

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE GREEN PARTY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-261-B-C
)	
SECRETARY OF STATE,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This declaratory judgment action represents an effort by the Maine Green Party (“Green Party”) to maintain its official status as a political party in Maine as the state enters the 1998 primary and general election cycle. The Green Party enjoyed such status during the 1996 elections and, facing disqualification as a major party by the state official who oversees the election process, it filed this action against that official, the Maine Secretary of State (“Secretary of State”).

The Green Party advances two distinct theories in its complaint. First is the argument that its disqualification would represent an erroneous interpretation of the applicable statute, 21-A M.R.S.A. § 301, which eliminates previously certified official major political parties from participation in future primary elections in certain circumstances. This court certified the statutory question to the Maine Supreme Judicial Court, sitting as the Law Court, (Docket No. 6), which provided an interpretation of the statute that is unfavorable to the Green Party. *See Maine Green Party v. Secretary of State*, 698 A.2d 516 (Me. 1997).¹ The second contention of the Green Party is that section 301, when applied in this unfavorable manner, unconstitutionally infringes on the

¹ The opinion and mandate of the Law Court appear in the present record as Docket No. 11.

rights secured to its members by the First and Fourteenth Amendments to the United States Constitution. Now before the court are cross-motions for summary judgment (Docket Nos. 15 and 18). I recommend that the court enter summary judgment in favor of the Secretary of State.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 56. “This is especially true in respect to claims

or issues on which the nonmovant bears the burden of proof.” *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The relevant facts are essentially not in dispute. In 1984 two like-minded Maine citizens organized a “loosely affiliated group” known as the Maine Greens. Declaration of John Rensenbrink (“Rensenbrink Decl.”) (Docket No. 22) at ¶¶ 2-3. The group’s activities included campaigning for “Green” candidates for public office in Maine, among them the 1992 congressional candidacy of Jonathan Carter. *Id.* at ¶ 3. Carter was not the nominee of a political party, but rather gained access to the ballot by filing the requisite number of signatures on a nomination petition pursuant to 21-A M.R.S.A. § 354(5)(D). Affidavit of Rebecca Wyke (“Wyke Aff.”) (Docket No. 33) at ¶ 5. As permitted by the statute, Carter chose the designation “Green” to accompany his name on the ballot. *Id.* Carter ran for governor of Maine two years later, again having gained access to the ballot by petition. Affidavit of Julie Flynn (“Flynn Aff.”) (Docket No. 16) at ¶ 3. On this occasion, Carter chose the designation “Independent Maine Greens” for inclusion on the ballot accompanying his name. Wyke Aff. at ¶ 6. He received 32,695 votes, representing 6.4 percent of the 511,308 votes cast. Flynn Aff. at ¶ 3 and Exh. A thereto.

During the period relevant to this litigation, the Maine Legislature had ordained the following regime for the formation of new political parties in Maine:

Formation of new party; organization about a candidate

A party whose designation was not listed on the general election ballot in the last preceding gubernatorial or presidential election qualifies to participate in a

primary election, if it meets the requirements of subsections 1, 2 and 3.

1. **Declaration of intent.** A voter or a group of voters who are not enrolled in a party qualified under section 301 must file a declaration of intent to form a party with the Secretary of State before 5 p.m. on the 180th day preceding a primary election. The declaration of intent must be on a form designed by the Secretary of State and must include:

- A. The designation of the proposed party;
- B. The name of a candidate for Governor or for President in the last preceding gubernatorial or presidential election who was nominated by petition . . . and who received 5% or more of the total vote cast in the State for Governor or for President in that election;
- C. The signed consent of that candidate; and
- D. The name and address of the voter or one of the group of voters who files the declaration of intent.

2. **Enrollment of voters.** After filing the declaration described in subsection 1, the voter or voters proposing to form the party may then enroll voters in the proposed party

3. **Municipal caucuses.** The proposed party must conduct municipal caucuses in at least one municipality in each of the 16 counties during that election year The chair of the municipal committee or a resident voter in the municipality must file a copy of the notice required by section 311, subsection 3, with the Secretary of State before 5 p.m. on April 15th.

4. **Convention.** A party which has qualified under subsections 1, 2 and 3 to participate in a primary election must, in that same year, hold a state convention . . . in order to have the party designation of its candidates printed on the ballot in the general election of that year. The voter or group of voters who file the declaration of intent may perform the duties of the state committee . . . for the party's initial convention.

21-A M.R.S.A. § 302.²

² The Legislature has subsequently made certain minor amendments to this provision that have no bearing on the present dispute. *See* 21-A M.R.S.A. § 302 (Supp. 1997) (citing P.L. 1997, ch. 436, §§ 42-43).

Shortly after the 1994 gubernatorial election, the Green Party came into formal existence at a meeting called by John Rensenbrink, one of the original founders of the Maine Greens group.³ Rensenbrink Decl. at ¶ 5. On December 21, 1994 a group of Maine voters filed a declaration of intent to form a new party, to be designated as the “Green Party,” based on Carter’s showing in the previous gubernatorial election and with Carter’s consent. Flynn Aff. at ¶ 4 and Exh. B thereto. Pursuant to subsection 302(2), the Green Party was thereafter permitted to enroll voters. *Id.* at ¶ 5.

The Green Party subsequently held the requisite municipal caucuses and state convention, thus qualifying it to participate in the 1996 primary and general elections in Maine. *Id.* at ¶¶ 6, 9-10. At its state convention, the party nominated Ralph Nader of Washington, D.C. as its presidential candidate. *Id.* at ¶ 10. The Green Party had worked with other similar organizations in other states to draft Nader as a presidential candidate, doing so at least in part because it had been advised in 1995 and 1996 that it would be disqualified as an official party if it did not run someone for president. Rensenbrink Decl. at ¶ 16. Nader ultimately appeared on the ballots of 21 states as the Green Party candidate. *Id.* at ¶ 17. There was, however, no national Green Party organization at the time Nader ran for president. *Id.* at ¶ 19.

Other than Nader, no Green Party candidates filed the requisite nomination papers to participate in the June 1996 Maine primary, nor did any Green Party candidate receive sufficient write-in votes to be placed on the general election ballot. Flynn Aff. at ¶¶ 7-8; *see* 21-A M.R.S.A. § 723(1)(A) (specifying requirements for nomination by primary election of write-in candidates).

³ According to Rensenbrink, he called this meeting on November 19, 1994 after having been advised by the predecessor to the incumbent Maine Secretary of State that Carter’s showing in the gubernatorial election meant that the Green Party had achieved “official” status. Rensenbrink Decl. at ¶¶ 4-5. Although this contention is in dispute, *see* Wyke Aff. at ¶ 8, it is not material to the resolution of the constitutional issues presented.

The Green Party attributes its failure to field candidates in the 1996 election for any races other than the presidential one to “confusion among local registrars” as well as “the more general confusion . . . among Green Party workers, the media, and the public stemming from 15 months of articulated ambiguity surrounding Green Party status.” Rensenbrink Decl. at ¶ 11. According to the Green Party, the general confusion stemmed from its official designation as merely a “proposed party” in 1995 notwithstanding its ability to enroll voters. *Id.* at ¶ 7. As to the problem with local registrars, the Green Party contends that many of them had erroneously failed to recognize voters who had lawfully sought to register as members of the party.⁴ *Id.* at ¶ 8; *see also* Declaration of John D. Dieffenbacher-Krall (“Dieffenbacher-Krall Decl.”) (Docket No. 28) at ¶ 11 and Exhs. 6-8 thereto (describing such problems in one municipality). Pointing out that any specific examples of registrar error cited by the Green Party were corrected, *see* Declaration of Nancy Allen (Docket No. 24) at ¶ 15; Exh. 6-8 to Dieffenbacher-Krall Decl.; Rensenbrink Decl. at ¶ 8, and that the Secretary of State’s office sent “no fewer than 10 memoranda to local registrars” between December 1994 and the 1996 general election clarifying that the Green Party was entitled to enroll voters and/or was a qualified political party, Wyke Aff. at ¶ 13, the Secretary of State attributes the failure to field candidates to the fact that, as of the 1996 general election, there were only 3,437 voters enrolled in the Green Party out of a total of 1,001,292 registered voters statewide, Flynn Aff. at ¶ 17 and Exh. D thereto. For whatever reason, Nader was the only Green Party candidate to appear on the 1996 general election ballot in Maine. Flynn Aff. at ¶ 10. In that election, Nader received 15,279 votes, or 2.5 percent of the 605,897 votes cast for president in Maine. *Id.* at ¶ 12 and Exh. C thereto.

⁴ The Secretary of State objects to any allegations of widespread failure to enroll voters as the Green Party’s “conjecture based on hearsay.” Secretary’s Response to Green Party’s Separate Statement of Material Facts (Docket No. 32) at ¶ 18-19.

The Secretary of State intends to disqualify the Green Party as an official political party, pursuant to 21-A M.R.S.A. § 301(1)(C), because its 1996 presidential candidate received less than 5 percent of the total vote cast for president in Maine. Complaint (Docket No. 1) at ¶ 6; Answer (Docket No. 3) at ¶ 6. By agreement of the parties, the court has stayed the disqualification of the Green Party pending the resolution of the instant litigation (Docket No. 2).

III. Discussion

The 1996 provision at the heart of this litigation is the one setting forth the requirements in Maine for maintaining, as distinct from establishing, an organization's status as an official political party:

Qualified parties

1. Primary election. A party qualifies to participate in a primary election if its designation was listed on the general election ballot in the last preceding gubernatorial or presidential election and if:

- A.** The party held municipal caucuses . . . in at least one municipality in each county in the State during that election year and fulfills this same requirement during the year of the primary election;
- B.** The party held a state convention . . . during that election year;
- C.** Its candidate for Governor or for President polled at least 5% of the total vote cast in the State for Governor or President in the last preceding gubernatorial or presidential election; and
- D.** Each state party committee must file a statement with the Secretary of State on or before April 4th⁵ certifying that the party has held the municipal caucuses required by paragraph A. The statement must be signed by the party chairman or his designated agent.

⁵ This deadline has subsequently been changed to March 20. *See* 21-A M.R.S.A. § 302 (Supp. 1997) (citing P.L. 1997, ch. 436, § 41).

2. General election. A party which qualifies under subsection 1 to participate in a primary election must, in that same year, hold a state convention . . . in order to have the party designation of its candidates printed on the ballot in the general election of that year.

21-A M.R.S.A. § 301. Because nomination by primary is the only method by which a political party may choose candidates for federal, state and county offices, *see* 21-A M.R.S.A. § 331(1), it is clear that disqualification from participation in the primary would mark the end of the Green Party's present existence as an official political party for purposes of seeking political office in Maine.

The proceedings before the Law Court involved the Green Party's contention that section 301 does not require its disqualification because, although its presidential candidate fell short of the 5 percent threshold in 1996, Carter obtained more than 5 percent of the vote in the 1994 gubernatorial election. Construing the language in subsection 301(1)(C) as requiring a 5 percent showing in whichever of the two elections is the more recent one, the Law Court determined that section 301 requires the disqualification of the Green Party. *Maine Green Party*, 698 A.2d at 518. As the Secretary of State points out, without objection, the Law Court's decision is dispositive of this aspect of the Green Party's claim.

The Green Party's constitutional argument is a novel one. It contends that section 301, as applied to the Green Party in these circumstances, violates its members' First and Fourteenth Amendment rights specifically by requiring a political party that has organized itself on the state rather than the national level to demonstrate a mandated level of support in a national presidential campaign. According to the Green Party, the Nader presidential campaign was essentially a symbolic effort and it is therefore unfair to disqualify the party based on Maine voters' disinclination to select a candidate they knew would not win.

The Supreme Court recently set out the appropriate analytical framework in *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997):

The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas. As a result, political parties' government, structure, and activities enjoy constitutional protection. On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. [Thus, w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, [the court must] weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.

Id. at 1369-70 (citations and internal quotation marks omitted). Restrictions on the access of political parties to a state's ballots may violate the First and Fourteenth Amendments because they "impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). "These associational rights, however, are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." *Id.*

In applying this framework to the instant case, the court does not write on a blank slate. The United States Court of Appeals for the First Circuit has previously considered the constitutionality of Maine's ballot-access statute, taking up the very issue that is central to the disposition of the Green Party's claim — the extent to which a state may properly require a political party to demonstrate "substantial support" among the electorate at large as a condition of official party status. *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 371 (1st Cir. 1993). As the First Circuit noted,

[t]he "support" requirement is meant to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory

margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process.

Id.

Like the Green Party here, the Libertarian Party had qualified for official party status when a gubernatorial candidate who had received the support of at least 5 percent of the electorate — Andrew Adam — thereafter permitted the party to use his name and electoral showing to attain official status under subsection 302(1)(B).⁶ *Id.* at 368-69. However, by the date of the ensuing primary the Libertarian Party had not satisfied the signature requirements set forth at 21-A M.R.S.A. § 335 for placing certain individual candidates on the primary ballots in their respective districts. *Id.* at 369. These candidates participated in the primary on a write-in basis, but did not receive sufficient support to qualify for appearance on the general election ballot pursuant to 21-A M.R.S.A.

⁶ The Green Party endeavors to distinguish its situation from that of the Libertarian Party by noting that Carter had “actively and enthusiastically espoused and advocated Green principles and Green philosophy” during his gubernatorial campaign that led to the party’s qualification. Plaintiffs’ Objection to Defendant’s Motion for Summary Judgment and Cross Motion for Summary Judgment, etc. (“Green Party Memorandum”) (Docket No. 18) at 15. I find this distinction unpersuasive. Even assuming that Adam did not publicly associate his 1990 candidacy with the Libertarian Party’s views to the same extent or in a similar manner to Carter’s public presence as a “Green” candidate in the 1994 campaign, it does not follow that the Carter candidacy represented a substantial show of support for the Green Party. Voters do not always choose a candidate because of his or her partisan affiliation and, indeed, sometimes make such a choice *despite* such affiliation.

Although not stressed by the Green Party, one further distinction between the situations of the Libertarian Party and the Green Party also bears noting. Unlike the Libertarian Party, the Green Party fielded absolutely no candidates in the 1996 primary because none of its supporters obtained the requisite signatures from enrolled party members. *See Libertarian Party*, 992 F.2d at 369 n.2 (noting that two Libertarian candidates for state representative qualified as primary and general election candidates). The Green Party attributes this non-showing to confusion and even misinformation, placing the blame with various state and local election officials. I mention this by way of stressing that section 301 does not require a political party to field candidates for any races other than the presidential and gubernatorial ones in order to maintain official status. Thus, the facts surrounding the Green Party’s failure to field non-presidential candidates in the 1996 elections are immaterial to the present controversy, which centers on the constitutionality of section 301.

§ 723(1)(A) (providing for nomination of write-in candidates receiving specified number of votes). According to the Libertarian Party, it was unconstitutional to exclude these candidates from the general election ballot on such a basis given the party's previous qualification under section 302 as an official party. *Id.* at 370. The First Circuit rejected this argument, explicitly holding that Maine may properly impose on new parties qualifying under subsection 302(1)(B) additional requirements for demonstrating substantial support among the electorate in light of the parties' having used this provision to bypass such a showing in the initial qualification process. *Id.* at 371-72. Further, as to the specific signature requirements at issue in *Libertarian Party*, the court found them to be "modest in numerical terms,"⁷ and held them not to be impermissibly onerous even though they involved signatures of party members as opposed to members of the electorate at large. *Id.* at 373-74. Of particular importance to the First Circuit was the existence of alternate means of ballot access. *Id.* at 374-75 (noting that Libertarian Party members could gain access to general election ballot through "nomination petition" pursuant to 21-A M.R.S.A. § 351).

The question here, given the legitimacy of Maine's interest in requiring a further demonstration of support for parties qualifying for official status pursuant to section 302(1), is whether the requirement challenged by the Green Party is more onerous in the constitutional sense than the local candidate signature requirement sustained in *Libertarian Party*. In that regard, I must disagree with the Green Party's characterization of the magnitude of the burden at issue. Contrary to the assertion of the Green Party, requiring a political party to present a presidential candidate every four years who attracts the support of at least 5 percent of those voting in the general election does

⁷ The numerical requirement ranged from .22 percent of the registered voters in the district for U.S. Congress, .4 percent of the registered voters in a state senate district, and .43 percent of the registered voters in a state representative district. *Libertarian Party*, 992 F.3d at 373.

not inevitably have the effect of prohibiting official parties that lack a national organization. Admittedly, parties that are organized nationally will have an easier time of clearing this hurdle, but it is also possible that Maine voters who care enough about the official status of a new political party would be willing to vote for that party's presidential candidate even if that candidate cannot win because he or she lacks a national organization or presence. Moreover, even accepting the Green Party's premise that only a political party with a national organization can realistically maintain official status under section 301, there is nothing in the applicable jurisprudence to suggest that Maine cannot opt for such a barometer of substantial support as a condition of continued official party status. One might take exception to such a requirement as a matter of political science, and even conclude that it tends to perpetuate the traditional two-party system,⁸ but these concerns do not implicate the Constitution. *See Timmons*, 117 S.Ct. at 1374 (states' "strong interest in the stability of their political systems . . . permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system"). Although a state may not "completely insulate the two-party system from minor parties' . . . competition or influence," nor impose "unreasonably exclusionary restrictions," the states "need not remove all of the many hurdles third parties face in the American arena today." *Id.*

Nor am I able to agree with the Green Party that the court must apply a "strict scrutiny" standard to the requirement at issue. Green Party Memorandum at 12. Not every law that impacts on the right to vote is subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). "[T]o subject every voting regulation to strict scrutiny and require that the regulation be narrowly tailored

⁸ According to the Green Party, not since 1914 in Maine has a third party demonstrated enough voter support for its candidates to satisfy section 301(1)(C) over a full four-year election cycle. Green Party Memorandum at 10.

to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* at 433. Moreover, as Justices Stevens and Blackmun have suggested, there is a danger that the strict-scrutiny paradigm can become an exercise in framing a constitutional problem in a manner that essentially assumes the result of the inquiry. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233-34 (1989) (Stevens, J. concurring) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)). The appropriate mode of constitutional analysis, therefore, is to apply the flexible approach most recently outlined in *Timmons*, in which the scrutiny increases with the character and magnitude of the restriction imposed on citizens’ associational and voting rights. *See Timmons*, 117 S.Ct. at 1370; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (any “severe restriction” must be “narrowly drawn to advance a state interest of compelling importance”) (emphasis added).

The restrictions at issue here are not of sufficient magnitude to require a heightened level of scrutiny. As the Secretary of State points out, and as the First Circuit noted in *Libertarian Party*, a party that lacks official status under section 301 may still cause its candidates to appear on the ballot, along with a chosen “political designation,” through the use of the general nomination petition process set forth in sections 351-57 of the elections statute. *See Libertarian Party*, 992 F.2d at 374-75. Although such a candidacy requires twice as many signatures as those required of an official party’s candidate, they may be obtained from any registered voter, including voters not enrolled in a party or even those enrolled in another party. *Id.* at 374 n.12. In these circumstances, the burden imposed on any rights secured to Green Party members by the First and Fourteenth Amendments is

relatively modest.⁹ The interest asserted by the Secretary of State to justify such a burden — that of “limiting the ballot to those political parties who demonstrate continuing evidence of electoral support,” Secretary’s Reply Memorandum, etc. (Docket No. 31) at 11 — has already been described in the context of the Maine statute as “legitimate,” *Libertarian Party*, 992 F.2d at 371. Such an interest more than justifies any burden on the associational rights of Green Party members imposed by section 301.

Two cases relied upon by the Green Party illustrate that the state’s ability to regulate political parties is far from limitless. *Eu* involved a statute that prohibited the governing bodies of political parties from endorsing candidates in their parties’ primaries. *Eu*, 489 U.S. at 216. The Supreme Court found that such a restriction “suffocates” the associational rights of a party and its members. *Id.* at 224. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court struck down a statute that prohibited a political party from allowing independent voters to participate in its primary. *Id.* at 210-11. As the Court would later point out in *Timmons*, *Eu* and *Tashjian* both involved regulation of political parties’ “internal affairs and core associational activities.” *Timmons*, 117 S.Ct. at 1370. By contrast, like the ban on fusion candidacies¹⁰ at issue in *Timmons*, the

⁹ This is so despite the Green Party’s contention that its decertification as an official party will not simply cost the party its ballot access, but also its right to obtain funds via contributions made by supporters’ through their state income tax returns pursuant to 36 M.R.S.A. § 5283, and the control of the “Green Party” designation. The Green Party advances no separate argument as to how these effects implicate the constitutional rights at issue. As to the former, I am not aware of any sense in which a political party’s associational rights, or the right to vote, are compromised by the loss of the so-called check-off. As to the latter, the Secretary of State aptly points out that even the major political parties are notoriously unable to control who wins their primaries and thus who obtains the official designation as their standard-bearers.

¹⁰ “Fusion” is “the electoral support of a single set of candidates by two or more parties.” *Timmons*, 117 S.Ct. at 1367 n.1.

restriction at issue here in no way regulates the organization and development of political parties. *See id.* at 1371. Indeed, by providing a reasonable vehicle for a new political party to attain official status, and thereafter to maintain such status by receiving at least 5 percent of the vote in the most broad-based race on the statewide ballot every two years, Maine has created a system that “implicitly recognizes the potential fluidity of American political life” and thus one that comports with the requirements of the Constitution. *Jenness v. Fortson*, 403 U.S. 431, 439-40 (1971).

This case sounds the same broad theme so recently heard in *Timmons*, where the Eight Circuit had decried a regulatory scheme that forced members of an emerging political party to make a “no-win choice” between voting for a candidate with no real chance of victory, voting for a candidate of another party, or not participating altogether. *Timmons*, 117 S.Ct. at 1371. The Supreme Court found nothing constitutionally significant about such a problem, and rejected the lower court’s concern that “without fusion-based alliances, minor parties cannot thrive.” *Id.* (dismissing such a view as “a predictive judgment which is by no means self-evident.”) Here, too, the challenged statute puts emerging political parties in the position of waging an uphill struggle against their firmly entrenched counterparts, and can have the effect of forcing members of such parties to make a difficult choice when voting in a presidential election. Whether or not such public policy is ultimately conducive to healthy politics in a pluralistic society, it is not precluded by the Constitution. As even Justice Stevens, joined by Justices Souter and Ginsberg, conceded in their vigorous *Timmons* dissent, “[i]f the State wants to make it more difficult for any group to achieve the legal status of being a political party, it can do so within reason and still not run up against the First Amendment.” *Id.* at 1378 (Stevens, J. dissenting).

IV. Conclusion

For the foregoing reasons, I recommend that the motion of the Secretary of State for summary judgment be **GRANTED** and that the motion for summary judgment of the Green Party be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of December, 1997.

*David M. Cohen
United States Magistrate Judge*