CENTER FOR COMPETITIVE DEMOCRACY

July 16, 2021

Via CM/ECF Filing

The Honorable Lance E. Walker
United States District Court for the District of Maine
Margaret Chase Smith Federal Building and United States Courthouse
202 Harlow Street
Bangor, ME 04401

Re: *Baines v. Bellows*, Docket No. 1:19-cv-00509-LEW – Notice of Newly Enacted Legislation (ECF No. 73)

Dear Judge Walker:

In her letter to the Court dated June 24, 2021 (ECF No. 73), Defendant Secretary of State Shenna Bellows ("the Secretary") states through counsel that the enactment of L.D. 1061 "moots Plaintiffs' claim that 21-A.M.R.S. § 301(1)(E) is unconstitutional" and "weakens Plaintiffs' claims that the six challenged statutes, including § 301(1)(E) operate in conjunction to violate Plaintiffs' rights." (*Id*., PAGEID #: 1103). That is incorrect. Although the Secretary's letter makes no mention of it, the Secretary herself submitted the amendment to § 301(1)(E) that became law with the enactment of L.D. 1061. (*See* An Act to Amend the Laws Governing Elections (Submitted by the Secretary of State April 5, 2021 (Attached as Exhibit A).) Consequently, far from "weakening" Plaintiffs' claims, the Secretary's actions in seeking to amend § 301(1)(E) provide further confirmation that the provision unconstitutionally burdened Plaintiffs as alleged in their Complaint (ECF No. 1) and as set forth in their pending Motion for Summary Judgment. (ECF No. 55.)

The Secretary also states that this legislation will "be in force at the next opportunity for a party to maintain qualified status -- the November 2022 general election." (*Id*.) That statement is misleading in the context of this litigation. It is true that the opportunity to run a candidate for governor in the 2022 general election ***should*** be available to Plaintiff Libertarian Party of Maine ("LPME"). But, because the Secretary did not seek to amend § 301(1)(E) until April 5, 2021, LPME was disqualified pursuant to that provision as it applied in 2018, and its 6,240 members were unenrolled. Had § 301(1)(E) as currently amended been the law in 2018, however, LPME would have remained a ballot-qualified party at least through the 2020 general election cycle, by virtue of the 5.1 percent of the vote that its presidential nominee Gary Johnson received in the 2016 general election. (Pl. Rule 56(b) Statement, ¶ 5 (ECF No. 55-2).) Instead, LPME was denied the opportunity to participate in the 2020 general election as a ballot-qualified party.

The History of this Legislation

1. In her testimony during the 2017 legislative session, Deputy Secretary of State Julie Flynn admitted that § 301(1)(E) serves no legitimate state interest and would be difficult to defend, predicted further litigation challenging the constitutionality of that provision, and testified that the 5% alternative should be sufficient for a political party to retain qualification. (Decl. of William P. Tedards, Jr., Attachment 1 (written testimony of Deputy Secretary of State Julie Flynn to the Joint Standing Committee on Veterans and Legal Affairs) (ECF No. 22-1, PAGEID #: 472).) The Legislature did not adopt the 5% alternative at that time.

2. As Deputy Secretary Flynn predicted, the Secretary has struggled to defend the 10,000-enrollee retention requirement imposed by § 301(1)(E), either separately or as applied in conjunction with the other provisions challenged in this case. Following Deputy Secretary Flynn's initial admission that the provision serves no legitimate state interest, the Secretary first asserted one illegitimate interest -- eliminating parties that do not have "any chance of winning" (Dep. of J. Flynn at 14/11–14/23 (ECF No. 12-10, PAGEID #: 232)) -- and then another -- ensuring that a new party is "growing and adding members" (ECF No. 18 at PAGEID #: 364) -- before finally alighting on the interest the Secretary now asserts.

3. Obviously dissatisfied with the State's legal position, the Secretary included a new § 301(1)(E) in its omnibus electoral legislation for the current 2021 legislative session. (L.D. 1363, Ex. A.) The new § 301(1)(E) is Section 4 of L.D. 1363 and Item No. 4 in the summary at the end of the legislation. This time, the Legislature took the Secretary's advice and, after repackaging Section 4 of L.D. 1363 as a separate stand-alone bill titled L.D. 1061, enacted the revision, adding the 5% alternative. The repackaged legislation is attached to the Secretary's Notice (ECF No. 73-1, PAGEID #: 1107).

4. The Secretary's current strategy to "moot" the question whether § 301(1)(E) is unconstitutional is a tacit admission that the provision unconstitutionally burdened Plaintiffs as alleged in their Complaint (ECF No. 1) and as set forth in their pending Motion for Summary Judgment. (ECF No. 55.)

5. As a result of the Legislature's failure to do the right thing in a timely manner in 2017, Plaintiff LPME was deprived of the opportunity to participate in the 2020 general election as a ballot-qualified party, as it would have been entitled to do under § 301(1)(E) as currently amended. Instead, LPME was disqualified in 2018, and then its 6,240 members were unenrolled by the Secretary, an action which the Court has preliminarily determined to be unconstitutional.

In light of this history, which suggests a process designed to assure that the Plaintiffs were sent back to square one before amending § 301(1)(E), this Court should direct the Secretary to contact the 6,240 LPME members who were unenrolled in 2018 to permit each one a workable opportunity to reenroll, in order to rectify the injury that resulted from their unconstitutional unenrollment that followed the enforcement of the unconstitutional § 301(1)(E). Further, LPME should be restored

to its status as a ballot-qualified party, to rectify its injury arising from its disqualification prior to the 2020 general election.

Respectfully submitted,

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