IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

GREEN PARTY OF ARKANSAS; MARK SWANEY; and REBEKAH KENNEDY — PLAINTIFFS

v. Case No. 4:09CV00695 JLH

CHARLIE DANIELS, in his official capacity as Secretary of State of the State of Arkansas — DEFENDANT

OPINION AND ORDER

The Green Party of Arkansas, Mark Swaney, and Rebekah Kennedy have commenced this action against Charlie Daniels, in his official capacity as Arkansas Secretary of State, challenging the constitutionality of Ark. Code Ann. § 7-1-101(21)(C), which provides that a political party ceases to be such when it fails to obtain three percent of the total votes cast in a presidential or gubernatorial election. The Green Party presidential electors received less than three percent of the vote in the 2008 election, so the Green Party may be decertified and therefore required to obtain the signatures of at least 10,000 registered voters in the State for its candidates to appear on the 2010 ballot. In the course of taking depositions, defense counsel asked for the names of prospective Green Party candidates, to which plaintiffs' counsel objected on grounds of relevancy and privilege. The magistrate judge granted a temporary protective order pending briefing from the parties. The plaintiffs have now filed a motion for a permanent protective order, and the defendant has responded. For the following reasons, that motion is granted in part and denied in part.

I.

On March 23, 2010, defense counsel deposed Kennedy and Swaney. Two days later, defense counsel deposed Mark Jenkins, who is the treasurer of the Green Party. During those depositions,

defense counsel posed questions relating to the names of persons who intend or may intend to run as Green Party candidates in the upcoming 2010 elections.[1] When those questions were raised in Kennedy's and Swaney's respective depositions, plaintiffs' counsel objected. The parties then contacted Magistrate Judge Henry Jones to discuss the objection. Plaintiffs' counsel argued that the information requested was irrelevant to the lawsuit and was privileged information. Judge Jones ordered the deponents to answer but granted a temporary protective order limiting the information to the people present in the deposition room. The plaintiffs were instructed to file a motion explaining why the Court should grant a permanent protective order.

The plaintiffs have now filed their motion for protective order and accompanying brief, and the State has responded. The plaintiffs' argument is two-fold. First, information as to the names of anticipated or potential candidates is not relevant to any claim or defense and therefore is not within the scope of discovery as defined by Federal Rule of Civil Procedure 26(b). Second, information as to the names of potential candidates is privileged information and protected from disclosure by the First Amendment to the United States Constitution.

In response, the State argues that the information is relevant because the information that the plaintiffs now seek to protect is the primary issue in their lawsuit. The State says that the Green Party cannot allege in its complaint that it seeks to run candidates for office in the future and then refuse to disclose the names of those candidates. The State also argues that the information is not protected by the First Amendment because the Green Party already voluntarily shares such information with third parties, so it has waived any privilege that may exist.

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[1]According to a transcript of Jenkins's deposition, defense counsel asked whether Green Party candidates who ran for office in 2008 were giving "serious consideration to another run in 2010."

II.

Federal Rule of Civil Procedure 26(b)(1) provides for the general scope of discovery:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

A court may enter a protective order pursuant to Rule 26(c)(1):

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> > (A) forbidding the disclosure or discovery;
> >
> > * * *
> >
> > (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters. . . .

The opening sentence of the complaint states that "[t]his is an action to preserve the Green Party's place on the ballot in Arkansas." The Green Party successfully petitioned to be on the ballot as a political party in 2006 and 2008. The plaintiffs assert that Charlie Daniels has decertified, or intends to decertify, the Green Party pursuant to Ark. Code Ann. § 7-1-101(21)(C), which, as noted, provides that when a political party fails to obtain three percent of the total votes cast in a gubernatorial or presidential election, it will cease to be a political party. Ceasing to be a political party means that a party's candidates will not appear on the ballot unless the party submits a petition with the signatures of at least 10,000 registered voters. Ark. Code Ann. § 7-7-205. The plaintiffs

seek a declaratory judgment that the Green Party has met the requirements of section 101(21)(C) and should not be decertified. In the alternative, if the Green Party has not met the requirements of section 101(21)(C), the plaintiffs seek a declaration that the decertification statute violates the First and Fourteenth Amendments.

The complaint alleges that Arkansas's party-recognition scheme forces political parties, even smaller ones like the Green Party, to compete in gubernatorial and presidential elections in order to maintain their certification. The complaint says that section 101(21)(C) forecloses the development of parties like the Green Party that lack the resources to compete in presidential campaigns, and that the statute severely burdens the plaintiffs' associational rights.

Of Swaney, the complaint alleges only that he is a member of the Green Party and wishes to vote for Green Party candidates in the future. The complaint alleges that Kennedy was the Green Party's nominee for United States Senate in 2008, wishes to run as a Green Party candidate in the future, and wishes to vote for Green Party candidates in the future.

To have standing, the plaintiffs must present a concrete dispute involving an injury to them. *Int'l Ass'n of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969, 973 (8th Cir. 2002). A plaintiff must show that "(1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court." *Id.* (quoting *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996)). The allegations in the complaint relating to Swaney and Kennedy show that they have standing to bring this action because (a) Swaney wishes to vote for Green Party candidates in 2010, (b) Kennedy wishes to run as a Green Party candidate and vote for Green Party candidates in 2010, and (c) Swaney and

Kennedy will thus be injured if the Green Party is decertified under section 101(21)(C). Whether Swaney intends to vote for Green Party candidates in 2010 is an issue as to which the State may conduct discovery because it directly relates to whether he has standing to proceed as a plaintiff in this action. Similarly, whether Kennedy intends to run for office as a Green Party candidate in 2010 is an issue as to which the State may conduct discovery because it directly relates to whether she has standing to proceed as a plaintiff in this action.

As to the names of persons other than Kennedy who intend to run for office as Green Party candidates in 2010, that information is not relevant to the claims or defenses in this action. The complaint challenges the constitutionality of the Arkansas statute that may result in decertification of the Green Party. The plaintiffs contend that Arkansas's decertification statute unfairly bases a party's status on the results of the elections for Governor and President[2], which alternate every two years, and that basing the decertification statute on either or both of those races, rather than on the races on which the state Green Party chooses to focus, is unconstitutional. According to the Supreme Court, the issues that must be decided in an action such as this are as follows:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. No litmus-paper test separates those

[2]The complaint says that the Arkansas Green Party has little or no control over the amount of involvement or campaigning done in Arkansas by the Green Party's presidential candidate.

> restrictions that are valid from those that are invidious. The rule is not self-executing and is no substitute for the hard judgments that must be made.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59, 117 S. Ct. 1364, 1370, 137 L. Ed. 2d 589 (1997) (citations and quotation marks omitted).

The name of any particular Green Party candidate other than Kennedy is not relevant to the plaintiffs' claims or the State's defenses. The issues will relate to the burden that the State's rule imposes on the Green Party's associational rights as compared to the State's interests that justify that burden. Whether the Green Party intends to nominate and support candidates for state races in 2010 is relevant, but answering that question does not require revealing the names of specific candidates.

Because information as to the names of specific Green Party candidates (other than Kennedy) is irrelevant to the plaintiffs' claim or the State's defense, and because that information does not appear to be reasonably calculated to lead to the discovery of admissible evidence, that information is not discoverable under Federal Rule of Civil Procedure 26(b)(1). Therefore, the plaintiffs' motion for a protective order is granted to prevent disclosure of the names of Green Party candidates, other than Kennedy, who have not yet announced their candidacies but anticipate running for office in 2010.[3]

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[3]The Court has also considered the parties' arguments regarding whether the identity of specific candidates is privileged information and protected from disclosure by the First Amendment. Because the Court finds that the information is irrelevant to the plaintiffs' claims, and thus not discoverable, the Court need not decide whether the plaintiffs' associational rights would be infringed by such disclosure. As for Kennedy, even if the First Amendment generally operates to prevent disclosure of her intentions to run as a Green Party candidate, she has asserted those intentions as a basis for her standing to bring this action. Kennedy may not normally be required to reveal her intentions, but neither was she required to participate as a plaintiff in this action. She has stated her intention to run as a Green Party candidate in the complaint because that intention directly bears on whether she may suffer an injury-in-fact and therefore has standing. She has therefore waived any privilege she may have to keep her intentions secret.

CONCLUSION

The plaintiffs' motion for a protective order is GRANTED IN PART and DENIED IN PART. Document #22. The motion is denied as to whether Rebekah Kennedy intends to run for office as a Green Party candidate in 2010. The motion is granted as to the names of all other potential Green Party candidates who intend to run for office in 2010.

IT IS SO ORDERED this 15th day of April, 2010.

J. Leon Holmes

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE