

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
George L. Russell, III
United States District Judge

101 West Lombard Street
Baltimore, Maryland 21201
410-962-4055

June 10, 2016

MEMORANDUM TO COUNSEL RE: Greg Dorsey v. Linda H. Lamone, et al.
Civil Action No. GLR-15-2170

Dear Counsel:

Pending before the Court is Defendants', the State Administrator and Members of the Maryland State Board of Elections (the "State Board"),¹ Motion to Dismiss Plaintiff Greg Dorsey's Complaint. (ECF No. 9). Having reviewed Dorsey's Motion and the parties' briefs, the Court finds no hearing necessary. See Local Rule 105.6 (D.Md. 2014). For the reasons that follow, the Court will deny the Motion.

Dorsey, a Maryland resident, seeks to gain access to Maryland's 2016 general election ballot as an unaffiliated candidate for the United States Senate. In Maryland, there are three avenues through which a candidate for public office may gain access to the general election ballot. See Md.Code Ann., Elec.Law § 5-701 (West 2016). First, Maryland's "principal political parties"² nominate a candidate by primary election. Id. Second, other political parties, including new parties, nominate a candidate in accordance with the parties' constitution and by-laws. Id. Before a new party can nominate a candidate, however, the party must file a petition with the State Board that includes, inter alia, "papers bearing the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the first day of the month in which the petition is submitted." Id. § 4-102(b)(2)(i). Subject to limited exceptions, a new party may file its petition at any time. See id. § 4-102(c)(1).

Third, unaffiliated candidates must file petitions with the State Board "signed by not less than 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought." Id. § 5-703(e)(1). This 1% figure is determined as of January 1, 2016, see id. § 5-703(e)(3), and represents approximately 38,000 signatures for the

¹ Defendants include Linda H. Lamone, State Administrator of the State Board, and five Members of the State Board: David J. McManus, Jr., Patrick J. Hogan, Kelley A Howells, Bobbie S. Mack, and Michael R. Cogan. Cogan is Charles Thomann's successor on the State Board. See Fed.R.Civ.P. 25(d) (explaining that a public officer's "successor is automatically substituted as a party"). Dorsey sues all the Defendants in their official capacities. The Court will refer to the Defendants collectively as the "State Board."

² Principal political parties are the parties whose candidates for Governor received the highest and second highest number of votes of any party candidate at the preceding general election. Id. § 1-101(dd), (jj), (kk).

2016 election. Unaffiliated candidates must submit their petitions to the State Board by August 1, 2016. Id. § 5-703(f)(1).

In February 2015, Dorsey filed his Certificate of Candidacy for Maryland's 2016 U.S. Senate race. Dorsey initiated this suit on July 24, 2015, alleging that Maryland's signature requirement for unaffiliated candidates both on its face and as applied to Dorsey and his supporters violates the rights to free speech and association and equal protection guaranteed by the First and Fourteenth Amendments to the United States Constitution.³ Specifically, Dorsey focuses on the disparity between the signature requirements for unaffiliated candidates and new parties, asserting that this disparity imposes an unconstitutionally severe burden on unaffiliated candidates. Dorsey raises one claim under 42 U.S.C. § 1983 (2012) and he requests declaratory and injunctive relief. Dorsey also seeks an order decreasing the number of signatures required for an unaffiliated candidate to gain access to the 2016 general election ballot for U.S. Senate to less than 10,000. On September 4, 2015, the State Board filed a Motion to Dismiss (ECF No. 9). Dorsey filed a Response in Opposition on September 21, 2015 (ECF No. 10), and the State Board submitted their Reply on October 8, 2015 (ECF No. 11).

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint,” not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” Edwards v. City of Goldsboro, 178 F.3d 231, 243–44 (4th Cir. 1999) (quoting Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)). A complaint fails to state a claim if it does not contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed.R.Civ.P. 8(a)(2), or does not “state a claim to relief that is plausible on its face,” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (citing Twombly, 555 U.S. at 556).

The Court must not confuse “plausibility” with “probability.” See SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 434 (4th Cir. 2015), as amended on reh’g in part (Oct. 29, 2015). Denying a motion to dismiss should not be mistaken for an endorsement of the ultimate merits of the plaintiff’s case. See id. At the pleadings stage, the plaintiff’s “prospects for success are largely irrelevant, as ‘a lawsuit need not be meritorious to proceed past [this stage].’” Id. (quoting Ringgold–Lockhart v. Cty. of L.A., 761 F.3d 1057, 1066 (9th Cir. 2014)). To dismiss a complaint because of some initial skepticism concerning the ultimate merits of a plaintiff’s case “would be to mistakenly ‘collapse discovery, summary judgment[,] and trial into the pleading stages of a case.’” Id. (quoting Petro–Hunt, L.L.C. v. United States, 90 Fed.Cl. 51, 71 (2009)).

³ Dorsey also mentions Article 24 of the Maryland Declaration of Rights in his Complaint. (Compl. ¶¶ 23, 39, ECF No. 1). “Because Maryland courts have generally interpreted this provision as in pari materia with the Equal Protection Clause of the U.S. Constitution,” however, the Court “will focus its analysis on federal constitutional law.” Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F.Supp.2d 385, 400 n.15 (D.Md. 2003).

In considering a Rule 12(b)(6) motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 268 (4th Cir. 2005) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); see Albright v. Oliver, 510 U.S. 266, 268 (1994). But, the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979), or legal conclusions couched as factual allegations, Iqbal, 556 U.S. at 678.

The State Board argues Dorsey fails to sufficiently state a claim for two principal reasons. First, when considered in their entirety, Maryland's ballot access requirements for unaffiliated candidates impose only a slight burden that is justified by the State's interests in preventing ballot overcrowding, deterring frivolous candidates, avoiding party-splitting, and discouraging independent candidacies motivated by short-range political goals. Second, the Constitution does not require that the burdens on unaffiliated candidates be identical to the burdens on new parties because they are not similarly situated. Dorsey responds that he states a plausible claim by alleging that Maryland requires unaffiliated candidates to obtain almost four times as many petition signatures as new parties and unaffiliated candidates, unlike new parties, do not know the exact number of petition signatures they must obtain until January 1 of the year in which they seek access to the general election ballot.

The Supreme Court of the United States has prescribed a flexible standard for considering challenges to state election laws: the Court

must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). Under this flexible standard, when First and Fourteenth Amendment rights are subjected to "severe" restrictions, the regulation must survive strict scrutiny by being "narrowly drawn to advance a state interest of compelling importance." Id. (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)). If, however, a ballot access regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. (quoting Anderson, 460 U.S. at 788). Reasonable, nondiscriminatory restrictions are those that neither substantially disadvantage nor favor unaffiliated candidates. Wood v. Meadows, 207 F.3d 708, 712 (4th Cir. 2000).

When determining whether a particular ballot access provision is constitutional, the Court must examine the totality of the state's ballot access scheme. See McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1223 (4th Cir. 1995) ("The Supreme Court has emphasized that ballot access restrictions must be assessed as a complex whole."). The Court may also consider whether a reasonably diligent unaffiliated candidate could be expected to satisfy a state's

signature requirement. See Storer v. Brown, 415 U.S. 724, 742 (1974). Past experience of prospective candidates is relevant to this inquiry. See id. Additionally, when comparing the burdens on unaffiliated candidates versus party candidates, the Court must remain mindful that the Constitution does not prevent a state from subjecting unaffiliated candidates “to reasonable burdens, similar in degree, to those imposed on party candidates.” Wood, 207 F.3d at 712.

At this stage of the litigation, the Court finds two cases are most instructive in determining whether Dorsey sufficiently states a claim: (1) Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014); and (2) Delaney v. Bartlett, 370 F.Supp.2d 373 (M.D.N.C. 2004). In Pisano, the United States Court of Appeals for the Fourth Circuit considered whether North Carolina’s ballot access requirements for prospective presidential candidates from new parties violated the First and Fourteenth Amendments. See Pisano, 743 F.3d at 929. North Carolina required new parties to submit petitions with signatures from at least 2% of the total number of voters who voted in the most recent general election for governor. Id. at 930. Prospective new parties were required to submit their petitions for signature-verification by no later than May 17 of the election year in which the new party sought to participate. Id. The Fourth Circuit concluded that the May 17 deadline in conjunction with the 2% signature requirement was constitutional as applied to the plaintiffs. Id. at 937. Critical to the court’s conclusion was the “important alleviating factor” that prospective new parties were on notice three-and-one-half years before the deadline of the number of signatures they needed to collect. See id. at 934.

This case, as presented in Dorsey’s Complaint, is readily distinguishable from Pisano. Dorsey alleges that in Maryland, unaffiliated candidates are on notice of the total signature requirement only seven months before the deadline—a duration nearly three years less than the duration in Pisano. Also, while Maryland’s 1% requirement is less than North Carolina’s 2% requirement, Maryland requires an unaffiliated candidate to obtain the 1% from all qualified registered voters in the state, not just those who voted in the most recent general election for governor. Considering these distinguishing elements, the Court finds that at this juncture of the litigation, Pisano militates in favor of denying the State Board’s Motion.

In Delaney, the United States District Court for the Middle District of North Carolina considered whether the disparity between the signature requirements for unaffiliated candidates and new party candidates violated the First and Fourteenth Amendments. See Delaney, 370 F.Supp.2d at 375. North Carolina required unaffiliated candidates seeking access to the general election ballot to obtain signatures from 2% of the total number of qualified registered voters in the state, or 90,639 signatures. Id. In contrast, North Carolina required new parties to gather signatures from 2% of the total number of qualified registered voters who voted in the most recent general election for governor, or 58,841 signatures. Id. at 375–76. The court determined that strict scrutiny was warranted because the large disparity in the signature requirement severely disadvantaged unaffiliated candidates. Id. at 378. After applying strict scrutiny, the court concluded that the disparity was unconstitutional because it neither advanced nor achieved the state’s interests in preventing ballot clutter and avoiding voter confusion. Id. at 379–80.

At this pleadings stage, Delaney, like Pisano, supports Dorsey’s position that he states a plausible claim for relief. Dorsey alleges that unaffiliated candidates are required to obtain approximately 30,000 more signatures than new parties. Based on raw numbers, the disparity in

Delaney is nearly identical. Based on proportion, however, the disparity is anything but identical. Maryland requires unaffiliated candidates to collect nearly four times the number of signatures as new parties, whereas North Carolina, in Delaney, required unaffiliated candidates to obtain less than two times the number of signatures as new parties. Furthermore, the State Board maintains that the signature requirement for unaffiliated candidates promotes the State's important interest in "preventing ballot overcrowding." (Mem. in Supp. Of Defs.' Mot. to Dismiss at 13, ECF No. 9-1). This is the same interest, however, the Delaney court determined that North Carolina's signature requirement for unaffiliated candidates did not advance. See Delaney, 370 F.Supp.2d at 379–80.

Accordingly, the Court concludes that at this stage of the litigation, Dorsey succeeds in stating a plausible claim that Maryland's ballot access requirements for unaffiliated candidates are unconstitutional. Accordingly, the Court will deny the State Board's Motion.⁴

For the reasons stated above, the State Board's Motion to Dismiss is DENIED. The State Board shall file an answer within fourteen days of the date of this memorandum. Despite the informal nature of this memorandum, it shall constitute an Order of the Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

George L. Russell, III
United States District Judge

⁴ The Court recognizes that this case is not exceedingly fact-intensive—Maryland's ballot access requirements for unaffiliated candidates are all outlined in the Maryland Code. Nevertheless, there are some facts, such as the number of instances in which unaffiliated candidates versus candidates from new parties have gained access to the general election ballot and whether there are any restrictions on who can sign petitions for unaffiliated candidates, that could further aid the Court in addressing the ultimate merits of Dorsey's case.