IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JAMES BAINES, et al.,	)	Case No. 1:19-cv-00509-LEW
	)	
Plaintiffs,	)	Judge Lance E. Walker
v.	)	Magistrate Judge John H. Rich III
	)	
SHENNA BELLOWS, in her official capacity as Secretary of State for the State of Maine,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Shenna Bellows' ("the Secretary") Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 60) ("Opp.") is largely non-responsive – indeed, the Secretary has simply refiled her own motion, with slight modifications, and captioned it as an opposition to Plaintiffs' motion. The Secretary thus continues to insist that each challenged provision is constitutional as applied separately, in isolation from the other challenged provisions, and never even acknowledges Plaintiffs' actual claim that the challenged provisions are unconstitutional as applied in combination, save for three scant paragraphs tacked onto the end of her discussion. (Opp. at 28-29.) As a result, the Secretary offers no defense against Plaintiffs' argument that the combined effect of the challenged provisions is "to freeze the political status quo" in Maine by making it practically impossible for average – *i.e.*, non-wealthy – citizens to form a new party, place candidates on the ballot and retain ballot access. *See Jenness v. Fortson*, 403 U.S. 431, 438 (1971). This is the *sine qua non* of an unconstitutional statutory scheme, *see id*., yet the Secretary disregards the issue entirely.

The essential facts demonstrating that the challenged provisions operate to freeze Maine's political status quo are not in dispute. First, no party except the Libertarian Party of Maine ("LPME") has complied with the initial enrollment requirement imposed by § 303, and the effort

cost LPME no less than $74,009,[1] took 18 months, and succeeded only because this Court extended the unconstitutionally early deadline for complying with that provision by more than seven months, from December to July. Second, during the two election cycles when LPME was ballot-qualified (2016 and 2018), all but one of its candidates were excluded from Maine's general election ballot because LPME was required to nominate by primary pursuant to § 331, but the primary election ballot access requirements imposed by § 335 were so severe that no LPME candidate could comply (for example, LPME candidates for statewide office needed signatures from approximately 40 percent of the voters eligible to sign their nomination petitions, whereas major party candidates for the same office needed signatures from less than 1 percent of their eligible signers). Third, § 301(1)(E) required that LPME double its enrollment between 2016 and 2018 (thus diverting its limited resources from supporting candidates to another costly enrollment drive) and ensure that 10,000 members voted in the 2018 general election – effectively obligating 100 percent of LPME's members to turn out to vote in an election with no Libertarian candidates. Fourth, although LPME enjoyed robust growth between 2016 and 2018 – its membership increased by nearly 25 percent – it was disqualified in December 2018 pursuant to § 304 for failure to comply with § 301(1)(E). Fifth, as a result, LPME's 6,240 members were involuntarily unenrolled without notice pursuant to § 306, thus leaving LPME with zero members and nothing to show for its exhaustive efforts to become an established party.

These facts show that a new party has little chance of surviving longer than two election cycles in Maine unless it enrolls several times more than the 5,000 members initially required by § 303 – thus incurring costs several times greater than $74,009 – because if it does not the primary election signature requirements imposed by § 335 will be impossible for its candidates to overcome

[1] The Secretary disputes Plaintiffs' evidence that the cost was even greater, (Opp. at 1,6), but does not dispute that their initial enrollment drive cost at least $74,009. (Def. Opp. Stmnt. of Mat. Facts ("Sec. OSMF") ¶ 3.)

(a "reasonable" result, according to the Secretary, (Opp. at 18)), thus making it all but certain that the party will fail to comply with the 10,000-voter turnout requirement imposed by § 301(1)(E), which leads inexorably to its disqualification pursuant to § 304 and the unenrollment of its members pursuant to § 306. How many members is enough for a new party to survive this crucible? Even the Maine Green Independent Party ("MGIP"), which has more than 43,000 members – it became ballot-qualified pursuant to the coattails provision of § 302 and grew to 34,294 members before § 301(1)(E) took effect (Dec. of L. Maravel ¶ 15 (Dkt. 55-4) – is unable to place its candidates for statewide office on the ballot. A new party therefore faces a near-impossible predicament: even if it can enroll 40,000 members (at an approximate cost of $592,000, based on a cost of $74,000 per 5,000 enrollments), its candidates for statewide office are still unlikely to qualify for the primary election ballot – as MGIP's experience proves – yet it still must convince its voters to turn out in a general election from which the party's candidates are excluded.

The Secretary's assertion that each challenged provision, as applied separately from the other challenge provisions, only imposes a "minor" burden on a new party's rights ignores all of this. (Opp. at 4.) And because the Secretary has essentially re-filed her own motion, she continues to rely on the same erroneous assertions it contains – even those that the Supreme Court has expressly rejected. Thus, the Secretary insists that Maine may use a new party's ability to raise funds to determine whether it has a "modicum of support" among the electorate, (Opp. at 1, 6-7), despite Plaintiffs' citation to two Supreme Court decisions holding that it may not. (Pl. Opp. at 3 (citing *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974); *Bullock v. Carter*, 405 U.S. 134, 146 (1972)). The Secretary likewise insists that Maine's June primary date justifies its unconstitutionally early January 2nd enrollment deadline, (Opp. at 2, 8-12), but fails to address the six cases Plaintiffs cite that reject that contention, (Pl. Opp. at 7-8 (citing cases)), or the even larger body of precedent

Plaintiffs cite that hold early filing deadlines like Maine's unconstitutional. (Pl. Mot. for Summ. J. ("Pl. Mot.") (Dkt. 55) at 12 (citing cases).)

In a similar vein, the Secretary attempts to minimize the evidence demonstrating that the signature requirements imposed by § 335 are severely burdensome as applied to a new party, first by falsely asserting that Plaintiffs have identified only one candidate that was unable to comply with them, (Opp. at 3), while disregarding any evidence to the contrary. (*E.g.*, Dec. of B. Young ¶¶ 4-5 (Dkt. 12-8.).) In any event, the Secretary's assertion that LPME candidates had "a success rate of 50%" is risible: it not only defies common sense but also the undisputed facts demonstrating that Maine's unduly burdensome signature requirements dissuade candidates from wasting limited time and resources in a futile effort to comply with them. (*E.g.* Dec. of B. Young ¶¶ 4-5 (Dkt. 12-8); Dec. of C. Lyons ¶ 14 (Dkt. 12-1); Dec. of L. Savage ¶ 5 (Dkt. 22-2); Dec. of L. Maravel ¶¶ 17,20,22 (Dkt. 55-4).) Moreover, it is undisputed that with a single exception, no LPME candidate was able to comply with § 335 during the two election cycles when it was ballot-qualified, (Pl. SMF ¶ 7 (Dkt. 55-2), and no MGIP candidate for statewide office has complied with it since 2010. (Dec. of L. Maravel ¶ 16); *see Storer v. Brown*, 415 U.S. 724, 742 (1974) (observing that "past experience" is a reliable indicator of whether ballot access requirements are unconstitutionally burdensome).

According to the Secretary, none of this matters because the First Circuit upheld § 335 against a "virtually identical attack" nearly 20 years ago. (Opp. at 2 (citing *Libertarian Party of Maine v. Diamond*, 992 F.2d 365 (1st Cir. 1993).) That is incorrect. For one thing, § 301(1)(E) did not exist when that case was decided, and as this Court has recognized, Plaintiffs' claim that § 335 is unconstitutionally burdensome as applied in combination with that provision presents "a serious challenge, and deserves consideration." (Order at 4 (Dkt. 35).) Furthermore, as explained below, the plaintiff party in *Diamond* was formed pursuant to the "coattails" provision of § 302, not the

enrollment provision of § 303, as is the case here. This distinction is critical, because it means that even under *Diamond's* rationale, LPME demonstrated the requisite modicum of support to place its candidates on the ballot for statewide office.

Finally, the Secretary urges this Court to "revisit" its conclusion that the involuntary unenrollment of LPME's members is likely unconstitutional, on the ground that Plaintiffs offer insufficient argument and evidence to sustain that conclusion. (Opp. at 3.) But while the Secretary devotes a great deal of verbiage to this issue, (Opp. at 23-28), it is her own discussion that falls short. Apart from paternalistic musings about helping voters make sound associational choices – which is not a legitimate state interest but a violation of voters' fundamental First Amendment rights – the Secretary's position boils down to the claim that Maine's computer program is not currently designed to enable re-enrollment of voters. As the precedent on which Plaintiffs rely unanimously holds, however, (Pl. MSJ at 23-25), even if that were true it cannot support the burden imposed on voters' First Amendment rights. Notably, except for one passing reference to a single case, (Opp. at 23), the Secretary fails to address any of this precedent in five pages of discussion. (Opp. at 23-28.)

With the benefit of complete briefing, therefore, it is now clear that Plaintiffs support their motion for summary judgment by properly applying binding precedent to the material facts, whereas the Secretary simply disregards the material facts and precedent that contradict her position. Plaintiffs are entitled to judgment as a matter of law. Defendants are not.

ARGUMENT

I. The Secretary's Assertion That the Challenged Provisions Are Permissible Because They Impose "Only Minor Burdens" on LPME Is Contrary to the Undisputed Facts and Binding Precedent.

In the discussion that follows, Plaintiffs address the Secretary's points in the order that she makes them. As a threshold matter, however, it bears repeating that the Secretary's attempt to

defend each challenged provision separately, in isolation from the others, is insufficient to defeat Plaintiffs' claims because Plaintiffs do not challenge each provision separately, but rather as it is applied in combination with the other challenged provisions. *See Storer*, 415 U.S. at 737 (observing that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights"). Plaintiffs' claim is that Maine's statutory scheme, taken in its "totality," is unconstitutional. *See id*. Because the Secretary fails to address that claim, she fails to provide any basis for denying Plaintiffs' motion.

A. The Secretary Fails to Rebut Plaintiffs' Claim That the 5,000-Voter Enrollment Requirement Is Unconstitutional as Applied in Combination With the Other Challenged Provisions.

The Secretary's attempt to defend the 5,000-voter enrollment requirement imposed by § 303 fails because she never acknowledges, much less attempts to justify, the burden that the requirement imposes as applied in combination with the other challenged provisions. In particular, § 335 presents a near-insurmountable barrier to candidates of a new party that qualifies pursuant to § 303 with approximately 5,000 members, because the signature requirements prescribed by § 335(5) are so high that in many jurisdictions they exceed the number of eligible signers as defined by § 335(2) (party members). The Secretary does not dispute this point. On the contrary, she expressly asserts that this is a "reasonable" result, and that if a new party's candidates cannot comply with § 335 because the signature requirement exceeds the number of eligible signers, it simply means that the party "lacks any modicum of public support" in the candidates' respective jurisdictions. (Opp. at 18.) Thus, in the Secretary's view, the party must enroll more members, or else it has "no constitutional right to field a general-election candidate in that district." (Opp. at 18.)

How many members must a party enroll before it has a reasonable expectation of complying with § 335? A party that qualifies pursuant to § 303 is required to enroll another 5,000

voters within the first election cycle after it qualifies, or else it will fall short of the 10,000-voter turnout requirement imposed by § 301(1)(E) and be disqualified pursuant to § 304. But the evidence demonstrates that a party with 10,000 voters also has little chance of complying with § 335 (and also with § 301(1)(E), unless the party ensures 100 percent turnout among its membership). In fact, the evidence demonstrates that MGIP, with 43,000 members, has been unable to run candidates for statewide office since 2010, because the requirements imposed by § 335 are too onerous. (Dec. of L. Savage ¶ 5; Dec. of L. Maravel ¶¶ 16,17,20,22.) If a new party is to remain qualified under Maine law, however, the ability to run candidates for statewide office is of paramount importance, because that is the only way the party can incentivize its entire membership to turn out in sufficient numbers to comply with § 301(1)(E).

As applied in combination with § 335, therefore, § 303 effectively requires that a new party enroll many more than 5,000 members. Otherwise, it will be ballot-qualified in name only, and unable to place candidates on the ballot, which will cause it to fall short of the 10,000-voter turnout requirement imposed by § 301(1)(E) and trigger its disqualification pursuant to § 304. Assuming that 40,000 enrolled members is enough to overcome the barrier that § 335 imposes (even though the evidence suggests that it is not), that places a new party's cost of complying with § 303 at $592,000. (Sec. OSMF ¶ 3 (conceding that it cost LPME approximately $74,000 to enroll its first 5,000 members).) That is in addition to the time, labor and other resources the party must dedicate to its enrollment efforts. (Pl. SMF ¶¶ 2-3.) That is the actual burden that § 303 imposes as applied in combination with the other challenged provisions, and the Secretary makes no attempt to address it. (Opp. at 4-8.)

To the extent that the Secretary attempts to defend § 303 as applied in isolation, she also fails, because she simply repeats the same erroneous assertions that Plaintiffs have already refuted. For example, the Secretary once again asserts that courts have upheld "more onerous"

requirements, (Opp. at 4), even though Plaintiffs have demonstrated that the cases she cites are inapposite – they do not involve enrollment requirements at all, but rather nomination petition signature requirements. (Pl. Opp. to Def. MSJ ("Pl. Opp.") (Dkt. 57) at 5.) The Secretary disregards this distinction and insists that "nothing in [Plaintiffs'] motion" undermines her reliance on those cases, (Opp. at 5), but that is not so. As Plaintiffs have explained, the evidence demonstrates that enrollment requirements are qualitatively more burdensome than signature requirements, not only because it takes longer to enroll a voter than to obtain a voter's signature, but also because, as the Secretary concedes, voters are more willing to sign a nomination petition than they are to enroll in a new party. (Opp. at 5.) Consequently, the Secretary's reliance on decisions upholding signature requirements as support for Maine's enrollment requirement is misplaced.

The reason that the Secretary attempts to invoke signature requirement cases here is obvious: Maine is the only state in the nation, except Delaware, that has adopted voter enrollment as the only means by which a party may become ballot qualified, and therefore it appears that no court has ever upheld such a statutory scheme. And as the foregoing discussion demonstrates, Maine's enrollment requirement is severely burdensome not merely because of the difficulty of enrolling the initial 5,000 members required by § 303, but because of the combined impact of § 303 as applied in combination with the other challenged provisions, and § 335 in particular. The Secretary's quibbles over minutiae such as whether it truly takes an average of 10 minutes to enroll a voter therefore miss the point. (Opp. at 7-8.) The enrollment requirement is severely burdensome because it is the first link in a chain that leads inexorably to a new party's disqualification unless it exceeds the initial 5,000-member requirement in the space of a single election cycle.

B. The Secretary Fails to Rebut Plaintiffs' Claim That the January 2nd Deadline Is Unconstitutional as Applied in Combination With the Other Challenged Provisions.

In their motion, Plaintiffs cite no fewer than 11 cases, including this Court's own prior decision in *LPME I*, that struck down filing deadlines like Maine's, which fall far in advance of the primary and general election dates. (Pl. MSJ at 14 & n.4. (citing cases).) Plaintiffs also explained in detail why the rationale of those cases applies here, notwithstanding the fact that the deadline imposed by § 303 now falls one month later, on January 2nd rather than December 2nd. (Pl. MSJ at 15.) And Plaintiffs cited no fewer than six cases that rejected a state's interest in maintaining its primary election date as justification for maintaining its unconstitutionally early deadline. (Pl. MSJ at 14 n.4.)

The Secretary conspicuously fails to address a single one of these cases, except *LPME I*, and thus makes no attempt to defend Maine's January 2nd deadline against the "great weight of authority" demonstrating that it is unconstitutional. *LPME I*, at PageID #: 301 (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590 (6th Cir. 2006)). Instead, the Secretary incorrectly asserts that Plaintiffs rely "primarily" on *LPME I*, (Opp. at 9), when in fact they rely on *LPME I* and the other ten cases cited in Plaintiffs' motion. The Secretary further asserts, also incorrectly, that the Legislature "addressed" the "problematic aspects" of Maine's December 2nd deadline by moving it to January 2nd. (Opp. at 9.) On the contrary, as Plaintiffs explained:

> This minor change did nothing to address the factors that led this Court to conclude that the deadline imposes a severe burden: under the current deadline, Plaintiffs still must obtain the required voter support exclusively during an off-election year, when voters are less engaged in the political process, and they are still prevented from responding to contentious issues raised during the election year. Consequently, the current deadline imposes a severe burden for the same reasons that the slightly earlier deadline enjoined in *LPME I* did.

(Pl. MSJ at 15 (citations omitted).) Once again, however, the Secretary makes no attempt to show that Maine's January 2nd deadline addresses these factors, much less that it alleviates them in any discernible way. It does not.

The single case that the Secretary cites in an effort to support the January 2nd deadline is plainly distinguishable. (Opp. at 9-10 (citing *Arizona Green Party v. Reagan*, 838 F.3d 983 (9th

Cir. 2016).) In that case, the plaintiff failed to submit any evidence in support of its motion for summary judgment – it did not submit any evidence at all – and consequently the Court concluded that it failed to establish a burden on its rights. *Arizona Green Party*, 838 F.3d at 985. That is not the case here. Plaintiffs have submitted evidence, which the Secretary does not dispute, that the January 2nd deadline is burdensome for the same reasons that the December 2nd deadline was. (*E.g.*, Dec. of C. Lyons, ¶ 9.) Consequently, unlike in *Arizona Green Party*, this Court need not "imagine" how Maine's January 2nd deadline burdens Plaintiffs' rights, but rather may rely on the undisputed facts.

Despite Plaintiffs' citation to no fewer than six cases rejecting a state's interest in maintaining its primary election date as sufficient justification for its unconstitutionally early deadline, (Pl. MSJ at 14 n.4), the Secretary cites no other interest as justification for Maine's January 2nd deadline here. (Opp. at 10-11.) And once again, the Secretary conspicuously fails to address the great weight of authority rejecting her position. Nor does the Secretary attempt to explain why that interest should be deemed sufficient here when it has been rejected in every other case that addresses the issue. It should not.

The Secretary asserts that Plaintiffs are "silent" as to how they would benefit from a judgment declaring Maine's January 2nd deadline unconstitutional, (Opp. at 12), but that is incorrect. As an initial matter, the record itself refutes the Secretary's assertion: in 2016, when LPME successfully qualified for the ballot pursuant to § 303, it did so only because this Court enjoined enforcement of the December 2nd deadline and extended it by seven months, until July. (Pl. SMF ¶ 4.) That relief alleviated the burden imposed by the unconstitutional deadline not only by providing LPME additional time to comply with the enrollment requirement, but also by enabling LPME to seek voters' support during the election year, when they are more engaged with

and interested in electoral politics. *See LPME I* at PageID #: 308 (citing *Blackwell*, 462 F.3d at 586.) LPME will similarly benefit from that relief in future enrollment drives.

Finally, the Secretary's suggestion that the Court should uphold Maine's unconstitutional January 2nd deadline on the ground that it provides a "generous" period of time to enroll the required number of voters is unavailing. (Opp. at 12.) As the Secretary well knows, the great weight of authority that holds early deadlines unconstitutional does so not (or not primarily) because they allow insufficient time to comply with other requirements, but because they force parties to comply in off-election years, when voters are less engaged, and because they deprive parties of responding to contentious issues raised during the election. *See LPME I* at PageID #: 308 (citing *Blackwell*, 462 F.3d at 586.). Maine's January 2nd deadline is unconstitutional for the same reasons.

C. The Secretary Fails to Rebut Plaintiffs' Claim That the January 2nd Deadline Is Unconstitutional as Applied in Combination With the Other Challenged Provisions.

As Plaintiffs have explained, Maine is the only state in the nation that imposes a double-enrollment requirement for parties to become ballot-qualified and remain ballot-qualified. *See* §§ 303, 301(1)(E). The Secretary does not dispute this point, but continues to insist that Maine's statutory scheme is "common among states." (Opp. at 13.) It is not. In the entire nation, no other state has adopted such a scheme.

Furthermore, as Plaintiffs have also explained, (Pl. Opp. at 12-13), Maine's statutory scheme is far more burdensome than the so-called "two-tiered" schemes to which the Secretary cites, because unlike them, Maine's double-enrollment provisions require that a new party divert its resources during an election cycle to another costly enrollment drive, thus interfering with the party's "basic function" of presenting its candidates to voters at general elections. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). In the "two-tier" cases that the Secretary cites, by contrast, the

state initially requires that a party comply with a signature requirement to qualify for the ballot, then requires that its candidates receive a certain percentage of the vote in order to retain ballot access. Such schemes do not impose the same burden that Maine's does. They do not interfere with a party's basic function of selecting candidates and offering them to voters at general elections, *see id.*, but rather are consistent with it. Only Maine forces a new party to devote its limited resources to an enrollment drive precisely when it should be devoting those resources to supporting its candidates' campaigns for election. The Secretary makes no attempt to address this unique burden that Maine's double-enrollment scheme imposes.

From the beginning of this proceeding, the Secretary's admission that "[i]t would be difficult for us to articulate a governmental interest sufficient to justify the 10,000-voter retention requirement if it were challenged in court…." has been in the record and remained undisputed. (Pl. SMF ¶ 19.) Now, for the first time, the Secretary asserts that this testimony is "out of context." (Opp. at 14.) That is incorrect.

According to the Secretary, her admission that the 10,000-voter retention requirement lacks justification in any legitimate state interest applied only to the requirement as it existed in 2017, when a new party had to comply with it in the same election cycle in which it initially qualified. (Opp. at 15.) Contrary to the Secretary's assertion, however, the context of the admission confirms that it applies to the 10,000-voter requirement as it applies in general. In fact, the Secretary's concern with respect to the timing of the requirement is expressed in an entirely separate paragraph of the written testimony. (Dec. of W. Tedards (Dkt. 22-1), Attch. 1.) Thereafter, a new paragraph begins: "Additionally," the Secretary testifies:

> if garnering 5% or more of the total vote cast for president is enough to qualify as a party (*see Title 21-A section 302*), then why shouldn't it be enough to retain party status? The Libertarian Party candidate for President, Gary Johnson, received 38,105 votes, which was 5.09% of the votes cast for President in 2016. ***It would be difficult to articulate a governmental interest sufficient to justify the 10,000 voter retention requirement if it were challenged.*** Not changing this could trigger a new lawsuit…

Id. (emphasis added).

The full context of the Secretary's written testimony thus confirms that her admission that no legitimate state interest justifies § 301(1)(E) had nothing to do with timing. Having expressed her concerns regarding timing, the Secretary starts a new paragraph and introduces a new thought with the signal, "[a]dditionally". The Secretary then states her reason for believing that § 301(1)(E) is unnecessary to serve any legitimate state interest, and her admission follows immediately thereafter. The Secretary should be held to that admission.

The Secretary concedes that a requirement that 100 percent of a new party's members "might indeed be constitutionally suspect," but denies that § 301(1)(E) operates as one. (Opp. at 15.) A "prudent" party, the Secretary suggests, will "continue to enroll voters after it reaches 10,000 enrollments, thus ensuring that it can meet the voter participation threshold with less than 100 percent voter participation." (Opp. at 15.) Thus, as with § 303, the Secretary admits that § 301(1)(E) effectively requires that a new party enroll even more voters than the provision specifies, because otherwise the party will be unable to comply with § 301(1)(E)'s voter turnout requirement. But how many more voters is sufficient? If voter turnout is approximately 50 percent, on average (and in mid-term elections like 2018 it is often much lower), a party would need to enroll no fewer than 20,000 voters to ensure compliance with § 301(1)(E).

In an effort to minimize this burden, the Secretary misleadingly asserts that MGIP "consistently exceeds the 10,000-voter requirement," but fails to mention that MGIP existed as a ballot-qualified party for many years before § 301(1)(E) was enacted. (Opp. at 16.) As a result, MGIP had the opportunity to grow in size to 34,294 members before the provision took effect. (Dec. of L. Maravel ¶ 15.) If LPME had the same opportunity, it likely would be able to comply with § 301(1)(E) too, given its healthy growth rate of nearly 25 percent during the short period when it was ballot-qualified. The Secretary is therefore incorrect that MGIP's experience suggests

that LPME lacks "organizational support or … public support." (Opp. at 16.) Rather, MGIP's experience confirms that § 301(1)(E) imposes a severe burden on new parties like LPME.[2]

D. The Secretary Fails to Rebut Plaintiffs' Claim That Maine's Primary Election Signature Requirements Are Unconstitutional as Applied in Combination With the Other Challenged Provisions.

The Secretary's assertion that *Diamond* is "controlling and precludes any grant of summary judgment to LPME" as to the unconstitutionality of § 335 is incorrect for several reasons. First, Plaintiffs challenge § 335 as applied in combination with the other challenged provisions, including § 301(1)(E), and § 301(1)(E) did not exist when *Diamond* was decided. That fact alone demonstrates that *Diamond* is not "controlling" here. It does not address the same claim.

Second, the plaintiff in *Diamond* became ballot-qualified pursuant to the coattails provision of § 302, not pursuant to the enrollment provision of § 303, as LPME did here. Consequently, unlike the plaintiff in *Diamond*, LPME did not "bypass" the requirement that it demonstrate a modicum of public support. *See Diamond*, 992 F.2d at 371. LPME complied with that requirement. Consequently, *Diamond's* rationale – that individual candidates must demonstrate a modicum of support because the party itself did not – does not apply here.

Third, even if *Diamond's* rationale does apply, LPME demonstrated the requisite modicum of support to place its candidates for statewide office on the ballot. It demonstrated that it had the support of more than 5,000 voters statewide by enrolling that many pursuant to § 303. If *Diamond* applies here at all, therefore, it confirms that Plaintiffs are entitled to relief.

The Secretary also expends considerable effort to convince the Court that it should disregard Plaintiffs' evidence relating to candidates' "past experience" in failing to comply with §

[2] The Secretary's brief is sprinkled with comments that disparage LPME for its supposed lack of public support, funds, organizational capacity, and the like. In fact, however, the Libertarian Party is the third largest party in the nation, it enjoys considerable support among the electorate, and it consistently qualifies for ballot access in all 50 states and the District of Columbia during presidential election cycles. (Dec. of J. Bishop-Henchman (Dkt. 55-6) ¶¶ 9-19.) Maine is one of the few states where the party has thus far struggled to qualify for and retain ballot access.

335. (Opp. at 18-19); *see Storer*, 415 U.S. at 742. But *Storer* remains good law and it is controlling precedent. And under *Storer*, the near-total exclusion of LPME's candidates from Maine's primary ballot, and the total exclusion of MGIP's statewide candidates since 2010, is powerful evidence that § 335 is unconstitutional as applied to new parties like LPME. *See Storer*, 415 U.S. at 742.

E. The Secretary Fails to Rebut Plaintiffs' Claim That Maine's Disqualification and Unenrollment Requirements Are Unconstitutional as Applied in Combination With the Other Challenged Provisions.

The Secretary fails to assert any legitimate state interest that can justify Maine's action in stripping LPME of its 6,240 members, then demanding that it enroll 5,000 new members to become ballot qualified. According to the Secretary, this ensures that a new party enjoys "*continuing*" public support – after all, the Secretary opines, "[v]oters who enrolled in a party many years ago might no longer support the party or wish to be affiliated with it." (Sec. MSJ (Dkt. 54) at 21-22.) The 6,240 LPME members who were involuntarily unenrolled did not enroll "many years ago," however, but only three years prior to their unenrollment, at most. Furthermore, the Secretary's speculation that a new party's members "might" not want to remain affiliated with the party is just that – pure speculation – and it contradicts the best evidence of the voters' interest, which is the express preference they indicated on their enrollment cards, as well as their continuing enrollment.

The Secretary concedes this point when she asserts that it is "beyond cavil" that the Republicans and Democrats enjoy "the requisite modicum of support" because "they have already persuaded" voters to enroll in their respective parties. (Sec. MSJ at 27.) The Secretary cannot have it both ways. If old voter enrollments are sufficient to demonstrate public support for the Republican and Democratic parties, then the same is true for new parties like LPME – especially because many if not most Republican and Democratic voters enrolled in those parties more than three years ago. Notably, however, the Secretary does not speculate as to whether these voters wish to remain affiliated with their parties, nor does Maine law involuntarily unenroll them.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted, and Defendant's Motion for Summary Judgment should be denied.

DATED: March 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 20th day of March, 2021, 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:

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

Dated: March 20, 2021

/s/ Oliver B. Hall
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