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-JAW
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 RECONSIDERATION

Defendants oppose Plaintiffs' Motion for Reconsideration of the Court's Order denying Plaintiffs' Motion for Preliminary Injunction ("PI Motion") for the reasons set forth below.

INTRODUCTION

Plaintiffs' Motion challenges the Court's conclusion that it:

> need not reach the constitutionality of the party certification deadline of December 1 because the injunctive relief sought here is a practical impossibility: the Secretary of State cannot certify the Libertarian Party on May 31, 2016 and arrange for their candidates to appear on the primary ballot on June 14, 2016.

Order on Motion for Preliminary Injunction, dated April 25, 2016 (ECF No. 30) at 24. Plaintiffs argue that this conclusion is based on a "manifest error of fact and/or law" and thus requires reconsideration under Local Rule 7(g) because, at the hearing on the PI Motion, Plaintiffs "were

not asking the Court to compel the Secretary of State to place any Libertarian Party candidates on the ballot for the June 14, 2016 primary election." *Plaintiffs' Motion for Reconsideration* (ECF No. 32) at 1, 3; *see* Plaintiffs' Ex. 7. Although it is true that Plaintiffs did not ask for this specific form of relief at the PI hearing, the Court's findings and conclusions nonetheless support denial of the PI Motion on equitable and other grounds.

ARGUMENT

1. The Court's findings are factually and legally correct and support denial of the preliminary injunction.

In its order denying the Motion for Preliminary Injunction, the Court correctly distilled from Deputy Secretary of State Julie Flynn's testimony and affidavit the multiple steps and time frames involved in designing, producing and distributing ballots for the primary election. ECF No. 30 at 24-25. The Court concluded from this testimony that it would be practically impossible for the Secretary to prepare Libertarian Party ballots for the primary election if the party were allowed to continue enrolling members in order to reach the 5,000 threshold up until May 31, 2016, as requested by Plaintiffs. This conclusion is correct as a matter of fact, and it also reflects a correct understanding of Maine's election law.

Deputy Secretary Flynn's testimony not only demonstrates the impossibility of preparing Libertarian Party ballots for this election cycle, it also shows that Maine's December 1st statutory deadline for parties to qualify is a reasonable and nondiscriminatory regulation that serves the state's important interest in the orderly administration of the election process. As the Court accurately noted, the sequence of required steps in the process "backs up" from the date of the June primary election to the December time frame for certification. ECF No. 30 at 23.[1] After a party qualifies by enrolling a minimum of 5,000 voters, party members who wish to be

[1] Maine's party qualification statute authorizes a qualified party to participate in the primary election, whether or not the party has candidates who wish to run for office in any particular election cycle.

nominated for election to a state or federal office have to have an opportunity to collect signatures of party members on nominating petitions. Upon receipt, the Secretary of State has to validate those nominating petitions, and others have to have an opportunity to challenge the validity of the nominating petitions through an administrative process followed by two stages of judicial review. 21-A M.R.S. §§ 335-337. After that, as the Court found, the Secretary of State has to design, proof, print and distribute ballots (including up to 700 different ballot styles) and make them available to military and overseas voters no later than 45 days ahead of the primary election (i.e., by the end of April, 2016). ECF No. 30 at 24-25.

These facts reveal the problems inherent in Plaintiffs' legal theory (articulated in the PI Motion and as a claim for ultimate relief) that the statutory deadline for parties to qualify is "unconstitutionally early" and must instead be pushed well into the election year.[2] The facts demonstrate the important governmental interests served by the December deadlines for party qualification that Plaintiffs are challenging in this litigation and thus support a finding that the Plaintiffs have no substantial likelihood of succeeding on the merits of their constitutional challenge. *See Def. Memo* (ECF No. 14) at 16-17.

The Court correctly concluded that to allow a political organization to qualify as a party able to participate in the primary election up until a few weeks before that election occurs is impractical and would disrupt the orderly process of elections in Maine. This is true even though Plaintiffs revised their request for relief since filing their Complaint and PI Motion, shifting their "central focus" away from gaining access to the primary election ballot by the time of the PI

[2] Plaintiffs' position in this regard is directly opposite to that of the Libertarian Party of New Hampshire, which challenged New Hampshire's statute as unconstitutionally burdensome because it requires parties to go through the process of qualifying *during* the election year when they should be free to campaign. *Libertarian Party of New Hampshire v. Gardner*, 2015 WL 5089838 *8 (Aug. 27, 2015), *appeal docketed*.

hearing since they were no longer intending to have candidates in this year's primary election. *See Plaintiffs' Motion for Reconsideration* (ECF No. 32) at 3 n.1.

2. The forms of relief sought by Plaintiffs would disrupt the orderly process of Maine's elections and potentially violate voters' rights.

In their Motion for Reconsideration, Plaintiffs highlight the other forms of relief sought in their proposed order (Plaintiffs' Ex. 7), arguing that these "place[] no burden whatsoever on the Secretary of State's office." ECF No. 32 at 2, 4 & 6. This claim is incorrect and ignores significant legal and equitable concerns with the relief requested.

"Restoring" Libertarian Party enrollments – Plaintiffs wish to have the Secretary of State in effect "flip a switch" in the Central Voter Registration database to re-enroll the 4,513 voters who had enrolled in the Libertarian Party during calendar year 2015, but who were made "unenrolled" when the Secretary of State determined that the Libertarian Party had failed to qualify as a party by December 1, 2015. Pl. Ex. 7, ¶ A. While it is technically possible to "switch" voters' enrollment status by writing a specific computer code or query in the CVR system, doing so could cause significant legal harm because voters have a right to make their own enrollment decisions. Many of the 4,513 voters who had enrolled in the Libertarian Party as of December 1, 2015, may have decided to enroll in another qualified party since that time – either because they wanted to participate in the presidential caucuses held this winter, or in the upcoming June primary election to select nominees for other federal and state offices. For the Secretary of State to automatically switch these voters' enrollment back to the Libertarian Party pursuant to a court order would prevent the voters from participating in the primary election and thereby violate those voters' rights.

A court order requiring the Secretary of State to "restore" the enrollment of those among the 4,513 voters who have remained unenrolled since December also would be problematic since

voters who enrolled in the Libertarian Party in 2015 might not make the same choice in 2016 and might prefer to remain unenrolled.[3]

To avoid violating voters' rights, some type of notice would need to be sent to the 4,513 voters informing them of the injunction and asking them to affirmatively state within a certain period of time whether they wish to be re-enrolled in the Libertarian Party. The Court would have to outline a procedure and a time frame for the issuance of and response to the notices. Implementing such an order would be a significant undertaking that would impose new administrative burdens on the Secretary of State's small elections staff while they are preparing for the June primary election. It would disrupt their ability to administer an orderly election process and would not be in the public interest.

Accepting new applications to enroll in the Libertarian Party – Plaintiffs have asked the Court to order "all municipal registrars and clerks to accept and process the applications of otherwise qualified voters seeking to register and/or enroll in the Libertarian Party up to and including May 31, 2016." Pl. Ex. 7, ¶ B. In their Motion for Reconsideration, Plaintiffs ask that the May 31 date be extended to 45 days after the Court issues a new ruling on reconsideration. ECF No. 32 at 6. To grant such relief would impose on municipal officials the added burden of processing enrollment applications during the same time period in which they must process applications for absentee ballots, handle the normal flow of voter registration applications leading up to the election, conduct the primary election, tabulate the results of that election, and enter voter history for that election. All of these duties have to be accomplished within time periods set by statute. *See, e.g.,* 21-A M.R.S. §§ 621-A - 627, 651-661, 711, 721 & 753-A - 756. Imposing an obligation to process Libertarian Party enrollment applications within the same time period would be unduly burdensome and contrary to the public interest.

[3] Being unenrolled precludes participation in the primary election but obviously not the general election.

Allowing the Libertarian Party to select candidates for the general election by state or national convention – In addition, Plaintiffs ask the Court to exempt the Libertarian Party from several statutory requirements that apply to all other major parties. They wish to be exempt from having to conduct any municipal caucuses pursuant to 21-A M.R.S. § 303(4), and from having to nominate candidates through the primary election process pursuant to 21-A M.R.S. § 331(1). Instead they wish to be allowed to select Libertarian Party candidates for the *general election* ballot in November 2016 at their upcoming state party convention. *See* Pl. Ex. 7, ¶¶ E – G. [4]

Plaintiffs are, in effect, asking the Court to re-write Maine election law to fashion an entirely separate legal process unique to the Libertarian Party. Such relief is both "extraordinary and drastic," and the proffered justification for it is unpersuasive. *See* ECF No. 30 at 22 (preliminary injunction is extraordinary and drastic remedy that should not be granted unless the moving party "*by a clear showing*, carries the burden of persuasion") (emphasis in original; citations omitted).

3. The Plaintiffs are not entitled to injunctive relief to remedy a problem of their own making.

The evidence presented at the hearing on Plaintiffs' PI Motion clearly demonstrates that the Libertarian Party of Maine failed to qualify as a political party under Maine law due to circumstances "of their own creation." *See Libertarian Party of Maine v. Dunlap*, 659 F. Supp. 2d 215, 220 (D. Me. 2009). In such situations, denial of injunctive relief on equitable grounds is appropriate. *See Crafts v. Quinn*, 482 A.2d 825, 829 (Me. 1984) (upholding denial of

[4] While parties may prefer to utilize an alternative procedure, such as selecting candidates by state convention, the Supreme Court has recognized that states have a legitimate interest in requiring parties to use the format of a primary election for selecting their nominees "in order to assure that intraparty competition is resolved in a democratic fashion." *Arizona Green Party v. Bennett*, 20 F. Supp. 3d 740, 748 (D. Ariz. 2014) (internal citations omitted).

preliminary injunction where plaintiffs "are themselves responsible for their present predicament").

The Chairman of LPME acknowledged in testimony that the organization did not start enrolling new members in earnest until several months after it was authorized to do so. He did not even request the voter registration and enrollment application forms ("voter cards") to use for this purpose until May. At some point later in the summer, LPME hired consultants to enroll party members, yet the Chairman acknowledged that he did not check to see if the handwriting on the voter cards was legible before accepting the cards, paying the consultants, and sending the cards to election officials. Testimony at hearing and copies of voter cards that were rejected by City of Portland officials (Plaintiffs' Ex. 4) show that most of the rejections were due to illegible handwriting – e.g., the officials could not decipher the voter's name or address. When the Chairman noticed "discrepancies" between the number of enrollments recorded in CVR, as reflected in the reports that were provided to him periodically by the Secretary of State, and the number of applications that he had recorded as having been submitted to election officials, he failed to do any follow-up and instead simply assumed that the discrepancies were the result of processing times. He apparently held onto this assumption despite hearing from the Secretary of State's staff in early October, 2015, that many applications received by municipal officials were being rejected as incomplete. Defendants' Ex. 4F.[5] As of October 7, 2015, LPME had enrolled just over half of the 5,000 members needed to qualify as a party; as of November 18, 2015 – just two weeks before the deadline – they were still only 80% towards the goal, with 3,922 enrolled voters. *See* Defendants' Exs. 4F & 4H.

[5] Mr. Maderal also testified that he did not keep copies of the voter cards and did not make a list of the voters who sought to enroll. Taking either step would have facilitated follow-up with local registrars to find out what happened to those applications. Voters who filled out cards were not asked to contact LPME if they received a notice from the registrar indicating that the card was incomplete or rejected for any reason.

This evidence shows that the Libertarian Party may well have been able to qualify by the existing statutory deadline had they taken a few simple steps, such as checking the voter cards for legibility before submitting them, following up with local election officials during the enrollment period to identify and correct problems, keeping copies of voter cards or a list of voter applicants to enable them to follow-up with voters and registrars, and/or providing voters with contact information in the event voters received a rejection notice from their town registrar. Indeed, the Portland City Clerk testified that Mr. Maderal could have come into her office at any time to review rejected voter cards with the staff. Julie Flynn testified that she and her staff would have provided assistance if Mr. Maderal had presented concerns that towns were improperly rejecting voter cards.

Having failed to take such seemingly obvious steps in order to qualify within the 12-month period allowed by Maine's statute, 21-A M.R.S. § 303, Plaintiffs are not entitled to the extraordinary equitable remedy of being excused from compliance with the December 1, 2015 deadline as well as several other provisions of Maine's election laws, and allowed to place their candidates on the general election ballot as Libertarian Party nominees.[6]

The Court's denial of the requested preliminary injunction does not reflect a manifest error of fact or law that warrants reconsideration.

[6] The evidence discussed above also supports a finding that Plaintiffs have not shown a likelihood of success on the merits of their constitutional claims. *See Def. Memo* (ECF No. 14) at 12-13.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny the pending Motion for Reconsideration.

Dated: May 6, 2016

Respectfully submitted,

JANET T. MILLS
Attorney General

/s/ Phyllis Gardiner
PHYLLIS GARDINER
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8830
Fax (207) 287-3145

Attorneys for defendants

CERTIFICATE OF SERVICE

I hereby certify that on this, the 6th day of May, 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
jbranson@bransonlawoffice.com

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

Dated: May 6, 2016

/s/ Phyllis Gardiner
PHYLLIS GARDINER
Assistant Attorney General
Office of the Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8830