

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: April 30, 2021
To: Veterans and Legal Affairs Committee
From: Janet Stocco, Legislative Analyst
LD 1061 **An Act To Protect Minor Political Parties That Seek Official Party Status**
(Representative J. Fecteau)

SUMMARY

This bill amends [21-A M.R.S. §303\(2\)](#) to reduce from 5,000 to 2,500 the number of voters that must be enrolled in a new or currently unqualified political party in order for that political party to participate in a primary election (this provision does not apply to a party that seeks to organize around a gubernatorial or presidential candidate). The bill also requires that, if the Secretary of State later determines that fewer than 2,500 voters are enrolled in the party, the Secretary must provide at least 90 days' notice to the party before the enrollment status of voters enrolled in the party is changed.

At the public hearing, the bill **sponsor proposed amending the bill** to eliminate the requirement in [21-A M.R.S. §301\(1\)\(E\)](#) that, after a political party has qualified to have its party designation appear on the ballot in 2 general elections, at least 10,000 of its enrolled voters must vote in each future general election to maintain the party's qualified status.

ADDITIONAL INFORMATION:

A. Comparison of bill to current law.

The attached chart compares the party-qualification provisions of current law and LD 1061, as amended by the sponsor's proposed amendment.

B. Conflicting legislation.

[LD 1363](#) proposes to amend [21-A M.R.S. §301\(1\)\(E\)](#) to provide that a qualified party may maintain its qualified status if it holds the required municipal caucuses and state conventions and either:

- The party's candidate for Governor or President received at least 5% of the total vote cast in the State for Governor or President in the most recent gubernatorial or presidential election, **or**
- At least 10,000 of its voters were enrolled in the party as of the date of the last general election, except that this enrollment requirement does not apply until the second general election after the party achieves its qualified status.

C. Recent past litigation and legislation.

1. 2016 Litigation

In 2016, the Libertarian Party of Maine challenged the provisions of Maine law that, at that time, required a party seeking to qualify to participate in a primary election by enrollment (with an eye toward also participating in the general election) to enroll 5,000 voters in the party during the year before the primary election and to certify proof of achieving this enrollment by December 1st of the year before the primary election. The U.S. District Court for the District of Maine agreed with the Libertarian Party that the December 1st deadline—which was 196 days before the primary election, at a time when candidates are not yet declared and public attention on the election is at its lowest—severely burdened the party's

rights to ballot access and to organize as a political party, especially in light of other aspects of Maine law at that time. The law gave the Secretary of State only 5 days to determine whether 5,000 individuals had validly enrolled in the new party, effectively pushing the deadline back before December 1st, and the law provided no appeals process through which the a party seeking to qualify could challenge the Secretary of State’s determination. *Libertarian Party of Maine v. Dunlap*, No. 2:16-cv-0002, 2016 WL 3039715 (D. Me. May, 27, 2016). As a remedy, the court afforded the Libertarian party an additional 15 days after the date of the court’s decision to enroll sufficient voters in the party to meet the 5,000 threshold to qualify as a political party and certify a presidential candidate for the general election.

2. 2017 Legislation

After the 2016 litigation, the 128th Legislature amended the laws governing the initial qualification of new parties organized by enrollment to:

- Extend the deadline set forth in [§302\(2\)](#) for enrolling 5,000 voters in the new party from December 1st of the year before the primary election to January 2nd of the primary election year;
- Enlarge the amount of time established in [§302\(2\)](#) for the Secretary of State to verify the new party’s enrollment figures from 5 to 15 days; and
- Establish an administrative process in new [§303-A](#) for a new party to challenge a determination by the Secretary of State that the party did not meet the 5,000-voter enrollment requirement.

See [P.L. 2017, ch. 254](#). In addition, the Legislature also amended the requirement that 10,000 voters from a qualified party must vote in each general election for that party to remain qualified in Maine by:

- Adding language to [§301\(1\)\(E\)](#) to create a grace period for newly qualified parties, which would not have to satisfy this requirement until the 2nd general election after qualifying for party status.

3. 2020 Litigation

In *Baines v. Dunlap*, 466 F. Supp. 3d 273, 275 (D. Me. 2020), the U.S. District Court for the District of Maine again examined Maine’s laws governing party qualification and ballot access as applied to the Libertarian Party. The Court concluded, at a preliminary injunction stage assessing the likelihood of the party’s success on the merits, that:

- The requirement in [§303\(2\)](#) that a party seeking to conduct a primary enroll 5,000 voters—less than ½ of 1% of all registered voters—by Jan. 2nd of the election year was a minimal burden that **did not violate** the party’s constitutional rights to association or to access the ballot;
- The requirement in [§335\(2\) & \(5\)](#) that a party’s candidate obtain signatures from a specified number of registered, party-enrolled voters in the electoral division the candidate seeks to represent **was not shown to infringe** on the party’s constitutional rights and was instead a valid ballot-access law requiring a showing of a “modicum of support” to access the ballot.
- The requirement in [§301\(1\)\(E\)](#) that, to retain its status as a qualified party, 10,000 voters—less than 1% of all registered voters—enrolled in the party must participate in the general election by the second election cycle, was similarly **not unconstitutionally burdensome**;
- But, because the State had not demonstrated “a colorable interest in unenrolling” the voters in a party that failed to achieve the 10,000-party-voter level of participation in the general election, the Libertarian Party was likely to succeed in showing that the unenrollment of its voters under [§306](#) **violated the party’s constitutional rights** to association. See *id.* at 285 (“By playing Lucy to non-major parties’ Charlie Brown, Sections 304 & 306 repeatedly set small parties back when they are just getting going—in any election if fewer than 10,000 of their registered members vote

they face the prospect of having to start all over again seeking a new round of 5,000 registrations, a significant cost to any party, let alone a fledgling one.”)

Although the court concluded that the Libertarian Party’s associational rights had likely been violated by the batch-unenrollment of its party members in December 2018, the court denied the party’s request for a preliminary injunction that would have ordered the State to re-enroll its former members. The court noted the party had waited nearly a year, until November 2019, to bring suit and, as a result, after being unenrolled from the Libertarian Party, former party members might now prefer to remain unenrolled or may have reenrolled in a new party in which they wished to remain enrolled. *Id.* at 286-87.

AMENDMENTS PROPOSED / ISSUES RAISED AT PUBLIC HEARING

A. Bill’s notice requirement is legally ineffective - Deputy Secretary of State.

In her testimony, Deputy Secretary of State Flynn observed that the bill’s insertion of a new sentence at the end of 21-A M.R.S. §303(2) on p.1, lines 15-19, is legally ineffective. That provision of the bill appears to be premised on the assumption that, if a new party qualifies to participate in a primary election under §303(2) by enrolling 2,500 voters in the party (the number of enrollments required in this section of the bill), it might subsequently lose that status if its enrollment numbers fall below the 2,500 threshold. Given this assumption, the bill imposes a new requirement that the Secretary of State provide 90-days’ advance notice before changing the enrollment status of the voters enrolled in that party.

Deputy Secretary Flynn observed that the Secretary of State does **not** have the authority to unenroll the voters of a new party in this circumstance, however. Instead, party members may only be unenrolled if fewer than 10,000 of the party’s voters participate in either the second general election after the party achieves qualified status or a subsequent general election as required by §301(1)(E). *See* §304 (party that fails to satisfy §301(1)(E) is disqualified); §306 (voters enrolled in a party that is disqualified under §304 are considered unenrolled voters for all purposes).

B. Proposed Amendment - Libertarian Party of Maine.

Tyler Rowe, Secretary of the Libertarian Party of Maine, proposed amending the bill as follows:

- Delay the Jan. 2nd deadline in §303(3) for new parties to enroll voters to qualify for the primary;
- Repeal the requirement in §301(1)(E) that, to retain the party’s status, at least 10,000 of a party’s enrolled voters must participate in the second and subsequent general elections after the party achieved qualified status; (*Analyst Note: this amendment was also proposed by the bill sponsor*);
- Remove the requirements that a party that does not achieve the 10,000-voter, general-election threshold be disqualified under §304 and that its members automatically be unenrolled under §306.
- Alleviate the burden imposed on new parties by the requirements (a) in §331(1) that party candidates may only appear on the general election ballot if they are nominated at a primary election; and (b) in §335(2) & (5) that a party candidate’s primary petition must be signed by a specified number of *party members* within the candidate’s electoral division for the candidate to appear on the primary ballot.

TECHNICAL ISSUES

None noted, other than the technical issue regarding the 90-day notice provision in section 1 of the bill discussed in the Deputy Secretary of State’s testimony.

FISCAL IMPACT

Not yet determined.

Attachment I: Party-qualification requirements under current law and LD 1061

Type of party	Current law	LD 1061 (with Sponsor Amendment)
New party organized by enrollment 21-A M.R.S. §303	To participate in primary election: A. ≥ 10 voters file declaration of intent in December of even-numbered year; and B. Enroll 5,000 voters by Jan. 2nd of the next even-numbered year.	To participate in primary election: A. ≥ 10 voters file declaration of intent in December of even-numbered year; and B. Enroll 2,500 voters by Jan. 2nd of the next even-numbered year.
	To appear on general election ballot: A. Must meet primary requirements; B. Must hold municipal caucuses in ≥ 1 municipality in ≥ 16 counties by March 20 th of primary year; and C. Must hold state convention between March 1 & Aug. 1 of general election year.	Same as current law
Existing party that appeared on the ballot in either of the two prior general elections 21-A M.R.S. §301	To participate in primary election: A. Must hold municipal caucuses in ≥ 1 municipality in ≥ 14 counties in: (1) general election year when qualified, (2) any interim election year and (3) by March 20 th of current primary year; B. Must hold state convention in (1) year party was listed on ballot and (2) in any interim year; and C. If party has been qualified for 2 general elections, $\geq 10,000$ party voters must have voted in last general election. ¹	To participate in primary election: A. Must hold municipal caucuses in ≥ 1 municipality in ≥ 14 counties in: (1) general election year when qualified, (2) any interim election year and (3) by March 20 th of current primary year; and B. Must hold state convention in (1) year party was listed on ballot and (2) in any interim year; and [delete item C] * <i>LD 1363 takes a different approach</i>
	To appear on general election ballot: A. Must meet primary requirements; and B. Must hold state convention between March 1 & August 1 of general election year.	Same as current law <i>Except that the primary requirements in item A are changed as noted above</i>

This chart does not describe the alternative process, set forth in [21-A M.R.S. 302](#), for a new party to obtain party qualification status by organizing around a gubernatorial or presidential candidate who obtained at least 5% of total votes cast in the State in the most recent general election.

¹ If a party fails to have 10,000 of its voters participate in a general election, under [21-A M.R.S. §304](#) the party is disqualified from participating in subsequent elections and, under [§306](#), voters enrolled in that party are considered unenrolled.