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## Election SLAPPs: Effective at Suppressing Political Participation and Giving Anti-SLAPP Statutes the Slip

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# ELECTION SLAPPS: EFFECTIVE AT SUPPRESSING POLITICAL PARTICIPATION AND GIVING ANTI-SLAPP STATUTES THE SLIP

*Leah McGowan Kelly*

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## ELECTION SLAPPS: EFFECTIVE AT SUPPRESSING POLITICAL PARTICIPATION AND GIVING ANTI-SLAPP STATUTES THE SLIP

*Leah McGowan Kelly\**

### I. INTRODUCTION

Allowing the states to set finicky rules for ballot access in presidential elections places a special burden on independent candidates. Most states have established an intricate network of rules and procedures that independent candidates need to follow in order to get on the state's ballot for the presidential election. If a candidate manages to make it onto a state's ballot, most states also have a mechanism that allows almost anyone to challenge the process the candidate went through to get on the ballot. Citizens can challenge the candidate's nomination petition, and then appeal the decision on the challenge at several different levels. An independent candidate running for national office can become embroiled in simultaneous petition challenges, and appeals, throughout the country. The process consumes a candidate's precious resources during a critical time in the campaign. Nominees of the major parties do not face this potential labyrinth of litigation.

A SLAPP (Strategic Lawsuit Against Public Participation) is a lawsuit that typically has no merit, but is filed to prevent the defendant from participating in a political process.<sup>1</sup> The nuance and variance of nomination petition requirements, combined with the availability of private challenges to the petitions, lay fertile ground for Election SLAPPS. In the mid-1990's, many states enacted anti-SLAPP statutes.<sup>2</sup> These statutes are intended to curb the effects of SLAPPS.<sup>3</sup> Anti-SLAPP statutes provide a vehicle for early dismissal of frivolous suits that appear to have been filed for collateral political purposes.

When Ralph Nader ran for President in 2004, his political rivals forced his campaign to defend against 29 complaints, in 19 different jurisdictions, in the months leading up to the election.<sup>4</sup> He faced Election SLAPPS. The complaints had no merit, and were filed to stifle his political participation. The majority of the complaints challenged his nomination petitions in various states, and five of the complaints alleged violations of campaign finance laws.<sup>5</sup> Nader defeated most of the challenges to his nomination petition, and all of the challenges to his compliance with campaign finance laws, but his challengers succeeded in diverting

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1. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996).

2. *See id.* at 189.

3. *See id.*

4. *See Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 695, 698 (D.C. Cir. 2009).

5. *See id.* at 695.

his campaign resources and thwarting his efforts to get on the ballot in some states. When the dust of the 2004 race settled, Nader tried to litigate back. Eight years and two presidential elections after the shenanigans that gave rise to them, Ralph Nader's lawsuits over the use of coordinated, nation-wide ballot challenges to sabotage his 2004 Presidential campaign have finally been dismissed – without a hearing on the merits.<sup>6</sup> Despite years of litigation in various jurisdictions, the alleged conspiracy to drain Nader's campaign by filing frivolous lawsuits has escaped judicial examination, let alone judicial sanction, and, ironically, has received protection from Maine's anti-SLAPP statute.

A review of the coordinated, scattershot litigation launched against Nader in the 2004 presidential election shows how petition challenges, and appeals of those challenges, stifle the political participation of independent candidates in presidential elections, without advancing the state interest of maintaining the sanctity of the ballot. The success of these Election SLAPPS, which are usually only filed against candidates who have actually gathered the requisite support to compile a valid nomination petition, shows that states should eliminate the availability of private challenges to nomination petitions. In practice, the private challenge mechanism does not operate to enforce a state's nomination petition requirements. Instead, the mechanism is used as a weapon against viable candidates who have actually gathered enough legitimate support to threaten an opponent. Allowing private challenges to nomination petitions invites a political rival to sabotage an opponent's campaign by filing frivolous challenges.

An examination of Nader's efforts to seek judicial redress for the alleged misuse of the judicial system raises the issue of the utility of Maine's anti-SLAPP statute. When Nader brought suit against those who had coordinated the frivolous lawsuits, his tormentors actually used Maine's anti-SLAPP statute to dismiss his case. So, a statute designed to minimize the impact of SLAPPS has been repurposed to protect those who file SLAPPS. Nader's struggle as a litigant seeking redress in the courts for the onslaught of frivolous litigation shows how some anti-SLAPP statutes, like Maine's, have been used to shelter the litigants they were designed to stymie.

This Article begins by outlining the hurdles an independent candidate needs to clear in order to appear on a state's ballot. Then, using Nader's 2004 campaign experience as an example, it demonstrates how the availability of private challenges to nomination petitions exponentially compounds the burden of initial compliance, without any accompanying benefit to the political process or advancement of any state interest. Next, this Article argues the futility of seeking legal redress for Election SLAPPS, using Nader's attempts to do so as an illustration. The procedural history of Nader's case in Maine also provides an example of how some litigants have used Maine's anti-SLAPP statute to dismiss the suits that followed in the wake of their own frivolous lawsuits. The Article concludes by arguing that 1) Maine's anti-SLAPP statute should not be interpreted

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6. See *Nader v. Me. Democratic Party*, 2013 ME 51, 66 A.3d 571 (2013); *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692 (D.C. Cir. 2009); *Nader v. Democratic Nat'l Comm.*, 590 F. Supp. 2d 164 (D.C. Cir. 2008); *Nader v. Democratic Nat'l Comm.*, No. 09-7004, 2009 WL 4250599 (D.C. Cir. Oct. 30, 2009).

to allow a singular nonfrivolous petition challenge to protect frivolous petition challenges in the same filing from sanction; 2) Maine's anti-SLAPP statute should be applied without either of the burden-shifting mechanisms imposed by the courts construing it; and 3) states should eliminate the availability of private challenges to nomination petitions.

## II. ACCESS TO THE PRESIDENTIAL BALLOT

### A. *The Requirements for Nomination Petitions Vary from State to State*

Let's start with a run-through of the process an independent candidate needs to go through in order to appear on a state's ballot. Article II of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" who shall select the President of the United States.<sup>7</sup> State legislatures pass laws and then election administrators, usually through a board of elections or a secretary of state's office, apply the laws and establish the regulations that determine how a candidate qualifies to be on a state's general election ballot as a presidential candidate.<sup>8</sup> Generally, a candidate may appear on a state's ballot in two ways. A party that has already established a place on the state ballot may nominate the candidate, or the candidate can satisfy the state's signature requirements for ballot access. Currently, every state and the District of Columbia have their own requirements for gathering and submitting signatures.<sup>9</sup>

So, a presidential candidate who has not been nominated by a party with a ballot line must comply with the signature requirements of each state and the District of Columbia. Each state establishes the number of signatures that a presidential candidate must collect in order to appear on the ballot. This number is variously based on the state's population of registered voters, the state's overall population, the number of people who actually voted in the last presidential election, the number of people who actually voted in the last election for Governor, or a set number that is not directly tied to any of the above. The number should relate to the state's goal of requiring candidates to show that they have some legitimate public support and merit ballot placement.<sup>10</sup>

The quantity of required valid signatures, both in number and in relation to the population of the state, varies tremendously between states – from as few as 1,000 signatures in Mississippi to 1% of registered voters in California.<sup>11</sup> States have

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7. U.S. CONST. art. II, § 1, cl. 2.

8. See Katharine Q. Seelye, *Democrats' Legal Challenges Impede Nader*, N.Y. TIMES, Aug. 19, 2004, available at <http://www.nytimes.com/2004/08/19/politics/campaign/19nader.html>.

9. See *id.*

10. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

11. New Jersey requires at least 2% of the entire vote cast for members of the General Assembly at the last preceding election; Mississippi requires, 1,000; Iowa, 1,500; Minnesota and Wisconsin require 2,000. See N.J. STAT. ANN. § 19:13-5 (West 2013); MISS. CODE ANN. § 23-15-785(1) (West 2013); IOWA CODE ANN. § 45.1(1) (West 2013); MINN. STAT. ANN. § 204B.08(3)(a) (West 2013); WIS. STAT. ANN. § 8.20(4) (West 2013). North Carolina requires 2% of the total number of voters who voted in the most recent general election for Governor. See N.C. GEN. STAT. ANN. § 163-122 (West 2013). California requires 1% of its registered voters at the time of the close of registration prior to the

also set different standards for who may sign a petition. In Texas, for example, someone who has voted in the state's primary election may not sign a third-party candidate's petition for the general election.<sup>12</sup> An independent candidate cannot start collecting signatures in Texas until after the presidential primaries, and the required signatures must be submitted no later than the second Monday in May.<sup>13</sup> In 2008, these rules required an independent candidate, who had to collect signatures from 1% of the number of people who voted in the last presidential election, to collect 64,076 valid signatures from those who did not vote in the primaries, in sixty days.<sup>14</sup>

Each state also makes rules concerning who may circulate signature petitions. In 2004, approximately 20% of the states, including California, New Jersey, New York, Michigan, Missouri, Nebraska, Pennsylvania, and Washington, D.C., required circulators of petitions to be registered voters.<sup>15</sup> Some states require the circulator to be eligible to vote in the state where the circulator is collecting signatures.<sup>16</sup> Arizona does not allow ex-felons to circulate petitions, even if they are registered to vote.<sup>17</sup> Arizona also requires circulators to swear that they live in a particular county, and to fill in their county of residence in a circulator affidavit that is notarized on each petition.<sup>18</sup> In D.C., the circulators must complete an affidavit wherein they swear that they are registered, qualified electors in D.C., that they personally circulated the petition sheets, that they witnessed the signing of each signature, and that they have determined from each signer that he or she is duly registered to vote in D.C.<sup>19</sup>

Each state sets standards for the form of the petition, and for the information required from each person signing the petition. As to the form of the petition, some

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preceding general election, which in 2004 was 156,252 signatures. See CAL. ELEC. CODE § 8400 (West 2013); *Report of Registration*, CAL. SEC'Y OF STATE (Sept. 3, 2004), <http://www.sos.ca.gov/elections/ror/ror-pages/60day-presgen-04/hist-reg-stats.pdf>. Texas requires an independent candidate to collect 1% of the number of people who voted in the last presidential election. See TEX. ELEC. CODE ANN. § 192.032(d) (West 2013). Wyoming requires 2% of the votes cast in the last presidential election, which in 2004 was 4,916 valid signatures. See WYO. STAT. ANN. § 22-5-304(a) (West 2013); *Wyoming Voter Registration and Voter Turnout Statistics*, WYO. SEC'Y OF STATE, <http://sos.wy.state.wy.us/Elections/Docs/profile.pdf> (last visited Oct. 30, 2013). To add color to this number, according to the 2010 U.S. Census, Cheyenne, the state capital and most populated place in the state, has only 59,466 people within its boundaries. See *Cheyenne (city)*, *Wyoming*, U.S. CENSUS BUREAU (2012), <http://quickfacts.census.gov/qfd/states/56/5613900.html>. Oklahoma requires 3% of the votes cast in the last presidential election. See OKLA. STAT. ANN. tit. 26, § 10-101.1(1) (West 2013). In 2004 this number amounted to 29,275. See *General Election*, OKLA. STATE ELECTION BD (Nov. 2, 2004), [http://www.ok.gov/elections/The\\_Archives/Election\\_Results/2004\\_Election\\_Results/General\\_Election\\_2004.html](http://www.ok.gov/elections/The_Archives/Election_Results/2004_Election_Results/General_Election_2004.html).

12. See TEX. ELEC. CODE ANN. § 192.032(f), (g) (West 2013). In reality, the person can and may sign such a petition. Such a signature provides a ground for a potential petition challenge. If challenged, the signature will later be struck.

13. See *id.* § 192.032(c), (g).

14. See THERESA AMATO, *GRAND ILLUSION: THE MYTH OF VOTER CHOICE IN A TWO-PARTY TYRANNY* 37 (2009).

15. *Id.* at 32–33.

16. See, e.g., ARIZ. REV. STAT. ANN. § 16-315(B)(2) (2013).

17. See AMATO, *supra* note 14, at 33.

18. See ARIZ. REV. STAT. ANN. § 48-265(H) (2013).

19. See D.C. CODE § 1-1001.08(b)(2)–(3) (2013).

states provide an actual petition or a sample petition, some do not. Some states allow candidates to photocopy forms to circulate; others require that the candidates obtain an original form from the state. According to Theresa Amato, Nader's campaign manager for the 2000 and 2004 elections, the campaign "had to beg Hawaii in writing for additional petitions, as they would ration them, costing [the campaign] crucial days and lost opportunities to collect signatures."<sup>20</sup> California accepts petitions on paper of any size; Maine provides candidates with petitions that are on pink, 11" x 17" paper.<sup>21</sup> In Ohio, each petition must bear a photocopy of the candidate's signature.<sup>22</sup>

States also differ with their requirements concerning a candidate's affiliation with a particular party. In some states, candidates who are a member of a political party may not run as an independent. When faced with this restriction in Delaware and Oregon, the Nader campaign handled vice-presidential candidate Peter Miguel Camejo's membership in the Green Party by obtaining the Independent Party's line (in Delaware) and by offering a "stand-in" vice-presidential candidate (in Oregon).<sup>23</sup> In some states, a candidate must simply designate a party on the signature petitions.

In some states, the vice-presidential candidate "must appear" on the petition; in others, the vice-presidential candidate "may" appear on the petition. Issues may arise regarding the validity of petitions listing stand-in vice presidential candidates that were circulated before the presidential candidate named the vice-presidential candidate, or before there was a nominating convention to select a vice-presidential candidate.<sup>24</sup> According to Amato, "[m]ost states don't say anything about this issue in their laws; some states specifically prohibit this substitution and refuse to substitute other candidates."<sup>25</sup>

In Illinois and Pennsylvania, the names and addresses of each of a candidate's electors must appear on the signature petitions.<sup>26</sup> In Pennsylvania and Maine, a candidate's electors must be registered as independent by a certain date.<sup>27</sup> In Nebraska, the electors must be from every congressional district in the state.<sup>28</sup> Idaho requires the electors to have lived in the state consecutively for two years.<sup>29</sup> Missouri requires notarized elector declarations of candidacy.<sup>30</sup>

Each state sets a date for when a candidate may begin collecting signatures, and a date by which the signatures need to be collected and submitted;<sup>31</sup> the

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20. AMATO, *supra* note 14, at 30.

21. *See id.*

22. *See id.* at 31.

23. *See id.*

24. *See id.* at 31-32.

25. *Id.* at 31.

26. *See id.* at 32.

27. *See id.*

28. *See* NEB. REV. STAT. ANN. §§ 32-1038, 32-620(1), *amended by* 2013 Neb. Legis. Serv. 349 (West 2012).

29. *See* IDAHO CODE ANN. § 34-606(2) (West 2013).

30. *See* AMATO, *supra* note 14, at 32.

31. In Florida, an independent candidate for president must collect signatures from 1% of registered electors by July 15 of each presidential election year; the petitions must be certified by county, one sheet per county, with a fee of 10 cents per signature. *See* FLA. STAT. ANN. §§ 103.021(3), 99.097(4) (West

deadlines range from May to September.<sup>32</sup> In addition to raw number quotas, some states require a certain number of signatures per congressional district. New Hampshire, for example, requires 1,500 valid signatures from each of its two congressional districts.<sup>33</sup> Virginia requires at least 400 valid signatures from each congressional district.<sup>34</sup>

Once a campaign masters each state's requirements, achieving the signature quota requires collecting up to double or triple the requisite amount to account for inevitable errors. According to Amato, circulators face a considerable challenge in discerning whether they are collecting a signature from a registered voter. "Most people don't walk around with a voter registration card in their pocket, and it might insult even those who do to ask them to flip it out to prove to the circulator that they are indeed registered."<sup>35</sup> Or, "some people *think* they are registered to vote, or are ashamed that they are not, but will tell you that they are and sign your petition."<sup>36</sup> Further, "[o]ther people have moved since they last voted or registered to vote, which in some states means that they are no longer registered, often unbeknownst to them."<sup>37</sup> Additionally, "[s]ome people who [are] registered to vote sign the address of where they currently live, instead of where they are registered to vote, thinking it doesn't matter; but it does."<sup>38</sup> Errors may also result from typos or misspellings.<sup>39</sup> Finally, according to Amato, "there are the people who sign 'Mickey Mouse' or 'Donald Duck' or the name of [the] candidate; or the people who will walk off with your clipboard because they are hostile to your candidate."<sup>40</sup> Although collecting double or triple the number of required signatures may insure collecting the required amount of valid signatures, some states also limit the number of signatures a candidate may submit.<sup>41</sup>

When it comes time to submit the petitions, the states have different requirements for binding or stapling the petitions, and for numbering or not numbering certain petition pages.<sup>42</sup> Deadlines for submission differ by day, by time of day, and by whether the submission should be made once, or on a rolling

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2013). In 2004, an independent candidate would have been required to collect 93,024 valid signatures by July 15, 2004. See *County Voter Registration by Party*, FLA. DIV. OF ELECTIONS (2002), <http://election.dos.state.fl.us/voter-registration/statistics/pdf/2002/2002genparty.pdf>.

32. See AMATO, *supra* note 14, at 28-29.

33. See N.H. REV. STAT. ANN. § 655:42 (2008 & Supp. 2012).

34. See VA. CODE ANN. § 24.2-543 (West 2013).

35. See AMATO, *supra* note 14, at 34.

36. See *id.* at 35.

37. *Id.*

38. *Id.*

39. See *id.*

40. *Id.* According to Amato, in 2004, a third party or independent candidate had approximately six and a half months to collect 634,727 valid signatures across the United States. *Id.* This broke down to collecting almost 4,000 valid signatures a day. *Id.* Amato states that a third-party or independent campaign really had to collect 8,000 to 12,000 signatures a day, to insure against signatures from unregistered voters, a state's imperfect voter registration records, and the inevitable lawsuits and challenges faced by serious candidates. *Id.*

41. Maine requires 4,000 valid signatures and only allows a candidate to submit 6,000 signatures. See 21-A M.R.S.A. § 354(5)(A) (2008 & Supp. 2012).

42. See AMATO, *supra* note 14, at 38.



basis.<sup>43</sup>

In states such as Massachusetts, Maine, and North Carolina, where circulators had to carry a separate petition for each town, city, or county, those petitions must be hand delivered, or mailed and received, in each and every town, city, or county where there are signatories to the petitions – thus necessitating, in some states like Massachusetts, delivery to over one hundred or more turn-in locations.<sup>44</sup>

North Carolina requires independent candidates to validate petition signatures first with the chairman of the Board of Elections of the county in which the signatures were obtained, and then validate the signatures with the State Board of Electors.<sup>45</sup>

In short, obtaining ballot access through nomination petitions requires compliance with innumerable and varying regulations.<sup>46</sup> Failure to comply with these tedious and fine-grained regulations means not getting on the ballot. Campaigns have to spend endless time, energy, and money figuring out what the requirements in each state are and complying with them.

### *B. Nomination Petitions are Open to Private Challenges*

Although the requirements for a valid nomination petition differ from state to state, most states make a candidate's nomination petition open to private challenges.<sup>47</sup> This means that a virtually unlimited number of people may subject a candidate to the burden of defending a petition challenge during the campaign period.

The nuance and variance of petition requirements from state to state lay fertile ground for petition challenges. The high volume of required signatures, the compressed time within which signatures may be gathered, the specific requirements for circulators, the requirements for the form of the petition itself, the

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43. *See id.*

44. *Id.*

45. N.C. GEN. STAT. ANN. §§ 163-122(a)(2); 163-182.4(b) (West 2013).

46. The variation itself is hard to justify in a national election. Most states establish one set of nomination petition requirements for independent candidates. The requirements apply to independent candidates who plan to run for a state office, or for president of the country. When the state legislature determines whether the burden of complying with the nomination petition requirements is unduly burdensome, one wonders whether the burden is examined solely in the context of a candidate running for state office, or whether the analysis accounts for a candidate planning to run for national office, who is also trying to comply with the different requirements of all the other territories, at roughly the same time.

47. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.552(2) (West 2013); 21-A M.R.S.A. § 356(2) (2008 & Supp. 2012); ARIZ. REV. STAT. ANN. § 16-351(A) (2013). In some states, like Illinois, nomination petition signatures are accepted unless they are challenged. *See Delay v. Bd. of Election Comm'rs*, 726 N.E.2d 755, 759 (Ill. App. Ct. 2000) (holding that state law does not authorize election officials to challenge nomination papers *sua sponte*). Under the Illinois system, it seems that only the petitions of serious candidates would receive challenges, while the petitions of nonserious candidates would not trigger any concern or challenge. Allowing private parties, as opposed to a government agency, to challenge a petition leads to uneven enforcement of ballot access requirements. A candidate serious enough to siphon significant votes from one of the two major parties would predictably face more challenges than a less serious candidate or a candidate that drew support evenly from both parties. This distortion does not serve a state's interest in avoiding voter confusion or keeping nonserious candidates off of the ballot. *See* Robert Yablon, *Validation Procedures and the Burden of Ballot Access Regulations*, 115 YALE L.J. 1833, 1840-41 (2006).

restrictions concerning who may sign a petition, the fact that restrictions on these factors vary from state to state, and the variable of interacting with the public at large make it likely that the determined challenger will find a way to assert some instance of noncompliance. Even if a candidate complies perfectly with the nomination petition requirements of a particular state, the determined opponent can always bring a challenge over the propriety of the state-imposed requirements that the candidate actually followed, which happened to the 2004 Nader Campaign in Maine.<sup>48</sup>

The petition requirements also lend themselves to sabotage by an opponent. An opponent could plant faulty or fraudulent signatures on a petition in order to lay a foundation for a later petition challenge. Considering the intricate and various regulations of each state's ballot restrictions, and the aspects of the signature gathering process that are outside a candidate's control, it is hard to imagine a "baseless" challenge to a signature petition.

### III. PRIVATE CHALLENGES TO NOMINATION PETITIONS COMPOUND THE BURDEN FACING INDEPENDENT CANDIDATES WITHOUT ADVANCING ANY STATE INTEREST

Nader's experience with Election SLAPPS shows how the availability of private challenges to nomination petitions exponentially compounds the initial burden of compliance with each state's petition requirements, without serving the state interest of keeping unqualified candidates off the ballot.

#### *A. Nader and the 2000 Presidential Election*

In the presidential election of 2000, runner-up Al Gore received more popular votes than winning candidate George W. Bush.<sup>49</sup> Bush won the 2000 presidential election with 271 electoral votes to Gore's 266 electoral votes. Disappointed democrats blamed this election result on Nader, who drew 2.74% of the popular vote and is said to have drawn critical votes away from Gore, the Democratic Party's candidate.<sup>50</sup> In the final weeks of the campaign, in fact, Republican Leadership Council ran pro-Nader ads in a few states in an effort to split the liberal vote.<sup>51</sup> For its part, the Gore campaign advertised the similarities between Gore and Nader and pressed the fact that Gore had a better chance of winning than Nader.<sup>52</sup> In the aftermath of the close race, many viewed Nader as the "spoiler" of the 2000 presidential election.

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48. In Maine, the Maine Democratic Party challenged the validity of the petition forms provided to independent candidates by Maine's Secretary of State. See discussion *infra* Part III.C.

49. See *2000 Presidential Popular Vote Summary*, FED. ELECTION COMM'N (2001), <http://www.fec.gov/pubrec/fe2000/prespop.htm>.

50. *Id.*

51. Laura Meckler, *GOP Group to Air Pro-Nader TV Ads*, WASH POST, Oct. 17, 2000, available at [http://www.washingtonpost.com/wp-srv/aponline/20001027/aponline115918\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20001027/aponline115918_000.htm).

52. See Katharine Q. Seelye, *The Campaign: The Vice President; Barnstorming Nader Turf; Gore Draws 30,000*, N.Y. TIMES, Oct. 26, 2000, available at <http://www.nytimes.com/2000/10/27/us/the-2000-campaign-the-vice-president-barnstorming-nader-turf-gore-draws-30000.html>.

*B. Nader and the 2004 Presidential Election*

In 2004, Nader ran for president again. This time, he faced nearly 30 simultaneous complaints against his candidacy, in forums across the country.<sup>53</sup> No such actions were filed against him in the 2000 election. Nader alleges that the Democratic National Committee (“DNC”) and its affiliates orchestrated the complaints. Nader’s campaign faced complaints in 18 different state courts concerning ballot eligibility, and five complaints before the Federal Election Commission (“FEC”) concerning alleged violations of campaign finance laws.<sup>54</sup> Typically, the challenges to the nomination petitions would start with a state administrative hearing, followed by multiple appeals to state or federal courts.<sup>55</sup> The complaints lodged with the FEC required a response from the Campaign (within 15 days) and compliance with the FEC as it investigated the complaints.<sup>56</sup> The Campaign faced these complaints in the campaign period between June and September of 2004.<sup>57</sup>

On the merits, the Campaign “won” 23 of the 29 complaints filed against it.<sup>58</sup> The FEC dismissed all of the complaints filed against the Campaign, though not until April 2006.<sup>59</sup> Nader ultimately appeared on the ballot in 13 of the 18 states in which his nomination petitions were challenged. The ballot access challenges succeeded in four states – Ohio, Oregon, Pennsylvania, and Illinois, preventing Nader from appearing on the general election ballot in these states.<sup>60</sup> After withdrawing his nomination papers in response to a challenge, and failing to prevail on his subsequent challenge to Arizona’s filing deadline, Nader also did not appear on the Arizona ballot.<sup>61</sup> In some states, like Maine, where the Maine Democratic Party filed two complaints, the Campaign prevailed in every administrative and court challenge to its nomination papers, until the appeals processes were exhausted.<sup>62</sup>

According to Nader, the challenges were frivolous, and brought by the DNC

53. Brief of Appellant at 2, *Nader v. Me. Democratic Party*, 2012 ME 57, 41 A.3d 551.

54. The Campaign’s signature petitions were challenged in: Arizona, Arkansas, Colorado, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin. *See Complaint* at 19-43, *In the Matter of the Democratic Party Ballot Access Litigation Against the Nader-Camejo 2004 Presidential Campaign*. In some of these states, the Campaign faced more than one complaint. *Id.* Twelve of these eighteen states were decided by five or fewer percentage points in the 2000 presidential election. *See* Joshua Green, *In Search of the Elusive Swing Voter*, ATLANTIC MONTHLY, Jan.-Feb. 2004, at 102, 103.

55. *See, e.g.*, discussion *infra* Part III.C.

56. FED. ELECTION COMM’N, *Filing a Complaint* (June 2008), <http://www.fec.gov/pages/brochures/complain.shtml#timeframes>.

57. *Complaint* ¶ 4, *Nader v. Me. Democratic Party*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

58. *See Nader v. Democratic Nat’l Comm.*, 567 F.3d 692, 695 (D.C. Cir. 2009) (explaining that eighteen out of twenty-four complaints made in state court were dismissed, in addition to five FEC complaints).

59. The FEC dismissed one of the challenges on February 10, 2005, three of the challenges on June 23, 2005, and the last challenge on April 21, 2006. *See Complaint* ¶ 134, *Nader*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

60. *See* AMATO, *supra* note 14, at 122.

61. *See id.*

62. *Id.* at 129.

and its affiliates for the collateral purpose of draining the Campaign of money and other resources.<sup>63</sup> The DNC didn't coordinate nation-wide ballot challenges because they thought that Nader had failed to gather enough support to qualify to appear on the ballot in each state. Instead, the DNC coordinated nation-wide ballot challenges because it perceived Nader as a serious political contender who threatened to siphon votes away from the democratic candidate. The DNC did not use the ballot challenge process for its intended purpose of keeping unsupported candidates off of the ballot. Instead, the DNC used the process to eliminate a candidate because he was actually supported.

Nader alleges that certain officials of the DNC preemptively declared, even before Nader announced his 2004 candidacy, that they would challenge his ballot eligibility.<sup>64</sup> Nader also alleges that the DNC funded and coordinated the nationwide challenges.<sup>65</sup> Toby Moffett, a former Connecticut congressman and president of the Ballot Project, told the *New York Times* that he and former Representative Elizabeth Holtzman were trying to “drain [Nader] of resources and force him to spend his time and money.”<sup>66</sup> Moffett was also quoted by the *New Mexican* in late July 2004 as saying that “[w]e’re going to make [Nader] spend time, money, resources.”<sup>67</sup>

The DNC’s coordination of petition challenges made perverse use of the petition-challenging processes available in every state. The aggregate burden of responding to 18 different state petition challenges creates a hurdle to ballot access that even candidates with the adequate prerequisite voter support may not clear. The DNC aggregated a series of processes aimed at eliminating non-serious candidates from a state ballot in order to eliminate a serious candidate for national office.

Although the challengers “lost” the overwhelming majority of the complaints filed, the challengers achieved their intended goal. The Campaign lost substantial money and other resources defending the lawsuits during a critical time in the campaign cycle. As Moffett told the *Washington Post* in August 2004, “[w]e wanted to neutralize [Nader’s] campaign by forcing him to spend money and resources defending these things, but much to our astonishment we’ve actually been more successful than we thought we’d be in stopping him from getting on at all.”<sup>68</sup> The lawsuits diverted resources that would have otherwise been spent gaining ballot access in the unchallenged states.<sup>69</sup> As a result of losing ballot access in some states in 2004, the Campaign was also unable to establish a ballot line in those states for 2008.<sup>70</sup> After the 2004 election, Moffett reported to *The Guardian UK*, that “[w]e distracted [Nader] and drained him of resources. I’d be

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63. Brief of Appellant at 2, *Nader v. Me. Democratic Party*, 2012 ME 57, 41 A.3d 551.

64. See Complaint ¶ 29, *Nader*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 25, 2009).

65. See *id.* ¶ 38.

66. Katharine Q. Seelye, *Convictions Intact, Nader Soldiers On*, N.Y. TIMES, Aug. 2, 2004, at A14.

67. Steve Terrell, *Fears of Nader Keep Dems on Offensive*, SANTA FE NEW MEXICAN, July 29, 2004, at A-4.

68. Jonathan Finer & Brian Faler, *Nader Still Unsure of Ballot Spot in Many States*, WASH. POST, Aug. 24, 2004, at A.09.

69. Complaint ¶ 136, *Nader*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

70. *Id.* ¶ 137.

less than honest if I said it was all about the law. It was about stopping Bush from getting elected.”<sup>71</sup> The coordinated, nation-wide lawsuits succeeded in marginalizing the Campaign’s efforts to fully participate in the 2004 presidential election.

Nader garnered fewer votes in 2004 than he had in 2000.<sup>72</sup> He appeared on the ballot as an independent candidate in 34 states and received 465,650 votes, for 0.38 % of the popular vote.<sup>73</sup> Bush won another election. John Kerry, the DNC’s 2004 candidate, came in second. Nader finished third. The challengers lost most of their lawsuits, succeeded in disabling the Campaign, but did not achieve their ultimate goal of winning the presidential race for Kerry. The challengers did not serve any state interest in keeping an unqualified candidate off of the ballot, as, in most cases, Nader had met the petition requirements in the first instance and ultimately appeared on the ballot.

### *C. Challenges to the Campaign’s Petition in Maine*

The petition challenges in Maine provide an example of the litigation faced by the Campaign in 18 different states. At heart, the Maine challenges were based on a typo, the Campaign’s use of the petition forms provided by the Secretary of State, and the defendant’s assertion (unsupported by statute or practice) that qualifications for electors should also apply to candidates. Although appealed to exhaustion, the Maine challenges failed at every level.

A nearly painful level of detail is required to relay the quality of the initial challenges to Nader’s nomination petitions in Maine, and the baseless nature of the exhaustive appeals. The following admittedly-dense-with-detail explanation takes the reader into the thickets of ballot access laws in Maine, but provides only a taste of the litigation faced by the Campaign in a 12-week period, across the country. The details of the Campaign’s experience in Maine provide insight into the effectiveness of Election SLAPPs, and the thickets of Maine’s ballot access laws show why this area of law is such fertile ground for them.

#### *1. Nomination Petition Requirements in Maine*

Maine requires an independent candidate to designate four electors, for Maine’s four electoral votes, and to name the electors on the signature petitions.<sup>74</sup> The signature petitions that are circulated are technically on behalf of these electors.<sup>75</sup> The slate of presidential electors is necessary to get the names of independent candidates, who run as unenrolled candidates in Maine, on the ballot for the November election.<sup>76</sup> The legal and practical effect of the Secretary of State’s acceptance of the signature petitions is to include the independent

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71. Julian Borger, *Fasten Your Seatbelts*, GUARDIAN, Dec. 7, 2004, at 6.

72. See FED. ELECTION COMM’N, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (May 2005), available at <http://www.fec.gov/pubrec/fe2004/federalelections2004.pdf>.

73. *Id.*

74. See 21-A M.R.S.A. § 354(1)(B) (2008 & Supp. 2012).

75. See *id.* §§ 351-355, 801.

76. See *id.*

candidate(s) on the November ballot, though technically the votes are cast for the slate of electors supporting these candidates.<sup>77</sup> If successful, these electors would then act as proxies for the candidates in casting their ballots as part of the Electoral College.<sup>78</sup>

Each elector must be a resident of and a registered voter in the electoral division the elector seeks to represent.<sup>79</sup> Each elector must sign and file a candidate's consent form, on which the elector declares his or her place of residence, states that he or she will accept the nomination, states that he or she has not been enrolled in a party qualified to hold a primary election after March 1<sup>st</sup> of the election year, and states that he or she meets the other qualifications to be an elector, as set forth in section 21-A M.R.S.A. § 352.<sup>80</sup> A municipal registrar in each of the towns where the electors reside and are registered to vote must also certify that the elector was not enrolled in a qualified party after March 1<sup>st</sup> of the election year, and that the elector had not applied to change his or her enrollment status on or after January 1<sup>st</sup> of the election year.<sup>81</sup>

So, the nomination petitions are technically for a slate of four presidential elector-candidates. Maine requires a campaign to submit 4,000 valid signatures, but restricts a campaign to submitting 6,000 signatures to satisfy this requirement.<sup>82</sup> The nomination petitions are due by August 1<sup>st</sup> of each election year.<sup>83</sup> They must consist of: 1) "Non-Party Nomination Petition" forms containing signatures of at least 4,000 registered voters, certified by the registrars of numerous municipalities; and 2) four "Non-Party Presidential Elector Consent and Certification of Unenrollment" forms completed by each of the four presidential elector-candidates, and by the registrars in each of their respective municipalities of residence.<sup>84</sup> The Secretary of State's office designs both of these forms and provides them to those seeking nomination by petition.<sup>85</sup>

Nader's campaign used the forms provided by the Secretary of State. It submitted the signatures to the registrar of the municipality, and then refiled the signatures with the Secretary of State. Maine's Secretary of State then determined that Nader's campaign had filed 4,128 valid signatures – enough to satisfy the statutory requirement.<sup>86</sup> Two challenges followed immediately after the

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77. *See id.*

Although the presidential electors are the candidates seeking nomination by petition, pursuant to 21-A M.R.S.A. §§ 351-355, their names do not appear on the ballot. Instead, the names of the persons running for President and Vice President appear on the ballot, and a vote for them is deemed to be a vote for the presidential electors named in the nomination petition.

Brief of Respondent/Appellee at 1, n.1, *Melanson v. Dep't of the Sec'y of State*, 2004 ME 127, 861 A.2d 641. *See also* U.S. CONST. art. II, § 1, cl. 3.

78. 21-A M.R.S.A. § 801 (2008).

79. *See id.* § 352.

80. *See* 21-A M.R.S.A. § 355(1), (3) (2008 & Supp. 2012).

81. *See id.* § 353.

82. *See id.* § 354(5)(A).

83. 21-A M.R.S.A. § 354.8-A (Supp. 2012).

84. *See* 21-A M.R.S.A. §§ 351-355 (2008 & Supp. 2012).

85. *See* Brief of Respondent/Appellee at 1, *Melanson v. Dep't of the Sec'y of State*, 2004 ME 127, 861 A.2d 641. *See also* 21-A M.R.S.A. §§ 351-355.

86. *See* AMATO, *supra* note 14, at 124.

Secretary's determination.

## 2. *The DNC's Challenges Failed at Every Level*

Dorothy Melanson, the head of the Democratic Party in Maine, challenged the signature petitions on six grounds:<sup>87</sup>

- (1) use of a fictitious presidential elector in violation of state statute;
- (2) failure by candidates to file consent forms in violation of state statute;
- (3) failure by candidates to unenroll as required by state statute;
- (4) failure to certify electors' status as unenrolled "on the petition";
- (5) false affirmations by circulators in violation of state statute;
- (6) erroneous acceptance by officials of incorrect or missing address information in violation of state statute.<sup>88</sup>

The challenges triggered a hearing before a Secretary of State departmental Hearing Officer, which was scheduled for August 30, 2004. The hearing lasted two days and included the presentation of legal arguments and testimony from approximately twelve witnesses.<sup>89</sup> The Hearing Officer issued a recommendation to the Secretary of State on September 2, 2004.<sup>90</sup> The Hearing Officer recommended rejecting all of the challenges to the nomination petitions.<sup>91</sup> The challengers had an opportunity to file objections with the Secretary of State, which Melanson did, by September 3, 2004.<sup>92</sup> Upon review of the recommendation, the objections, and the record of the hearing, the Secretary of State adopted the Hearing Officer's Report and Recommendation in a decision dated September 8, 2004.<sup>93</sup>

The first challenge concerned the birth name of one of Nader's presidential electors, "Joseph Noble Snowdeal." Mr. Snowdeal, however, "has been known exclusively in his community as 'J. Noble Snowdeal.'" <sup>94</sup> Mr. Snowdeal's consent form and two of the 479 petitions accurately identified him as "J. Noble Snowdeal," but the remaining petitions identified him as "John Noble Snowdeal."<sup>95</sup> Melanson argued for invalidation of the petitions that identified Nader's elector as "John," instead of "J." or "Joseph." On this basis, she claimed that Nader was

87. Another individual, Benjamin Tucker, filed a challenge and participated through counsel in the administrative hearing held by the Secretary of State. He did not file a petition for judicial review of the Secretary of State's rejection of his challenge. See Brief of Respondent/Appellee at 2, *Melanson*, 2004 ME 127, 861 A.2d 641. According to Nader, Tucker, a registered Democrat in Maine, prepared and filed his challenge at the direction of and in cooperation with the DNC, Ballot Project, Kerry-Edwards 2004 and others. Complaint ¶¶ 57–58, *Nader v. Me. Democratic Party*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

88. See Brief of Appellees at 4, *Nader v. Me. Democratic Party*, 2012 ME 57, 41 A.3d 551. See also *Melanson v. Dep't of the Sec'y of State*, 2004 WL 3196784, at \*1 (Me. Super. Sept. 27, 2004), *aff'd*, 2004 ME 127, 861 A.2d 641; AMATO, *supra* note 14, at 124–25.

89. See Brief of Respondent/Appellee at 2, *Melanson*, 2004 ME 127, 861 A.2d 641. See also AMATO, *supra* note 14, at 124.

90. See Brief of Respondent/Appellee at 2, *Melanson*, 2004 ME 127, 861 A.2d 641.

91. See *Melanson*, 2004 WL 3196784, at \*1.

92. See Brief of Respondent/Appellee at 2, *Melanson*, 2004 ME 127, 861 A.2d 641.

93. *Id.*

94. *Melanson*, 2004 WL 3196784, at \*2.

95. *Id.*

using a fictitious presidential elector.<sup>96</sup>

The Hearing Officer found that “. . . the name ‘John Noble Snowdeal’ does not represent a fictitious person, but instead is an incorrect statement of a real elector’s first name.”<sup>97</sup> The Hearing Officer suggested that “the unique combination of middle and last name would make it unlikely that anyone reviewing the petition would be misled.”<sup>98</sup> The Hearing Officer also pointed out that Melanson had presented no evidence of anyone actually being misled, and no evidence to rebut the explanation that the incorrect first name was an honest mistake.<sup>99</sup>

The Hearing Officer also rejected Melanson’s second and third challenges, that Nader and Camejo failed to file consent forms and unenroll, because these challenges were premised on a misunderstanding of Maine’s statute.<sup>100</sup> Maine’s statute requires that “[a] *person who seeks nomination by petition*” must file a consent form and an enrollment form if enrolled in a party, but neither Nader nor Camejo were seeking nomination through the petition signatures.<sup>101</sup> As discussed above, technically, the campaign’s presidential electors were seeking nomination through the petitions. The consent and unenrollment requirements only apply to the presidential electors, not to the actual presidential candidates.<sup>102</sup>

In her fourth challenge, Melanson argued that the signature petition forms, *designed by the Secretary of State*, did not ask for all of the information required by Maine’s election statutes, on each page.<sup>103</sup> Melanson argued that *the Secretary of State therefore erred* by certifying Nader’s petitions, which utilized this form. Her argument was based on 21-A M.R.S.A. § 353, which states that:

A person who seeks nomination by petition qualifies by filing a nomination petition and consent as provided in section 354 and 355. If enrolled, the person must also withdraw enrollment in a party on or before March 1st to be eligible to file a petition as a candidate in that election year, as provided in section 145. The registrar, or clerk at the request or upon the absence of the registrar, in the candidate’s municipality of residence must certify to that fact on the petition.<sup>104</sup>

Melanson argued that the two separate forms – one for signatures, and one for the elector’s consent and certification of unenrollment, meant that the necessary information was not all on the same petition. Melanson’s reading of the statute required all of the required information to be contained on every signature page. She argued that with two separate forms, the certifications were not *on the face* of the petition.<sup>105</sup>

The Secretary of State argued that the forms, submitted together, constituted the petition.<sup>106</sup> The Secretary of State pointed out its authority, under the general

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96. *See id.*

97. *Melanson*, 2004 WL 3196784, at \*2 (quoting the Hearing Officer).

98. *Id.*

99. *See id.*

100. *Melanson*, 2004 WL 3196784, at \*3.

101. 21-A M.R.S.A. § 353 (2008 & Supp. 2012) (emphasis added).

102. *See Melanson*, 2004 WL 3196784, at \*3.

103. *Id.*

104. 21-A M.R.S.A. § 353 (emphasis added).

105. *Melanson*, 2004 WL 3196784, at \*3.

106. *See* Brief of Respondent/Appellee at 9, *Melanson*, 2004 ME 127, 861 A.2d 641.



election statutes, to establish the forms necessary to carry out elections. The Secretary of State also pointed out that the consent and certification of unenrollment forms for all four electors, as well as the names and addresses of all four electors, which also needed to be included on the petition, would take up over half of a page and leave little room on the form for signatures.<sup>107</sup> The Secretary of State also argued that this additional information would serve no purpose because the election statutes don't even require this information to be added to the petition until after registered voters have added their signatures. The additional information on the forms would not even inform those signing the petition because it would be, or could be, added to the form after signatures were collected. The Secretary of State argued that using a separate form should not run afoul of the statute.<sup>108</sup>

On this issue as well, the Hearing Officer agreed with the Secretary of State. The Hearing Officer acknowledged the Secretary of State's authority under 21-A M.R.S.A. § 21 to "establish the form and content of all forms, lists, documents and records required by or necessary to the efficient operation of" Maine elections.<sup>109</sup> The Hearing Officer also looked to 21-A M.R.S.A. § 354, which states that nomination petitions "shall be on a form provided by the Secretary of State," and "a nomination petition may contain as many separate papers as necessary."<sup>110</sup> The Hearing Officer also explained that practical considerations warranted the use of two separate forms for the nomination petitions.<sup>111</sup> As it stood, each petition needed to include the circulators' verification statements and the registrar's certification of voters' signatures, because these certifications related solely to the particular signatures appearing in each petition form.<sup>112</sup> To add a registrar's certification of unenrollment for each of the four electors, in addition to the circulator's verification and the registrar's certification as to individual voters, would leave little space for signatures.<sup>113</sup> The Hearing Officer also stated that even though there are two forms, the Secretary of State considers both forms to be part of the nomination petition, and both forms have to be completed and filed in order for the nomination to be accepted.<sup>114</sup> Finally, the Hearing Officer pointed out that putting the certifications of unenrollment for all four presidential electors on the face of the petitions would not inform voters. Because the certificates of unenrollment do not need to be completed before voters sign the petitions, this portion of the petition would most likely be blank when voters were actually asked to sign the form.<sup>115</sup>

The Hearing Officer also recommended rejecting the remaining challenges concerning false affirmations by circulators and acceptance of incorrect or missing address information.<sup>116</sup> The Hearing Officer provided numerous and solid grounds

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107. *Id.* at 8.

108. *See Melanson*, 2004 WL 3196784, at \*3.

109. 21-A M.R.S.A. § 21 (2008).

110. *Id.* § 354. *See also* Brief of Respondent/Appellee at 8, *Melanson*, 2004 ME 127, 861 A.2d 641.

111. *See* Brief of Respondent/Appellee at 8, *Melanson*, 2004 ME 127, 861 A.2d 641.

112. *See id.* at 8.

113. *See id.* at 9.

114. *See id.*; *see also* 21-A M.R.S.A. §§ 353, 354, 355 (2008 & Supp. 2012).

115. *See* Brief of Respondent/Appellee at 9, *Melanson*, 2004 ME 127, 861 A.2d 641.

116. *See Melanson v. Dep't of the Sec'y of State*, 2004 WL 3196784, at \*1 (Me. Super. Sept. 27, 2004), *aff'd* 2004 ME 127, 861 A.2d 641.

for rejecting Melanson's challenges, and, as mentioned above, the Secretary of State accepted the Hearing Officer's recommendation.<sup>117</sup>

Nonetheless, Melanson appealed the Secretary of State's decision concerning her first four challenges, arguing that the Secretary of State had abused its discretion in adopting the Hearing Officer's Recommendation. Melanson's appeal went to the Superior Court of Maine.<sup>118</sup> The Superior Court granted Nader and Camejo's motion to intervene; counsel for all three parties – Melanson, Nader/Camejo, and the Secretary of State – met an expedited briefing schedule, followed by oral argument before the Superior Court on September 24, 2004.<sup>119</sup> On September 27, 2004, Judge Studstrup of the Superior Court affirmed the decision of the Secretary of State based on the evidence of record, the Hearing Officer's report, and the oral and written arguments of the parties.<sup>120</sup>

Judge Studstrup found that the testimony of Mr. Snowdeal sufficiently defeated Melanson's allegations concerning the Campaign's use of a "fictitious" elector.<sup>121</sup> Finding the use of "John Noble Snowdeal," as opposed to "J. Noble Snowdeal" or "Joseph Noble Snowdeal," on some of the petitions to be an immaterial typographical error, Judge Studstrup cited to the "immaterial irregularities provision" of 21-A M.R.S.A. § 3(1).<sup>122</sup> Judge Studstrup found that:

[T]he analysis by the hearing officer, and particularly the *lack of any evidence* of confusion by those signing or reviewing the petitions is persuasive. Mr. Snowdeal is a living, breathing person who testified before the Hearing Officer, not a fictitious would-be elector created to fool petition signers. Acceptance of the petitions with the incorrect first name is appropriate, whether as a matter of application of [the Immaterial Irregularities Statute] or as an exercise of the Secretary's discretion on questions of this type.<sup>123</sup>

Judge Studstrup also affirmed the Secretary of State's ruling on the second and third challenges, which concerned the absence of consent and unenrollment forms from the candidates. Judge Studstrup deferred to the Secretary of State's interpretation of the laws that it administers. He noted that "[h]istorically, the Secretary has required that only the slate of electors file such consent and unenrollment forms because technically it is the electors who are being elected, not the actual candidates for the office of president and vice-president."<sup>124</sup> The candidates were therefore not required to file consent and unenrollment forms, and the fact that Mr. Camejo was a member of the Green Party in California did not matter. Neither Camejo nor Nader were required to file the forms, so it did not

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117. *Id.* at \*\*1-3.

118. *See Melanson*, 2004 WL 3196784, at \*1.

119. *See id.*

120. *See id.*

121. *See id.* at \*2.

122. *See id.* This statutory provision states that "[i]mmaterial irregularities include, but are not limited to, misspelling, inclusion or omission of initials and substitution of initials for given names." Further, such immaterial irregularities "shall not invalidate the name or signature if the identity of the person named is clear to the public official charged with reviewing that document." 21-A M.R.S.A. § 3(1) (2008 & Supp. 2012).

123. *Melanson*, 2004 WL 3196784, at \*2 (emphasis added).

124. *Id.* at \*3.

matter that they weren't, in fact, "unenrolled."

Judge Studstrup also affirmed the Secretary of State's ruling on the fourth challenge – that the petitions supplied by the Secretary of State did not comply with the petition requirements set forth in the election statutes. Here, Judge Studstrup also deferred to the Secretary of State's decisions interpreting the laws that it administers, stating:<sup>125</sup>

For many years the Secretary has followed a practice that incorporates both the petition form and the consent and certification, though two documents, as one petition. . . . The Secretary's interpretation of the statute provides the needed information even if not on the front page. With the Secretary's interpretation and practice, information potential signers may wish [to see] is available to the curious. At the same time, the candidate's interest in getting on the ballot clearly outweighs the interest of having all four certifications appear on the face of the petition, when they are available elsewhere.<sup>126</sup>

Undeterred, Melanson, the head of the Maine Democratic Party, appealed Judge Studstrup's decision concerning the fourth challenge.<sup>127</sup> The Supreme Judicial Court of Maine (Law Court) affirmed the Superior Court's decision.<sup>128</sup> Because the Superior Court was acting as an intermediate court of appeals, the Law Court reviewed the decision of the Secretary of State directly for errors of law, abuse of discretion, or findings not supported by the record.<sup>129</sup> Per standard canons of statutory construction, the Law Court, in construing the statute, attempted to give effect to legislative intent by examining the plain meaning of the statutory language.<sup>130</sup> It concluded that the language of 21-A M.R.S.A. § 353 requiring certification "on the petition" was ambiguous when read in conjunction with § 354, which states that a petition "may contain as many separate papers as necessary."<sup>131</sup> Because the Law Court found the statute to be ambiguous, it reviewed whether the Secretary of State's construction was reasonable.<sup>132</sup>

The Law Court noted the mandate of title 21-A, that the "[t]he Secretary of State may establish the form and content of all forms, lists, documents and records required by or necessary to the efficient operation of this Title."<sup>133</sup> The Law Court found that "[a]llowing the unenrollment certification forms and the circulating petition forms to be collectively considered 'the petition' certainly supports the efficient operation of the nomination process."<sup>134</sup> It also found the legislative history of section 353 to show that "the existence of the certification, not its location, is the primary purpose of the certification requirement."<sup>135</sup> The Law Court rejected Melanson's argument that the purpose of certification is to inform

125. *See id.*

126. *Id.*

127. *See* Melanson v. Sec'y of State, 2004 ME 127, ¶ 2, 861 A.2d 641.

128. *See id.*

129. *See id.* ¶ 7.

130. *See id.*

131. *See id.* ¶ 9 (quoting 21-A M.R.S.A. § 354(1) (2008 & Supp. 2012)).

132. *See id.* ¶ 8.

133. *Id.* ¶ 10 (quoting 21-A M.R.S.A. § 21 (1993)).

134. *Id.*

135. *Id.* ¶ 11.

the public of an elector candidate's party status prior to the distribution of a petition. It stated that "[t]he purpose of the certification is to aid the Secretary in fulfilling his responsibilities in the election process by ensuring that any person who may be placed on a ballot meets the statutory requirements."<sup>136</sup> The Law Court concluded that "[t]he purpose of the certification, the legislative history, and the Secretary of State's authority to prescribe forms for all provisions of title 21-A pursuant to 21-A M.R.S.A. § 21, convinces us that the Secretary's interpretation of the statute is both reasonable and warranted when reading the statute in context."<sup>137</sup> The court deferred to the reasoning of the Secretary of State in interpreting the statute to permit the certification to appear on an approved form deemed to be part of the petition.<sup>138</sup>

So, although Melanson issued an objection to the Report and Recommendation of the Hearing Officer, appealed the decision of the Secretary of State, and appealed the decision of the Superior Court, none of the four judicial bodies that entertained her challenges found merit in any of them. In Maine, as in other states, the private challenges, and the appeals of the decisions made on those challenges, did not operate to keep unqualified candidates off of Maine's ballot. To the contrary, the challenge mechanisms were used to try to keep a qualified candidate off of the ballot, and to tie up his resources. Nader became the target of these challenges and appeals because he had enough support to put together a valid nomination petition, not because there was any indication that he lacked the requisite voter support. Candidates without any real support from voters, the candidates whose petitions should be challenged, are unlikely to inspire a petition challenge.

#### IV. ELECTION SLAPPS EVADE JUDICIAL SANCTION

##### *A. The Campaign's Lawsuits Against the DNC*

Between October 2007 and November 2009, Nader filed four lawsuits seeking redress for the Democratic Party's use of frivolous lawsuits to sabotage his campaign.<sup>139</sup> Three of the lawsuits ultimately ended up before the D.C. Court of Appeals and the last lawsuit was ultimately dismissed pursuant to an order from Maine's highest court, in the summer of 2013.<sup>140</sup> The six-years of hard-fought litigation, which never even led to a trial on the merits, show the futility of seeking meaningful relief from Election SLAPPS brought during the three-month election cycle.

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136. *Id.* ¶ 12.

137. *Id.* ¶ 13.

138. *Id.*

139. *See* Nader v. Democratic Nat'l Comm., No. 09-7004, 2009 WL 4250599 (D.C. Cir. Oct. 30, 2009); Nader v. Democratic Nat'l Comm., 567 F.3d 692 (D.C. Cir. 2009); Nader v. Democratic Nat'l Comm., 590 F. Supp. 2d 164 (D.C. Cir. 2008); Nader v. Me. Democratic Party, 2013 ME 573, 66 A.3d 571.

140. *Id.*

*I. The D.C. Lawsuits*

In the first of the lawsuits to come before the D.C. Court of Appeals, the court declined to affirm the District Court's dismissal under the Noerr-Pennington doctrine, a body of law arguably designed to solve other problems.<sup>141</sup> Instead, after noting that the lawsuit "present[ed] interesting legal issues of first impression,"<sup>142</sup> the D.C. Court of Appeals affirmed dismissal on statute of limitations grounds.<sup>143</sup>

Before affirming the dismissal on statute of limitations grounds, however, the court acknowledged the difficulty a court would face in ruling on malicious prosecution and abuse of process claims based on the facts of Nader's case. The court stated that the case would turn on Nader's ability to prove a pattern of filings that were objectively baseless and intentionally so, meaning that Nader would have to show that the defendants filed the petition challenges knowing that they were false.<sup>144</sup> The court accepted Nader's theory of special injury for both claims: that the pattern of baseless litigation launched by the democrats deprived him "so dramatically of resources that he was unable to meaningfully campaign for the presidency."<sup>145</sup> The court interpreted Nader's claim as an "aggregated, conspiratorial theory of misuse of the judicial process."<sup>146</sup>

Given that a few of the challenges succeeded, the court expressed concern over whether the complaint alleged "a strategy of repeatedly filing deliberately false claims."<sup>147</sup> The court explained that it would need to decide whether Nader must prove that the Democrats' overall strategy was itself objectively baseless or whether it would be sufficient for Nader to show only that the Democrats' strategy resulted in more than one baseless suit.<sup>148</sup>

The showing required by the court would also have choice of law implications. If the court required plaintiffs to prove that the defendants' overall strategy was itself objectively baseless, D.C. law would apply.<sup>149</sup> If the court only required Nader to show that the defendants' strategy resulted in more than one baseless suit, choice of law issues would emerge:

[W]e would face the choice of law problem in marking the boundary between a Democratic loss and a baseless lawsuit. . . . [I]f each suit requires separate consideration, we would face nineteen separate legal standards, each having at least three inquiries: (1) What makes a valid ballot challenge in State X? (2) What is State X's law of probable cause for purposes of malicious prosecution? and (3) Does State X have a special standard for, say, sending a letter to an election commission or for election law issues in general? Almost all these legal issues are questions of state law on which we lack instructive precedents. And this list is hardly exhaustive.<sup>150</sup>

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141. See *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 699 (D.C. Cir. 2009).

142. *Id.* at 698.

143. *Id.* at 702.

144. *Id.* at 698.

145. *Id.*

146. *Id.*

147. *Id.* at 699.

148. *Id.*

149. *Id.*

150. *Id.*

After outlining some of the issues that an analysis on the merits would raise, the court took the less laborious approach of affirming the dismissal on statute of limitations grounds.<sup>151</sup> The court's opinion gives an ominous warning about the challenges that a plaintiff, and the court, would face in a suit that sought redress for this particular brand of Election SLAPP. The D.C. Court of Appeals eventually dismissed the remaining two suits before it on claim preclusion and *res judicata* grounds.<sup>152</sup>

## 2. The Maine Lawsuit

After the dismissals of the D.C. lawsuits, Nader filed a new complaint in Maine's state court.<sup>153</sup> The plaintiffs in this suit, Nader (as candidate), and Christopher Droznick, Nancy Oden, and Rosemary Whittaker (his 2004 Maine presidential electors), brought claims against the Maine Democratic Party, the Democratic National Committee, Kerry-Edwards 2004, Inc., the Ballot Project, Inc., Dorothy Melanson, Terry McAuliffe, and Toby Moffitt. The plaintiffs brought claims of civil conspiracy, abuse of process and wrongful use of civil proceedings (a tort in Maine similar to malicious prosecution) arising from the alleged groundless and abusive litigation against the campaign during the 2004 presidential election.<sup>154</sup> The plaintiffs alleged that the nomination petition challenges, the subpoenas, the discovery requests, and the related appeals filed or issued by defendants were baseless.<sup>155</sup> The plaintiffs further alleged that the coordinated onslaught of this baseless litigation was calculated to harass and embarrass the candidates' electors, and to obstruct and drain funds from the candidates, thereby interfering with the candidates' rights to run for public office.<sup>156</sup>

Ironically, the Maine lawsuit was initially dismissed pursuant to Maine's anti-SLAPP statute – a statute intended to protect parties from frivolous lawsuits designed to stifle political participation.<sup>157</sup> On appeal of the dismissal, however, the highest court in Maine announced a change to the standard applied to the anti-SLAPP statute and remanded the case.<sup>158</sup> The initial dismissal of Nader's lawsuit via Maine's anti-SLAPP statute illuminated two burden-shifting mechanisms, which courts had previously tacked on to the statute when they applied it, that made the statute yield perverse results. The Law Court announced that it was eliminating one of the burden-shifting mechanisms that rendered the statute unconstitutional, but it left the other burden-shifting mechanism in place. It remanded the case and directed the trial court to apply the new standard. It looked

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151. *Id.* at 702.

152. *Nader v. Democratic Nat'l Comm.*, 590 F. Supp. 2d 164, 170 (D.C. Cir. 2008); *Nader v. Democratic Nat'l Comm.*, No. 09-7004, 2009 WL 4250599, \*1 (D.C. Cir. Oct. 30, 2009).

153. Complaint, *Nader v. Me. Democratic Party*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 25, 2009)

154. *Id.*

155. *Id.* at 3.

156. *Id.* at 4.

157. See *Nader v. Me. Democratic Party*, WASSC-CV-09-57 (Me. Super. Ct., Was. Cty., Nov. 15, 2010).

158. See *Nader v. Me. Democratic Party*, 2012 ME 57, ¶¶ 36, 39, 41 A.3d 551.

as though Nader was going to have his day in court.

The trial court applied the new standard and denied defendant's attempts to dismiss Nader's suit via the anti-SLAPP statute.<sup>159</sup> On appeal of this decision, however, the Law Court retreated from its initial opinion and directed the trial court to dismiss Nader's suit.<sup>160</sup> The second Law Court decision muddies the waters on anti-SLAPP jurisprudence. Although its first opinion purports to announce a new standard, its second opinion dictates an application of the "new" standard that sounds much like the old unconstitutional application. Ultimately, Maine's anti-SLAPP statute was used to dismiss a lawsuit that sought redress for . . . SLAPPs.

## V. MAINE'S ANTI-SLAPP STATUTE

### A. Maine's Anti-SLAPP Statute

Maine's anti-SLAPP statute states:

When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. The court shall advance the special motion so that it may be heard and determined with as little delay as possible. The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.<sup>161</sup>

The trial court initially found that Nader's claims were based on *defendants'* exercise of *their* right of petition.<sup>162</sup> The trial court then found that Nader failed to show that the defendants' challenges were "devoid of any reasonable factual support or any arguable basis in law. . . ."<sup>163</sup>

When the defendants moved for attorneys' fees, however, the trial court awarded a fee of one dollar.<sup>164</sup> The court acknowledged that Nader's case was not the "typical" SLAPP that the anti-SLAPP statute was enacted to address.<sup>165</sup> "The character of this litigation brought, by a candidate for President of the United States, against one of the two major political parties, is significantly different in tone and tenor" from the typical SLAPP cases.<sup>166</sup> The court reasoned:

This case does not pit a wealthy developer against a citizen of modest means . . .  
This case involves a candidate for national elective office seeking to put forth his

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159. Nader v. Me. Democratic Party, 2013 ME 51, ¶ 10, 66 A.3d 571.

160. *Id.* ¶ 26.

161. 14 M.R.S.A. § 556 (2003 & Supp. 2012).

162. Nader v. Me. Democratic Party, WASSC-CV-09-57, at 10 (Me. Super. Ct., Was. Cty., Nov. 15, 2010).

163. *Id.* at 18-19 (quoting 14 M.R.S.A. § 556).

164. *See id.* at 4.

165. *Id.* at 2.

166. *Id.*

ideas to the national electorate for their consideration and approval and the defendants alleged calculated efforts to interfere, discourage and impede public exposure to that candidacy and those ideas. Those efforts are central to the functioning of this democracy.<sup>167</sup>

The court acknowledged the competing First Amendment rights at issue in the case.<sup>168</sup> Nader alleged that the defendants filed frivolous lawsuits to suppress his political participation. The defendants were asking the court to toss out Nader's lawsuit because it infringed on their right to bring lawsuits.

In its opinion concerning attorneys' fees, the court acknowledged that the defendants' request to dismiss Nader's lawsuit pursuant to Maine's anti-SLAPP lawsuit implicated competing rights of political association, effective voting, Equal Protection, and petitioning. Although the court felt compelled by precedent to dismiss the case, it flagged the underlying decision to dismiss the case as one that shows how Maine's anti-SLAPP statute can be applied to protect one party's First Amendment petitioning rights at the expense of the opposing party's First Amendment petitioning rights:

The broad interpretation and application of this statute, 14 M.R.S. § 556, by the Law Court, compels the decision reached by this Court in its decision of November 15th. However, this case involving Candidate Nader, raises significant questions concerning the appropriate judicial interpretation of 14 M.R.S. § 556 in the context of the Maine and Federal Constitutions and the competing interests represented therein. Whether this Court's decision of November 15th provides the opportunity for that to happen is for others to decide. But for the impact of legal authority in this State relating to 14 M.R.S. § 556, this Court is of the opinion that Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process. Defendants Ballot Project and Moffett characterize Plaintiffs' litigation as 'meritless.' With all due respect, the merits of Plaintiffs' underlying claims have yet to be evaluated.<sup>169</sup>

So, although the trial court dismissed the suit, it awarded only a nominal one dollar in attorney's fees and wrote that binding precedent required it to reach this unsettling result. In Nader's case, Maine's anti-SLAPP statute traded one litigant's right to petition for another litigant's right to petition, without an examination of the merits of any of the "petitions" at issue.

Both parties appealed the decision.

*B. Apparent Change of Burdens on Maine's Anti-SLAPP Statute and Remand to the Trial Court*

On appeal, the Law Court announced a new standard for Maine's anti-SLAPP statute and remanded the case to the trial court.<sup>170</sup>

Maine's anti-SLAPP statute involves two steps of analysis. In the first step, the defendant, as movant on the special motion to dismiss, carries the initial burden to show that the suit is based on activity that qualifies as an exercise of the

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167. *Id.* at 2.

168. *Id.* at 3-4.

169. *Id.*

170. *See* Nader v. Me. Democratic Party, 2012 ME 57, ¶¶ 36, 39, 41 A.3d 551.



defendant's First Amendment right to petition the government (Step 1).<sup>171</sup> If the defendant carries this initial burden, then the statute applies and the burden shifts to the plaintiff for step two of the analysis.<sup>172</sup> To avoid dismissal, the plaintiff then needs to show that the defendant's petitioning activity: (1) was without "reasonable factual support"; (2) was without an "arguable basis in law"; and (3) resulted in "actual injury" to the plaintiff (Step 2).<sup>173</sup> The plaintiff may make this showing through affidavits and the pleadings.<sup>174</sup>

Maine's anti-SLAPP statute does not specify how a court determines whether the parties have carried their respective burdens in Step 1 and Step 2.<sup>175</sup> Before Nader's suit, courts would review the evidence in a light most favorable to the movant – the defendant.<sup>176</sup> As a result, if the parties presented conflicting facts, the defendant would prevail and the case would be dismissed. The Law Court recognized this "converse summary-judgment-like standard" as working in stark contrast with other traditional dispositive motions, where conflicts are resolved in favor of the nonmoving party.<sup>177</sup>

With motions to dismiss and motions for summary judgment, for example, courts view pleadings and evidence in a light most favorable to the nonmoving party. If the movant fails to carry his burden, the case continues to discovery or trial.<sup>178</sup> Under the traditional model, the party moving to dispose of the case carries the heavier burden. The Law Court also recognized the problem of viewing evidence in favor of a moving party, when the evidence had not yet been subject to discovery or trial. "Application of this standard becomes problematic when the 'evidence' to be viewed most favorably to the moving party is disputed and consists only of pleadings and statements in affidavits not yet subject to discovery or trial."<sup>179</sup> Recognizing the "converse summary-judgment-like standard" as a "creature of case law," the Law Court saw fit to change the standard.<sup>180</sup>

The Law Court established a new standard for analyzing whether a plaintiff carries his burden at Step 2 of the analysis. Under the new standard, a plaintiff must present *prima facie* evidence, and the court must infer that the allegations in the plaintiff's complaint and affidavits are true.<sup>181</sup> The court described *prima facie* evidence as proof of "enough evidence to allow a fact-finder to infer the fact at issue and rule in the party's favor."<sup>182</sup> The plaintiff must present "some evidence" of every element.<sup>183</sup> The court described this threshold as a "low standard that does

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171. See Schelling v. Lindell, 2008 ME 59, ¶ 7, 942 A.2d 1226.

172. *Id.*

173. *Id.*

174. See 14 M.R.S.A. § 556 (2003 & Supp. 2012).

175. See *id.*

176. See Morse Bros., Inc. v. Webster, 2001 ME 70, ¶ 18, 772 A.2d 842; Maietta Constr., Inc. v. Wainwright, 2004 ME 53, ¶ 8, 847 A.2d 1169.

177. See Nader, 2012 ME 57, ¶ 30, 41 A.3d 551.

178. See *id.*

179. *Id.* ¶ 17.

180. *Id.* ¶ 31.

181. *Id.* ¶ 33.

182. *Id.* ¶ 34 (quoting Cookson v. State, 2011 ME 53, ¶ 8, 17 A.3d 1208).

183. *Id.* ¶ 35 (quoting Cookson, 2011 ME 53, ¶ 8, 17 A.3d 1208).

not depend on the reliability or credibility of evidence . . . .”<sup>184</sup> Under this new standard, the plaintiff would be able to avoid dismissal, “even when faced with conflicting evidence from the defendant.”<sup>185</sup>

After establishing the new standard, the Law Court remanded Nader’s case to the trial court.<sup>186</sup> Applying the new standard, the trial court found that Nader made a *prima facie* showing that the defendants’ petitioning activities were devoid of any reasonable factual support or arguable basis in law, which would have allowed the case to proceed to trial.<sup>187</sup>

Of course, the defendants appealed this decision, too.

### *C. Retreat to Unconstitutional Application of Maine’s Anti-SLAPP Statute*

In May of 2013, the Law Court took issue with the way the trial court applied the newly-announced standard. The Court vacated the judgment of the trial court and remanded with instructions to dismiss the case under Maine’s anti-SLAPP statute.<sup>188</sup>

In its first opinion (*Nader 1*), the Court stated that Nader “should be allowed to proceed” if he presented *prima facie* evidence that “any, rather than all” of defendant’s petitioning activities were “devoid of any reasonable factual support or arguable basis in law.”<sup>189</sup> In its second opinion (*Nader 2*), the court glommed together many of the petition challenges and characterized the underlying petitioning activity as only “three discrete petitioning activities”: (1) Benjamin Tucker’s complaint to the Secretary of State;<sup>190</sup> (2) Melanson’s complaint to the Secretary of State; and (3) Melanson’s appeals to the Superior Court and to the Law Court.<sup>191</sup>

Instead of looking at Nader’s evidence that many of the individual challenges to the nomination petition lacked support and a basis in law, the Law Court defined “petitioning activity” as the group of challenges in a particular filing, and determined that it would be satisfied if at least one of the individual challenges in a filing had some arguable basis in law. This characterization is at odds with the language of the anti-SLAPP statute itself, which defines “petitioning activity” to include “any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding.”<sup>192</sup> “[A]ny written . . . statement” should include any written statement in a court filing, even if the written statement appears next to written statements that have a basis in law.

Under this framework, the court ignored evidence that many of the individual challenges lacked support. Defining “petitioning activity” as the collective group

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184. *Id.* (quoting *Cookson*, 2011 ME 53, ¶ 8, 17 A.3d 1208).

185. *Id.*

186. *Id.* ¶ 38.

187. *Nader v. Me. Democratic Party*, 2013 ME 51, ¶ 10, 66 A.3d 571.

188. *Id.* ¶ 26.

189. *Nader*, 2012 ME 57, ¶ 36, 41 A.3d 551 (emphasis added).

190. According to Nader, Tucker is a registered Democrat in Maine, who filed a challenge to Nader’s nomination petition at the direction of the DNC. *See FN 87*; *see also* Complaint ¶¶ 57-58, *Nader v. Me. Democratic Party*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

191. *Nader*, 2013 ME 51, ¶ 17, 66 A. 3d 571.

192. 14 M.R.S.A. § 556 (2003 & Supp. 2012).

of challenges, as opposed to each individual challenge, enabled the Law Court to, essentially, apply the inverse standard of the one initially announced. Instead of determining whether *any* of the challenges to the nomination petition were devoid of support or a basis in law, the Court looked to see if any of the challenges *had* support or a basis in law.<sup>193</sup> The Law Court found that the challenge over the birth name of one of Nader's presidential electors (*John Noble Snowdeal v. J. Noble Snowdeal v. Joseph Noble Snowdeal*) had a technical basis in law and that this saved all of the petition challenges in Melanson's complaint.<sup>194</sup> It then found that the appeal over the propriety of the signature petition forms, which were designed by the Secretary of State, also had a technical basis in law.<sup>195</sup> Without examining the basis of the appeals of Melanson's other three challenges, the Law Court found that Melanson's entire appeal had a basis in law.<sup>196</sup> The process employed in *Nader 2* was a far cry from the standard announced in *Nader 1*. In terms of guidance for future litigants, it seems that a technical legal basis for one claim will validate a host of baseless claims, as long as the claims are part of the same pleading.

*Nader 2* also departs from the *prima facie* standard announced in *Nader 1*. *Nader 1* held that courts must "infer that the allegations in a plaintiff's complaint and factual statements in any affidavits responding to a special motion to dismiss are true."<sup>197</sup> But in *Nader 2*, the Law Court ignores much evidence, and primarily addresses evidence that it finds insufficient. For example, on the issue of whether the Democratic Party was behind the Tucker complaint, Nader pointed out that 1) an exhibit to the Tucker complaint is a letter from a California elections official to one of the attorneys who filed the Democratic Party's Pennsylvania challenge; 2) the organization of another one of the named defendants paid this attorney's firm for the costs associated with that challenge; and 3) the Democratic Party retained the other law firm that filed the challenge.<sup>198</sup> One would think that this would satisfy the definition of *prima facie* evidence set forth in *Nader 1*:

[P]roof only of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor. . . . [O]nly some evidence on every element of proof necessary to obtain the desired remedy. . . . [P]rima facie proof is a low standard that does not depend on the reliability or credibility of the evidence, all of which may be considered at some later time in the process.<sup>199</sup>

But, *Nader 2* does not discuss this evidence. Instead, it picks out other evidence that Nader did not present, and states that other averments made "on information and belief" do not satisfy the burden of producing *prima facie* evidence.<sup>200</sup>

Although the Law Court announced a "new standard" in *Nader 1*, its

193. *Nader*, 2013 ME 51, ¶¶ 21, 24, 66 A.3d 571.

194. *Id.* ¶ 21.

195. *Id.* ¶ 24.

196. *Id.*

197. *Nader*, 2012 ME 57, ¶ 33, 41 A.3d 551.

198. Complaint ¶¶ 58, 120-21, *Nader v. Me. Democratic Party*, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 25, 2009)

199. *Nader*, 2012 ME 57, ¶ 34, 41 A.3d 551 (quoting *Cookson*, 2011 ME 53, ¶ 8, 17 A.3d 1208).

200. *Nader*, 2013 ME 51, ¶ 19, 66 A. 3d 571 (quoting Complaint ¶ 30, *Nader*, 2012 ME 57, 41 A.3d 551).

instructions for applying the “new standard” in *Nader 2* undermine the initial message and leave a murky precedent.

*D. Eliminating Both Burden-Shifting Mechanisms from  
Maine’s Anti-SLAPP Statute*

Aside from the mixed messages about Step 2 of the analysis for Maine’s anti-SLAPP statute, neither of the Law Court’s opinions address the weird standard courts have been applying in Step 1 of the analysis.

Now, courts must infer that the allegations in the plaintiff’s complaint and affidavits are true for Step 2, but courts should also make this inference in Step 1, when the court needs to decide whether the suit is based on activity that qualifies as an exercise of the defendant’s First Amendment right to petition the government.

Even though *Nader* alleged that the defendants initiated challenges and appeals, and issued subpoenas and other discovery, which were devoid of factual support or an arguable basis in law, the court found that the defendants’ activity was protected by the First Amendment and that the anti-SLAPP statute applied.<sup>201</sup> Because at Step 1 the courts in Maine look to the general underlying action of the complaint (litigation), as opposed to what is more specifically pled (*frivolous* litigation), the anti-SLAPP statute will apply to all abuse of process and wrongful use of civil procedure claims.

Accordingly, all plaintiffs bringing these claims will be subjected to the heightened standards of Maine’s anti-SLAPP statute. Even under the revised standard at Step 2, the statute creates extra burdens on plaintiffs. Without the aid of discovery, plaintiffs bringing these claims will have to come forward with *prima facie* evidence that the defendant engaged in litigation that (1) was without “reasonable factual support”; (2) was without an “arguable basis in law”; and (3) resulted in “actual injury” to the plaintiff.<sup>202</sup> To the extent that this *prima facie* evidence standard is higher than the notice pleading standard applicable to all other claims made under Maine law, Maine has now set a different pleading standard for certain torts.<sup>203</sup> And, according to *Nader II*, the *prima facie* standard applied in Maine’s anti-SLAPP statute far exceeds the notice pleading standard applied to all other torts, under any other statutes.

It also follows that Maine’s anti-SLAPP statute imposes additional elements to claims for abuse of process. As discussed above, all abuse of process claims will be subject to the anti-SLAPP statute because at the base of all of these claims is a process or petition that Maine courts give First Amendment protection to, regardless of whether the complaint alleges the abuse of the process or the baselessness of the petition.<sup>204</sup>

Under Maine law, two elements are required to sustain a claim for abuse of process: (1) “the use of process in a manner improper in the regular conduct of the

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201. See *Nader*, 2012 ME 57, ¶ 28, 41 A.3d 551.

202. See 14 M.R.S.A. § 556 (2003 & Supp. 2012)

203. Cf. Me. R. Civ. P. 8 (setting forth the pleading standard for claims brought under Maine law). Maine’s Rule 8 calls for “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief which the pleader seeks.” *Id.*

204. See *Nader*, 2012 ME 57, ¶ 28, 41 A.3d 551.

proceeding,” and (2) “the existence of an ulterior motive.”<sup>205</sup> At Step 2 of the analysis in motions to dismiss brought pursuant to Maine’s anti-SLAPP statute, the plaintiff must come forward with *prima facie* evidence that the defendant engaged in litigation that (1) was without “reasonable factual support;” (2) was without an “arguable basis in law;” and (3) resulted in “actual injury” to the plaintiff.<sup>206</sup> Accordingly, a plaintiff bringing an abuse of process claim will be required to present *prima facie* evidence of elements wholly separate and apart from the elements that constitute his claim. Maine’s anti-SLAPP statute imposes these extra elements, and then requires a plaintiff to present evidence of them without the aid of discovery.

Although the Law Court recognized that the “converse summary-judgment-like standard” in play with the anti-SLAPP statute ran contrary to the standards applicable to other dispositive motions, the Law Court only changed the standard applied to Step 2 of the analysis. As for Step 1 of the analysis, when the defendant is required to show that the suit is based on activity that receives protection from the First Amendment, the evidence is still viewed in a light most favorable to the moving party – the defendant. The court is not necessarily accepting the truth of the plaintiff’s allegations, even though the anti-SLAPP statute is a vehicle for dismissal. When the parties present conflicting facts (*e.g.* the plaintiff alleges that the defendant’s litigation was baseless and the defendant submits an affidavit stating that it was not), the defendant prevails and the statute applies. The analysis then moves to Step 2.

The court should view the pleadings and evidence in a light most favorable to the nonmoving party (the plaintiff) at Step 1 as well as at Step 2. Without the aid of discovery, the defendant is in a much better position to come forth with evidence that it had probable cause for bringing its litigation. The party bringing the underlying petition shouldn’t even need discovery to show that its petitioning was premised on “reasonable factual support” and an “arguable basis in law.” The initiator of litigation is in a better position to show probable cause for the litigation, so it should not also receive a beneficial standard on this issue. Further, as recognized by the Law Court in the context of Step 2, courts traditionally view evidence in a light most favorable to the nonmoving party in dispositive motions.<sup>207</sup>

The Law Court made some corrective measures to how Maine’s anti-SLAPP statute is applied, but it should change the way courts view the pleadings and evidence in Step 1, as well as Step 2 of the statute. Suits seeking redress for SLAPPs, which typically take the form of claims for abuse of process or malicious prosecution, as well as other types of malicious prosecution and abuse of process claims, are now subjected to heightened pleading standards. The anti-SLAPP statute also imposes an extra element to abuse of process claims. Ironically, suits actually seeking redress for SLAPPs will be subjected to the heightened pleading

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205. See *Advanced Const. Corp. v. Pilecki*, 2006 ME 84, ¶ 23, 901 A.2d 189 (internal citation omitted). “The filing of a lawsuit qualifies as a regular use of process and cannot constitute abuse of process, even if the filing was influenced by an ulterior motive. Instead, abuse of process claims arise when litigants misuse individual legal procedures, such as discovery, subpoenas, and attachment, after a lawsuit has been filed.” *Id.*

206. See 14 M.R.S.A. § 556 (2003 & Supp. 2012).

207. See *Nader*, 2012 ME 57, ¶ 30, 41 A.3d 551.

standards of Maine's anti-SLAPP statute.

#### VI. ELIMINATION OF PRIVATE CHALLENGES TO NOMINATION PETITIONS

Moving back to the root of Election SLAPPS, here are the problems with allowing private challenges to nomination petitions: 1) While the nomination petition system is designed to only allow candidates with a prerequisite amount of voter support to appear on the ballot, only those candidates who actually have that support (and therefore pose a threat to an opponent), will actually draw petition challenges (in other words, the challenges are not likely to be used for their intended purpose); 2) No one will challenge the nomination petitions of those most likely to lack the requisite voter support; 3) The task of responding to petition challenges and appeals exponentially increases the burden an independent candidate faces when trying to get on a state's ballot; 4) The task of responding to petition challenges and appeals on a state-by-state basis *in a federal election* further compounds this burden, and the burden is not likely accounted for when state legislators assess the burden of compliance with their state's nomination petition requirements.

A true analysis of the burden imposed on an independent presidential candidate seeking ballot access needs to incorporate the burdens of complying with the ballot access restrictions and validation procedures of 51 different territories. Examined under this framework, the piece-meal nature of the federalist electoral process, plus the availability of private challenges to nomination petitions, creates an undue burden on independent candidates. An independent candidate could face limitless and simultaneous petition challenges, and appeals, in far-flung forums across the country, all during a compressed and time-sensitive period in the campaign cycle.<sup>208</sup> Nader's 2004 experience shows the reality of this undue burden. The coordinated challenges issued by the DNC against the Campaign's nomination petitions in 19 different forums were effective in diluting the Campaign's force during a critical time in the election cycle, even though the overwhelming majority of the challenges and appeals failed on their merits.<sup>209</sup>

The judicial contours of Nader's lawsuits against the DNC for its use/abuse of the challenge process show how such behavior is not easily sanctioned by filing a lawsuit. Existing case law does not provide ready answers to the questions presented by Nader's case. Can a slew of claims, some with merit, most without, constitute an abuse of process claim?<sup>210</sup> Would Nader have to "prove that the Democrats' overall strategy was itself objectively baseless," or would it be sufficient for Nader to "show only that the Democrats' strategy resulted in more than one baseless suit"?<sup>211</sup> The courts presented with Nader's case have not yet answered these questions, but they loom large.

The courts presented with Nader's claims did acknowledge the complex

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208. *See generally*, AMATO, *supra* note 14.

209. *See* Complaint ¶ 136, Nader v. Me. Democratic Party, WASSC-CV-2009-57 (Me. Super. Ct., Was. Cnty., Nov. 15, 2010).

210. *See* Transcript of Oral Argument 34-40, Nader v. Democratic Nat'l Comm., 567 F.3d 692 (D.C. Cir. 2009).

211. *Nader*, 567 F.3d at 699.

analysis demanded by the claims. Jurisdictional issues could arise if a judge in one territory was asked to make determinations concerning cases tried and decided by different judges in different forums.<sup>212</sup> Choice of law issues would abound if a judge was asked to distinguish between a lost challenge and a baseless challenge.<sup>213</sup> If each challenge required separate consideration, a judge would face a separate legal standard for each forum and would have to determine:

- (1) what makes a valid ballot challenge in State X?
- (2) What is State X's law of probable cause for purposes of malicious prosecution? and
- (3) Does State X have a special standard for . . . sending a letter to an election commission or for election law issues in general?<sup>214</sup>

When faced with Nader's case the Court of Appeals for the District of Columbia acknowledged this trying analysis and noted that "the merits of Nader's claims present state law issues of first impression." Rather than tackling this analysis, the court affirmed the dismissal of the case on statute of limitations grounds.<sup>215</sup>

Finally, judicial recourse after-the-fact is cold comfort to a candidate who was denied the ability to fully participate in an election. Post-election judicial redress could not provide an independent candidate with another shot at the election. Judicial redress in the middle of the fray would not necessarily alleviate the burden imposed by the frivolous challenges. Because of the burden imposed on a candidate in defending the nation-wide petitions, it is unlikely the campaign would have the resources to bring individual malicious prosecution counterclaims or Rule 11 motions during the course of the actual challenges or that such claims would be resolved in time to matter. Even if it did, engaging in additional litigation during the time sensitive campaign period would exacerbate the underlying problem of being entangled in litigation in the first place.

Coordinated, aggregated challenges to nomination petitions are an effective way to handicap a campaign in a way not envisioned by the individual challenge procedures themselves. Under the existing system, private parties can coordinate and aggregate their challenges in a way that perverts the purpose of the individual challenge mechanisms. Aggregated challenges do not identify ineligible candidates and then keep them off of state ballots; aggregated challenges create an undue burden that prevents ineligible and eligible candidates alike from appearing on state ballots. Instead of relying on private, partisan enforcement, states should audit the nomination petitions using a universally applied, neutral, predetermined process, such as statistical sampling. State audits would eliminate the uneven enforcement created by the private challenge systems in place in most states. They would create a neutral validation system that would apply evenly to all independent candidates, not just those targeted by opponents. The criteria and methods for the statistical sampling should be set forth in advance and allow some measure of predictability for independent candidates seeking to comply with the signature requirements. The audits should be final, thus eliminating the use of appeals by a well-funded private party to prolong the validation procedure.

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212. See *Nader*, 2012 ME 57, ¶ 37 n.14, 41 A.3d 551.

213. See *Nader*, 567 F.3d 692, 699 (D.C. Cir. 2008).

214. *Id.*

215. *Id.* at 694.

## VII. CONCLUSION

Nader's 2004 plight shows how coordinated ballot challenges can cripple a campaign. The current system allows private parties to create undue procedural burdens to ballot access by aggregating petition challenges. This use of petition challenges does not advance the states' interests of: 1) keeping ineligible candidates off of the ballot; or 2) eliminating voter confusion. In fact, only serious candidates who threaten another candidate are likely to inspire petition challenges. Eliminating the availability of private challenges to nomination petitions would create a less partisan validation system. And, the private challenge mechanism could be replaced by state audits, which would result in a more even enforcement of a state's nomination petition requirements.

Nader's 2004 plight shows how there is no safeguard against the use of concerted frivolous lawsuits to manipulate the election process, as long as private challenges remain available. Nader's post-election lawsuits show the difficulty in obtaining post-election legal redress. Nader's post-election lawsuit in Maine has led to at least a surface-level adjustment to the way courts apply Maine's anti-SLAPP statute, but the Law Court's most recent order allows a singular nonfrivolous petition to protect frivolous petitions in the same filing from sanction, and continues to impose extra burdens on a particular class of litigants – those most likely to be seeking redress for SLAPPs or for other malicious uses of prosecution.



