No. _____

In the

Supreme Court of the United States

THE LIBERTARIAN PARTY OF NORTH DAKOTA, RICHARD AMES, THOMMY PASSA AND ANTHONY STEWART,

Petitioners,

v.

ALVIN A. JAEGER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 21, 2012

QUESTIONS PRESENTED

Whether a statute requiring that candidates for state legislative office show support from as much as 15 percent of the actual voters in an election, as a prerequisite to appearing on the ballot, violates the First Amendment, where this Court has struck down requirements as high as 15 percent of actual voters, and has never upheld a ballot access requirement higher than 5 percent of registered voters?

Whether a statute requiring that candidates for state legislative office show support from as much as 15 percent of the actual voters in an election, as a prerequisite to appearing on the ballot, violates the Fourteenth Amendment, by imposing a disparate impact on minor party and independent candidates, where no such candidate has appeared on the general election ballot since 1976?

PARTIES TO THE PROCEEDING

The Petitioners are the Libertarian Party of North Dakota ("LPND"), Richard Ames, Thommy Passa and Anthony Stewart ("the Candidates," and collectively with LPND, "the Libertarians").

The Respondent is North Dakota Secretary of State Alvin A. Jaeger ("Secretary Jaeger").

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The opinion of the Court of Appeals is reported at 659 F.3d 687. App. 1a. The District Court's opinion, Case No. 3:10-cv-64-RRE, is not reported. App. 29a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 2011, and its order denying the Libertarians' timely filed motion for rehearing was entered on November 23, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law abridging the freedom of speech … or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amdt. I.

The Fourteenth Amendment provides, in relevant part, that "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amdt. XIV.

North Dakota Century Code § 16.1-11-11 ("Section 16.1-11-11") provides, in relevant part:

Every candidate for a county or

legislative district office shall present, between the first date candidates may begin circulating nominating petitions according to this chapter and before four p.m. of the sixtieth day before any primary election, to the county auditor of the county in which the candidate resides either:

1. A certificate of endorsement signed by the district chairman of any legally recognized political party containing the candidate's name, post-office address, and telephone number, the title of the office to which the candidate aspires, and the party that the candidate represents; or

2. A petition containing the following:

> c. The signatures of qualified electors, the number of which must be determined as follows:
>
> > (4) If the office is a legislative office, the signatures of at least one percent of the total resident population of the legislative district as determined by the most recent federal decennial census.

> (5) In no case may more than three hundred signatures be required.

North Dakota Century Code § 16.1-11-36 ("Section 16.1-11-36") provides, in relevant part:

> 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 placed on the primary ballot.

N.D.C.C. § 16.1-11-36.

STATEMENT OF THE CASE

This case raises two discrete issues of fundamental importance to the proper disposition of every ballot access case in the nation. First, what is the upper limit on the "modicum of support" a state may require of candidates seeking ballot access? Second, how is it to be measured? Although this Court routinely recognizes that such a limit exists, it has never directly addressed that question. Instead, in more than a dozen cases deciding the constitutionality of ballot access statutes, the Court has applied inconsistent and potentially conflicting

standards and procedures for ascertaining the level of support they require, and for determining whether such burdens are permissible. As a result, the lower courts lack adequate guidance to govern their review of ballot access statutes, and often resort to *ad hoc* reasoning applied on a case by case basis. The decisions by the courts below in this case are but the latest example. The Court of Appeals expressly recognized that the challenged provision in this case imposes a burden this Court has previously struck down, but upheld the provision nonetheless, in a decision that cannot be reconciled with this Court's precedent. Such fundamental confusion over the proper analysis to be applied in ballot access cases demonstrates the grave need for this Court to intervene, to ensure uniformity among the lower courts deciding such cases in the first instance, and to protect the important and interdependent First and Fourteenth Amendment rights of minor party and independent candidates and voters, as well as those of the growing majority of Americans of all political affiliations who want more choices on the ballot.

The Libertarians commenced this action on July 20, 2010, to challenge the constitutionality of Section 16.1-11-36. They alleged that the provision violated their rights under the First and Fourteenth Amendments, and requested declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Complaint ("Comp.") ¶¶ 29-41; App. 30a. They also moved for a preliminary injunction directing that Secretary Jaeger place the Candidates on North Dakota's 2010 general election ballot. App. 30a.

Section 16.1-11-36 prohibits winners of partisan primary elections from appearing on North Dakota's general election ballot unless they receive a specified minimum number of votes in the primary election. N.D.C.C. § 16.1-11-36. North Dakota's election code defines the number of votes required of legislative candidates as equal to "one percent of the total resident population" of their legislative district. N.D.C.C. § 16.1-11-11(2)(c)(4). As applied in this case, that requirement translated to a showing of support from as much as 15 percent of the voters in North Dakota's 2010 primary election. App. 11a.

LPND became a ballot-qualified party in North Dakota in 2010 by submitting a petition signed by 7,000 qualified electors. App. 17a. This entitled LPND to place its candidates on North Dakota's 2010 primary election ballot. *See* N.D.C.C. § 16.1-11-30. But while the Candidates each won their respective races in LPND's 2010 primary election, they were barred from appearing on the general election ballot because they did not receive the minimum number of votes required by Section 16.1-11-36. App. 32a.

On September 3, 2010, the District Court denied the Libertarians' motion for a preliminary injunction and dismissed their case. App. 29a. It reasoned that North Dakota may require the Libertarians to demonstrate "a substantial modicum of support" before permitting the Candidates to appear on the general election ballot, App. 30a, but completely failed to address the relevant issue, which is whether the modicum of support that North

Dakota actually requires is constitutionally permissible. App. 29a-45a. The District Court also neglected to address the Libertarians' equal protection claims, beyond finding that Section 16.1-11-36 "is non-discriminatory because it applies to all political parties equally." App. 39a-40a.

The Court of Appeals affirmed. App. 2a. It acknowledged that, as applied, Section 16.1-11-36 required a showing of support from as much as 15 percent of the voters in the primary election, and that this Court had previously struck down a similar requirement. App. 10a-11a (citing *Williams* v. *Rhodes*, 393 U.S. 23, 24-26 (1968) (striking down Ohio law requiring showing of support equal to 15 percent of voters in previous election)). It also recognized that this Court has never upheld a statute requiring a showing of support greater than 5 percent of registered voters. App. 10a (citing *Jenness* v. *Fortson*, 403 U.S. 431, 432 (1971). Nonetheless, the Court of Appeals concluded that the showing of support required by Section 16.1-11-36 is "minimal" when defined as a percentage of the entire population, which it found to be the proper "eligible pool" under the statute. App. 11a, 27a. The Court of Appeals thus purported to distinguish *Williams* – "compare 15% to 1%," it reasoned. App. 27a.

Any grade school student who has mastered fractions would readily identify the Court of Appeals' error. Simply put, 1 percent is not necessarily less than 15 percent, unless both percentages derive from a common denominator. To be valid, therefore, a comparison of the burden imposed by two ballot

access statutes must account for any such difference in the manner by which they define the level of support required. One percent of the entire population is greater than 1 percent of all registered voters, which is greater than 1 percent of the actual voters in an election. The Court of Appeals failed to grasp this essential distinction. Despite its express recognition that 1 percent of the entire population was "equivalent to" a requirement "as high as 15% of actual votes cast," App. 11a, the Court of Appeals concluded that "the burden imposed by the statute is not undue or excessive." App. 28a. In other words, the Court of Appeals upheld a requirement practically identical to the one this Court struck down in *Williams*, 393 U.S. at 24-25.

The Court of Appeals upheld this impermissible requirement based on the mistaken belief that submitting a 7,000-signature petition in 2010 was a "one-time occurrence," which qualified LPND to place its candidates on North Dakota's primary election ballot "in future years." App. 18a. The Court of Appeals therefore incorrectly concluded that the minimum vote requirement imposed by Section 16.1-11-36 is "the only protection the state has from frivolous party candidates and ballot overcrowding in subsequent elections." App. 18a. In fact, LPND is required to submit a new 7,000-signature petition in each election cycle, unless an LPND candidate for statewide office wins at least 5 percent of the general election vote. *See* N.D.C.C. § 16.1-11-30. In a motion for rehearing, the Libertarians requested that the Court of Appeals correct this obvious error. The Court of Appeals

declined to do so. App. 46a.

REASONS FOR GRANTING CERTIORARI

I. The Court's Ballot Access Decisions Are Inconsistent and Fail to Provide the Lower Courts With Adequate Guidance Regarding the Showing of Support States May Require.

In its first case deciding the constitutionality of a state's restrictions on ballot access, this Court flatly rejected the assertion that the state "has absolute power to put any burdens it pleases on the selection of electors." *Williams*, 393 U.S. at 28. Limits on state power do exist, and they arise chiefly from the rights guaranteed to citizens by the First and Fourteenth Amendments. *See id.* at 30. These include the right to equal protection and the "right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id*.

In *Williams* the Court invalidated Ohio's entire ballot access scheme on equal protection grounds, including the requirement that new parties show support equal to 15 percent of actual voters in the previous election. *See Williams*, 393 U.S. at 24-25. The Court found that Ohio had made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties." *See id.* at 25, 34. Although the majority did not specify that the 15 percent requirement, standing alone, was

unconstitutional, Justice Harlan wrote separately to emphasize that it was invalid "even when regarded in isolation." *See id.* at 46 (Harlan, J. concurring). Like North Dakota in this case, Ohio asserted that its 15 percent requirement was needed to guard against "voter confusion" that might result if too many candidates appeared on the ballot. *See id.* Justice Harlan rejected that assertion, however, on the ground that the 15 percent requirement was not "reasonably related" to that interest. *Id.* Requiring such a high level of support virtually guaranteed no more than six additional candidates would ever qualify for the ballot, Justice Harlan reasoned, which could happen only in "the unprecedented event of a complete and utter popular disaffection with the two established parties," and even then, only if "popular support should be divided relatively evenly among the new groups." *Id.* at 46-47.

But if Justice Harlan hoped to clarify that 15 percent of the actual voters in an election exceeded the upper limit on the showing of support states may require of candidates seeking ballot access, his effort was undermined by the Court's next ballot access case. *See Jenness*, 403 U.S. 431. In *Jenness*, the Court upheld Georgia's ballot access statute against a challenge brought by a minor party's candidate for governor and two of its candidates for U.S. House. *See id.* at 432 n.3. Georgia's law required that candidates submit a petition with signatures equal in number to 5 percent of all registered voters. *See id.* at 432. The Court thus dedicated the bulk of its short opinion to demonstrating that Georgia's law was less burdensome than the Ohio law it had

invalidated in *Williams*. *See id.* at 434-42. In fact, however, Georgia's law, as applied in *Jenness*, was more burdensome with respect to the showing of support it required.

Because the pool of actual voters in any election is inevitably smaller than the pool of all registered voters, Georgia's 5 percent requirement actually mandated more signatures than Ohio's 15 percent requirement would have, had it been in effect. *See* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness* v. *Fortson*, 1 ELECTION LAW JOURNAL No. 2, 242 (2002). Had Georgia applied Ohio's 15 percent requirement instead of its own 5 percent requirement, the gubernatorial candidate in *Jenness* would have been required to submit 68,252 signatures. *See id.* at 243. Instead, under Georgia's 5 percent requirement, she needed 88,175 signatures. *See id.* Yet while the Court struck down Ohio's less burdensome signature requirement in *Williams*, it upheld Georgia's more burdensome signature requirement in *Jenness*, on the ground that states have an interest in requiring that candidates show "a significant modicum of support" before they are permitted to appear on the ballot. *Jenness*, 403 U.S. at 442. The Court never acknowledged that the modicum of support mandated by Georgia's 5 percent requirement was actually greater than the 15 percent requirement struck down in *Williams*.

The Court's subsequent ballot access decisions have likewise failed to observe the important distinction between statutes that define the requisite

modicum of support as a percentage of all registered voters, and those that define it as a percentage of actual voters in a previous election. Following *Jenness*, the Court confronted a challenge to California's requirement that independent candidates obtain signatures equal in number to 5 percent of the actual votes in the last general election. *See Storer* v. *Brown*, 415 U.S. 724, 726-27 (1974). Partisan primary voters were ineligible to sign the candidates' petitions, however, and the Court therefore remanded for a determination of whether exclusion of those voters made California's signature requirement "substantially more than 5% of the eligible pool," which "would be in excess, percentagewise, of anything the Court has approved … and in excess of the 5% which we said in *Jenness* was higher than the requirement imposed by most state election codes." *Id*. at 739. *Storer* thus drew a false equivalency between the 5 percent requirement in *Jenness*, which was based on all registered voters, and California's 5 percent requirement, which was based on the actual voters in a previous election.

Injecting further uncertainty into the matter, the Court observed in *Storer* that "no litmus-paper test" exists for distinguishing impermissible ballot access restrictions from those that are valid. *Id.* at 730. Instead, the Court indicated that lower courts should apply a more functional analysis. The "inevitable question for judgment," the Court observed, is whether a "reasonably diligent" candidate could be "expected to satisfy the signature requirements," or whether such candidates would "only rarely … succeed in getting on the ballot." *Id*.

at 742. Under this analysis, lower courts should look to "past experience" in evaluating the constitutionality of ballot access restrictions. *Id.* If candidates "qualified with some regularity," the Court suggested, the restrictions might be permissible, whereas it will be "quite a different matter if they have not." *Id. Storer* thus recognizes a limit on the modicum of support states may require of candidates seeking ballot access, but only hints as to how that limit might be ascertained.

Finally, the balancing test the Court established for determining the standard of review to be applied in particular ballot access cases provides no guidance as to the substantive limits on state power to restrict ballot access. *See Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). *Anderson* directs lower courts first to "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," and then to "evaluate the precise interests put forward by the State as justifications for the burden imposed" by its restriction. *Id.* at 789. Courts should "determine the legitimacy and strength" of the interests asserted, and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* But while *Anderson* concludes that "reasonable, nondiscriminatory restrictions" generally may be justified by a state's "regulatory interests," it offers no guidance as to what constitutes a "reasonable" regulation. *Id.* at 788.

In sum, the Court's ballot access jurisprudence

fails to establish clear and consistent standards for determining whether a ballot access restriction is permissible. The 5 percent requirement upheld in *Jenness* mandated a higher showing of support than the 15 percent requirement struck down in *Williams*, and neither case identified an upper limit on the showing of support states may require, although such a limit undoubtedly exists. *See Williams*, 393 U.S. at 28; *id.* at 46-47 (Harlan, J. concurring). Further, by treating the disparate standards applied in each case as if they were interchangeable, *Storer* incorrectly suggests that the burden imposed by a statute requiring a showing of support from 5 percent of the actual voters in a previous election is the same as that imposed by a statute requiring a showing of support from 5 percent of all registered voters, when in fact the latter burden is far more severe.

The direct result of such imprecision is that lower courts have struggled to discern not only whether particular ballot access restrictions are reasonable or constitutionally impermissible, but also how to address that question in the first instance. *See*, *e.g.*, *Republican Party of Arkansas* v. *Faulkner County Arkansas*, 49 F.3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); *see also Libertarian Party of Ohio* v. *Blackwell*, 462 F.3d 579 (6th Cir. 2006) (striking down signature requirement equal to 1 percent of total votes cast in the previous election); *McLain* v. *Meier*, 637 F.2d 1159 (8th Cir. 1980) (striking down

signature requirement equal to 3.3 percent of electorate); *Lee* v. *Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down signature requirement equal to 10 percent of total votes cast in the previous election); *Green Party of Arkansas* v. *Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006) (striking down requirement equal to 3 percent of total votes cast in statewide election); *but see Rogers* v. *Corbett*, 468 F.3d 188 (3rd Cir. 2006) (upholding signature requirement equal to 2 percent of total votes cast for candidate who received most votes in last statewide election); *Libertarian Party of Illinois* v. *Rednour*, 108 F.3d 768 (7th Cir. 1997) (upholding signature requirement equal to 5 percent of registered voters). The Court of Appeals' decision in this case is but the latest example demonstrating the lower courts' uncertainty in this area of the law.

II. This Case Is an Ideal Vehicle for the Court to Clarify the Proper Analysis for Determining Whether the Showing of Support Required By a Ballot Access Statute Is Permissible.

This case squarely raises two discrete issues of fundamental importance to the proper disposition of ballot access cases, neither of which has been directly addressed by this Court. First, what is the upper limit on the showing of support states may require of candidates before placing them on the ballot? Second, how should courts measure the burden such restrictions impose? This case therefore presents the Court with an ideal vehicle for providing the lower courts with the guidance needed

to ensure uniformity of the law, and to protect the important and interdependent First and Fourteenth Amendment rights of candidates and voters, which are implicated by ballot access restrictions.

The Court of Appeals' answer to each of the foregoing questions is incompatible with this Court's precedent. As the Court of Appeals expressly recognized, the minimum vote requirement imposed by Section 16.1-11-36 is "equivalent to" a requirement "as high as 15% of actual votes cast." App. 11a. This burden is practically identical to the one the one the Court struck down in *Williams*. *See Williams*, 393 U.S. at 24-25. The Court of Appeals nonetheless concluded that Section 16.1-11-36 is permissible because, by its terms, the statute requires a minimum number of votes equal to 1 percent of the entire population of a legislative district, and 1 percent is less than 15 percent. App. 10a-11a. But this reasoning is fallacious. Redefining the requirement imposed by Section 16.1-11-36 as a lower percentage of a larger pool does not lessen the burden the statute imposes. Rather, the burden remains the same, whether it is defined as 1 percent of the entire population, or 15 percent of the actual vote – and that burden is unconstitutional under *Williams*. As Justice Harlan made clear, requiring a showing of support equal to as much as 15 percent of the actual voters in a the primary election guarantees that no more than six candidates can appear on the general election ballot, and no state interest can justify such a severe restriction. *See Williams*, 393 U.S. at 46-47 (Harlan, J. concurring).

The Court of Appeals' decision also runs afoul of the more functional usage test set forth in *Storer*, 415 U.S. at 742. Although it conceded that no minor party or independent candidate for state legislature had appeared on the general election ballot since 1976, the Court of Appeals dismissed such past experience on the ground that the Libertarians had "failed to provide evidence" sufficient to "prove" the showing of support required by Section 16.1-11-36 was the cause of their absence. App. 13a. Without a "causal connection," the Court of Appeals reasoned, "the mere absence of minor parties from the general election ballot" does not "necessarily establish[]" that Section 16.1-11-36 imposes "an unconstitutional disparate impact." App. 27a.

This reasoning is in direct conflict with *Storer*. In that case, the Court did not require proof, at the pleading stage, of a "causal connection" between a ballot access restriction and the prolonged absence of minor party or independent candidates from the ballot, as the Court of Appeals concluded. App. 27a. Rather, *Storer* indicates that such "past experience" renders the restriction constitutionally suspect. *See Storer*, 415 U.S. at 742. Contrary to the Court of Appeals' conclusion, therefore, the "mere absence" of minor party or independent candidates from the ballot is sufficient to permit the inference that a ballot access restriction is too severe. *See id.* ("past experience will be a helpful, if not always an unerring, guide"). The Court in *Storer* thus remanded for further fact-finding to determine whether the showing of support required by the challenged statute was permissible, given that the

state had shown "only one instance" of a candidate complying with it. *See id.* Here, by contrast, the Court of Appeals affirmed dismissal for lack of proof regarding the burden imposed by Section 16.1-11-36, without permitting the Libertarians any opportunity to provide such proof. App. 27a-28a.

Finally, the Court of Appeals was simply wrong that the state asserted sufficient interests to justify the excessive and unequal burden imposed by Section 16.1-11-36. App. 13a-23a. The 7,000-signature petition minor parties must submit to place their candidates on the primary election ballot is not a "one-time occurrence," App. 18a, as the Court of Appeals erroneously found, but rather is required in each election cycle, unless a party demonstrates a sufficient showing of support in the preceding general election. *See* N.D.C.C. § 16.1-11-30. The Court of Appeals was therefore incorrect that the minimum vote requirement imposed by Section 16.1-11-36 is "the only protection the state has from frivolous party candidates and ballot overcrowding." App. 18a.

The errors committed by the Court of Appeals in this case arise directly from its improper analysis of the burden Section 16.1-11-36 imposes. Had the Court of Appeals properly identified that burden, it could not have upheld the statute's minimum vote requirement, which imposes an excessive and unequal burden, in violation of this Court's precedent. Certiorari is therefore warranted, to clarify the proper analysis lower courts must apply in their review of ballot access laws in the various

states, and to protect the important and interdependent First and Fourteenth Amendment rights at stake in such cases.

III. This Court's Ballot Access Jurisprudence Fails to Protect the Important First and Fourteenth Amendment Rights Burdened By Restrictions That Serve No Legitimate State Interest.

This Court has not accepted a petition for certiorari filed by a minor party or independent candidate in the last 20 years – a total of 49 consecutive petitions. *See* Richard Winger, *Supreme Court Rejects Two More Minor Party Cases*, BALLOT ACCESS NEWS, Vol. 27, No. 7 (November 1, 2011) (excluding petitions in which major party candidates joined). During the same 20 year period, by contrast, the Court accepted three of only six ballot access cases filed by states, and it ruled in the state's favor in all three. *See id*. This suggests that the Court may be paying insufficient attention to the important First and Fourteenth Amendment rights at stake in ballot access cases.

In its recent decisions, the Court has shown great deference for the state interests asserted to justify ballot access restrictions. The Court concluded, for example, that a state's interest in preventing "voter confusion, ballot overcrowding, or … frivolous candidacies" is sufficient to justify ballot access restrictions, even where the state fails to show any evidence that such threats actually exist. *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 194-95

(1986). The Court also concluded, for the first time, that states have a legitimate interest in enacting restrictions that "favor the traditional two-party system." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). Yet the Court has never acknowledged that the "state" to which it grants such deference is indistinguishable, as a practical matter, from the major party politicians who control the state legislatures. *See State and Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (2011) (in 2011, the major parties held all but 25 of 7,382 state legislative seats) (visited Feb. 12, 2012) <http://www.ncsl.org/documents/statevote/2011_Legis_and_State.pdf>; *but see Clingman* v. *Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J. concurring) (recognizing that "the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit").

The effect of the Court's deference to "the State" in these recent decisions is that the major parties are now free to enact ballot access restrictions for the purpose of benefiting themselves and burdening their competition. *See Timmons*, 520 U.S. at 367. Further, they may do so even if there is no evidence that such restrictions are needed to further a legitimate state interest. *See Munro*, 479 U.S. at 194-95. Such deference is unwarranted, particularly at a time when the political system has become so stable that large numbers of elections routinely go uncontested. *See*, *e.g.*, *Is There Accountability Without Candidates?*, FAIRVOTE

(November 15, 2007) (reporting that 37.6 percent of state legislative races nationwide were uncontested by a major party in 2006) (visited Feb. 17, 2012) <http://archive.fairvote.org/index.php?page=27&pressmode=showspecific&showarticle=193>. Minor party and independent candidates, including petitioners in this case, have a right to ballot access that is protected by the First and Fourteenth Amendments. *See Williams*, 393 U.S. at 30. Therefore, certiorari is also proper to ensure adequate protection of the important and interdependent constitutional rights of candidates and voters who are burdened by ballot access restrictions, including the voting rights of the growing majority of Americans who want more choices on the ballot. *See* Jeffrey M. Jones, *Americans Renew Call for Third Party*, GALLUP POLITICS (Sept. 17, 2010) (reporting that 58 percent of Americans "believe a third major political party is needed because the Republican and Democratic Parties do a poor job of representing the American people") (visited Feb. 12, 2012) <http://www.gallup.com/poll/143051/Americans-Renew-Call-Third-Party.aspx>.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-3212

[Filed October 17, 2011]

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

Appellants,

v.

Alvin Jaeger,

Appellee.

Appeal from the United States District Court for the District of North Dakota.

Submitted: May 11, 2011
Filed: October 17, 2011

Before WOLLMAN, BYE, and SHEPHERD, Circuit Judges.

BYE, Circuit Judge.

The Libertarian Party of North Dakota and three party candidates from the 2010 North Dakota state elections challenge the constitutionality of North Dakota Century Code § 16.1-11-36. The party and candidates contend this statute as applied to them violates the First and Fourteenth Amendment and the Equal Protection Clause because it prevented the candidates' names from appearing on the 2010 general election ballot despite their winning the party's primary. The party and candidates sought a preliminary injunction, which the North Dakota Secretary of State Alvin Jaeger, who was named in the suit in his official capacity, opposed by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court[1] granted Secretary Jaeger's motion and dismissed the complaint, therein denying the motion for a preliminary injunction. The Libertarian Party of North Dakota and the three candidates appeal the dismissal of their claims. We affirm.

I

In North Dakota's elections for state legislature, a candidate is listed on the primary election ballot based on one of two qualifying methods: filing a petition or receiving a party endorsement. A candidate filing a petition is required to include a number of signatures

[1] The Honorable Ralph R. Erickson, Chief Judge, United States District Court for the District of North Dakota.

equal to the lesser of 1% of the legislative district's population or 300 people. A candidate entering the ballot by endorsement need only file a Certificate of Endorsement from the party, which does not require any number of signatures from the electorate. N.D. Cent. Code § 16.1-11-11(1)-(2) (hereinafter "N.D.C.C."). However, following the primary election, the candidate receiving the highest number of votes within his or her party designation in the primary election will be named on the general ballot only if the number of votes the candidate received equals the number of signatures which was, or would have been, required to have the candidate's name placed on the primary election ballot through petition—that number being the lesser of either 1% of the district population or 300 votes. N.D.C.C. §§ 16.1-11-36 and 16.1-11-11(2)(c)(4)-(5).[2]

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[2] North Dakota Century Code § 16.1-11-36 states:

> 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 placed on the primary ballot.

In addition, North Dakota Century Code § 16.1-11-11(2)(c)(4)-(5) provides the number of signatures required for a person who had not had his name placed on the ballot through a certificate of endorsement, which requires "the signatures of at least one percent of the total resident population of the legislative district as determined by the most recent federal decennial census. In no case may more than three hundred signatures be required."

Thommy Passa, Anthony Stewart, and Richard Ames are members of the Libertarian Party of North Dakota ("LPND"). Each pursued seats in the North Dakota State Legislature in 2010 and was named on the primary election ballot pursuant to nominations by the LPND: Passa was nominated for the House of Representatives, 43rd District; Stewart for the House of Representatives, 17th District; and Ames for the Senate, 25th District. During the primary election each received the highest number of votes within the LPND for his respective seat: Passa received four votes, Stewart received six votes, and Ames received eight votes. The North Dakota Secretary of State Alvin Jaeger declined to include Passa, Stewart, and Ames on the general election ballot because they failed to obtained the required number of votes under N.D.C.C. § 16.1-11-36. Based on the respective district populations, Passa needed 132 votes, Stewart needed 130 votes, and Ames needed 142 votes.

On July 20, 2010, after Secretary Jaeger refused to place their names on the general election ballot, the LPND, Passa, Stewart, and Ames ("the LPND and candidates" collectively) filed a complaint with the district court, naming Secretary Jaeger, in his official capacity, as defendant. In the complaint, the LPND and candidates challenged the constitutionality of N.D.C.C. § 16.1-11-36, alleging it unduly burdens their rights under the First and Fourteenth Amendment and violates the Equal Protection Clause. The LPND and candidates then filed a motion for a preliminary injunction. Secretary Jaeger opposed the preliminary injunction and filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The LPND and candidates responded to the motion to dismiss, requesting oral argument. On September 3,

2010, the district court issued its order granting the motion to dismiss, and denying both the motion for a preliminary injunction and the request for oral argument. The LPND and candidates appealed challenging the district court's order dismissing their complaint.

II

We review de novo a dismissal for failure to state a claim. Fed. R. Civ. P. 12(b)(6); Detroit Gen. Ret. Sys. v. Medtronic, Inc., 621 F.3d 800, 804 (8th Cir. 2010). In reviewing a dismissal, "[w]e accept the factual allegations of the complaint as true, but the allegations must supply sufficient 'facts to state a claim to relief that is plausible on its face.'" O'Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Thus, on appeal, we must determine whether the LPND and candidates failed to state a claim upon which relief could be granted, construing the complaint in their favor.

III

A. First and Fourteenth Amendment Challenge

The LPND and candidates first challenge the constitutionality of N.D.C.C. § 16.1-11-36 claiming it unduly burdens their First and Fourteenth Amendment rights. In considering a challenge to a ballot access statute, we are reminded "[b]allot access statutes are not susceptible of easy analysis, nor is the appropriate standard of review always easy to discern." McLain v. Meier, 637 F.2d 1159, 1163 (8th Cir. 1980) (hereinafter "McLain I"). Although several

cases address ballot access issues, no opinion from either the United States Supreme Court or the Eighth Circuit has clearly defined the appropriate standard for reviewing these constitutional challenges. Instead, each provides for a case-by-case assessment of the burdens and interests affected by a disputed statute, focusing on the statute as part of a ballot access scheme in its totality. McLain v. Meier, 851 F.2d 1045, 1049 (8th Cir. 1988) (hereinafter "McLain II"). We may uphold a specific ballot access statute as constitutional so long as the restrictions it imposes are reasonable, justified by reference to a compelling state interest, and do not go beyond what the state's compelling interests actually require. McLain I, 637 F.2d at 1163. In other words, we review the statute under a form of strict scrutiny referred to as the "compelling state interest test" by first determining whether the challenged statute causes a burden of some substance on a plaintiff's rights, and if so, upholding the statute only if it is "narrowly drawn to serve a compelling state interest." McLain II, 851 F.2d at 1049.

Despite this rigid standard, not all restrictions on the right to vote or the right to associate are necessarily invalid. Storer v. Brown, 415 U.S. 724, 729 (1974). The states must ensure elections are fair, honest, and orderly, which necessarily requires "substantial regulation." Id. at 730. And, over time, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." Id. "It is very unlikely that all or even a large portion of the state election laws

would fail to pass muster . . . ." Id. As explained by the United States Supreme Court in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983):

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. . . . Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

(internal citations omitted). Thus, we begin by reviewing the LPND and candidates' alleged injury, the state's asserted interest, and the necessity of the statute in furthering that interest.

In application, the crux of this analysis is to determine whether the challenged statute "'freezes the status quo'" of a two-party system, or whether "[i]t affords minority political parties a real and essentially

equal opportunity for ballot qualification." Am. Party of Tex. v. White, 415 U.S. 767, 787-88 (1974); see also Storer, 415 U.S. at 728 (noting the state must provide a "feasible means for other political parties and other candidates to appear on the general election ballot") (citing Williams v. Rhodes, 393 U.S. 23 (1968)). Restated, the need for fair and orderly elections requires states to enact restrictions on the election process, even though the restrictions may be "necessarily arbitrary." McLain II, 851 F.2d at 1050 (internal quotation marks omitted). When this is the case, our inquiry evolves from strict and exacting scrutiny into "one of reasonableness: Do the challenged laws freeze the status quo by effectively barring all candidates other than those of the major parties." Id.

1. Undue Burden

For a ballot access restriction to be found unconstitutional, a challenger first must establish that the law imposes a substantial burden. McLain II, 851 F.2d at 1049. North Dakota Century Code § 16.1-11-36 limits candidates' access to the general ballot, which affects both the "right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams, 393 U.S. at 30; Libertarian Party v. Bond, 764 F.2d 538, 541 (8th Cir. 1985). "These rights rank among our most precious freedoms," Libertarian Party, 764 F.2d at 541, and are thus protected against federal encroachment by the First Amendment and state infringement by the Fourteenth Amendment, Williams, 393 U.S. at 30-31. The Supreme Court has emphasized the fundamental nature of these rights: "'No right is more precious in a free country than that

of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" Id. at 30 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). Consequently, we conclude N.D.C.C. § 16.1-11-36 imposes a substantial burden on the LPND and candidates' First and Fourteenth Amendment rights by restricting their access to the general elections ballot.

However, this substantial burden is not necessarily undue or excessive. An undue burden, which essentially removes all realistic chance for a minor party or independent candidate to ever access the general election ballot, cannot be justified by any state interest, regardless of how compelling the interest may be. Am. Party of Tex., 415 U.S. at 787-88; MacBride v. Exon, 558 F.2d 443, 449 (8th Cir. 1977). Thus, a ballot access statute imposing an undue burden is necessarily unconstitutional. In alleging N.D.C.C. § 16.1-11.36 is unduly burdensome, the LPND and candidates focus not on the requirement for "candidates [to] show a 'modicum' of support prior to their placement on the ballot." Appellant's Br. at 10. Instead, they specifically challenge as undue and excessive the percentage of support they are required to show under the statute. Id. ("[T]he issue in this case is whether the modicum of support that Section 16.1-11-36 actually requires—more than 15 percent of the eligible pool for some candidates—is constitutional.").

The Supreme Court often focuses on the amount of support a candidate is required to show when determining whether a ballot access restriction is

constitutional, specifically considering the percentage of signatures or votes required. See, e.g., Munro v. Socialist Workers Party, 479 U.S 189, 190 (1986) (holding as constitutional a 1% vote requirement in a blanket primary); Am. Party of Tex., 415 U.S. at 774-75, 783 (holding a 1% signature requirement as "within the outer boundaries of support the State may require before affording political parties ballot position"); Jenness v. Fortson, 403 U.S. 431, 432 (1971) (holding a 5% signature requirement constitutional because it "in no way freezes the status quo"); Williams, 393 U.S. at 24-26 (holding a 15% signature requirement unconstitutional because it eliminated any realistic chance of a third party accessing the ballot, effectively freezing the two-party status quo). Significantly, though, the Supreme Court does not merely consider the percentage stated in a challenged law. Rather, it determines the percentage of support based on the "eligible pool." See Storer, 415 U.S. at 739. In Storer, the statute required candidates to receive signatures totaling 5% of the number of votes cast in the previous general election. However, candidates could only receive signatures from those who had not voted in the primary or signed petitions for any other party. Id. at 727-28. While the 5% requirement did not appear to be excessive on its face, the Court found it unclear on the record whether the "eligible pool" was so diminished by the number of people that voted in the primary as to make the signature requirement impractical. Id. at 739. Thus, the Court remanded the case for further fact finding so the lower court could determine the exact percent of the "eligible pool" required for the independent candidates, and noted concern if the percent was found to be substantially more than 5%. Id.

The LPND and candidates cite Storer to implore this court to ignore the plain language of N.D.C.C. § 16.1-11-36 requiring a vote total equal to 1% of the general population in the primary election, and ask us to look instead at the percentage in terms of actual votes cast in the primary election. With regard to the numbers from the 2010 election, a candidate receiving votes equal to 1% of the general population is equivalent to the candidate receiving as high as 15% of actual votes cast in the primary. While we heed the LPND and candidates' caution as to relying solely on the 1% figure stated in the statute, we are not persuaded the correct consideration is the percent of actual votes cast. Essentially, the LPND and candidates asks us to define the "eligible pool" in a way unsupported by precedent.

In Storer, the Supreme Court looked beyond the plain language of the statute and attempted to reconcile whether a requirement for signatures equal to 5% of the number of votes cast in the previous gubernatorial election remained reasonable when converted to a percentage of the eligible pool. 415 U.S. at 739. Because voters were limited to either voting in a primary or signing one nominating petition, an independent candidate did not have access to all persons who voted in the previous election and instead had to work with the remaining persons who did not vote in the primary. Id. This eligible pool in Storer was consequently defined as those who were available to sign a petition after the primary elections were concluded. Id. Notably, the eligible pool in Storer was not based on the number of people who actually signed petitions following the primaries. Equally so, in the present case, we see no reason to define the eligible pool as those who voted in the actual primary. Instead,

as was the case in Storer, the eligible pool should be the number of people who were *eligible* to vote for the candidates in the primary regardless of whether they cast a vote or not, not the number who *actually* voted.

The number of people eligible to vote in the primary election is not in the record, but Secretary Jaeger provides some evidence estimating that number to be about 75% of the general population, which in turn means the vote requirement of 1% of the general population would become 1.33% of the eligible pool of adults who can vote—a percent still well below the upper threshold of reasonable under Supreme Court precedent. Even more, considering this is an as applied challenge, even if the eligible pool was the number of actual primary voters, none of the candidates received 1% of actual votes cast: Passa received 0.24%, Stewart received 0.20% and Ames received 0.86%. Thus, regardless of which "eligible pool" the court uses, these three candidates still have failed to show any indication of a modicum of support entitling them access to the general ballot. As Secretary Jaeger stated in his brief, "not only did the plaintiff candidates not receive the number of votes equal to 1% of the population of their legislative districts, and not only did they not receive the number of votes equal to 1% of the number of eligible voters in their legislative districts, they did not even receive 1% of the actual votes cast." Appellee's Br. at 20.

The LPND and candidates also attempt to demonstrate that regardless of which eligible pool is relied upon, N.D.C.C. § 16.1-11-36 creates an unrealistic burden for minor parties because no minor party candidate has been included on the general election ballot for a state legislature position since

1976. This information could certainly be concerning, but in this case, the LPND and candidates have failed to tie the absence of minor party candidates to the challenged statute or its requiring candidates to show a modicum of support during the primary election. The mere fact such candidates have been absent from the general election ballot does not, alone, prove the unconstitutionality of the statute. As Secretary Jaeger observed, the historical absence of minor parties on ballots has not been shown to be directly attributable to this statute, because it could instead be from any one of the other hurdles a party and candidate must overcome in North Dakota's election scheme to be placed on the general ballot. Because the LPND and candidates have failed to provide evidence of any other minor party candidates who have been placed on the primary ballot but have failed to meet the challenged statute's 1% requirement for reaching the general ballot, we are unpersuaded by the mere absence of minor party candidates on the ballot. There is no historical evidence N.D.C.C. § 16.1-11-36 has prevented any candidate from reaching the general ballot by imposing an insurmountable and undue burden.

For these reasons, we conclude N.D.C.C. § 16.1-11-36 imposes a substantial, but not undue or excessive, burden on the LPND and candidates' First and Fourteenth Amendment rights.

2. State's Interest

To justify this substantial but not undue burden, Secretary Jaeger contends N.D.C.C. § 16.1-11-36 is necessary to prevent ballot overcrowding and voter confusion by eliminating frivolous candidates, among

other interests. A substantial but not undue burden may be constitutional so long as it is necessary to achieve a compelling state interest. McLain II, 851 F.2d at 1049. "'[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" Williams, 393 U.S. at 31 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). A state has a compelling interest in "'protecting the integrity of their political processes from frivolous or fraudulent candidacies, in insuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.'" Libertarian Party, 764 F.2d at 540-41 (quoting Clements v. Fashing, 457 U.S. 957, 965 (1982)). Consequently, a state has a legitimate interest in regulating the number of candidates on the ballot in order to "prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Bullock v. Carter, 405 U.S. 134, 145 (1971). "Moreover, a [s]tate has an interest, if not a duty, to protect the integrity of its political process from frivolous or fraudulent candidacies." Id. A state's interest in eliminating frivolous candidates from the ballot is "sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." Am. Party of Tex., 415 U.S. at 782; see also Jenness, 403 U.S. at 442 ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in

avoiding confusion, deception, and even frustration of the democratic process at the general election."). Accordingly, the state's alleged interests of preventing ballot overcrowding, avoiding voter confusion caused by frivolous candidates, as well as ensuring an efficient election process and avoiding the expense associated with run-off elections are all sufficiently compelling as to justify infringing upon the rights to vote, to freely associate, and to promote political beliefs.

However, whether N.D.C.C. § 16.1-11-36 is necessary to achieve these compelling interests is a more complex analysis. As an initial matter, the LPND and candidates assert there are alternative, less burdensome means of furthering the state's compelling interest and consequently the chosen means is not necessary and must be unconstitutional. We disagree. The LPND and candidates offer as an alternative means the option of requiring 1% of the number of voters in a previous election instead of basing the percentage on the district's population. Certainly, it could be reasonable for North Dakota to do this as it is similar to the requirements upheld by the Supreme Court for other states' election laws. See, e.g., Am. Party of Tex., 415 U.S. at 782. However, the mere identification of a less burdensome alternative is not dispositive in election cases such as this one. The need for fair and orderly elections requires states to enact restrictions even though those restrictions may be "necessarily arbitrary," McLain II, 851 F.2d at 1050 (internal quotation marks omitted), and such arbitrary restrictions may include the selection of the number of signatures or votes needed to get on a general election ballot. In this case, the LPND and candidates' suggestion to use a percent of actual votes, or votes

cast in a previous election, as opposed to a percentage of the general population, is really an argument about the number of votes required, an arbitrary component to the law, for which our inquiry evolves from strict and exacting scrutiny into "one of reasonableness." Id. As we previously discussed in more detail, the percentage of votes required by N.D.C.C. § 16.1-11-36 is not excessive or undue and thus we conclude requiring a number of votes equal to 1% of the population is reasonable and, therefore, constitutional despite the existence of alternatives. See MacBride, 558 F.2d at 448 (analyzing a deadline as an arbitrary component to the law and would uphold deadline so long as it was reasonable). As the LPND and candidates concede in briefing, it has "never been in dispute in this case" that "North Dakota may enact 'reasonable' ballot access restrictions," Appellant's R. Br. at 4, and the requirement of acquiring votes equal to 1% of the general population to reach the general election ballot is reasonable under Supreme Court and Eighth Circuit precedent.

The LPND and candidates raise two additional challenges to the necessity of N.D.C.C. § 16.1-11-36 in achieving the state's alleged compelling interests. First, they contend the statute "does not serve any legitimate state purpose" because it targets candidates who already "demonstrated a significant modicum of electoral support." Appellant's R. Br. at 5. They specifically argue the statute is not necessary because"[by] its own terms, [§] 16.1-11-36 is specifically directed at candidates who 1) win their primary election races; 2) after successfully qualifying for inclusion on the primary election ballot; [and] 3) [are] of a political party that likewise successfully

qualified for inclusion on the primary election ballot." Id.

In North Dakota, a candidate is placed on the primary ballot through one of two processes. First, a nonparty candidate can file a petition containing the signatures of 1% of the general population of the relevant legislative area or 300 signatures, whichever is less. The second method, which applies to candidates affiliated with a party, involves filing a certificate of nomination requesting a chosen candidate be placed on the primary ballot without the candidate first obtaining signatures. In this case, candidates Passa, Stewart, and Ames were all nominated by the LPND and thus they were placed on the primary ballot without meeting the nonparty candidate signature requirement. However, to become a party—and thus to be able to bypass the candidate signature requirement—the LPND had to obtain 7,000 signatures statewide to show sufficient party support. These 7,000 signatures could be from any adult statewide regardless of whether the adult had signed any other party's petition and did not require the signer to commit to voting for the party in the future primaries.

The LPND and candidates contend this 7,000-signature requirement to become a party establishes sufficient voter support to justify future ballot placement of all candidates and thus obviates the need for a minimum vote requirement following the primary election. We cannot agree, particularly given the LPND and candidates chose to bring this challenge as applied. For candidates Passa, Stewart, and Ames, not one of them had to acquire signatures to show support as an individual candidate. The only

evidence of support before the primary election was the 7,000 signatures acquired by the LPND to become a party. These signatures—while obtained in part by each of these candidates—were not to show support for the individual candidates, but rather for the party as a whole. At no point in the process leading up to the primary election were the voters ever provided the opportunity to show support, or lack thereof, for any specific candidate. Instead, as North Dakota's election laws require, the first point at which these candidates' voter support was demonstrated was at the primary election itself. Accordingly, N.D.C.C. § 16.1-11-36 is not obviated by the process of getting onto the primary election ballot. To the contrary, given the ease with which a candidate may be placed on the primary ballot, the primary election becomes the first instance to filter candidates by actual voter support. Further, the necessity of the lesser of 1% or 300 primary vote requirement becomes even more evident when considering the fact that the 7,000 signature requirement on which the LPND and candidates rely as their showing of support is a one-time occurrence. Once a party is established using the 7,000 signatures, it will not have to regain those signatures in future years. Instead, the only protection the state has from frivolous party candidates and ballot overcrowding in subsequent elections is the 1% or 300 vote requirement in the primaries. And, as addressed in more detail above, it was at these primaries that candidates Passa, Stewart, and Ames failed to generate sufficient support to establish themselves as viable, nonfrivolous candidates. We therefore are unpersuaded by the LPND and candidates' contention as to § 16.1-11-36 being unnecessary because we cannot agree the candidates had already demonstrated a sufficient modicum of support.

Second, the LPND and candidates challenge the state's reliance on primary elections as the forum for determining the amount of support for a particular candidate. The LPND and candidates contend primary elections "are an inherently *inaccurate* measure of support for minor party candidates" because primary elections are notorious for low voter turnout, voters are limited to voting within only one party at the primary, and the elections take place too early in the campaign process "before voters can possibly know who the major party nominees are, must less register dissatisfaction with them." Appellant's R. Br. at 7. We are unpersuaded by each of these contentions. To begin, the LPND and candidates' argument as to low voter turn out is without merit as it has already been rejected by the United States Supreme Court in Munro, 479 U.S. at 198. The Supreme Court stated, "We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." It further explained,

> "candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. . . ." States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.

Id. (quoting Jenness, 403 U.S. at 438). It is relevant that just as major parties are able to do, minor parties can campaign and reach out to the electorate for

support leading up to the primary. Am. Party of Tex., 415 U.S. at 785. Thus, despite the traditionally lower interest in primary elections than general elections, the burden is appropriately placed on the candidate to generate support and rally voters to vote in order to make it to the general election ballot. It is not the state's obligation to find or create an easier forum for establishing voter support.

Similarly, we are unpersuaded by the LPND and candidates' frustration with the restriction created by N.D.C.C. § 16.1-11-22 which limits voters to voting only within a single party's primary election. The LPND and candidates claim this limitation makes it more difficult for smaller third parties to attract a significant number of voters when the two major parties likely have more contentious and more nationally-relevant elections on their ballots. The Supreme Court has indicated such a limitation is reasonable and constitutional for states to impose, Am. Party of Tex., 415 U.S. at 785, but as the LPND and candidates aptly point out, this rule creates a potential disadvantage for third parties in generating voter support at the primaries because a voter who is interested in a particular, nationally-relevant campaign might desire to vote for a major party candidate in one seat and thereby foreclose the opportunity to vote for a third party candidate in a state legislature position. Nevertheless, the fact that voters are limited to voting within only one party at the primary election is not fatal to the ballot access restriction created in N.D.C.C. § 16.1-11-36. The purpose of the primary election is for voters to indicate support for a desirous candidate. Parties are responsible for campaigning and generating voter support leading up to the primary election. Munro, 479

U.S. at 197-98. The candidates had the responsibility of rallying the voters to come to the primary to generate the necessary support to reach the general election ballot. Id. As the Supreme Court has explained, states are permitted to require candidates "through their ability to secure votes at the primary election, [to demonstrate] they enjoy a modicum of community support in order to advance to the general election." Id. The fact the candidates in this case failed to generate this support shows N.D.C.C. § 16.1-11-36 performed precisely the function the state intended to further: its compelling interest of eliminating frivolous and unsupported candidates from the ballot. See id. at 198 ("[R]equiring candidates to demonstrate such support [at a primary] is precisely what we have held States are permitted to do."). Consequently, we conclude the limitation of voting only within a single party's primary election does not render primary elections an unconstitutional forum for evaluating a candidate's modicum of support.

The LPND and candidates' last challenge is to the timing of the primary election. They suggest primary elections are held at a time before minor parties and independent candidates are likely to generate support and therefore places third parties at an unconstitutional disadvantage. The courts have recognized the "disaffected" group of voters likely to support candidates outside of the two major parties may not be cohesive or identifiable until a few months before the election because "the identity of the likely major party nominees may not be known until shortly before the election." Williams, 393 U.S. at 33. We have emphasized that minor parties and independent candidates often face greater difficulties in generating voter support too early in the campaigning process:

"[W]ithin the framework of organized political parties, most voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties. This dissatisfaction often will not crystalize until party nominees are known." McLain II, 637 F.2d at 1164; see also MacBride, 558 F.2d at 449 ("The American political system is basically the two-party system with which all are familiar, and ordinarily popular dissatisfaction with the functioning of that system sufficient to produce third party movements and independent candidacies does not manifest itself until after the major parties have adopted their platforms and nominated their candidates."). Consequently, a deadline for showing support which is too early may be an arbitrary restriction precluding third party candidates from accessing a general election ballot. See MacBride, 558 F.2d at 448 (rejecting as arbitrary a deadline for party signature requirements nine months before general election and ninety days before primary election).

We have nevertheless upheld deadlines for showing voter support as early as one week before a primary election, Libertarian Party, 764 F.2d at 542, and the Supreme Court has upheld deadlines occurring even before primary elections are held. Compare Am. Party of Tex., 415 U.S. at 787 (holding deadline 120 days before election was not unreasonable or unduly burdensome) and Jenness, 403 U.S. at 433-34 (holding mid-June deadline for third party nominees, which was the same deadline as that for candidates filing in party primaries, was not unreasonably early) with Anderson, 460 U.S. at 780 (held a filing deadline 229 days in advance of general election was unconstitutional) and McLain I, 637 F.2d at 1164-65

(holding deadline for new political parties, which was 90 days before primary election, was "particularly troublesome"). Even more, the Supreme Court has upheld the use of primaries as a forum to determine whether a candidate has a modicum of support. See Munro, 479 U.S. at 197-98. We therefore conclude the LPND and candidates' concern should be rejected. The courts have acknowledged the necessity of giving third party and independent candidates an opportunity to capitalize on the disaffected group of voters created only after the major parties platform and candidates are known. However, in acknowledging that necessity, the courts have also held primaries are a reasonable basis for determining candidate support, and a deadline occurring even a week before a primary election is reasonable. Accordingly, we conclude a requirement of a showing of support at the time of a primary election is not an arbitrarily restrictive deadline and is within the bounds of reasonableness.

Because we conclude the substantial burden created by N.D.C.C. § 16.1-11-36 is reasonable and necessary to serve compelling state interests, we affirm the district court's dismissal of the LPND and candidates' challenge to the constitutionality of N.D.C.C. § 16.1-11-36 under the First and Fourteenth Amendments.

B. Equal Protection Challenge

We turn next to the LPND and candidates' argument as to N.D.C.C. § 16.1-11-36 violating the Equal Protection Clause. The district court rejected this argument, briefly stating it found no unequal treatment across parties because all candidates are subject to the same 1% or 300 vote requirement to

reach the general ballot. According to the LPND and candidates, the district court erred because it failed to address the disparate impact created by the statute. They argue the minor parties are essentially required to demonstrate the same level of support as the major parties, but the major parties had decades in which to build a higher level of support placing minor parties at a disadvantage.

To determine whether or not a statute violates the Equal Protection Clause, we consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams, 393 U.S. at 30. In analyzing the LPND and candidates' equal protection challenge, we first look at the state's interests, which are the same as those discussed above—protecting the integrity of the political process from frivolous or fraudulent candidacies, ensuring the election process is efficient, avoiding voter confusion caused by an overcrowded ballot, and avoiding the expense and burden of run-off elections. As we have already concluded, these interests of the state are not only compelling, but the statute is necessary to further those interests. Similarly, the burdens alleged by the LPND and candidates in their equal protection challenge are the same burdens alleged in their First and Fourteenth Amendment challenges discussed above—the infringement on the right of individuals to associate for the advancement of political beliefs and on the right to cast votes effectively regardless of political persuasion. As concluded above, these burdens are substantial, but not undue or excessive.

However, in the context of equal protection, we engage in further considerations, namely whether the

law disadvantages one group over another so as to result in unequal treatment and whether this unequal treatment is justified by a compelling interest. See id. ("We have . . . held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause."). We agree with the district court's conclusion as to no unequal treatment being present in this case. On its face, N.D.C.C. § 16.1-11-36 treats all candidates, regardless of party, the same. Any candidate appearing on the primary ballot will be placed on the general ballot only if he or she received the requisite number of votes required to meet the lesser of 1% of the relevant district's population or 300 votes. Nevertheless, the United States Supreme Court has previously invalidated an election law scheme despite the scheme treating all parties equally because, in application, the equal treatment had a disparate impact. Jenness, 403 U.S. 431 (citing Williams, 393 U.S. at 34). In Williams, the Supreme Court reviewed and rejected Ohio's election law scheme as a whole because it denied equal protection to minority political parties. 393 U.S. at 34. The law at issue in Williams required parties to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election in addition to complying with a slurry of more technical requirements before it could be considered a party in the subsequent election. In contrast, another law permitted those parties who received 10% of the votes in the last gubernatorial election to retain their party status for the election, avoiding the 15% signature requirement and other technical requirements. The Supreme Court determined these laws created an unequal treatment between minor and major parties. Rejecting the state's argument that the laws applied to all parties equally,

the Supreme Court recognized that, in application, this scheme resulted in the two major parties consistently retaining party status and avoiding the signature requirement while minor parties on numerous occasions tried and failed to become a new party on the ballot. The Supreme Court later interpreting its holding in Williams opined: "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes." Jenness, 403 U.S. at 442.

The LPND and candidates focus on that language from Jenness to highlight the inequalities they allege are created by N.D.C.C. § 16.1-11-36 in application, namely, minor and major parties each complying with a requirement more easily met by major parties. However, we view the situation in Williams as significantly different from the statutory scheme in North Dakota. For instance, in Williams, the major parties were essentially never subject to the 15% signature requirement or any of the other more technical and nuanced requirements because those parties consistently retained 10% of the votes cast in the previous election. 393 U.S. at 25-26. By comparison, minor parties were required to meet new party requirements in Ohio's attempt "to keep minority parties and independent candidates off the ballot." 393 U.S. at 26. In fact, one of the minor parties in Williams had achieved the 15% signature requirement, but was still denied access to the ballot due to the failure to meet other technical requirements. 393 U.S. at 26-27. By contrast, under North Dakota's election scheme, all parties are subject to the same 1% or 300 vote requirement in the primaries regardless of support shown in a prior year's

election. Further, the requirement is fairly minimal—compare 15% to 1%. In contrast to the law in Williams, North Dakota's ballot access restriction not only treats each party equally on the face of the law, it also treats each party equal in application. We see no unequal effects sufficient to sustain an equal protection challenge.

Nevertheless, the LPND and candidates further their argument with one additional point: the fact that no third party candidate has appeared on the state legislature ballots since 1976. Assuming the facts as true—as this court should on a motion to dismiss for failure to state a claim—this fact could be damaging to the constitutionality of the statute. As the Supreme Court has stated, "it will be one thing if [minor party] candidates have qualified with some regularity and quite a different matter if they have not." Storer, 415 U.S. at 742. A disparate impact that "operate[s] to freeze the political status quo" to a two-party system violates the Equal Protection Clause. Jenness, 403 U.S. at 438. However, as discussed above as well, the claims made by the LPND and candidates in their complaint do not establish N.D.C.C. § 16.1-11-36 as the cause of minor parties' absence on general election ballots. There are no facts indicating minor party candidates have appeared consistently on the primary election ballot but are denied access to the general ballot based on the required showing of support under the challenged statute. Accordingly, we fail to see how the mere absence of minor parties from the general election ballot, without a causal connection, necessarily establishes N.D.C.C. § 16.1-11-36 has an unconstitutional disparate impact.

IV

We conclude the burden imposed by the statute is not undue or excessive and the state has a compelling interest in having a minimum vote requirement before a candidate may appear on the general election ballot. We therefore hold N.D.C.C. § 16.1-11-36 is not unconstitutional on First or Fourteenth Amendment grounds. Furthermore, because the law applies equally to all candidates and does not result in unequal treatment, we hold the statute does not violate the Equal Protection Clause. Accordingly, we affirm the district court.

APPENDIX B

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

Case No. 3:10-cv-64

[Filed September 3, 2010]

Libertarian Party of North Dakota, Richard Ames, Thommy Passa, and Anthony Stewart,	)
Plaintiffs,	)
-vs-	)
Alvin A. Jaeger,	)
Defendant.	)

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

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

I. 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 Fourteenth 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 voter 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 LAPD 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 interesting 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 candidates name place 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 that 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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3212

[Filed November 23, 2011]

Libertarian Party of North Dakota, et al.	)
	)
Appellants	)
	)
v.	)
	)
Alvin Jaeger	)
	)
Appellee	)
	)

Appeal from U.S. District Court
for the District of North Dakota - Fargo
(3:10-cv-00064-RRE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 23, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans