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 RECONSIDERATION

Plaintiffs submit this Reply Memorandum in support of their Emergency Motion for Reconsideration dated April 29, 2016. For the reasons set forth more fully below, the arguments set forth in Defendants' memorandum in opposition to the pending Motion are unavailing.

I. DEFEDANTS DO NOT APPEAR TO DISPUTE THAT THE INJUNCTIVE RELIEF REQUESTED BY THE PLAINTIFFS HAVE NTOHING TO DO WITH THE JUNE 14TH PRIMARY ELECTION AND WOULD NOT DISPRUPT THAT ELECTION.

In their opposition memorandum dated May 6, 2016, Defendants nowhere dispute the central basis for Plaintiffs' pending motion for reconsideration—contrary to the Court's conclusion, the Plaintiffs are not seeking to secure the placement of any candidates on the June 14th primary election and the relief requested would not disrupt that election. This is not

surprising. At no time during its written briefing or at the hearing did the Defendants ever argue that the injunctive relief requested by the Plaintiffs would disrupt the primary election—*instead, Defendants' arguments relating to the timing of Maine's primary were confined to the debate over whether the December 1st party qualification deadline was unconstitutionally early, an issue which the court declined to rule on when it denied the pending motion for a preliminary injunction*.

If the Court is inclined to grant the pending motion for reconsideration, it will no doubt have to rule on whether the Plaintiffs' claim that the December 1st deadline is unconstitutionally early has a likelihood of success. In doing so, the Court may need to address Defendants' argument that the party qualification process must be completed more than 6 months before the primary and more than 11 months before the general election. Plaintiffs welcome a ruling on that central issue, particularly given that every court addressing the same issue – with party qualification deadlines not nearly as early has Maine's – have struck down such deadlines.

II. DEFENDANTS' ATTEMPT TO CONSTRUCT NEW PROBLEMS WITH THE INJUNCTIVE RELEIF REQUESTED THAT WERE NOT IDENTIFIED BY THE COURT AND NEVER PREVIOUSLY ARGUED BY THE DEFENDANTS IS UNAVAILING.

For the very first time in this entire proceeding, Defendants contend that it cannot restore the Libertarian Party enrollment status of the 4513 registered voters who were summarily stripped of that status by the Defendants on or about December 18, 2016. Plaintiffs expressly requested an order directing Defendants to restore the Libertarian Party enrollment status of the 4513 registered voters when they filed their Motion for Preliminary Injunction and proposed Order filed on January 27, 2016 (see Motion at page 2, subparagraph A; proposed Order at page 2, subparagraph A). Despite filing a 26-page opposition brief with 47 pages of exhibits, and participating in a hearing spanning over two days, Defendants never raised this particular objection to the relief requested by the Plaintiffs.

Moreover, when Deputy Secretary of State Flynn was asked at the hearing about whether – if ordered to do so by the Court – the Department was able to restore the Libertarian Party enrollment status of the 4513 registered voters who were stripped of that status on December 18th, *she answered affirmatively with no qualification*. Deputy Flynn not once testified about any havoc or problems that would create, whether on direct, examination, cross-examination or re-direct examination. Her own affidavit in opposition to the Motion for Preliminary Injunction is bereft of any assertion that restoring the enrollment status of the disenfranchised Libertarians would violate their rights or disrupt the electoral process.

Defendants have thus already refuted their own 13th hour argument by positions already taken in the case. The law does not favor trial by ambush, let alone an ambush that happens after the hearing is over. In the very least, Defendants have waived this argument and deprived the Court and the Plaintiffs of any meaningful opportunity to explore and/or refute their newfound assertion.

That said, Plaintiffs will endeavor to respond to the extent the Court is willing to entertain the Defendants' newly constructed argument. First, Plaintiffs appreciate that Defendants' now recognize the right of voters to make their own enrollment decisions. *See* Opposition Brief at p. 4. Unfortunately, Defendants showed no regard for that fundamental right of association when they summarily stripped 4513 voters of their chosen enrollment in the Libertarian Party, and issued a memorandum directing municipal clerks and registrars to deny any further requests by voters to enroll in the Libertarian Party.[1] In a bizarre form of Chutzpah laced with a twist of irony, Defendants now cite such associational rights as a basis for convincing the court that it

[1] Several courts have recognized the first amendment right of voters to enroll in the political party of their choosing, including parties that are not qualified to participate in a state's primary election. *See, e.g., Green Party of New York v. New York State Board of Elections*, 389 F.3d 411 (2d Cir 2004); *Baer v. Meyer*, 728 F 2d 471 (10th Cir. 1984); *Atherton v. Ward*, 22 F.Supp.2d 1265 (W.D. Ok 1998); *Council of Alternative Parties v. State*, 781 A 2d 1041 (N.J.Super.App.Div. 2001). If the Secretary of State had recognized such rights back in December of 2015, it would have preserved the Libertarian Party enrollment status of the 4513 voters notwithstanding its determination that the party failed to qualify.

cannot act to restore and safeguard those fundamental rights. When those 4513 voters were converted to "unenrolled" status on December 18, 2016, that was not by their choice, but instead because the Secretary was determined to enforce an unconstitutionally early party qualification deadline. Plaintiffs urge the Court to see through the horribly cynical charade being perpetuated by the Defendants at this late hour. By feigning a newfound respect for the associational rights of these 4513 voters, Defendants seek to persuade the Court not to intervene on their behalf and on behalf of the Libertarian Party with whom they sought to associate with.

Second, if in fact this Court were inclined to believe what the Defendants now suggest – and ignore the position they took at the hearing – there are ways to address their 13th hour objection without using it as an excuse to perpetuate the violation of Plaintiffs' constitutional rights and the rights of thousands of other Maine voters. If in fact any of those 4513 unenrolled voters have subsequently enrolled in other political parties, then the Secretary of State can notify such persons of the Court's ruling and give them the opportunity to either remain enrolled in that party or instead be reenrolled in the Libertarian. The Court can also order that the Secretary of State give the Libertarian Party full credit for the 4513 enrollments that were verified as of December 18, 2016, *even if the Secretary determines that for whatever reason it has too much newfound respect for the enrollment decisions of those voters to restore their Libertarian Party enrollment status*.

Above all else, the theme of the relief should be to enjoin the state from enforcing the December 1st party qualification deadline and the consequences thereof. *See, e.g., Stoddard v. Quinn*, 593 F. Supp. 300 (D. Me. 1984) (after finding Maine's qualification deadline for independent candidates to be unconstitutionally early, the Court barred the Secretary of State from enforcing the filing deadline against the Plaintiff). Even if the Court determines that the Libertarian party enrollment status of any one of those 4513 cannot be restored for whatever

reason – despite the Defendants' failure to present a shred of evidence to support that assertion – it can still enjoin the Secretary from depriving the Libertarian Party of credit for the 4513 verified enrollments that were subsequently nullified by the Secretary when it decided to enforce the unconstitutionally early December 1st party qualification deadline.

III. DEFENDANTS' CONTINUED EFFORT TO BLAME THE VICTIM ARE UNAVAILING.

The Defendants continue to suggest that the deficiencies of the Plaintiffs' enrollment campaign can form a proper basis for denying the relief they seek. As argued in Plaintiffs' Reply Brief in support of the Motion for Preliminary Injunction, and during the oral argument portion of the hearing, *the Court need not find that Plaintiffs acted did everything within their power to comply with the requirements of an unconstitutionally early party qualification process in order to grant them the relief they seek*. Any alleged failings on the part of the Plaintiffs in their effort to comply with the early qualification deadline – including those seized upon by the Court from the bench and in its decision involving illegible handwriting on enrollment forms – 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).

CONCLUSION

For the foregoing reasons, and those set forth in its pending Motion for Reconsideration, Plaintiffs respectfully request that the Court reconsider its April 25, 2016 Order, address and find likelihood of success on the merits, and grant the relief requested by the Plaintiffs, which has nothing to do with the primary election and places no undue burden on the Secretary of State. Moreover, given the unexpected course of the proceedings on this Motion, the May 16th date set for oral argument on this Motion, and the fact that the granting of this Motion would require the Court to render a decision on the merits of the central constitutional issues underlying the Plaintiffs' Motion for Preliminary Injunction, Plaintiffs respectfully request – if the motion is granted – that they have not less than forty-five (45) days from the date of the Court's ruling to enroll additional voters in the Libertarian Party and file a declaration with the Secretary of State, instead of the May 31st deadline set forth in their Proposed Order (Plaintiffs' Exhibit 7).

Dated at Portland, Maine this 11th day of May, 2016.

/s/ John H. Branson

BRANSON LAW OFFICE, P.A.
482 Congress Street, Suite 304
P.O. Box 7526
Portland, Maine 04112-7526
Tel. (207) 780-8611
jbranson@bransonlawoffice.com

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the Reply Memorandum in Support of Plaintiffs' Emergency Motion for Reconsideration with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's CM/ECF system, including those listed below. Parties may access this filing through the CM/ECF system.

Assistant Attorney General Phyllis Gardiner, Esq.
Office of the Maine Attorney General
6 State House Station
Augusta, Maine 04333-0006
Phyllis.Gardiner@maine.gov
Counsel for the Defendants

/s/ John H. Branson

BRANSON LAW OFFICE, P.A.
482 Congress Street, Suite 304
P.O. Box 7526
Portland, Maine 04112-7526
Tel. (207) 780-8611
jbranson@bransonlawoffice.com

Counsel for the Plaintiffs