

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NORTH DAKOTA
 SOUTHEASTERN DIVISION

Libertarian Party of North Dakota, Richard)
 Ames, Thommy Passa, and Anthony)
 Stewart,)

Case No. 3:10-cv-64

Plaintiffs,)

**MEMORANDUM OPINION AND
 ORDER GRANTING DEFENDANT’S
 MOTION TO DISMISS AND DENYING
 PLAINTIFFS’ REQUEST FOR A
 PRELIMINARY INJUNCTION**

-vs-)

Alvin A. Jaeger,)

Defendant.)

INTRODUCTION

Plaintiffs Libertarian Party of North Dakota (LPND), Richard Ames (Ames), Thommy Passa (Passa), and Anthony Stewart (Stewart) filed a Complaint seeking a declaratory judgment holding N. D. Cent. Code § 16.1-11-36 unconstitutional as applied (Doc. #3). They seek an order directing Defendant North Dakota Secretary of State Alvin A. Jaeger (Secretary Jaeger) to certify Ames, Passa, and Stewart for inclusion on the 2010 General Election ballot as nominees of Plaintiff LPND for the offices of North Dakota State Senate 25th District, North Dakota House of Representatives 43rd District, and North Dakota House of Representatives 17th District, respectively. Plaintiffs also seek an award of attorney fees.

Plaintiffs now move for a preliminary injunction directing Secretary Jaeger to include Plaintiffs Ames, Passa, and Stewart on the November 2, 2010 general election ballot in their respective districts (Doc. #5). Plaintiffs request oral argument on their motion (Doc. # 8). Secretary Jaeger resists the motion for a preliminary injunction and moves to dismiss under Fed. R. Civ. P. 12 (Docs. #9 & #11). Plaintiffs filed a brief in opposition to Secretary Jaeger’s motion to

dismiss (Doc. #15). Thus, all motions are now ripe for the Court's determination.

SUMMARY OF DECISION

States may condition access to the general election ballot upon a showing of a substantial modicum of support in the primary election. Candidates receiving fewer than ten votes each in the primary have not demonstrated a substantial modicum of support. Denial of access to the general election ballot for candidates without a substantial modicum of support is justified by compelling state interests in preventing voter confusion, preventing ballot overcrowding and frivolous candidates. In this case, Plaintiffs failed to obtain a modicum of support in the primary election and North Dakota's statute limiting access in the general election is non-discriminatory and serves a compelling state interest; therefore, the Court **GRANTS** Defendant's motion to dismiss. Because Plaintiffs can show no likelihood of success on the merits and because of the urgency of the motions, their Motion for a Preliminary Injunction and Motion for Oral Argument are **DENIED**.

BACKGROUND

1. The Parties

LPND is a North Dakota political party by virtue of submission of a petition containing at least 7,000 signatures of qualified electors on or before April 9, 2010. N.D. Cent. Code § 16.1-11-30 (Doc # 3, ¶ 14). Ames, Passa, and Stewart were candidates for the North Dakota legislature on the June 8, 2010 primary election ballot as LPND candidates in their respective legislative districts by virtue of a signed Certificate of Endorsement filed with the North Dakota Secretary of State pursuant to N. D. Cent. Code § 16.1-11-11(1) (Doc. # 3, ¶¶ 7-9).

Secretary Jaeger is the North Dakota Secretary of State (Doc. # 3, ¶ 16). The Complaint is against Secretary Jaeger in his official capacity; therefore, this action is against the State of North

Dakota who appears and defends through the North Dakota Solicitor General, Douglas Bahr (Doc. # 9).

2. Undisputed Facts

Ames, Passa, and Stewart are the winning LPND candidates by virtue of garnering the most LPND votes in their respective districts in the June 8, 2010 primary election (Doc. #3, ¶¶ 7-9).

Ames received 8 votes, Passa received 4 votes, and Stewart received 6 votes.

<http://results.sos.nd.gov/>. There has been no dispute with regard to the vote totals and the Court takes judicial notice of the vote totals from the official website of the North Dakota Secretary of State.

By operation of N. D. Cent. Code § 16.1-11-36 and N. D. Cent. Code § 16-11-11(4), in order to be placed on the general election ballot, Ames was required to receive 142 votes, Passa was required to receive 132 votes, and Stewart was required to receive 130 votes in the primary election, these numbers representing 1% of the total resident population of each respective legislative district under the last federal census (Doc. # 3, ¶ 23). Secretary Jaeger has declined to include Ames, Passa, or Stewart on the general election ballot, to be certified on September 8, 2010. Secretary Jaeger asserts neither Ames, Passa, nor Stewart received the requisite number of votes in the primary election; thus, according to North Dakota law they cannot be included on the general election ballot.

LAW AND ANALYSIS

1. Motion to Dismiss and Preliminary Injunction Standards

When considering a motion to dismiss, a court must take all facts as alleged in the complaint as true. Dubinsky v. Mermart, LLC, 595 F.3d 812, 815 (8th Cir. 2010). Further, the complaint should be construed in a light most favorable to the plaintiff. Coleman v. Watt, 40 F.3d 255, 258

(8th Cir. 1994).

Whether a court should grant a preliminary injunction is analyzed under the well-known Dataphase factors. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). These factors include: the threat of irreparable harm to the moving party, the balance between this harm and the injury that granting the injunction will inflict on the other parties, the probability the moving party will succeed on the merits, and the public interest. Id.

2. Jurisdiction and Venue

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as Plaintiffs' claims arise under the First and Fourth Amendments to the United States Constitution and 42 U.S.C. § 1983. Shaffer v. Jordan 213 F.2d 393, 396 (9th Cir. 1954). Venue is proper in the District of North Dakota because the matter concerns a North Dakota election for the state legislature and the parties include the North Dakota Secretary of State, a North Dakota political party (LPND) and three North Dakota residents who are candidates for office in North Dakota (Doc. # 3).

3. Standing

To have standing, a plaintiff invoking the judicial process must establish the following: (1) the existence of an injury in fact, which is concrete and particularized; (2) a causal connection between the injury and conduct complained; and (3) a likelihood the harm will be redressed by a favorable decision. Lujan v. Defenders of Wildlife 504 U.S. 555, 560 (1992). The individual Plaintiffs are undisputed winners as the LPND candidates for the respective races in the legislative elections. But for N. D. Cent. Code § 16.1-11-36, Plaintiffs, as winners of the primary election as LPND party candidates, would be placed on the general election ballot. Thus, the individual

Plaintiffs meet the factors set forth in Lujan.

Plaintiff LPND became a ballot qualified political party by submitting nomination petitions from 7,000 qualified voters prior to the April 9, 2010 filing deadline (Doc. # 3, ¶ 14). Political parties in similar cases have claimed “associational standing” on the basis of injury to its members. See Constitution Party of South Dakota v. Nelson, 2010 WL 3063193, ___ F. Supp 2d. ___ (D.S.D. Aug. 4, 2010). In Nelson, the court applied the three part test from Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333 (1977). Associational standing exists only if the association’s members (1) independently meet Article III standing requirements, (2) the interests the party seeks to protect are germane to the purpose of the party, and (3) neither the claim asserted nor the relief requested requires participation of individual members. Id. In Nelson, the court found none of the Constitution Party members filed a nomination petition and, therefore, no member possessed standing to challenge the 250 signature requirement under the South Dakota statute. Id. Because no member had standing, the court concluded the party also lacked standing. That case, however, is distinguishable from the case at bar.

Here, the three LPND members have not been placed on the general election ballot by operation of N. D. Cent. Code 16.1-11-36. The support of their candidacy is the whole raison d’être for the LPND, thus satisfying the second Hunt requirement. As in Nelson, LPND seeks to protect its organization’s interests and promote the goal of getting one of its members elected. With the number of votes attracted in the primary (18 votes total between three candidates) the chances of electing any LPND candidate in the upcoming election is likely remote. However, presence on the ballot gives the LPND coverage in the media and presence in debates and the political arena.

As noted by another court: “The freedom to associate with others for the advancement of

political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendment” and “the right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.” Cool Moose Party v. State of Rhode Island, 183 F.3d 80, 82 (1st Cir. 1999) (quoting Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)). “ The exclusion of candidates burdens voters’ freedom of association, because an election campaign is an effective platform for the expression of view on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.” Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983). The Court believes simply getting its candidates on the ballot with the resulting public attention to its platform and agenda, not necessarily election of its candidates, is the true goal of LPND and thus LPND together with its candidates has suffered an injury in fact. Accordingly, LPND has standing to challenge the statute.

4. Standard of Review

“The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes.” Republican Party of Arkansas v. Faulkner County Arkansas, 49 F.3d 1289, 1296 (8th Cir. 1995). “Ballot access restrictions implicate the constitutional rights of voters to associate and cast their votes effectively.” Nelson, 2010 WL 3063193. Thus, a “court considering a challenge to a state election law 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.’” Republican Party of Arkansas, 49 F.3d at 1297 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

Thus, in ballot access cases the Supreme Court has directed the trial courts to balance the competing interests of those seeking ballot access and then evaluating the interest put forward by the State as a justification for the burden imposed by the rule. Celebreeze, 460 U.S. at 788. The Supreme Court has noted it has “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” Id. Moreover, [t]he state has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.” Id. at 788 (citing Jenness v. Fortson, 403 U.S. 431 (1971)).

Ballot access restrictions endanger vital individual rights including the right of individuals to associate for the advancement of political beliefs and the rights of qualified voters of any political persuasion to cast their votes. Manifold v. Blunt, 863 F.2d 1368, 1373 (8th Cir. 1988). With these concerns in mind, the Eighth Circuit has determined the proper standard is strict scrutiny. Id. Under this standard, if a challenged law burdens rights protected by the First and Fourteenth Amendments it can survive only if the State carries its burden of showing a compelling state interest narrowly tailored to serve the interest by the least restrictive means that furthers that interest. Republican Party of Arkansas, 49 F.3d at 1297.

A close reading of the cases however “reveal that the while the Supreme Court purports to subject ballot access requirements to strict scrutiny, the [United States Supreme] Court has not used the term consistently.” Id. In ballot access cases, the Supreme Court has directed trial courts to balance the competing interests by considering the character and magnitude of the injury to the constitutional rights protected. Anderson, 460 U.S. at 787-88. The standard of review thus depends on the severity of the burden imposed and the character of the right protected. If the election

restriction imposes a severe burden on constitutional rights it will survive only if it is narrowly tailored to protect a compelling state interest. Timmons v. Twin City Area New Party 520 U.S. 351, 358 (1997). If the ballot access restriction imposes reasonable non-discriminatory restriction on the complaining parties First and Fourteenth Amendment rights, it will survive as long as the state shows an important regulatory interest. Id.

There is no “litmus-paper test” for deciding ballot access cases. Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986). States may condition access to the general election ballot by minor party candidates upon a showing of a modicum of support among potential voters for the office. Id. A state’s interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot to those with “significant” and “substantial” voter support before inclusion on the general election ballot is a compelling State interest. Id. at 194. States are not required to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to imposition of reasonable ballot access restriction. Id. at 195. Thus, if the statute imposes a reasonable, non-discriminatory restriction upon First and Fourteenth Amendment rights, it will survive if the state shows an important regulatory interest. Timmons, 504 U.S. at 434.

5. Application of Munro, Anderson and Timmons To This Case

The statute giving rise to Plaintiffs’ Complaint limits Plaintiffs’ access to the general election ballot. Section 16.1-11-36, N. D. Cent. Code, provides:

A person may not be deemed nominated as a candidate for any office at any primary election unless that person receives a number of votes equal to the number of signatures required, or which would have been required had the person not had the person’s name placed on the ballot through a certificate of endorsement, on a petition to have a candidate’s name for that office place on the primary ballot.

Section 16.1-11-11, N. D. Cent. Code sets forth the requirements for candidates for office. Subpart

1 of the statute provides that a candidate may get his or her name on the primary election ballot by the filing of a Certificate of Endorsement signed by the chairman of any legally recognized party, which is how Plaintiffs Ames, Passa, and Stewart had their names placed on the June primary ballot.

Section 16.1-11-36, N. D. Cent. Code, requires a person advancing from a win in the primary election receiving a threshold minimum number of votes in the primary of the lesser of three hundred votes or 1% of the total resident population of the legislative district as determined in the most recent federal census, to have that candidate's name placed on the general election ballot. Ames, Passa, and Stewart did not reach this threshold.

N. D. Cent. Code § 16.1-11-36 applies to all candidates for office. It does not place different or additional obstacles in the path of minor party candidates that are not applied with equal force to all candidates from all political parties. It simply requires that a party seeking to receive a place on the general election ballot for the state legislature must have the lesser of 300 votes in the primary or a number of votes equal to 1% of the total resident population in the district where the candidate seeks general election ballot access. The number is tied to the population of the district; therefore, the statute is non-discriminatory because it applies to all political parties equally.

Legislatures are free to respond to concerns about voting integrity with foresight by enacting rules to prevent voter confusion, ballot overcrowding, and prevention of frivolous candidacies by imposing ballot access restrictions. Munro 479 U.S. at 195. Primary elections function to winnow out and reject all but serious candidates. Id. at 196. States can properly reserve the general election ballot for major struggles by conditioning access to the ballot for candidates on a showing of a modicum voter support. Id. The Supreme Court in Munro noted the State of Washington was willing to have a long and complicated ballot in the primary election by raising the ante to gain

access to the general election ballot. Id. By granting relative ready access to the primary ballot, the State of Washington was free to require voter support as a precondition to access to the general election ballot. This resulted in a simpler general election ballot and avoided the possibility of unrestrained factionalism in the general election.

The Supreme Court rejected the argument that low turnout at the primary impermissibly reduced the pool of potential supporters. Id. at 198. The state primary election in Munro was an integral part of the election process. Every supporter of the minor party was free to cast his or her ballot and the member and candidates of the small or newly formed party were wholly free to “associate, to proselytize, to speak, to write and to organize campaigns for any school of thought they wish...” Id. at 198 (quoting Jenness v. Fortson, 403 U.S. 431 (1971)). When the state has done no more than visit on a candidate a requirement that the candidate have a “significant modicum” of voter support shown by votes the candidate received in the primary election, the state’s minor party voters are not denied freedom of association because they “must channel their expressive activity into a campaign at the primary as opposed to the general election.” Id. at 198. It is true that voters must make choices as they vote in the primary, but there are no state-imposed obstacles impairing voters in the exercise of their choices. Id. at 199.

The issue before the Court is whether North Dakota can require candidates to garner votes equal to the lesser of 1% of the population of the legislative district or 300 votes in the primary election as a precondition to appearing on the general election ballot. Applying Munro and Anderson to the facts, the eighteen total votes received by Ames, Passa, and Stewart combined do not demonstrate a preliminary showing of substantial support in order to qualify for a place on the general election ballot.

Plaintiffs' reliance on Anderson v. Celebrezze is misplaced because it is distinguishable on the facts. In Celebrezze the Supreme Court analyzed an Ohio statutory plan requiring independent candidates to file earlier than major party candidates. 460 U.S. at 782. Major parties had an additional five months. This unequal treatment of parties was at the center of the court's concerns regarding the Ohio plan. Those same concerns are not present in this case, as all parties are treated equally.

Plaintiffs also rely on MacBride v. Exon, 558 F.2d 443 (8th Cir 1977) to support their arguments. In MacBride, a political party was required to organize and seek certification 90 days before the primary elections and nine months prior to the general election. In this case, LPND was not prevented access by the timing of certification. In fact, LPND and its candidates satisfied the certification requirement. LPND and the three candidates were thwarted by a lack of voter support in the primary. MacBride is not controlling in this case.

In McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) cited by Plaintiffs, the Eighth Circuit considered an action brought by an independent candidate. The candidate sought a change in the method of ballot access under the North Dakota statutes in effect at the time. The statute reserved a place on the ballot for major party candidates and for parties that had obtained 5% of the votes cast for the governor in the previous election. 637 F.2d at 1162. Any other party could obtain access to the ballot by obtaining the signatures of 15,000 voters. As a result, all parties were not treated equally. In contrast to McLain, the statute before the Court treats all candidates equally, requiring the same percentage of support in the primary by all candidates.

Similarly, the Court finds Plaintiffs' reliance on Storer v. Brown 415 U.S. 724 (1974) unpersuasive. That case involves a California requirement in which independent candidates had

to file nomination papers during a 24 day window following the primary election. The nomination papers needed signatures from at least 5% of the number of votes cast in the previous general election in the area for which the candidates seek to run. Those signature could come from anyone who had not voted in the primary election. The Supreme Court remanded the case for a factual determination as to whether the disqualification requirement so diminished the pool of potential signatories as to place too great a burden on the independent candidate. Id. at 744. This burden is simply not present in the case before this Court. In North Dakota, the election has two phases: (1) a primary where access is relatively easy followed by (2) a general election ballot, access to which is determined by a showing of sufficient popular voter support in the primary election. Consequently, the concerns raised in Storer are not present in this case.

Finally, Plaintiffs rely on In re Candidacy of Independence Party Candidates v. Kiffmeyer, 688 N.W.2d 854 (Minn. 2004). The Minnesota statute challenged is considerably different (and more complicated) than the North Dakota statute at issue. The threshold number of votes under the Minnesota statute was 10 % of the average number of votes received by the party's candidates in the previous general election. Consequently, the impact was discriminatory, as the number of votes needed to secure a place on the ballot varied for different parties in the same election year. Also, different parties in the same district were required to receive a different number of votes in the same district. The Minnesota Attorney General conceded Minnesota's plan could not accomplish any rational state purpose. In contrast, North Dakota's statute is based on the population of the district. Access to the primary is relatively easy and all candidates face the same barrier to the general election. The statute and the facts are so different in Kiffmeyer that the case is of no guidance to the Court.

CONCLUSION

The United States Supreme Court has made clear that states may condition access to the general election ballot upon a showing of a substantial modicum of support in the primary election. Candidates receiving fewer than ten votes each in the primary, such as Ames, Passa, and Stewart, have not demonstrated a substantial modicum of support. As such, denial of access to the general election ballot for candidates without a substantial modicum of support is justified by compelling state interests in preventing voter confusion, preventing ballot overcrowding, and frivolous candidates.

For these reasons, the Court **GRANTS** Defendant's motion to dismiss (Doc. #9). Because Plaintiffs can show no likelihood of success on the merits, their Motion for a Preliminary Injunction and Motion for Oral Argument are **DENIED** (Docs. #5 & #8). See F.T.C. v. Freeman Hosp., 69 F.3d 260, 273 (8th Cir. 1995) (district court properly denied preliminary injunction when plaintiff failed to carry its burden of showing a likelihood of success on the merits). The request for oral argument is denied because the Court believes all issues were appropriately and adequately briefed, that no availing unstated arguments are likely to be presented, and finality is urgently necessary to allow for appellate review, if sought.

It is hereby **ORDERED** that Plaintiffs' complaint be **DISMISSED** in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 3rd day of September, 2010.

/s/ Ralph R. Erickson _____
Ralph R. Erickson, Chief Judge
United States District Court