year period).

The fact that LPME did not utilize the 12-month period allowed – indeed, barely used two thirds of that time – shows a lack of effective organization, not a defect in the statutory framework. LPME filed its Declaration of Intent almost a month later than the statute allowed. *Flynn Aff.* 4. Mr. Maderal also concedes that LPME did not start enrolling voters in earnest until May, 2015. *See Maderal Aff.* ¶ 10 (ECF 8-2). The state's CVR data shows that only 75 voters were enrolled during the period from January through April, 2015, and it was not until May that LPME requested voter cards from the SOS to use for enrollment purposes. *Flynn Aff.* ¶¶ 7, 18; and Ex. C. By waiting until May, LPME missed an opportunity to seek out voters attending town meetings that are

⁴ Many of the cases relied upon by Plaintiffs involved higher signature requirements as well. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (Ohio required party to submit petitions with signatures of voters equal to 1% of total vote cast in previous general election); *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996) (Arkansas required party to gather signatures equal to 3% of total vote cast for Governor); *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064 (M.D. Tenn. 2010) (Tennessee required party petition to contain signatures of enrolled voters equal to 2.5% of total vote cast for Governor in last election).

held in municipalities across the state during the February through April time period.

Within the first six months of the year, LPME had failed to enroll even 5% of the number required to qualify. Flynn Aff. ¶18. It did not pick up the pace of enrollment efforts until the early fall of 2015. *Id.*

The statewide election on November 3, 2015, provided a golden opportunity for LPME to encounter voters across the state (220,834 of whom voted in that election) who might wish to enroll in the Libertarian Party. Indeed, CVR data shows that 1,151 voters successfully enrolled in the Libertarian Party during the month of November. Since almost a full month remained after the election and before the December 1st deadline, this timing was advantageous to LPME. Far from imposing a severe burden, the December 1st deadline should have made it possible for LPME to fully utilize the election period to its advantage in enrolling voters.

The constitutional standard contemplates a “reasonably prudent” and “reasonably diligent” party organization seeking to qualify. *See Dobson v. Dunlap*, 576 F.Supp.2d 181, 191 (D. Me. 2009) (constitutional standard for independent candidate petition filing deadline contemplates reasonably diligent candidate, not a last-minute procrastinator). *See also Storer*, 415 U.S. at 742 (relevant question is whether reasonably diligent minor party candidate would normally gain access to ballot); *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005) (deadline not so early that diligent candidate cannot meet it). The factual record in this case shows that LPME could have done far more to help itself achieve its desired goal.

Alternative routes to ballot access. It is significant that under Maine’s statutory framework, if a political organization such as LPME fails to meet the enrollment threshold by the December 1st deadline, it still retains the option of helping like-minded

candidates gain access to the general election ballot, where they can be listed with the political designation “Libertarian” or “Libertarian Party.” To the general election voter, such a designation would likely be indistinguishable from the same candidate’s name appearing as the official nominee of the Libertarian Party. This feature distinguishes Maine’s framework from the state laws at issue in the primary case that Plaintiffs rely upon in their motion, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). Under Ohio law, unenrolled candidates who were not enrolled in a qualified party and accessed the general election ballot through the nomination petition process were not allowed to list any political designation on the ballot. Instead, their names were shown on the ballot as “independent” or “other party,” thus giving voters no clue as to the candidates’ political affiliation. The First Circuit distinguished *Blackwell* on these grounds in *Barr v. Glavin*, 630 F.2d 250, 251 (1st Cir. 2010), recognizing that Massachusetts (like Maine) allows candidates to “ally themselves with a ‘political designation’” even if they are accessing the ballot through the petition process, as opposed to being a nominee of a qualified party.

There are distinguishing features of the state election laws in each of the other cases relied upon by Plaintiffs and decided under the *Anderson-Burdick* balancing test that render those cases inapposite.⁵ Every state’s set of ballot access requirements is

⁵ See, e.g., *California Justice Committee v. Bowen*, 2012 WL 5057625 (C.D.Cal. 2012) (petition filing deadline for party to qualify in order to place presidential nominee on general election ballot was 135 days before primary even though party was not required to use primary election process to determine its nominees); *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064 (M.D. Tenn. 2010) (party petition filing deadline of 120 days before primary found unduly burdensome in conjunction with requirement to obtain signatures of enrolled voters equal to 2.5% of total vote cast for Governor in last election); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3rd Cir. 1997) (deadline to file nominating petitions 54 days before primary held unduly burdensome for alternative party candidates seeking access to general election ballot); *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996) (party required to gather signatures equal to 3% of total vote cast for Governor and file 5 months

unique, and the combined effects must be assessed on a case-by-case basis. *See Libertarian Party of New Hampshire v. Gardner*, 2014 WL 7408214 *5 (D.N.H. Dec. 30, 2014) (analysis of ballot access restrictions is factually driven and case-specific; no litmus-paper test can be applied to separate valid from invalid restrictions); *Arizona Green Party*, 20 F.Supp.3d at 747 (challenges to election laws are context dependent; thus early filing deadline cannot be deemed automatically invalid).

B. Maine's requirements are reasonable and nondiscriminatory.

History shows that political organizations such as LPME have managed to qualify as political parties under Maine's regulatory framework. This supports a finding that the requirements are reasonable. *See Arizona Green Party v. Bennett*, 20 F.Supp.3d 740, 746 (D. Ariz. 2014) (historical evidence of ballot access cuts against conclusory allegations that regulations impose a severe burden).

Americans Elect, which had no prior history in Maine, qualified as a party in the 2012 election cycle after submitting petitions containing 30,908 valid signatures of registered voters collected during a period of approximately 63 days – from October 13, 2011 to December 15, 2011. Flynn Aff. ¶ 35. This was during the period when Maine's party qualification requirement was more stringent than it is today.

The Green Independent Party has qualified in Maine (as did its predecessor, the Green Party), and it remains qualified with an enrollment representing approximately 4% of Maine's registered voters. Flynn Aff. ¶ 34. The Libertarian Party has gained and lost party status over the last few decades. *See Maderal Aff.* ¶ 6; Flynn Aff. ¶ 36. In four out

before primary in order to participate in general, not primary, election); *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (minor party required to submit qualifying petitions and certify its candidate nominees for general election 2 months before primary election for major parties).

of the past five presidential elections, however, Libertarian presidential and vice presidential candidates have qualified for the general election ballot, as have candidates affiliated with other minor parties. *See* Flynn Aff. ¶37 and Ex. J.

Plaintiffs contend that Maine’s regulatory requirements “fall unequally” on minor parties because the parties that are already qualified in Maine – the Republican Party, the Democratic Party and the Green Independent Party – “never have to gather 5,000 new party enrollments” to stay qualified. Pl. Br. at 21. This argument ignores the reality that in order to remain qualified, these parties have to demonstrate every two years that at least 10,000 voters enrolled in their party (double the number required to qualify initially) actually voted in the last general election. 21-A M.R.S. § 301(1)(E). To remain qualified, all parties must hold municipal caucuses in at least one municipality in a minimum of 14 counties in the state as well as a state convention in a candidate election year. *Id.* §§ 301(1)(A), (B) & 301(2). Any party that fails to meet these on-going requirements is not qualified to participate in a subsequent election. *Id.* § 304. And any party that becomes disqualified has to requalify through the enrollment process challenged here, or by riding on the “coattails” of a consenting candidate who garners at least 5% of the total vote cast for Governor or President in a given election year. *Id.* §§ 302 & 303. The obligations to maintain party status are thus applied equally in Maine.

- C. The December 1st deadline is necessary to further Maine’s legitimate interests in administering an orderly primary election process and to afford all party candidates the same period of time in which to circulate nominating petitions for the primary.

The December 1st deadline is justified by important state interests in a number of ways. First and foremost is that any candidate who belongs to a qualified party must collect signatures on nomination petitions between January 1 and March 15 of election

year. The SOS is required to print these petition forms and make them available to candidates by January 1st of election year. Flynn Aff. ¶ 42. Determining which parties are qualified to participate in the primary election process is obviously a necessary prerequisite to this process.

Party candidates have to file their primary nomination petitions by March 15th so that any challenges to the validity of those petitions may be resolved in time to get ballots printed for the primary. Such challenges may take 65 to 70 days to resolve. Flynn Aff. ¶ 43; 21-A M.R.S. § 337(2).

The SOS has to prepare ballots for the primary, including a significant number of separate lay-outs or “ballot styles” given the number of different electoral districts. Statewide offices, such as Governor and U.S. Senator appear on every ballot, but the number of permutations for every ballot style multiply once the district offices of U.S. Representative, State Senator, State Representative, and county offices are included. For each political party qualified to participate in the primary election, the SOS must prepare approximately 700 different ballot styles (350 for official ballots and 350 for sample ballots). Flynn Aff. ¶ 43. This process can take several weeks. *Id.* Viewed in this context, it becomes clear that a December 1st deadline for a new party to qualify is not too early; it is indeed necessary to ensure that all the subsequent steps in the primary election process occur in time to conduct an orderly primary election for all the qualified parties seeking to nominate their candidates for federal, state and county offices.

Maine has a legitimate interest in ensuring that a political party possesses a basic level of support among the electorate as a prerequisite to conducting a primary election for that party and listing the party’s candidates on the primary and general election ballots. *See Diamond*, 992 F.2d at 371; *accord Libertarian Party of New Hampshire v.*

Gardner, 2015 WL 5089838, *12 (D. N.H. Aug. 27, 2015), citing *American Party of Texas v. White*, 415 U.S. 767, 782 (1974) (state’s interest in requiring political organizations to “demonstrate a significant, measurable, quantum of community support” is “vital”); and *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (recognizing 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 requirement to enroll 5,000 voters, which is only one half of one percent of the registered voters in Maine, and eight tenths of a percent of those who cast ballots in the last gubernatorial election, is a reasonable measure of the “modicum” of community support necessary to qualify as a party for which the state will run a primary election. Given the time and expense involved in preparing ballots and conducting a primary election, it is not unreasonable for Maine to require a new party to demonstrate this level of support in order to trigger that investment of public resources. *See Flynn Aff.* ¶¶43, 44; *Diamond*, 992 F.2d at 371 (support requirement meant to safeguard integrity of elections by, among other things, avoiding added costs of conducting elections).

The state possesses an equally important interest in determining that the party’s candidates demonstrate support in the particular electoral subdivision for which the candidate is seeking nomination. *Diamond*, 992 F.2d at 372. This justifies requiring candidates of all parties to file nominating petitions with a sufficient number of signatures of voters in that party in their electoral district, to qualify for the primary election ballot.⁶

⁶ A qualified party’s candidates need only gather half as many signatures on their candidate petitions for the primary as would an unenrolled candidate seeking access to the general election ballot. *Compare* 21-A M.R.S. § 335(5) to § 354(5). This difference makes sense only if the

Courts have recognized that states have a greater interest in imposing restrictions on the qualification of new parties since, unlike independent candidates, “a new party organization contemplates a statewide, ongoing organization with distinctive political character [and] [i]ts goal is typically to gain control of the machinery of state government by electing its candidates to public office.” *Storer*, 415 U.S. at 745; *Rainbow Coalition*, 844 F.2d at 746 n.9.

These important interests amply justify the minimal burdens on a new political party of enrolling 5,000 voters by December 1st, in order to participate in the process that begins on January 1st of election year.

II. Plaintiffs have not shown a likelihood of success on the merits of Count II, challenging the constitutionality of the 5-business day period to verify that the party has enrolled 5,000 voters.

The second regulatory requirement that Plaintiffs challenge is the period of 5 business days within which the SOS must verify whether the party has, in fact, enrolled the 5,000 voters claimed in its certification. *See* 21-A M.R.S. § 303(2). Plaintiffs contend that this deadline “does not afford the Secretary and the Department sufficient time to verify all the enrollments that were submitted to towns and cities across the state in the final weeks leading up to the December 1st deadline, nor does it afford the local election officials sufficient time to finish processing all the forms submitted by that deadline.” Pl. Br. at 23. They allege that the Secretary “was not able to follow up with every single town or city that may still have been in possession of unprocessed or wrongly rejected enrollment applications.” *Id.* Finally, Plaintiffs claim that by not allowing time for these procedures to take place after December 1st, the statute effectively

qualified party has demonstrated a sufficient level of support statewide to warrant the state holding a primary election to determine its nominees.

“forces a minor party and its members to finish collecting and submit not less than 5,000 enrollments several weeks if not months before the December 1st deadline.” All of these arguments are flawed, however, leaving Plaintiffs without a likelihood of success on this constitutional claim.

First, the enrollment process is not a complicated or involved process. If a voter card is properly completed, the registrar can process the voter’s enrollment or change of enrollment quickly and enter the data directly into CVR. If key information is missing from the voter card, the registrar will send a notice to the voter, who can readily supply the missing information if they care to do so. If some voters fail to respond, that reflects their choice -- not an unreasonable burden imposed by the statute.⁷

The SOS supplied LPME with clear instructions for how to fill out voter cards, and it was up to the LPME to pass along those instructions to any volunteers or paid staff who were assisting the enrollment effort. *See* Ex. D to Flynn Aff. If the LPME had reviewed the voter cards before submitting them to local registrars, it should have been able to spot any defects and get them corrected promptly.

Second, because local officials perform changes of enrollment and new enrollments in CVR – a database that both local and state officials can readily access – the results are immediately apparent to the SOS. All the SOS staff had to do to verify whether the Libertarian Party had achieved the 5,000 enrollment threshold to qualify as a party as of December 1, 2015, was to query the CVR database and run a report of enrolled voters as of that date. The Director of Elections did this on December 1, 2015,

⁷ A voter whose application was rejected as incomplete, or for some other reason, also has the option to challenge the registrar’s decision, but generally enrollments are rejected only because the application is incomplete. *See Dobson v. Dunlap*, 576 F.Supp. 2d at 192 (noting availability of Rule 80C judicial review of a registrar’s decision to reject signature on candidate petition).

and informed LPME that they were short of the target. Flynn Aff. ¶ 11. The 5-business day period is more than adequate to accomplish this task, and the SOS has no legal obligation to do more.

In this case, the SOS agreed to and did do more, and the staff's actions only had the potential to benefit, not burden, LPME and its members. When the LPME chairman claimed that certain registrars had failed to process applications that were submitted to them on or before December 1st, the SOS staff agreed to follow up and did so. Flynn Aff. ¶14. Indeed, the Director of Elections contacted seven municipalities on Mr. Maderal's list and found that officials in two cities (Lewiston and Auburn) had not yet finished processing all the voter cards they had received on or before December 1st. *Id.* The SOS staff decided to treat these enrollments as having been timely filed and gave the LPME the benefit of including them in the final total. *See* Ex. D to Pl. Compl.

Similarly, although according to 21-A M.R.S. § 144(2), a voter's request to change parties is not perfected until 15 days after the registrar receives it, SOS acknowledged that an argument can be made that such enrollments should be counted for party qualification purposes under section 303(2) as long as the cards were received by the registrars on or before December 1st. Accordingly, the SOS gave the LPME the benefit of including all the voters (a total of 42) whose enrollment was in "pending" status as of December 1, 2015. Flynn Aff. ¶¶ 15-16. Without these voters, the LPME would have fallen farther below the qualifying threshold.

As this court noted in *Dobson v. Dunlap*, 576 F.Supp.2d at 190, in the context of reviewing the deadline for an independent candidate to file petitions with local registrars, the statute does not require LPME to file *on* December 1st; it requires filing "*on or before* December 1st." 21-A M.R.S. § 303(2) (emphasis added). Although a properly completed

application filed on December 1st would count toward the 5,000 threshold if the registrar was available to review and act on it right away, a reasonably prudent party organization would anticipate the need to give local registrars some time to review and verify the voter cards with Libertarian Party enrollments before December 1st so that the voters' names would appear as fully enrolled by the time the SOS queried the CVR within five business days of that deadline.

It was up to the LPME to organize its enrollment campaign effectively. The factual circumstances show that their failure to reach the target to qualify by December 1, 2015, was not due to an unreasonably burdensome statute but rather a failure of organization or lack of adequate support for the Libertarian Party among the electorate.

III. Plaintiffs will not suffer any irreparable injury if injunctive relief is denied.

Plaintiffs allege that they will suffer three distinct harms if denied injunctive relief. Pl. Br. at 27. The first alleged harm is insubstantial, the second is speculative, and the third is non-existent.

First, Plaintiffs argue that they will be denied the ability to secure a place for Libertarian Presidential and Vice Presidential candidates in the same manner available to Republican and Democratic Parties – i.e., by communicating the candidates' names to the SOS after the party's national convention. While this is a benefit of being a qualified party, the First Circuit has already held that the alternate route to getting those party candidates' names on the general election ballot – by submitting petitions with signatures of 4,000 Maine voters on or before August 1st of the election year – is not substantially more burdensome. *Diamond*, 992 F.2d at 374-75. Indeed, the Libertarian Party's candidates for President and Vice President have appeared on the ballot in Maine with the

printed designation “Libertarian” or “Libertarian Party” next to the candidates’ names in *four out of the last five* presidential elections. Flynn Aff. ¶ 37; and Ex. J.

Second, Plaintiffs assert that by not qualifying they would lose “the ability to ensure that only a single candidate for any given elective office (including the office of President) would appear on Maine’s general election ballot with the Libertarian Party designation.” Pl. Br. at 27. If LPME had qualified to participate in the primary, and if multiple Libertarian Party candidates sought the same office, it is true that the primary election would winnow the competitors to a single candidate for that office in the general election. It is also theoretically possible, since LPME has not qualified to participate in the primary, that more than one candidate using “Libertarian” as their political designation will seek access to the general election ballot for the same office through the nomination by petition process. So far, however, Plaintiffs have not identified a single candidate who wishes to run for office in 2016 as a Libertarian, let alone multiple candidates seeking the same office. Accordingly, the possibility of having two Libertarian candidates competing for the same office in 2016 is too remote and speculative to be considered a real harm.

The third harm Plaintiffs allege is that if it is not a qualified party, the LPME will be unable to obtain from the SOS a statewide list of voters, including party status, for use in candidate campaigns or get-out-the-vote efforts. Pl. Br. at 27-28. This claim lacks any foundation, however, since a political organization engaged in such activities is expressly authorized to obtain CVR data including this information by statute. *See* Flynn Aff., ¶ 45; 21-A M.R.S. § 196-A(1)(B).

IV. The balance of hardships and the public interest support denial of injunctive relief.

Plaintiffs cannot show a substantial likelihood of success on their constitutional challenges to the deadlines in Title 21-A section 303 for the reasons noted above, but even if they could, they cannot meet the third and fourth prongs of the test for injunctive relief.

Failure to qualify as a political party in no way prevents the LPME, the individual plaintiffs, and other like-minded individuals from “band[ing] together to nominate, promote and vote for candidates who reflect their policy preferences on contemporary issues in the 2016 election,” as Plaintiffs’ allege. Pl. Br. at 29. Plaintiffs remain free to associate in support of like-minded candidates and to assist them in qualifying for the ballot through the nomination by petition process with “Libertarian” or “Libertarian Party” as their political designation. And voters who wish to cast a vote for someone who adopts Libertarian political views and policies will be able to readily identify those candidates when they read the general election ballot, precisely because the word “Libertarian” would appear below the candidate’s name.

Granting the requested injunctive relief, on the other hand, would significantly disrupt the state’s electoral process in the middle of the primary election season and harm the public interest in the orderly and fair administration of that election – a process that is predicated on meeting a series of interrelated deadlines, beginning with the December 1st deadline for parties to qualify. Waiving that deadline aside, and allowing the Libertarian Party to continue seeking to enroll voters until some undefined “reasonable time” before the primary, would be unmanageable for Defendants and unfair to other candidates and

parties. It would also resolve a problem that LPME created for itself and thereby reward its dilatory behavior.

CONCLUSION

For the above reasons, Defendants urge the court to deny Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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Dated: February 17, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 17th day of February, 2016, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

JOHN H. BRANSON
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To my knowledge, there are no non-registered parties or attorneys participating in this case.

Dated: February 17, 2016

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