UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LIBERTARIAN PARTY OF MAINE, INC., JORGE MADERAL, SUSAN POULIN, SHAWN LEVASSEUR, CHRISTOPHER LYONS, ERIC GRANT, AND CHARLES JAQUES, Plaintiffs v. MATTHEW DUNLAP, Secretary of State for the State of Maine, in his official capacity, JULIE FLYNN, Deputy Secretary of State for the State of Maine, in her official capacity, TRACY WILLETT, Assistant Director, Division of Elections, in her official capacity, and the MAINE DEPARTMENT OF THE SECRETARY OF STATE, Defendants	)	Civil Action No. 2:16-cv-00002-JAW

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs submit this Reply Memorandum in response to Defendants' Memorandum in Opposition to their Emergency Motion for Preliminary Injunction dated February 17, 2016. For the reasons set forth more fully below, the Defendants' arguments in opposition to the pending Motion are unavailing. The overwhelming weight of authority – as applied to the particular statutory provisions that are being challenged in this case – demonstrate that Plaintiffs have a substantial likelihood of success on the merits, which is the central focus of Defendant's opposition and this reply. Plaintiffs stand on their initial Memorandum of Law in regard to the issues of irreparable harm, balance of hardships, and public interest, which also weigh heavily in favor of granting the requested injunctive relief.

I. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Early Deadline Cannot Be Cured By Suggesting that Plaintiffs Should Have Attempted to Gather Signatures During a Period that is Even Further Removed from the Primary and General Elections At Issue.

The Defendants miss the central constitutional flaw in the early party qualification deadline that has been fatal to such deadlines in a litany of similar cases. As the U.S. Supreme Court and lower federal courts throughout the nation have held, the central flaw of an early party qualification deadline is that it requires minor parties and their supporters to generate support during a period when public attention to and enthusiasm the political process is at its lowest and the issues for the coming general election year have not yet formed. *See* cases cited at Section II(C)(1) of Plaintiffs' January 27th Memorandum at pp. 18-19 and n.12. For this reason, it is utterly remarkable that the Defendants' central defense against the motion for injunctive relief is that the Plaintiffs – who began their enrollment campaign *thirteen* months before the primary election and *eighteen* months before the general election – should have started even earlier.

As part of a further effort to blame the victim in this case, Defendants contend that Plaintiffs showed a lack of diligence in their efforts to enroll 5000 voters in the Libertarian Party. First, this blame-shifting tactic is factually off the mark. Regardless of the fact that they began their enrollment campaign later than Defendants claim they should have, Plaintiffs gathered and submitted 6482 libertarian party enrollments, which is fully 30% more than the 5000 required by the statute. Defendants do not contend – nor could they plausibly contend – that Plaintiffs should reasonably have expected that 30% of those enrollments would be rejected.

Second, in the context of Plaintiffs' facial challenge to the statute in question, Defendants' argument about lack of diligence is *legally* off the mark as well, because it is not a legal defense to the constitutional flaws inherent in the statute. As the most relevant case law makes clear, a statute which unnecessarily requires a minor party and their supporters to collect any number of signatures during a period too far removed from the election places an impermissible burden on their

constitutional rights, regardless of how diligently they conduct their campaign. The U.S. District Court for the Central District of California explained it this way:

> The Secretary of State's argument that Plaintiffs have suffered no real injury because they have not made meaningful progress toward satisfying the . . . voter registration threshold erroneously shifts the focus from whether Plaintiffs have established the unconstitutionality of the [statutory deadline], the legal issue before the Court, to the likelihood that Plaintiffs will ever meet the qualification requirements that the court might conclude are constitutional. Whether Plaintiffs have met, or ever would meet, the numeric threshold has no bearing on determining whether setting the deadline for doing so ten months before the relevant election impermissibly burdens Plaintiffs' fundamental rights, which involves assessing the severity of that restriction against the justifications for it proffered by the Secretary of State.

California Justice Committee v. Bowen, 2012 WL 5057625 *8 (C.D. Cal. 2012).[1]

B. <u>The Number of Required Enrollments Does Not Cure the Constitutional Defects Associated with the Early Deadline and 5-Day Verification Period</u>.

Defendants' other main argument in defense against the pending motion for injunctive relief is that the "low" number of required party enrollments set forth in the applicable statute (5000), and the 12 months within which they may be gathered, negates any burdens imposed by Maine's unusually early party qualification deadline of December 1st, which is more than 9 months before the primary and more than 11 months before the general election. However, the governing case law overwhelming rejects the notion that an unnecessarily early deadline passes constitutional muster if the signature/enrollment requirement is otherwise reasonable.[2] Although several of the cases

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[1] The Defendants also cite the case of *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005) for the proposition that "early" deadlines can survive constitutional scrutiny when viewed together with the assumption that candidates/applicants are reasonably diligent. In that case however, the deadline was in March of the general election year.

[2] *See, e.g., Stoddard v. Quinn*, 593 F. Supp. 300, 304 (D. Me. 1984) (this Court struck down Maine's April 1st ballot access deadline for non-party candidates as unconstitutionally early, noting, *inter alia*, that it required signatures to be gathered during the period from January 1 through April 1 "when election issues are undefined and the voters are apathetic" . . . the fact that the prospective candidate needed to obtain only 4000 signatures – from *any* registered voter in Maine – was not relevant to the constitutionality of the early deadline); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (contrary to arguments by the State of Ohio, the fact that the prospective presidential candidate needed to obtain only 5000 signatures from any registered voter in Ohio – which was only twelve one-hundredths of 1% of the vote in the last presidential contest – did not cure the constitutional defects associated with the unnecessarily early qualification deadline); *Libertarian Party of Ohio v Blackwell*, 462 F.3d 579 (6th Cir. 2006) (Ohio's early deadline for parties to qualify to participate in primaries – 4 months before primary election and 12 months before general election – was struck down when viewed in combination with the requirement that all parties including minor parties nominate through

striking down qualification deadlines as too early were in states with signatures requirements that Defendants view as significantly more burdensome than Maine's 5000 enrollment requirement, the cases cited in footnote 2 hereof make clear that the specifics of the signature requirement is not pertinent to whether the early deadline impermissibly burdens the constitutional rights of citizens seeking to form a political party.[3] The early deadline cases in which courts *did* address the burdensome nature of the signature requirement – or its reasonableness – were cases in which the plaintiffs challenged the constitutionality of both the early deadline and the signature requirement. *See, e.g., McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); and *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064 (M.D. Tenn. 2010).[4]

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the primary process (as is also the case in Maine), not because of the number of required signatures); *New Alliance Party v Hand*, 933 F 2d 1568, 1572 (11th circuit 1991) (although Alabama's signature requirement was substantially lower and less burdensome than most other states, the early deadline for minor parties to file nominating petitions in order to qualify for ballot access – 7 months before the general election – did not survive constitutional scrutiny because it burdened plaintiffs' well established 1st and 14th Amendment rights and was not necessary to further any legitimate interest articulated by the state); *MacBride v. Exon*, 558 F.2d 443, 448-450 (8th Cir. 1977) (the number of required signatures – 1% of the votes cast in the previous gubernatorial election – was wholly irrelevant to whether Nebraska's statute requiring new political parties to file qualifying petitions 90 days before the primary election and 9 months before the general election was unconstitutionally early); *Libertarian Party of Nevada v. Swackhamer*, 638 F.Supp. 565, 568-570 (D. Nev. 1986) (the court declined to reach the issue of whether the required number of signatures for a party qualification petition was too burdensome, after striking down the statute based on an unconstitutionally early party qualification deadline); *Citizens to Establish a Reform Party v. Priest*, 970 F.Supp. 690, 694-701 (E.D. Ark. 1996) (in striking down an Arkansas law requiring new political parties to file qualifying petitions 5 months before the primary election and 10 months before the general election as unconstitutionally early, the court did not address or consider the number of required signatures or find it pertinent to the constitutionality of the early deadline); *California Justice Committee v. Bowen*, 2012 WL 5057625 *3-10 (C.D. Cal. 2012) (in striking down California's early party qualification deadline – 154 days before the primary and 10 months before the general election – the court held that the deadline itself imposed severe burdens on plaintiffs' constitutional rights irrespective of the nature or reasonableness of the signature requirement); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 879-884 (New Jersey's April 10th deadline for minor political parties to file nominating petitions was unconstitutionally early notwithstanding fact that signature requirement less than 1000); *Constitution Party of New Mexico v. Duran* at page 11 (D. N.M. 2013—unreported case—Civ. No. 1:12-325 KG/LFG) (attached as Exhibit 2 to Plaintiffs' January 27th Memorandum of Law) (Court expressly held that the number of required signatures need not be considered in determining the constitutionality of early party qualification deadlines, noting that courts which have considered the signature requirement are cases in which the plaintiffs challenged the constitutionality of both the early deadline and the signature requirement).

[3] It is also worth point out that in nearly all the cases cited by the Plaintiffs, the party qualification requirement involves getting a certain number of signatures from registered voters across the state, regardless of party affiliation or lack thereof, who simply support the concept of promoting greater competition and ballot access in our electoral system. Common sense dictates that this is substantially less burdensome than convincing voters to switch their official enrollment from a major party to a minor party, or from unenrolled to a minor party.

[4] Furthermore, all the cases cited by Defendants in defense of the reasonableness and constitutionality of its 5000-enrollment requirement – *which is not even being challenged in this case* – involve party qualification deadlines substantially later than Maine's. *See, e.g., Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) (May

C. **The Statutory Procedures for Individual Candidates to Gain Ballot Access Through Nominating Petitions Do Not Justify the Imposition of Unnecessary Burdens on the Rights of Citizens to Form Political Parties**.

The Defendants also focus extensively on the fact that prospective candidates in Maine can gain ballot access through a nominating petition and request that the State put a partisan designation next to their name. As the Supreme Court itself has held, however, "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, 415 U.S. 724, 745 (1974). As the Defendants basically concede at page 19 of their opposition brief, political parties exert more power over elections and government than one-off independent candidates. [5] For that reason, United States Supreme Court long ago recognized the unique rights of minor political parties and their supporters. *See Colorado Republican Federal Campaign Commission v. Federal Election Commission*, 518 U.S. 604, 616 (1996); *Norman v. Reed*, 502 U.S. 279 (1992); and *Eu v. San Francisco County Democratic Central Commission,* 489 U.S. 214 (1989).[6]

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deadline); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.3d 740 (10th Cir. 1988) (May deadline); *American Party of Texas v. White*, 415 U.S. 767 (1974) (July deadline).

[5] The Defendants incorrectly cite *Storer* for the remarkable proposition that states have a greater interest in making it difficult for new political parties to qualify, because political parties can exert more influence over the affairs of government than unassociated individual candidates. *See* Defendants' Memorandum at p. 19. In *Storer*, the Supreme Court simply made clear that the party qualification process cannot substitute for the individual nominating petition process and *vice versa*. 415 U.S at 745.

[6] In no case cited by either side has the court upheld a burdensome or unnecessary party qualification restriction on the ground that individuals could run as non-party candidates, even when such candidates have the right to include a party label next to their name on the ballot as they do in some twenty-five states around the nation. Apart from the inability to build and sustain a political party organization that survives beyond the next election, there are numerous other disadvantages of the non-party nominating petition route which are not cured by the ability to add partisan ballot label. First, while the major parties can ensure only party candidate for each office appears on the general election ballot, unrecognized minor parties cannot. Second, although candidates who consider themselves libertarians may be able to gain ballot access through nominating petitions – and even place the label "Libertarian" next to their name – they cannot obtain in advance of the election lists of voters *enrolled* in the Libertarian Party unless the party is recognized by the Secretary of State as a qualified political party, a plain burden not only on their associational rights but their ability to generate support and actually win an election. This Court can take judicial notice of the fact that the voter lists the two major parties obtain from the Secretary of State in advance of the general election for purposes of get-out-the-vote efforts would be of little use if they did not contain the designation "Democrat" or "Republican" next to each voter. Third, in the case of the presidential election, requiring an unrecognized minor party to rely on independent nominating petitions means that the process for gathering the 4000 required signatures would realistically need to begin *before* that party's presidential candidate has even been chosen or nominated at the minor party's national convention in the late spring or summer. This is because under Maine law, petitions with all 4000 signatures must be collected and submitted

D. The December 1st Party Qualification Deadline – and 5-Day Verification Deadline – Are not Necessary to Further Any Legitimate State Interest.

Plaintiffs concede that the state has general interest in regulating the conduct of its elections and requiring that new parties demonstrate a modicum of public support. As set forth more fully below, however, Maine's unusually early party qualification deadline – and the extremely short 5-day window for verification of enrollments – is not *necessary* to further any of the various interests articulated by the state in this case. As such, it is unconstitutional even if these court declines to apply strict scrutiny. *Anderson*, 460 U.S. at 805-806.

The first justification/interest articulated by the Defendants is that Maine's early party qualification deadline is required in order to make various other provisions its election scheme work. Defendants contend that "any candidate who belongs to a qualified party must collect signatures on nominating petitions between January 1 and March 15 of election year," and that "[t]he SOS is required to print these petition forms and make them available to candidates by January 1st of election year." *See* Defendants' Opposition Brief at pp. 16-17. The December 1st deadline, however, is not necessary to further or protect those aspects of Maine's existing primary election process, nor is any deadline occurring before March 1st for that matter.[7]

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to the towns and municipalities across the state by July 25th of the general election year. 21-A M.R.S.A. § 354(7)(B). This actually happened to the Libertarian Party in Massachusetts in 2008, when the presidential and vice presidential candidates who gained ballot access through nominating petitions were not the candidates nominated at the party's national convention in late May 2008. *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010), *rehearing denied*, 630 F.3d 250 (1st Cir. 2010). In that case, the Court of Appeals for the First Circuit upheld the constitutionality of a state statutory scheme that did not allow for substitution of replacement candidates who were not formally nominated by petition. Contrary to Defendants' suggestion, that case does *not* stand for the proposition that an early party qualification deadline – or an otherwise burdensome party qualification scheme – can survive scrutiny merely because the state allows independent candidates who gain ballot access by petition to select a political designation of their choosing.

[7] First, nothing requires that the blank primary petitions that must be made available to candidates by January 1st be printed with the name of the political party printed on them—instead the form could have a blank for the prospective candidate to insert the name of the political party, including the name of a political party whose application for recognition may be pending. In fact, this is *precisely* what Plaintiffs' undersigned counsel was told about those forms when he made inquired of Defendants' counsel, that is, that the space for party affiliation on the form issued to prospective candidates is already blank. Plaintiffs' undersigned counsel has requested a copy of that primary petition form from Defendants' counsel, and expects to be able to introduce it into evidence at the March 31st hearing and ask Deputy Flynn about it. Second, there is nothing requiring a prospective primary candidate to begin gathering signatures as early as January 1st of the election year. Third, there is nothing that should or would prevent a prospective primary candidate from beginning to gather signatures of registered voters enrolled in a prospective political party before that

The second interest asserted by the Defendants is the need to require new parties to demonstrate a modicum of community support. However, that interest is already accomplished by Maine's requirement that a new party procure 5000 enrollments, which is not being challenged in this case. In none of the many cited cases striking down party qualification deadlines *much less early than Maine's* did the court even consider, let alone accept, the argument than an early deadline which forces the minor party to conduct a campaign long before the election is a legitimate way for the state to require a demonstration of viability or public support. The reason is simple – these courts have all held that it is unconstitutional, in and of itself, to require prospective minor parties to demonstrate their viability during a period when the election is too remote and voters are not yet paying attention.[8]

CONCLUSION

For the foregoing reasons, those articulated in Plaintiffs' January 27th Memorandum, and any others this Court deems sound and just, Plaintiffs respectfully request that the Court grant their pending Motion for Preliminary Injunction.

Dated at Portland, Maine this 9th day of March, 2016.

/s/ John H. Branson

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party has been officially qualified by the Secretary of State. Indeed, if Maine's party qualification was not so extraordinarily early, such candidates could, *at the same time*, both enroll voters on behalf of the party as part of its Section 303 qualification effort, and gather primary petition signatures.

[8] Defendants cite no governmental interest or justification for the extremely short window of time – 5 business days – within which the Secretary must verify the total number of enrollments, which Defendants have challenged as yet another statutory set-up for minor parties to fail. Plainly more time could be afforded so as to ensure that voter registration and enrollment forms submitted in the final weeks leading up to the December 1st deadline are all fully processed, without adversely affecting any other part of the state's electoral scheme.