

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

KENNETH BLOCK; MODERATE PARTY OF :
RHODE ISLAND; and MODERATE PARTY OF :
RI PAC, :

Plaintiffs :

v. :

C.A. No. 09-047-S

A. RALPH MOLLIS, Secretary of State of the :
State of Rhode Island, in his official capacity; :
ROBERT KANDO, Executive Director of the :
Rhode Island Board of Elections, in his official :
capacity; and PATRICK LYNCH, Attorney :
General of the State of Rhode Island, in his official :
capacity, :

Defendants :

PLAINTIFFS' TRIAL MEMORANDUM

Introduction

Plaintiffs Kenneth Block ("Block"), the Moderate Party of Rhode Island (the "Moderate Party"), and the Moderate Party of RI PAC (the "PAC") (sometimes collectively, "Plaintiffs") submit this memorandum in support of their claims to be made at trial in connection with their requests for injunctive and declaratory relief against Defendants A. Ralph Mollis, Secretary of State of the State of Rhode Island; Robert Kando, Executive Director of the Rhode Island Board of Elections; and Patrick Lynch, Attorney General of the State of Rhode Island (sometimes collectively, "Defendants").

In sum, Plaintiffs seek inclusion on the statewide ballot in 2010 as a recognized political party in order to compete and participate effectively in that year's general election. To do so under current law, however, they must amass enough qualified signatures to meet Rhode Island's

requirement that a prospective political party submit signatures equal to five percent (5%) of the total number of voters who voted for president or governor in the preceding general election. That percentage represents the highest such threshold in the nation. Moreover, Plaintiffs desire to start gathering petition signatures as soon as possible in light of the daunting task and the uncertain bureaucratic journey that they face. But, under Rhode Island law, they are currently prevented from doing so until January 1, 2010. Because there is no justifiable basis for the high 5% threshold or for an arbitrary ban on signature collection before January 1, and because both barriers are in direct contravention of Plaintiffs' constitutional rights of free speech, association, access to the ballot and due process, this Court should find for Plaintiffs at trial and should grant the relief requested in their Verified Complaint.

Factual Background

The facts to be offered by Plaintiffs in support of their claims for injunctive and declaratory relief will be developed through live testimony and the presentation of other evidence at a bench trial currently scheduled to commence on April 30, 2009. Plaintiffs currently anticipate presenting live testimony from Block, a founder and representative of the Moderate Party. Plaintiffs have also supplemented the factual record, in accordance with prior discussions with this Court, through the submission of the appendices to this memorandum, which reflect the current status of other ballot access laws throughout the United States. Those appendices are as follows:

- Attachment A is a compilation of the party petition signature requirements in all 50 states. It also compares all such state requirements (percentage-based and numerical) to voter turnout in those states in 2008.
- Attachment B is a compilation of the party petition start dates (if any) in all 50 states.
- Attachment C is a graph that "normalizes" the signature requirements for comparative purposes by showing those requirements as a percentage of total voters for president

in 2008. It also indicates the number of months available to collect the required signatures, so that both relevant requirements are depicted simultaneously, showing how Rhode Island compares to other states cumulatively.

This data is intended to provide this Court with a comparative basis and a context in which to judge the reasonableness of the barriers to entry present for third political parties in Rhode Island.

The Moderate Party desires to become an officially recognized political party under the laws of the State of Rhode Island as soon as possible, in order to enjoy the benefits of such recognition and with a view towards engaging in political activity in the 2010 general election. Specifically, it desires to nominate candidates for statewide and/or legislative office, and to have those candidates appear on the statewide ballot as Moderate Party candidates. The Moderate Party already has a demonstrated history of engaging in political activity relating to the 2008 general election in Rhode Island. It endorsed multiple legislative candidates in the 2008 election. It has published a platform, issues press releases, and maintains a web site that was visited approximately 5,000 times during the 2008 election cycle. More than five hundred (500) volunteers or other interested parties have registered through the web site, and regularly receive newsletters on other information.¹ The Moderate Party is associated with an active PAC, through which it engages in fund-raising activities, and it makes decisions on political issues through a steering committee of affiliated individuals.

¹ The State has repeatedly focused on whether or not the Moderate Party has "members." However, as an unincorporated association of like-minded individuals, who cannot yet achieve formal party recognition or status, the Moderate Party is unable to confer formal "membership" status on anyone. Therefore, this designation is ultimately irrelevant, not only to the State's standing argument, but to the question of constitutionality presented by this lawsuit. Having said that, the Moderate Party respectfully submits that it speaks on behalf of a sufficient number of involved and interested individuals, to be described in and supported by Block's testimony at trial, that it can satisfy any standing requirements associated with the claims made in this case.

Organizations cannot become recognized political parties in Rhode Island other than by satisfying the requirements of Rhode Island General Laws § 17-1-2(9). Unless the organization nominated a candidate for president or governor in the prior general election who received at least five percent (5%) of the entire vote for that office, a prospective new party must resort to the petition process established by Rhode Island General Laws § 17-1-2(9). That section flatly prohibits the collection of petition signatures before January 1 of the year of the election in question. See R.I. Gen. Laws § 17-1-2(9) (“All the signatures must be obtained no earlier than January 1 of the year in which the political organization desires to place a candidate or candidates on any ballot as a ‘party’ candidate.”).

Plaintiffs are prepared to commence collecting signatures and addresses now in order to qualify as a political party under applicable Rhode Island law as soon as possible. If the 5% threshold is not lowered, they estimate that they will need to collect nearly 25,000 qualified signatures in order to achieve such recognition. However, under current law, they must wait until January 1, 2010 to do so, and any efforts they might undertake prior to that would bear no tangible or legally competent results. Hence, Plaintiffs are placed at a substantial logistical and financial disadvantage as compared to recognized political parties. The ultimate result is a suppressed number of recognized political parties, candidates on the ballot, and voter choices.

Standing

Standing is, of course, a necessary prerequisite in any Federal constitutional case. Oseidacz v. City of Cranston, 414 F.3d 136, 139 (1st Cir. 2005). In Lujan v. Defenders of Wildlife, the Supreme Court delineated the three essential elements for constitutional standing.

504 U.S. 555, 560-61 (1992). Accordingly, Plaintiffs must ultimately show:

- (1) an invasion of a legally protected interest (injury) that is:
 - (a) concrete and particularized; and
 - (b) actual or imminent; and
- (2) a causal connection between the injury and the Defendants' conduct;
- (3) that is likely redressable by the Court.

See id.

Plaintiffs will prove ample facts at trial to demonstrate that they have standing to bring the instant claims. They desire to become an officially recognized political party for the 2010 general election and beyond, and they want to start that process now. Along with official recognition, Plaintiffs also wish to engage in political activity and nominate candidates to appear on the ballot. They face a difficult burden in having to collect nearly 25,000 valid signatures, and in having to wait several more months to collect those signatures.² They are also burdened by their diminished ability to recruit candidates, engage in fund-raising, and build a brand. As compared with their officially recognized competitors, they are heavily restricted in what they can collect from donors as well as what they can contribute to candidates. Plaintiffs' history of political activity demonstrates that their future aims are not merely speculative. Furthermore, Plaintiffs' injuries are caused by R.I. General Law § 17-1-2-(9), as enforced by Defendants. Their alleged injuries are clearly redressable by the prayed-for injunctive relief.

It should also be noted that Plaintiffs in ballot access cases have standing even when they have not yet made any attempt to comply with the challenged statute. See Libertarian Party of Ky. v. Ehrler, 776 F. Supp. 1200, 1202-03 (E.D. Ky. 1991) (citing Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (Socialist Labor Party had standing to challenge Ohio's

² Plaintiffs need only show a burden, not an impossibility, to prevail in this case. See infra, pp. 6-7.

restrictions on minor party access to election ballot, including petition signature requirement, even though plaintiff had not filed any petition signatures); Stevenson v. State Bd. of Elections, 794 F.2d 1176 (7th Cir. 1986) (independent presidential candidate had standing to challenge Illinois' early filing deadline even though he did not submit any petition signatures); Rainbow Coalition of Okla. v. Okla. State Election Bd., 844 F.2d 740 (10th Cir. 1988) (minority parties who contested Oklahoma's petition requirements and filing deadline for third parties had standing, even though they had not attempted to comply with statutes)).

In sum, Plaintiffs will prove at trial a particularized, imminent injury that is traceable to the Defendants and redressable by this Court. Any standing requirements will thus be satisfied.

Standard of Review

The U.S. Supreme Court in Anderson v. Celebrezze, 460 U.S. 780 (1983), set forth the analysis to be employed in considering the constitutionality of state election laws and their impact on the fundamental rights of political parties, candidates and voters.

[A court] 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.

Anderson, 460 U.S. at 789. This test is a special balancing test, or sliding scale, in which the degree of scrutiny varies with the "extent of the asserted injury." Green Party of Ark. v. Priest, 159 F.Supp.2d 1140, 1143 (E.D. Ark. 2001).

At one end of that sliding scale, if the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick v. Takushi, 504

U.S. 428, 434 (1992) (quoting Anderson, 460 U.S. at 788)). Where, however, First and Fourteenth Amendment rights “are subjected to ‘severe’ restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” Burdick, 504 U.S. at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)). Hence, in order to apply the relevant standard, this Court must first assess the severity of the burdens imposed on Plaintiffs by the challenged statutory scheme and then consider the State's purported justifications for those requirements.

Analysis

A. Fundamental Rights Are At Stake

The U.S. Supreme Court has specifically held that fundamental rights of association and voting extend to political parties:

The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that “only 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 v. Rhodes, 393 U.S. 23, 31 (1968) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); see also Norman v. Reed, 502 U.S. 279, 288 (1992) (“For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties.”). Hence, constitutional rights of the highest order are at stake in the political process and where access to the ballot is at issue.

B. The Burden On Plaintiffs Is Severe

Here, the burden on Plaintiffs and their exercise of those fundamental rights is severe and meaningful. The requirement that a prospective political party collect signatures equaling five percent (5%) of the vote from the prior election – in this case, amounting to nearly 25,000 valid signatures – is a high threshold for any new party to achieve.³ The sheer number of signatures is challenging, and the time restraint makes it moreso. No organization has ever qualified by petition under the Rhode Island scheme and it has been rare throughout American history for any organization to satisfy a 5% petition requirement.⁴

This high barrier, however, is not the only obstacle that prospective political parties in Rhode Island must overcome. In addition, Rhode Island law does not even permit Plaintiffs to begin collecting signatures until January 1, 2010. Plaintiffs are ready, willing and able to do so now, and indeed want to start soon because of the daunting nature of the task at hand.⁵ Yet, they are completely prohibited from collecting any signatures until January 1, 2010, with no clear basis for that artificial time constraint. In short, they are barred from exercising their rights as a political party altogether in 2009, and must wait on the sidelines while the already tough task they face gets harder as the days go by.

³ As a practical matter, far more signatures will be needed to compensate for those that are rejected because they are deemed invalid by boards of canvassers. Even the State concedes that there can be a high percentage of disqualification when the signatures are reviewed at both state and municipal levels. Moreover, the high turnout in the 2008 presidential election makes the 5% threshold that much more difficult for Plaintiffs to satisfy for 2010. Taking all those factors into account, perhaps as many as 40,000 signatures will need to be actually collected to be realistically successful.

⁴ Federal courts do consider historical experience when evaluating the constitutionality of state election laws. See Storer v Brown, 415 U.S. 724, 742 (1974) (“Past experience will be a helpful, if not always an unerring, guide”).

⁵ A practical consequence of the January 1, 2010 start date is that it requires Plaintiffs to attempt collecting thousands of signatures in the middle of the New England winter—hardly the ideal time. This seasonal timing of the start date compounds the difficulty of successfully completing the petition process. Cf. Citizens to Establish a Reform Party in Ark. v. Priest, 970 F.Supp. 690, 698 (E.D. Ark. 1996) (“Even the influence of inclement weather is recognized as a rationale for finding early petition filing deadlines unconstitutional.”).

C. The State Has No Adequate Justification For The 5% Threshold

Plaintiffs assert that the 5% threshold places a severe burden upon fundamental constitutional rights of the highest order, thereby subjecting the statute to the strictest scrutiny on the sliding scale of judicial inquiry. But, however the burden is characterized, Defendants still must adequately justify it in light of their asserted interests.⁶ Even at the more tolerant end of the sliding scale, the 5% threshold is still unconstitutionally high because it burdens Plaintiffs far more than necessary to protect the State's interests.

The U.S. Supreme Court has held that a state has a “compelling” interest in “the stability of its political system.” Storer v. Brown, 415 U.S. 724, 736 (1974). Yet, the Court held more recently that this interest does not extend so far as to permit a state to protect existing parties from competition from independent or third-party candidates. Anderson, 460 U.S. at 801-02. Indeed, “[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms,” Id. at 802 (quoting Williams, 393 U.S. at 32). There is thus a crucial difference between a legitimate interest in avoiding “splintered parties and unrestrained factionalism,” Storer, 415 U.S. at 736, and an illegitimate interest “in protecting the two major political parties,” Anderson, 460 U.S. at 802; see also Nat'l Women's Political Caucus, Inc v. R.I. Lottery Comm'n, 609 F.Supp. 1403, 1418 (D.R.I. 1985) (“By conferring a fundraising benefit on the two major parties, the exception simply promotes their interests over those of their less popular opponents without serving any legally cognizable interest.”).

⁶ Defendants' heavy reliance on the purported rational basis standard from Gill v. Rhode Island, 933 F. Supp. 151, 160-61 (R.I. 1996), should not persuade this Court to avoid the “hard and realistic review” that it must undertake in this context. McClain v. Meyer, 637 F.2d 1159, 1163 (8th Cir. 1980). Gill is hardly dispositive here for a number of reasons, not least of which is that the petition process at issue here was not at issue there because it did not exist at that time. Defendants' repeated assertions that the challenged statute was “upheld” in Gill are misleading because Plaintiffs here do not challenge the 5% threshold for party recognition by prior gubernatorial vote. See Gill, 933 F.Supp. at 160-61. The petition process at issue here is an altogether different animal.

The Supreme Court has also recognized that there is an “important” state interest in “avoiding confusion, deception, and even frustration of the democratic process.” Jeness v. Fortson, 403 U.S. 431, 442 (1971). This appears to be the State’s primary asserted interest in this case. (See Defs.’ Mot. J. Pleadings 9.) To this end, states may require “some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot.” Jeness, 403 U.S. at 442.⁷ To be clear, though, requiring the oxymoronic “significant modicum” is not the actual state interest. Rather, it is a means to an end. That end – which is the actual state interest – is to avoid “confusion, frustration, and even deception of the democratic process.” Id. In defending this interest, Defendants must show that the burdens imposed by the statute necessarily protect against confusion, frustration, and deception in such a way as to justify the infringement on Plaintiffs’ fundamental rights.

Defendants’ purported concern with ballot clutter is not a new argument in ballot access cases. Such an argument failed, for example, in the Williams case, where the Supreme Court struck down Ohio election laws that suppressed new political parties. The Supreme Court explained:

Finally Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular will could be frustrated. But the experience of many states, including Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. It is true that the existence of multitudinous fragmentary groups might justify some regulatory control but in Ohio at the present time this danger seems to us no more than “theoretically imaginable.” No such remote

⁷ Defendants inappropriately extrapolate this statement to cover not just ballot placement, but all of the “rights and privileges of a lawful ‘political party’.” (See Defs.’ Mot. J. Pleadings 9.) Jeness did not say as much, and the Plaintiffs here want not just to gain ballot access, but also to accrue all of the benefits attendant upon official parties.

danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case.

393 U.S. at 33 (also noting that 42 states had signature requirements of one percent of the electorate or less); see also McLain, 637 F.2d at 1163-64 (“The Supreme Court has spoken on at least one occasion of 1% of the vote for governor as ‘within the outer boundaries of support the State may require before according political parties ballot position’”) (quoting Am. Party of Texas v. White, 415 U.S. 767, 783 (1974)).⁸ Similarly, in this case, concerns that are no more than “theoretically imaginable” are simply insufficient to justify the challenged restriction, particularly in light of the resulting burden.

Defendants’ expressed concern with ballot clutter at a lower threshold is not even “theoretically imaginable” because it is palpably false when one considers the ease by which independent candidates can secure a place on the ballot under Rhode Island law.⁹ In Rhode Island, only 1,000 nomination signatures are needed to run for governor, United States senator, or presidential elector. See R.I. Gen. Laws § 17-14-7. Less are required for the U.S. House of Representatives. See id. Some lesser offices require as few as ten (10) signatures. See id. If so few signatures are required for independent candidates to secure a place on the ballot, then Defendants cannot credibly argue that there is some risk that the ballot would be further “cluttered” or “confused” by the introduction of a third political party. Defendants have no evidence that shows Rhode Island’s ease of ballot access for independent candidates leading to any outbreak of election chaos.

⁸ It is worth noting that the decision in White, 415 U.S. 767 (1974) (1% as within the outer boundary), was decided after Jenness, 403 U.S. 431 (1971) (5%).

⁹ A relatively easy independent candidate path to the ballot does not excuse an unconstitutional path for political parties. See discussion infra pp. 19-21.

Not only can Defendants present absolutely no evidence to demonstrate that ballot confusion would arise in Rhode Island at some lower threshold, the requirements of other states disproves any such hypothesis. Rhode Island is, after all, the most difficult state in the nation in which to qualify by petition when considering the combination of the percentage threshold and the time window restrictions. See infra; see also Attachments A-C. Most states have petition signature requirements that are far lower than Rhode Island's and there is no palpable evidence in the case law cited here of any demonstrable ballot clutter or chaos in those jurisdictions.

In defending the 5% threshold, the Defendants rely primarily on Jenness, 403 U.S. 431. (See Defs.' Mot. J. Pleadings 11-13.) To clarify, the Supreme Court in Jenness confronted a challenge to a Georgia law requiring a nonparty candidate to file a petition signed by 5% of eligible electors in order to be listed on the ballot. 403 U.S. at 433-34. That is, Jenness did not address a petition process for a party to gain official recognition. Even if the Jenness holding had covered the recognition of parties, the 5% threshold upheld in that case could not be dispositive because subsequent cases clearly establish that there is no hard and fast rule or litmus test in this context.¹⁰

The Defendants' reliance on Gill is similarly misplaced. Unlike Jenness, Gill did address party recognition requirements. However, the challenge in Gill did not include a petition process challenge, because none existed at that time. Moreover, it is far from clear that the correct standard of review was applied by the Court in Gill, and the court's reasoning in that case focused solely on ballot access and not the right of a party to gain recognition for other purposes

¹⁰ Defendants' further reliance on Libertarian Party of Maine v. Diamond, 992 F.2d 365 (1st Cir. 1993), completely misses the point. That case was about the difficulty under Maine law for a candidate to gain placement on the primary ballot of a party that was already officially recognized. The Libertarian Party was *already recognized* before the case was filed and, as such, that case is only tangentially related to the instant case where the Moderate Party seeks initial and official recognition.

such as campaign financing or the ability to be a party in odd-numbered years. Finally, as a trial court decision, Gill is not necessarily binding on this Court, and, as a case brought by pro se plaintiffs, it lacks certain clarity in its outcome and its guidance.¹¹

Notwithstanding Jeness and Gill, the plain reality is that Rhode Island has a historical lack of ballot clutter despite the very low signature requirements for independent candidates. See Perez –Guzman v. Gracia, 346 F.3d 229, 245 (1st Cir. 2003) (“In considering whether a ballot access requirements is narrowly drawn to advance the state’s interest...the mechanisms that the state already has in place serve as benchmarks.”). In addition, there is no indication of any ballot confusion or problems in states with easier requirements. Therefore, Defendants’ central argument that the State’s interests justify the 5% threshold completely fails. Indeed, Defendants’ argument falls so far short that they cannot use the 5% threshold to justify infringing on Plaintiffs constitutional rights regardless of how one characterizes Plaintiffs’ burden or where on the Anderson sliding scale one weighs the factors.

D. The State Has No Adequate Justification For The January 1 Start Date

Defendants also lack an adequate justification for the arbitrary January 1 start date. As with the 5% threshold, Plaintiffs fundamental rights are severely burdened, calling for the strictest scrutiny along the Anderson sliding scale.

The specific interest that the State asserts on this point is that “[t]he signatures (names) and addresses of registered qualified voters must be good and fresh, not old and stale.” (Defs.’ Mot. J. Pleadings 23.) Defendants cite absolutely no authority for this novel proposition and it cannot withstand scrutiny. First of all, one need not fear a party petition tainted by invalid

¹¹ Judge Boyle repeatedly criticized the lack of clarity in the arguments advanced by the pro se plaintiffs in Gill. E.g., 933 F.Supp. at 157 (“It is not entirely clear from the pleadings and arguments upon what grounds the plaintiffs premise their argument.”).

signatures because it is precisely the role of municipal boards of canvassers to check the validity of those signatures. Hence, the process is specifically designed to guard against this perceived evil. Second, if anything, it would seem that creating a longer time window would ease any perceived administrative burden on state or municipal officials because petitions could be certified well in advance of any deadline and perhaps even on a rolling basis.¹² Indeed, the limited case law on time constraints in this area suggests that the focus is most often on the closing date for submission of petitions -- wherein a state asserts that it needs time to certify signatures and prepare a ballot -- and not on the opening date of the time window. See, e.g., McClain v. Meier, 637 F.2d 1159 (8th Cir. 1980) (“North Dakota’s filing deadline of June 1, more than ninety days before the primary election and more than one hundred fifty days before the general election is particularly troublesome.”). Limitations on the starting date for signature collection are unusual. See infra; see also Attachment B.

Furthermore, Defendants’ preoccupation with “stale” petition signatures confuses the rights of individuals to form a party with the rights of candidates to obtain ballot access and the need to ensure the participation of authorized voters on Election Day. This is perhaps understandable given the often close relationship between parties, candidates and elections, but the accuracy and currency of voter registration on Election Day is an entirely separate matter from confirming the validity of petition signatures submitted on behalf of a party -- so that the party can start enjoying the attendant benefits of recognition at that time. Again, ballot access

¹² Nothing prevents boards of canvassers from convening as needed to certify signatures as they come in. In fact, boards would have a responsibility to convene on a reasonable basis to do so; otherwise they could defeat the relief sought herein by taking no action on properly submitted petitions until June 1. The State appears to concede that this approach would be possible, while also acknowledging that it has never undertaken this particular process before, thereby leading to some risk of uncertainty and delay.

for nominated candidates is only one attribute of official party recognition. Other aspects of recognition are important long before the day of the election.

In any event, it is arbitrary for the State to declare that signatures are not likely to be stale if collected on January 2 (about 10 months before Election Day) but much more likely to be stale if collected the previous year (perhaps no more than 11 months before Election Day). As it is now, the State already accepts “stale” indications of support when it provides party recognition to a an established party whose nominee polls at least five percent of the vote for president or governor in an election held 24 months previously. See R.I. Gen Laws § 17-1-2(9).

Finally, by refusing to allow signatures before January 1 of even-numbered years, the current Rhode Island scheme operates to ban completely the formation or recognition of a political party in any odd-numbered year. A similar situation was challenged under Arkansas law and found unconstitutional in Green Party of Arkansas v. Priest, 159 F.Supp.2d 1140 (E.D. Ark. 2001), where the plaintiffs sought recognition to participate in a special election in an odd-numbered year. Arkansas allowed petitions by parties seeking official recognition to be filed only in even-numbered, general election years. Id. at 1142. Much like Rhode Island currently, the organization could not begin collecting signatures until 150 days before. See id. The federal district court concluded:

The burdens imposed by Arkansas’s party recognition scheme are sufficiently severe as to require the application of strict scrutiny. Indeed, these burdens make it impossible for new and emerging political parties to gain recognition in odd-numbered years in time to participate in any special elections that might occur. As a result, Arkansas’s party recognition scheme must be narrowly drawn to advance a compelling state interest.

Id. at 1144. Despite the Arkansas Secretary of State invoking the talismanic “significant modicum of support” language, the court found the scheme unconstitutional under strict scrutiny,

noted that “[s]uch arbitrary restrictions on political association fail even the test of rationality” and held that no compelling or even legitimate state interest was served. Id.

In sum, making Plaintiffs sit on the sidelines for a full calendar year before allowing them to begin the hard work of meeting the required threshold is simply irrelevant to avoiding “confusion, deception, and even frustration of the democratic process.” Jeness, 403 U.S. at 442.¹³ Meeting any appropriate threshold would be sufficient alone to demonstrate a “significant modicum of support” without imposing artificial or draconian time restrictions that make that threshold even harder to achieve. Defendant’s novel concern of guarding against “stale” signatures cannot withstand scrutiny and interferes with the rights of political organizations to obtain recognition in odd-numbered years. Because Defendants cannot provide an adequate justification for severely burdening and otherwise infringing on Plaintiffs’ fundamental constitutional rights, the Court should enjoin enforcement of the January 1 start date.

E. The State Also Cannot Justify The Threshold And The Start Date As They Operate In Tandem

The arguments above explain how the 5% threshold and the January 1 start date are each unconstitutional when considered individually. The analysis, however, need not end there because Federal courts also examine all of the relevant factors as they relate to each other. See Anderson, 460 U.S. at 789. The Supreme Court has explained:

Constitutional challenges to specific provisions of a State’s election laws therefore cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions... The results of this evaluation will not be automatic; as we have recognized there is no substitute for the hard judgments that must be made.

¹³ While there is no reason why prospective parties could not start collecting signatures earlier than January 1 of the election year at issue, Plaintiffs do not argue that signatures collected on or before November 4, 2008 (the last Election Day) should be accepted. Plaintiffs do submit that there is no rational basis for eliminating the entire calendar year between election cycles, and respectfully submit that any signatures collected after the prior election (or at least after January 1 of the odd-numbered year) should be valid.

Id. (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

Numerous factors, often intertwining or interdependent, can influence outcomes concerning the various criteria and thresholds governing political party recognition. Compare Jenness, 403 U.S. at 442 (upholding a 5% requirement) with McLain, 637 F.2d at 1163-64 (disapproving a 3.3% requirement). There are no clear guidelines as to the percentage threshold because it is not the only factor that courts scrutinize to determine constitutionality. Rather, “the facial validity of a signature requirement is but one indication of the constitutionality of a state’s access provisions ... The time at which nominating petitions are filed can have an equal if not greater impact on the viability of third party candidacy.” McLain, 637 F.2d at 1164 (emphasis added). Just last year the U.S. Supreme Court found a 37-day window acceptable, but only where 500 signatures in a New York assembly district were required. N.Y. State Bd. of Elections v. Torres, 128 S.Ct. 791, 798 (2008). Another example is Mandel v. Bradley, where the U.S. Supreme Court vacated and remanded a district court ruling which suggested that a 21-day period was not insufficient to meet a 2% threshold. 432 U.S. 173, 177 (1977) (“This limited time enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate.”).¹⁴

While it may be difficult to glean or discern a clear rubric from these many variables, the Court need not struggle in this case. Rather, this Court can simply refer to the comparative data

¹⁴ Defendants have assembled a variety of cases to suggest mathematical comparisons to the Rhode Island time window and signature requirements. (See Defs.’ Mot. J. Pleadings 18-21.) The burden on Plaintiffs cannot, however, be so easily reduced to case comparisons with a common variable of signatures per day. The suggestion in Storer v. Brown that 325,000 signatures in 24 days would not be impossible was dicta. Many subsequent cases reflexively refer back to Storer but the root statement was only dicta. Moreover, this Court must consider undue burden (justification), not lack of impossibility.

collected in Attachments A-C hereto, of which it can take judicial notice, and can conclude that the cumulative ballot-access requirements in Rhode Island for political parties are among the most severe in the nation – if not the single most severe. Rhode Island is one of only four states that have a 5% threshold (no state is higher and most are far lower), and none of the other three states have such a restrictive time window. See Me. Rev. Stat. Ann. tit. 21-A, § 303 (2008) (5% but no starting date); Minn. Stat. Ann. § 200.2 (West 2008) (5% but no starting date); Okla. Stat. Tit. 26, § 1-108 (2008) (5% over a one-year window starting whenever the party chooses, so long as petitions are not circulated between May 1 and November 15 of any even-numbered year). Rhode Island also appears to be one of only five states with a firm starting date, and none of the other four have such a high percentage threshold. See Idaho Code Ann. § 34-501(c) (2008) (August 30, 2009, and only 2%); Tex. Elec. Code Ann. §§ 181.005-.006 (Vernon 2008) (after party’s precinct conventions and only 1%, including those who attended the party precinct conventions); Wis. Stat. § 5.62 (2008) (January 1, 2010, but only 10,000 signatures); Wyo. Stat. Ann. § 22-4-402 (2008) (April 1, 2009 and 2%).

Finally, when evaluating the actual number of required signatures as against the votes cast for president in the 2008 election, the picture becomes even cleaner.¹⁵ Rhode Island is clearly the most difficult state in the nation in which to qualify by petition. See Attachment C. Federal courts do examine this type of comparative data when considering the constitutional significance of burdens imposed by a given state’s statutory scheme. See, e.g., Green Party of Ark. v. Daniels, 445 F.Supp.2d 1056, 1060 (E.D. Ark. 2006) (finding that “Arkansas is one of three states that has a mandatory petition for a new party in excess of two percent of the last gubernatorial vote”); see also Libertarian Party of Okla. v. Okla. State Election Bd., 593 F.Supp.

¹⁵ Because some states have percentage-based requirements and others have specific numerical requirements, it is necessary to use this objective methodology to compare all such states on comparable terms. See Attachments A, C.

118, 121-22 (W.D. Okla. 1984) (enjoining enforcement of a 5% threshold with a 90 day window, noting that the combination was “more severe than any other state”). Therefore, even if the 5% threshold and the January 1 start date could each survive scrutiny when examined individually (which they cannot), they cannot pass muster when their compounding effects are considered together. Without adequate justification, they operate in tandem to aggravate the severe burden upon Plaintiffs’ fundamental constitutional rights.

F. The Ability Of Candidates To Run As Independents Does Not Cure The Constitutional Deficiencies Of The Petition Process

Relative leniency in independent candidate access does not compensate for overly restrictive party requirements. McLain, 637 F.2d at 1165. “A candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the election process.” Id. (striking down a 15,000 (3.3%) signature party candidate petition requirement even though only 300 signatures were needed to qualify as an independent candidate); see also Storer, 415 U.S. at 745 (“the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other”). Plaintiffs wish to achieve not just ballot access for their candidates, but also all of the other benefits that accompany official party recognition,¹⁶ particularly a level playing field in

¹⁶ For example, registered voters can formally affiliate with a recognized party. See R.I. Gen. Laws § 17-9.1-23. The importance of such lists is evident by numerous cases that have struck down state laws interfering with affiliation on and access to voter lists. E.g., Green Party of N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411 (2d Cir. 2004) (state law removing a political party’s name from voter registration forms after it failed to demonstrate required election performance was a severe burden not justified by state’s asserted interests in restricting access to primaries and preventing voter confusion).

campaign financing.¹⁷ Accordingly, the independent candidate path is not a viable alternative in this case even if it were a constitutionally permissible consideration.

An illustrative case is Citizens to Establish a Reform Party in Ark. v. Priest, 970 F.Supp. 690, 699 (E.D. Ark. 1996), where Arkansas provided a more lenient path for independent candidates than for new political parties. The court concluded:

First, the Arkansas legislature has arbitrarily chosen to apply both the same standard and a different standard for proponents who advance independent candidates in contrast to proponents who advance a new political party. On the one hand, both can demonstrate a satisfactory showing of support with a 3% signature requirement. On the other hand, an independent candidate for statewide office may, in the alternative, meet the requirement with 10,000 signatures. **Such an arbitrary classification makes it unreasonably difficult for proponents to advance new political parties while allowing independent candidates to be placed on the ballot with even less public support.** Second, as discussed previously, ballot access and voters' interests in the political process constitute fundamental rights which this Court must review with the strictness [sic] of scrutiny. Third, the State cannot advance any compelling interest or rational basis supporting this discriminatory and arbitrary classification.

Id. at 698-99 (emphasis added). The court further explained that “the finite number of signatures that should be allowed for the creation of a new political party should be the same as the finite number alternative established by the Arkansas Legislature, given the common fundamental rights involved in both instances.” Id. at 699.

This issue arose again a decade later before the same court in Green Party of Arkansas v. Daniels, 445 F.Supp.2d 1056 (E.D. Ark. 2006). The plaintiffs there challenged the “discrepancy between the number of signatures (24,741) required to certify a new political party under Ark. Code Ann. § 7-7-205 and the number of signatures (10,000) required to recognize an

¹⁷ For example, candidates may receive only \$1,000 from a political action committee (PAC) but may receive \$25,000 cash and unlimited in-kind contributions from party committees. See R.I. Gen. Laws § 17-25-10.1(a), (e). Moreover, PACs may only contribute an aggregate of \$25,000 to all candidates combined, where no aggregate restriction applies to party committees. See id. § 17-25-10.1(a). Recognized parties may also receive up to \$10,000 per source for organizational and party building activities. Id. § 17-25-10.1(a)(2). These disparities are also evidenced by Defendant Kando's own 2009 Campaign Finance Manual. See Attachment D, available at <http://www.elections.state.ri.us/finance/>.

independent candidate under Ark. Code Ann. § 7-7-103.” Id. at 1058. The court concluded that “Arkansas’s three percent requirement in its party recognition scheme is not narrowly drawn to serve a compelling state interest. The 10,000 signature threshold is a sufficient modicum of support to serve the state’s interest in avoiding cluttered ballots...” and found that the statute violated associational rights under the First and Fourteenth Amendments. Id. at 1062-63.

These cases demonstrate that Rhode Island’s more lenient ballot qualification provisions for independent candidates do not excuse the State’s unconstitutional recognition process for political parties. Quite to the contrary, the State’s relatively lax independent candidate qualification procedures compel the conclusion that the current petition scheme is excessively burdensome without adequate justification.

Finally, Defendants oddly suggest that the Moderate Party suffers no harm by a lack of official recognition because its affiliated candidates can run as independents and have the words “Moderate Party” printed aside their names. (See Defs.’ Mot. J. Pleadings 27-28.)¹⁸ This argument further undercuts Defendants’ purported interest in avoiding ballot clutter and confusion. Indeed, if the Moderate Party were not officially recognized, there is nothing that would stop multiple candidates competing for the same office to each place the phrase “Moderate Party” aside their names. This would surely increase, not decrease, voter confusion. As such, this proffered workaround to the unconstitutional petition process falls woefully short.

¹⁸ Defendants’ citation to R.I. General Law § 17-19-9.1 is also a useful reminder that such independent candidates would suffer the additional harm of being placed in random position “following the listing of the political party candidates.” That is, the candidates of officially recognized parties enjoy first position on the ballot.

Conclusion

The high 5% threshold and the January 1 start date found in Rhode Island General Laws § 17-1-2(9) establish the most challenging process for third-party ballot access in the nation. In doing so, the state impermissibly infringes upon Plaintiffs' fundamental constitutional rights. The overall effect is to suppress the ability of prospective political parties to gain official recognition and to compete in the political arena on a level playing field.

The State's asserted interests, legitimate as they may appear at first blush, do not justify the severe burdens created by the statute. Upon strict scrutiny, or even upon a less rigorous inquiry on the Anderson sliding scale, the asserted State interests are simply not advanced by the challenged statute in such a way that justifies the burden on Plaintiffs and other organizations seeking the full panoply of benefits attendant upon officially recognized parties. The 5% threshold and the January 1 start date, individually and as they operate in tandem, are therefore unconstitutional.

Respectfully submitted,

KENNETH BLOCK
MODERATE PARTY OF RHODE ISLAND
MODERATE PARTY OF RI PAC

By their Attorneys,

/s/ Mark W. Freel
Mark W. Freel, Esq. (# 4003)
Cooperating Attorney, Rhode Island Affiliate,
American Civil Liberties Union
EDWARDS ANGELL PALMER & DODGE, LLP
2800 Financial Plaza
Providence, RI 02903
(401) 274-9200
(401) 276-6611 (fax)

Dated: April 28, 2009

CERTIFICATE OF SERVICE

I certify that on the 28th day of April, 2009, I will electronically file the foregoing with the clerk of court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Thomas A. Palombo, Esq.
Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-440, Ext. 2296
Fax (401) 222-2995

/s/ Mark W. Freel _____

ATTACHMENT A

HOW A NEW, FULLY-QUALIFIED PARTY MAY BE RECOGNIZED, 2010 ELECTION

STATE	STATUTORY REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	% of PRES VOTE
Ala	3% of 2006 gub vote	17-6-22	37,513	1.79
Alas	3% of 2008 pres. vote	15.60.010(25) (reg.)	9,786	3.00
Az	1 & 1/3% of 2006 gub vote	16-801A	20,449	.89
Ark	number stated in law	7-1-101(1)	10,000	.92
Cal	1% of 2006 vote cast	elec. code 5100(b) (reg.)	88,991	.66
Colo	number stated in law	1-4-1303(b) (reg.)	1,000	.04
Ct	no procedure	---	---	--
Del	.05% of Dec. 2009 registration	Title 15, sec 3001 (reg)(est)	300	.07
Fla	just be organized	Title 9, 97.021(17) & 99.096	0	.00
Ga	1% of no. of reg. voters as of 2008	21-2-180	57,582	1.47
Hi	.1% of no. of reg. voters as of 2008	Title 2, 11-62	692	.15
Id	2% of 2008 pres. vote	34-501(1)(c)(D)	13,101	2.00
Il	no procedure	---	---	--
In	no procedure	---	---	--
Iowa	no procedure	---	---	--
Kan	2% of 2006 gub. vote	25-302a	16,994	1.38
Ky	no procedure	---	---	--
La	number stated in law	Title 18, sec. 441 (reg.)	1,000	.05
Me	5% of 2006 gub. vote	Title 21, sec. 303	27,544	3.77
Md	number stated in law	Art. 33, 4-102(b)	10,000	.38
Ma	1% of no. of reg. voters, Feb. 2010	Chap. 53, sec. 6 (est.)(reg.)	40,000	1.30
Mi	1% of 2006 gub. vote	168.685	38,024	.76
Mn	5% of 2008 vote cast	200.02(7)	145,519	5.00
Ms	just be organized	23-15-1059	0	.00
Mo	number stated in law	sec. 115.315	10,000	.34
Mt	number stated in law	13-10-601(2)	5,000	1.02
Neb	1% of 2006 gub. vote	32-526	5,921	.74
Nev	1% of 2008 US House vote	Sec. 293.1715.2(c)	9,083	.94
NH	3% of 2008 gub. vote	655:40	20,394	2.87
NJ	no procedure	---	---	--
NM	1/2 of 1% of 2008 gub. vote	1-7-2.A	4,151	.50
NY	no procedure	---	---	--
NC	2% of 2008 gub. vote	163-96(2)	85,379	1.98
ND	number stated in law	16.1-11-30	7,000	2.21
Oh	law void (<i>LP of Ohio v Blackwell</i>)	3517.01	Not set	.00
Ok	5% of 2008 pres. vote	Title 26, sec. 1-109	73,134	5.00
Ore	1.5% of 2006 gub. vote	Sec. 249.732	20,640	1.13
Pa	no procedure	---	---	--
RI	5% of 2008 pres. vote	17-12-16, 17-1-2(f)	23,589	5.00
SC	number stated in law	7-9-10	10,000	.52
SD	2.5% of 2006 gub. vote	12-7-1	8,389	2.20
Tn	2.5% of 2006 gub. vote	2-104(27)(b)	45,254	1.74
Tx	1% of 2006 gub. vote	Elec. code 181.005	43,991	.54
Ut	number stated in law	20-3-2.5	2,000	.21
Vt	be organized in at least 10 towns	Title 17, sec. 2313	20	.0+
Va	no procedure	---	---	--
Wa	no procedure	---	---	--
WV	no procedure	---	---	--
Wis	number stated in law	Title 2, sec. 8.20(4)	10,000	.34
Wy	2% of 2008 U.S. House vote	22-4-402(d)	4,981	1.96

This shows what a new party must do, to obtain recognition as a "Party." "Requirement" is the # of signatures or registrants needed. "%" means the requirement, divided by the number of votes cast for president in 2008. In some states, there is no procedure for a new group to turn itself into a "party" before an election. Such states are annotated "no procedure" above.

ATTACHMENT B

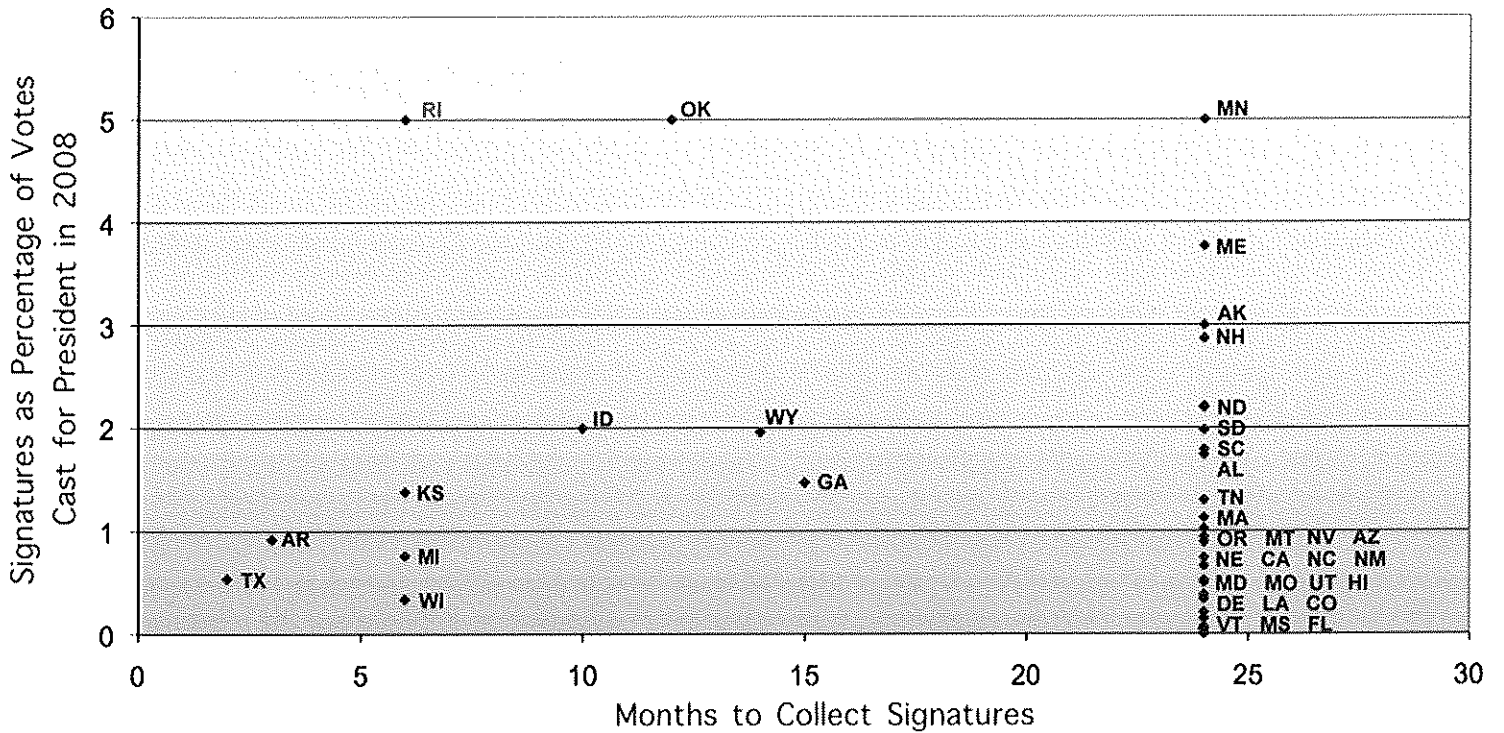
START DATES FOR NEW PARTIES TO QUALIFY FOR THE 2010 BALLOT

State	Start Date	Election Code Citation	Formula for Determining Date
Ala	anytime	17-8-2.1	no start date specified in the law
Alas	anytime	15.60.010(20)	no start date specified in the law
Az	anytime	16-803	no start date specified in the law
Ark	anytime	7-7-204	party picks its own 90 day period
Cal	anytime	Election code 5100	no start date specified in the law
Colo	anytime	1-4-1302(1)	no start date specified in the law
Ct	---	no procedure	---
Del	anytime	Title 15, §3001	no start date specified in the law
Fla	anytime	97.021(13)	no start date specified in the law
Ga	anytime	21-2-182	party picks its own 15 month period
Hi	anytime	11-62	no start date specified in the law
Id	Aug 31,2007	34-501(c)(H)	date named in law
Il	---	no procedure	---
In	---	no procedure	---
Iowa	---	no procedure	---
Kan	anytime	25-3602	party picks its own 180 day period
Ky	---	no procedure	---
La	anytime	Title 18, §441	no start date specified in the law
Me	anytime	Title 21A, §303.3	no start date specified in the law
Md	anytime	Art. 33, §4-102(b)(2)(ii)	party picks its own 2 year period
Ma	anytime	Ch. 50, §1	no start date specified for reg. drive
Mi	anytime	168.685	party picks its own 6 month period
Mn	anytime	200.02, subd. 7(b)	no start date specified in the law
Ms	anytime	23-1-81(c) (just be organized)	no start date specified in the law
Mo	anytime	115.329	no start date specified in the law
Mt	anytime	13-10-601(2)	no start date specified in the law
Neb	anytime	32-716	no start date specified in the law
Nev	anytime	293.1715.2(c)	no start date specified in the law
NH	anytime	655:40a	no start date specified in the law
NJ	---	no procedure	---
NM	anytime	1-7-4, 1-8-2, 1-15-3	no start date specified in the law
NY	---	no procedure	---
NC	anytime	163-96(2)	no start date specified in the law
ND	anytime	16.1-11-30	no start date specified in the law
Oh	anytime	3517.01	no start date specified in the law
Ok	anytime	1-108.2	party picks its own 1 year period
Ore	anytime	249.722(1)	no start date specified in the law
Pa	---	no procedure	---
RI	Jan 1, 2010	17-1-2(9)	date named in law
SC	anytime	7-9-10	no start date specified in the law
SD	anytime	12-5-1	no start date specified in the law
Tn	anytime	2-1-104(28)(B)	no start date specified in the law
Tx	Mar 2 2010	181.006(k)	day of the first primary
Ut	anytime	20A-8-103	no start day specified in the law
Vt	anytime	Title 17, §2313, 2318	no start date specified in the law
Va	---	no procedure	---
Wa	---	no procedure	---
WV	---	no procedure	---
Wis	Jan. 1, 2010	5.62	start date named in the law
Wy	Apr 1, 2009	22-4-402(e)	start date named in the law

Procedures listed above are to qualify new political parties for the ballot. All such listed procedures are petitions, except that they are registration drives in Alaska, California, Delaware, Louisiana, Massachusetts; and they are drives to build a party organization in Mississippi and Vermont. Some states have no procedure by which a group can become a qualified party, prior to any election; these states are annotated above "no procedure".

ATTACHMENT C

How Rhode Island Ballot Access Laws Compare to the Rest of the Country



ATTACHMENT D

SUMMARY CHART

ALLOWABLE AND PROHIBITED CONTRIBUTIONS

(All limits shown below are for a calendar year)

CONTRIBUTIONS FROM:	CONTRIBUTIONS RECEIVED:				
	Candidate	PAC	Political Party Committee	<u>Aggregate Annual Limits</u>	Political Party-Organizational & Party Building Activities Only
Individual/Candidate	\$1,000 (including in-kind)	\$1,000	\$1,000	\$10,000 (all Candidates, PACs & Party Committees)	\$10,000 (not counted towards aggregate limit)
PAC	\$1,000 (including in-kind)	\$1,000	\$1,000	\$25,000 (all Candidates, PACs & Party Committees)	\$10,000 (not counted towards aggregate limit)
Party Committee	\$25,000 (unlimited in-kind)	\$1,000	\$1,000		\$10,000 (not counted towards aggregate limit)
Corporations, Unions, Business Entities, Unregistered PACs	Prohibited	Prohibited	Prohibited		Prohibited

SUPPLEMENTAL INFORMATION

- Contributions of cash in excess of \$25 from a single source in the aggregate in a calendar year are prohibited.
- Anonymous contributions are prohibited.
- Contributions from an individual's dependent child are deemed contributions from the individual.
- There is no restriction on the amount of money a candidate may loan to his or her own campaign.
- Loans are counted as contributions until repaid.