11th Circuit Docket Number: 0914250-CC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDY SHUGART and JONOTHAN GRAY	)
	)
Appellants,	)
	)
v.	)
	)
BETH CHAPMAN, SECRETARY OF STATE	)
	)
Appellee.	)

APPEAL
FROM A FINAL JUDGMENT OF
THE U. S. DISTRICT COURT FOR THE MIDDLE DISTRICT,
ALABAMA
NORTHERN DIVISION

APPELLANTS' BRIEF

Filed on behalf of
Andy Shugart and Jonothan Gray

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CERTIFICATE OF INTERESTED PERSONS
and
CORPORATE DISCLOSURE STATEMENT

Andy Shugart, Individual: Appellant

Arlene M. Richardson, Attorney for the Appellants

Beth Chapman, Alabama Secretary of State: Appellee

Corey L. Maze, Solicitor General

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Jonathan Gray, Individual: Appellant

Mark E. Fuller, Chief United States District Judge

State of Alabama

Troy King, Alabama Attorney General

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Independent Candidates and Voters in Alabama

Minor Party Candidates and Voters in Alabama

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested in this case.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellants do not adopt the briefs of any other parties.

JURISDICTIONAL STATEMENT

A. Subject Matter Jurisdiction.

Jurisdiction is derived from the First and Fourteenth Amendments of the United States Constitution as well as Title 17 of the Code of Alabama §17-9-(a) (3) (1975) and §17-14-31 (1975). Andy Shugart is a resident of Jefferson County, Alabama and U.S. House of Representatives District 6 and Jonothan Gray is a registered voter and resident of Shelby County, Alabama and U.S. House of Representatives District 6.

B. Jurisdiction of the Court of Appeals.

This Court has jurisdiction pursuant to 28 U.S.C. §1291. This is an appeal from the District Court's July 23, 2009 final order granting Alabama Secretary of State, Beth Chapman's Motion to Dismiss.

C. Filing dates.

The District Court entered a Final Order of Judgment Granting Secretary of State, Beth Chapman's Motion to Dismiss on July 23, 2009.

Andy Shugart and Jonothan Gray filed their Notice of Appeal on August 26, 2009.

D. This is an appeal from a final order.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is it discriminatory to require an independent candidate for U.S. House of Representatives to submit more petition signatures to place his name of the ballot in his district than is the amount of petition signatures required of an independent candidate for U.S. President to place his name on the ballot statewide.

2. Did the District Court err in refusing to apply the holding in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) to the facts presented by Shugart and Gray. Does Illinois State Board, which held that the State could not require more petition signatures for independent candidates for the City of Chicago than it required for candidates running for statewide offices, apply to candidates running for U.S. House of Representatives and U.S. President in Alabama?

STATEMENT OF THE CASE

Andy Shugart a potential candidate for the U. S. House of Representatives District 6 and Jonothan Gray a supporter of Andy Shugart and registered voter in U. S. House District 6, filed suit in the District Court for the Northern District of Alabama. They challenged Alabama Statute 17-9-3 (3)Ala. Code (1975) which requires that independent candidates for the office of the House of Representatives District 6 submit to the Secretary of State petition signatures of qualified voters in the district equal to or exceeding "three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, district, or other political subdivision in which the candidate seeks to qualify." (R. 1: ¶¶ 14,15,16).

In the 2008 election cycle candidate Andy Shugart would have to submit a minimum of 6,155 signatures in order to have his name placed on the general election ballot for U.S. House of Representatives District 6. In the same election independent candidates for the office of President and Vice President of the United States were required to submit only 5000 petition signatures to have their names placed on the general election ballot. Ala. Code §17-31—14-31(a). (R. 1: ¶17).

Shugart and Gray alleged that it was unconstitutional to require 6155 signatures for U.S. House candidates in District 6 and 5000 signatures for Presidential candidates statewide. (R. 1: ¶A pg. 6).

(i) Course of the Proceedings.

Secretary of State, Beth Chapman, filed a Motion to Dismiss or Transfer Venue. (R. 3). The case was transferred to the Middle District of Alabama. (R. 9). The Secretary renewed her Motion to Dismiss (R. 11) and Shugart and Gray filed their renewed response. (R. 19).

Both parties filed a reply brief (R.20, 21) and the Secretary filed a sur-reply (R. 24). The Court Granted the Secretary's motion and Dismissed Shugart and Gray's case without prejudice. A final judgment was entered in the case.

(ii) STATEMENT OF THE FACTS

The facts of the case are largely undisputed. In order for his name to be placed on the November 2008 general election ballot in Alabama District 6 U. S. House of Representatives, candidate Andy Shugart would have to present to the Secretary of State 6155 signatures of qualified voters from his district. The amount of signatures is calculated by adding 3% of the votes

cast for governor in District 6 in the last gubernatorial election. Ala. Code § 17-9-3 (1975).

An independent candidate running for President or Vice President in the same year would have to present 5000 signatures of qualified voters from the State of Alabama to the Secretary of State. The amount of signatures required for President and Vice President is defined in the Statute. Ala. Code §17-14-31 (1975).

District 6 encompasses Jefferson, Shelby, St. Clair and Tuscaloosa counties in Alabama. Because this District is more densely populated than other districts in Alabama, the three percent petition requirement to have an independent candidates name placed on the ballot is more than 5000. The same amount of signatures will be required in the election cycle 2010. (R. 4 - 2).

(iii) SCOPE OF REVIEW

The standard of review in election cases is not readily distinguishable. In some cases the Supreme Court has examined election statutes with strict scrutiny and in other cases has employed a lesser burden. The appellants in this case believe that strict scrutiny applies because the disparity in the number of signatures needed to access the ballot for U. S. House and

President is discriminatory on its face and denies independent candidates in heavily populated districts equal access to the ballot.

In 1995 the 8th Circuit examined the confusion in applying the correct standard of review in election law cases. The Court explained as follows:

> The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes. In some cases, the Court has articulated and employed a flexible test, calibrating the level of scrutiny to the seriousness of the burden imposed by the challenged law; yet on other occasions it has suggested that all election and voting regulations must be subjected to strict scrutiny.
>
> In *Bullock v. Carter*, 405 U.S. at 143, the Supreme Court announced that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." The proper level of scrutiny for a particular set of regulations depends on "the extent and nature of their impact on voters." Id. The Court concluded that Texas's filing fee scheme "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Id. at 144. Variations on this flexible, sliding-scale standard have been employed in several subsequent cases. See Burdick v. Takushi, 504 U.S. 428, 119 L. Ed. 2d 245, 112 S. Ct. 2059, 2063 (1992); *Tashjian*, 479 U.S. at 214-15; [**20] and *Anderson*, 460 U.S. at 788-89. In *Anderson*, the Court struck down Ohio's early filing deadline for independent candidates, explaining its test in terms highly deferential to state prerogatives: Each provision of [a state's election scheme], whether it governs the registration and qualifications of voters, the selection and eligibility of the candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. 460 U.S. at 788.
>
> The Court in *Tashjian* directly imported the *Anderson* formulation of the sliding-scale approach and invalidated a Connecticut law which

prevented parties from permitting nonmembers to vote in party primaries. 479 U.S. at 213-214. In *Burdick*, the Court upheld Hawaii's prohibition on write-in voting. The Court summarized the elements of the flexible approach as follows: A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."112 S. Ct. at 2063 (quoting *Anderson*, 460 U.S. at 789). The Court conditioned the rigorousness of the inquiry on "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Id.. In *Burdick*, strict scrutiny is associated with "severe" restrictions. Id.

However, in another recent case, the Supreme Court has suggested that a law which imposes any appreciable burden on rights of association, expression and voting demands strict scrutiny: To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. . . . If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.Eu, 489 U.S. at 222 (citations omitted) (invalidating restrictions on the internal structuring of California's political parties).

FOOTNOTES: The precise standards of review in the earliest election code cases cannot so readily be classified. For example, in the ballot access case of *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968), the Supreme Court applied strict scrutiny and struck down Ohio's election laws insofar as they prevented minor parties from placing candidates' names on the ballot. While Justice Black's opinion implies that strict scrutiny is required when First Amendment freedoms are "limited," the opinion discusses the required "compelling state interest" in connection with the "heavy burdens on the right to vote and to associate" imposed by Ohio's election code. Id. at 31. Thus, Williams is arguably susceptible of two readings: the Court either

> mandated strict scrutiny in all election cases or instead employed it due to the gravity of the challenged burdens.

Republican Party v. Faulkner County, 49 F.3d 1289, 1297 (8th Cir. Ark. 1995). (Distinguished on other grounds.)

Shugart and Gray assert that their case presents significantly similar facts to those asserted in *Illinois State Board* and that the Alabama Secretary of State is required to adopt the least drastic means to accomplish her purposes. The Supreme Court in Illinois State Board stated:

> [E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that States adopt the least drastic means to achieve their ends. *Lubin v. Panish*, supra, at 716;*Williams v. Rhodes*, supra, at 31-33.This requirement is particularly important where restrictions on access to the ballot are involved.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (U.S. 1979).

SUMMARY OF THE ARGUMENT

The difference between the signatures required of Andy Shugart to run as an independent candidate for the U.S. House District 6 and an independent candidate for President, such as Ralph Nader whose name appeared on the Alabama ballot in the 2008 election, is 1155 signatures and is discriminatory on its face.

If the States interest in requiring independent candidates for Federal offices to show a modicum of support is satisfied by a petition of 5000 qualified voters from the entire State of Alabama, then certainly the States interest in candidates for a U.S. House District (a smaller political unit) showing a modicum of support should be satisfied by the same 5000 signatures. Requiring 1,155 more signatures of Andy Shugart than of Ralph Nader, or any other independent candidate, is nothing but discriminatory. Thus, the Secretary of State cannot rest upon Alabama's important regulatory interest to justify the restriction on Shugart's right to access the ballot. Only "reasonable non-discriminatory restrictions" trigger "less exacting review." Swanson v. Worley, 490 F. 3rd 894, 903 (11th Cir. 2007).

The logic applied by the Supreme Court in Illinois State Board v. Socialist Workers Party, 440 U.S. 173 (1973) applies to the facts of this case. The State cannot ask more of a candidate running for office in a lesser political unit than a candidate running for office in a larger political unit without violating the less restrictive means test.

ARGUMENT

1. The Alabama Statute is Discriminatory.

The disparity between the signature requirement for President and U.S. House of Representative cannot have a rational basis and is discriminatory on its face. The Secretary of State in her Motion to Dismiss espouses that in order to satisfy the States important regulatory interest a candidate must show a "modicum of support" by submitting signatures of 3% of the qualified voters in the district for the political office being sought by a candidate. Ala. Code §17-9-3 (1975)

The Secretary's burden in justifying an important regulatory interest is initially minimal. However, once the State puts forth its justification for the burden it is imposing, the Court must consider the " extent to which those interests make it necessary to burden the candidate's rights. A court must then weigh all of these factors to determine if the statute is constitutional." Swanson v. Worley, 490 f. 3d at 902 (11th Cir. 2007).

The lower court did not consider the extent to which it burdens Shurgart's rights as a candidate. The collection of 1,155 more signatures is undoubtedly a burden. The lower court did not consider why the additional burden is necessary to protect the states interest, a necessary piece of the evaluation process. If the states regulatory interest in requiring a modicum of

support is sufficiently protected by allowing the independent candidate for President to submit 5000 signatures it does not logically follow that a District candidate, who is running in a District one seventh the size of the Presidential candidate, must show more support.

There is no State interest, much less a compelling state interest, justifying imposing a heavier burden on a district candidate. The trial court in this case relied on the decisions in two separate cases, Wilson and Swanson and arrived at an erroneous conclusion without weighing the facts. (R. 25 - 4).

In Wilson v. Firestone the court said that there is a logical reason for Florida requiring fewer signatures of an independent candidate for statewide office than for President. However, the one page opinion does not explain what the logical reason is. Nor does it explain the circumstances involved in the suit. The Court's entire opinion is set out below:

> We affirm the trial court's judgment. There is a logical reason for Florida's requiring fewer signatures on the petition of an independent candidate for President of the United States than for an independent candidate for a statewide office. Plaintiff is not being discriminated against nor denied equal protection by this difference in classification.
>
> The Florida statute in question has been approved summarily by the Supreme Court in *Beller v. Askew*, 403 U.S. 925, 91 S. Ct. 2248, 29 L. Ed. 2d 705 (1971). More stringent requirements for access to the ballot have been approved by the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971).

> *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), does not control this case. The opinion in that case illustrates an anomaly that existed. A candidate for a statewide office in Illinois could have access to the ballot by obtaining 25,000 names in Chicago (or anywhere in the state), but could not have access to the ballot in a citywide race in Chicago unless he obtained 35,947 names. The concurring opinion of Mr. Justice Rehnquist points out how the fractured Illinois Election Law resulted in this incongruous result. There is no similarity between the Illinois Election Law, as circumscribed by two appellate court decisions, and the Florida Election Law which has been approved by the Supreme Court.

Wilson v. Firestone, 623 F.2d 345, 346 (5th Cir. Fla. 1980).

The Wilson Court did not apply Illinois State Board to the facts contained in the case because **both** candidates had to submit signatures from a **statewide** petition. In Shugart's case, he was running in densely populated District 6 and therefore had to submit more petition signatures than the candidate for President. Just like the candidate in Illinois State Board who was running for Mayor of Chicago, a densely populated city, was required to submit more signatures than a candidate running for statewide office. The same logic applies. "There is no reason why a petition with identical signatures could satisfy legitimate state interests for restricting ballot access in state elections and yet fail to do the same in an election in a lessor political unit [City of Chicago]." Illinois State Board v. Socialist Workers Party, 440 U.S. 173, 174; 99 S. Ct. 983 (1979).

In Shugart's case the trial court stated that he had "overstated [Illinois State Board's] applicability" to the circumstances of his own situation. The court said that the Illinois comparison between a "statewide ballot and a municipal ballot within the same state" is different than the challenge of the differences between a U.S. Congressional District and U.S. President. (R.25 - 4). Shugart fails to see how Illinois is not applicable, since both situations require more of a candidate running in a smaller political unit.

In Norman v. Reed the Supreme Court once again struck down an Illinois law that required more signatures to access the ballot for a County office than for a statewide office.

> the State Supreme Court's construction of § 10-2 required petitioners to accumulate 50,000 signatures (25,000 from the city district and another 25,000 from the suburbs) to run any candidates in Cook County elections. The State may not do this in the face of Socialist Workers Party, which forbids it to require petitioners to gather twice as many signatures to field candidates in Cook County as they would need statewide.

Norman v. Reed, 502 U.S. 279, 293; 112 S. Ct. 698 (1992). In Illinois Justice Rehnquist said it very succinctly; "the disparate treatment bears no rational relationship to any state interest." Illinois at 191. The same principal applies to Shugart.

2. The State did not establish that its higher signature requirement for U.S. House district was necessary to serve a compelling state interest.

In Swanson v. Worley the 11th Circuit upheld Alabama's three percent signature threshold and primary day deadline for candidates to turn in their petitions. The court found in Swanson that the state had "articulated important interests justifying its reasonable, nondiscriminatory ballot restrictions."

Swanson v. Worley, 490 F.3d 894, 912 (11th Cir. Ala. 2007).

In a footnote, the Swanson the Court addressed the difference between requirements for independent presidential candidates and statewide elections.

> In presidential elections, independent candidates need to obtain only 5,000 signatures to appear on the general election ballot in Alabama. See Ala. Code § 17-19-2(a) (2005) (current version at Ala. Code § 17-14-31(a)). Plaintiffs contend that if a less restrictive signature requirement sufficiently satisfies the State's interests in presidential elections, there is no justification for requiring more signatures through the three-percent signature requirement in statewide elections.
>
> However, presidential elections call for a different balancing of interests than statewide or local races. As the Supreme Court emphasized in Anderson, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." Anderson, 460 U.S. at 795, 103 S. Ct. at 1573. Accordingly, we cannot say it is unreasonable for Alabama to apply more demanding regulations on statewide and local races than presidential races.

Swanson v. Worley, 490 F.3d 894, 905 (11th Cir. Ala. 2007).

In Anderson v. Celebreze the Supreme Court specifically addressed the Ohio filing deadline as it pertained to presidential candidates. In the opinion, the Court briefly discussed the national impact of State restrictions on presidential candidates. The excerpt in its entirety stated:

> Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." Cousins v. Wigoda, 419 U.S. 477, 490 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

Anderson v. Celebrezze, 460 U.S. 780, 795; 103 S. Ct. 1564 (U.S. 1983).

The trial judge in this case stated that the footnote in Swanson addressed the identical issue raised in Shugarts case. The Court in Swanson

did not examine an independent Presidential candidate and an independent state U.S. House District candidate. Furthermore, the Anderson Court examined only the petition requirement of a presidential candidate and did not compare it to the burden placed on U.S. House District candidates.

The idea put forth in Anderson that States have less interest in regulating presidential elections than local or statewide elections does not carve out a justification for Alabama to impose more severe burdens on local district independent candidates. The reasoning in Anderson, does not create a binding precedent. The trial court is still obligated to weigh the states interest in imposing the burden against the burden it places on the candidate. The Anderson Court cautioned against courts improperly relying on summary affirmance. It stated:

> The District Court improperly relied on a prior summary affirmance by this Court to strike down the restriction, and failed to undertake an independent examination of the merits. We remanded for factual findings. Id., at 177-178. On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. Bradley v. Mandel, 449 F.Supp. 983, 986-989 (Md. 1978).
>
> We have often recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.

Anderson v. Celebrezze, 460 U.S. 780, 786 (U.S. 1983).

Neither Swanson or Wilson Courts reviewed the precise issue brought in this case. Yet the trial court relied on their combined judgment to reach a conclusion without weighing whether the signature requirement unnecessarily burdened independent candidates for the U.S. House of Representatives.

CONCLUSION

It is discriminatory for the Alabama Secretary of State to require more of Andy Shugart to have his name placed on the general election ballot than those names of independent candidates for President. While it may be true that President and Vice President are the only nationally held elected offices and restrictions may affect elections at a national level it does not follow that U.S. House District offices are less important and require more restrictions to accomplish the states regulatory interests. What serves the States legitimate interests is showing support for a candidate for president also serves the states legitimate interest in a showing of support for a U.S. House of Representatives candidate. The more onerous task of collecting 1,166 more signatures because a candidate is running for a smaller political unit has no real justification.

WHEREFORE, the Appellants ask that this Court reverse the judgment of the trial court.

Respectfully submitted this the 2nd day of October, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitation of Fed. R. Appeal P. 32(a) (7)(B) because:

2. This brief contains 3860 words excluding parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) 5 and the style requirements of Fed. R. App. P. 32(a) 6 because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point New Times Roman.

/s/ Arlene M. Richardson
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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2009 I electronically filed the foregoing with the Clerk of the Court of Appeals for the 11th Circuit using the CM/ECF system which will send notification of such filing to the following:

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And certify that I have hereby mailed by United States Postal Service the document to the following non-CM/ECF participants:

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Respectfully submitted,

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