CASE NO. 11-3152

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

CONSTITUTION PARTY OF KANSAS, CURT ENGELBRECHT and MARK PICKENS	)
Plaintiffs - Appelles,	)
v.	)
KRIS KOBACH, in his official capacity as Secretary of State of Kansas	)
Defendant - Appellant.	)

On Appeal from the United States District Court
For the District of Kansas
The Honorable Judge Sam A. Crow
D.C. No. 5:10-cv-0403-SAG-KGS

APPELLEE'S ANSWER BRIEF

Respectfully submitted,

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No Oral Argument Requested

September 12, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

STATEMENT OF RELATED CASES

There are no related cases.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State of Kansas's registration and party affiliation statutes are constitutional because they require that a political party show by petition a modicum of state-wide support before being granted state recognition and recording voter affiliation with the party by way of using voter registration applications.

STATEMENT OF THE CASE

Nature of the Case

This case is an election law case regarding Kansas's law requiring that a political party circulate a petition gathering signatures amounting to at least 2% of the total votes cast for governor in the last general election before allowing voters to affiliate with the party on the Kansas voter registration form. The case was filed as a civil rights action under 42 U.S.C. § 1983.

Course of the Proceedings and the Disposition Below

The original complaint was filed on April 30, 2010. (R. 1.) In addition to the count at issue in this appeal (Count I), there was an additional count (Count II) that alleged a constitutional violation based on the statutory prohibition barring non-residents of Kansas from circulating petitions for a candidate's ballot access. *Id*. Count II was settled and the district court entered judgment on August 13, 2010. (R. 15.)

Motions for summary judgment were submitted by both parties on Count I. A joint statement of facts was filed by the parties on September 30, 2010. (R. 20; Appellants' Appendix, pp. 6-10.) After full briefing, the district court issued a memorandum and order denying Plaintiffs' motion for summary judgment and granting the Defendant's motion. (R. 30; Appellants' Appendix, pp. 11-27.) Judgment was issued on April 27, 2011. (R. 31; Appellants' Appendix, p. 28.) A timely Notice of Appeal was filed on May 26, 2011. (R. 34; Appellants' Appendix, p. 29.)

STATEMENT OF RELEVANT FACTS

The Plaintiffs-Appellants are (1) the Constitution Party of Kansas ("Constitution Party"), (2) Curt Engelbrecht, a resident and citizen of Kansas and the treasurer of the Constitution Party, and (3) Mark Pickens, a resident of Arizona. (R. 20, ¶¶ 1, 4-7; Appellants' Appendix, p.6; R. 1, ¶ 5.)[1] The Constitution Party is not currently an officially recognized party in the state of Kansas. (R. 20, ¶ 2; Appellants' Appendix, p. 6.) The Defendant-Appellee is Kris Kobach,[2] who was sued in his official capacity as Secretary of State. *Id.*, ¶¶ 8 and 10. The Kansas

[1] The parties agreed on a Joint Statement of Facts upon which both parties relied for their cross-motions for summary judgment. (R. 20; Appellants' Appendix, p. 6.)

[2] Kris Kobach took office after this litigation began. The prior office-holder was Chris Biggs and was only sued in his official capacity. Secretary of State Kris Kobach is the successor in office to Secretary of State Chris Biggs and is automatically substituted as the Defendant in this action pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

Secretary of State "oversees the [state of Kansas's] electoral process and enforces the state laws at issue." *Id*., ¶ 9.

A political party gains official recognition by the State of Kansas by filing petitions signed by qualified electors. *Id*., ¶ 11. The number of signatures required for recognition is 2% of the total vote cast for the office of governor in the last general election. *Id*., ¶ 12. In 2006, the last gubernatorial election in Kansas prior to the filing of the Complaint, a total of 847,700 votes were cast; therefore, approximately 16,994 signatures were required for a political party to gain official recognition by the State of Kansas. *Id*., ¶ 13.

On the voter registration card, a voter, regardless of political affiliation, may only select an affiliation with an officially state-recognized political party or must select "Not affiliated with a party" on the voter registration form when that voter registers to vote. *Id*., ¶ 15. At the time the Complaint was filed, there were four officially-recognized party affiliations in Kansas; Democratic, Republican, Libertarian, and Reform.[3]

A recognized political party loses recognition if its nominee for statewide office fails to receive 1% of the total vote or the party fails to nominate a candidate for at least one statewide office. *Id*., ¶ 17. Any registered voter affiliated with a

[3] The "Americans Elect" Party is a new party that qualified for the ballot in July 2011.

political party that loses official recognition will have his affiliation changed to "unaffiliated." *Id*., ¶ 18.

The Kansas Secretary of State records party affiliation (or "tracks") by a computerized system and only classifies registered voters as being affiliated with a recognized party or as unaffiliated. *Id*., ¶ 19. The Secretary of State makes party affiliation lists and voter registration records available to the parties and to the public. *Id*., ¶ 20. Party affiliation lists and voter registration records can be used for political campaign and election purposes. *Id*., ¶ 21.

SUMMARY OF ARGUMENT

The threshold at which Kansas recognizes political parties is exceedingly low. The process employed by Kansas is even-handed, fair and reasonable given the state's interest in conducting closed primary elections for parties that qualify and desire a closed process. Kansas even provides an intermediate tier to all parties, recording voter affiliation with parties that are recognized but do not yet have the public support necessary to allow the state to conduct for them a primary election. The Plaintiffs do not argue that any of Kansas's ballot access requirements are unconstitutional; however, they do argue that the state should be required to record voter registration for all parties - no matter how tiny and fractional.

When balanced, the interests advanced by the state as well as the administrative burdens imposed by the Plaintiffs' proposal clearly outweigh any burden imposed on the Plaintiffs. The state does nothing to inhibit the Plaintiffs from recording voter affiliation on their own, so the Plaintiffs lack any true injury. Even if an injury exists, the burden felt by the Plaintiffs is light when compared to the burdens imposed on the state and the interests the state advances. The district court correctly applied a balancing test of these factors and found in favor of the Defendant. Its ruling should be affirmed.

The district court also correctly applied two Tenth Circuit opinions – *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984) and *Rainbow Coalition of Oklahoma v. Oklahoma St. Election Bd.*, 844 F.2d 740 (10th Cir. 1988). In doing so, the district court analyzed the factors in this case according to the balancing test laid out in *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983). Following the Tenth Circuit's guidance in *Rainbow Coalition*, the district court found that three factors discussed in *Baer* were products of Colorado law and not applicable in Kansas. Given numerous problems with the Plaintiffs' interpretation of *Baer*, the district court was correct in its analysis and its decision should be affirmed.

ARGUMENT

The district court was correct in upholding the challenged statutes because when balanced against the interests of the state, Kansas's current voter registration structure does not unfairly burden the rights of the Plaintiffs. Furthermore, the district court correctly applied the *Baer* and *Rainbow Coalition* cases in its analysis.

I. THE CURRENT VOTER REGISTRATION SYSTEM IN KANSAS IS CONSTITUTIONAL IN THAT IT DOES NOT UNFAIRLY OR UNNECESSARILY BURDEN THE PLAINTIFFS' RIGHTS

A. Standard of Review

In its analysis, this court should "review summary judgment decisions *de-novo*, applying the same legal standard as the district court." *Willis v. Bender*, 596 F.3d 1244, 1253 (10th Cir. 2010). "Summary judgment is appropriate 'if the pleadings . . . show no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id*. at 1254.[4] In reviewing challenges to the constitutionality of statutes, appellate courts "begin with a presumption of constitutionality." *United States v. Monts*, 311 F.3d 993, 996 (10th Cir. 2002) *citing United States v. Morrison,* 529 U.S. 598, 607 (2000).

[4] The facts in this case were stipulated to by the parties. *See* Appellants' Brief, p. 3, F.N. 2. *See also* R. 20; Appellants' Appendix, pp.6- 9.

B. An Overview of the Kansas Voter Registration Structure.

Kansas law allows qualifying parties to use a closed nomination process if they wish. The reason that Kansas records party affiliation is to allow parties to determine which voters are eligible to participate in closed nomination processes. This is particularly important for parties who utilize the closed primary election process which is conducted by the state. *See* Kan. Stat. Ann. § 25-3301(c).

To fully understand the voter registration structure, it is important to first understand the tiered level of state involvement with political parties' nomination process based on the level of public support demonstrated, thereby justifying the use of public funds to record party affiliation. This structure was created with an eye toward parties that are likely to gain enough public support to have the state conduct primary election on their behalf. In the event that such a party desires a closed primary election, it is necessary for the state to have a list of voters affiliated with such a party to determine which voters may vote in the closed primary.

The lowest level of state involvement occurs if a party meets the requirements laid out in K.S.A § 25-302a which includes, primarily, the filing of a petition signed by qualified electors. (Doc. 20, ¶ 12; Appellants' Appendix, p.7.) The number of signatures required for party recognition status is 2% of the total vote cast in the last general election for the office of governor. *See* Kan. St. Ann §

25-302a *and* Doc. 20, ¶ 17; Appellants' Appendix, p. 8. Once a party is recognized, the ballot for the general election will include its nominee for any office so long as: (1) a nominee exists; and (2) a certificate of nomination is submitted.[5] *See* Kan. Stat. Ann §§ 25-202(a), 25-301 & 25-304. In order to allow a party to close its nomination process if it wishes, a list of voters and party affiliation is kept by the state and is accessible to the parties and the general public. *See* Kan. St. Ann §§ 25-2320 & 25-3302 *and* Doc. 20, ¶ 20; Appellants' Appendix, p. 8. However, because a party at this level conducts its own nomination process, it is not absolutely imperative from a policy standpoint that the state keep this list. However, Kansas law requires the state to keep a party affiliation list in the event that a party on this tier goes on to meet the next threshold.

At the point where a party's nominee for governor is able to achieve 5% of the total vote cast in a general election, at the next general election, such a party would be able to ask the state to conduct a primary election on their behalf . *See* Kan. Stat. Ann. § 25-202(b). Until this point, parties conduct their own internal nominating process such as a caucus or convention without much state involvement. *See* Kan. Stat. Ann. § 25-302. However, at the point a primary election is possible, a party is able to request that its primary election be closed so

[5] However, this is not the only way to obtain general election ballot access. For example, candidates not affiliated with a party may submit an independent nomination petition. *See* Kan. Stat. Ann. § 25-303.

as not to allow non-party members to vote in its election. *See* Kan. Stat. Ann. §§ 25-216; 25-3301(c). The party affiliation lists compiled by the state are used to make this eligibility determination. *See* Kan. Stat. Ann. § 25-3301(c). Parties not meeting this threshold may use the party affiliation list but the state's interest in keeping such a list is based on the possibility that these parties may reach the 5% threshold in the future.

The Plaintiffs do not challenge Kansas's ballot access structure or other election statutes. Their contention is limited to whether or not the state must record party affiliation for party's not meeting the 2% threshold.

C. Overall, the Voter Registration Structure in Kansas is Even-Handed, Reasonable, and Fair.

Although it does not necessarily determine the constitutionality of Kansas's voter registration structure, it is helpful to understand how low Kansas's party recognition thresholds are compared to those examined in other cases in other states. Kansas has set its party recognition threshold at a very low level when compared to states whose party recognition threshold laws have received judicial examination.

The elected representatives of the citizens of Kansas have established a carefully constructed structure by which all parties are treated equally and receive state involvement if certain thresholds are met. The Plaintiffs here would be no different. If the Constitution Party could demonstrate the modicum of public

support necessary to meet each threshold as determined by the Kansas legislature, the statutes above would be applied accordingly. However, instead of building public support for their party to meet the requirements set by the Kansas legislature, the Plaintiffs have determined it is easier to sue in federal court to obtain party recognition and force the state to record party affiliation for them.

For recognition, Kansas merely requires that a party obtain signatures at least equal to 2% of the total number of votes cast in the last general election. *See* Kan. Stat. Ann §§ 25-302a, 25-302b, & 25-3307(a). To maintain recognition status, a party merely needs to nominate at least one nominee for statewide office and obtain at least 1% of the total vote cast for any statewide office during each general election cycle. *See* Kan. Stat. Ann. § 25-302b. These requirements are much lower than the thresholds struck down in other states. *See e.g. Council of Alternative Political Parties v. State of New Jersey*, 781 A.2d 1041 (N.J. Super. 2001) (holding a 10% threshold unreasonably burdensome); *Baer v. Meyer*, 728 F.2d at 471. (10th Cir. 1984) (similarly, holding a 10% threshold unreasonably burdensome); *Atherton v. Ward*, 22 F. Supp. 2d 1265 (W.D. Okla 1998) (holding a 5% threshold unreasonably burdensome); *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411 (2nd Cir. 2004) (upholding the

enjoinment of a statute which removed the tracking of a party's affiliation if a party's candidate failed to receive 50,000).[6]

Alternatively, statutes similar to the thresholds in Kansas have been upheld. *See e.g. Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir. 1990) (upholding a 2% threshold); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740 (10th Cir. 1988).

It is also important to note that Kansas already recognizes three minor parties demonstrating that the threshold can and has been met. (Appellant's Brief, p. 5). This is unlike the situation in Colorado when *Baer* was decided and there were no minority parties that had obtained recognition. In Kansas minority parties can clearly obtain recognition. These factors demonstrate that at a general level the Kansas voter registration structure is even-handed, reasonable, and fair.

D. When Applying the *Anderson* Balancing Test Articulated, the Factors Weigh Heavily in Favor of the State.

Although Kansas's statutes apply equally to all parties, if the court determines that the statutes impose a burden that falls unequally on independent parties, *Anderson* describes a balancing test that has been adopted by the Tenth Circuit to determine such statutes constitutionality. *Anderson v. Celebreeze*, 460 U.S. at 789. The balancing test was succinctly stated in the district court's decision

[6] For comparison, the Constitution Party only needed to obtain 16,994 signatures to obtain party recognition, just one third of 50,000. (Doc. 20, ¶ 13; Appellants' Appendix, p.7.)

and used in its analysis. *See* Doc. 30, p. 7; Appellant's Appendix, p. 17. The Supreme Court described the balancing test as follows:

> [The Court] must first consider the character and the magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebreeze, 460 U.S. at 789. The district court correctly used this analysis in the case at bar and found that the statutes at issue were constitutional. In applying the balancing test, this court should also find that the factors weigh heavily in favor of the state just as the district court found.

1. The "Injury" to the Plaintiffs by the Current Statutory Structure.

The Plaintiffs argue that the current voter registration and party affiliation structure burden their First and Fourteenth Amendment rights. (Appellants' Brief, p. 12-14.) However, this is not necessarily in line with *Anderson* which states that the court should examine the "character and magnitude of the asserted injury." *Anderson v. Celebreeze*, 460 U.S. at 789. The full *Anderson* balancing test is ultimately used to determine overall if an unreasonable burden is imposed by the statutes. While the Plaintiffs might articulate a burden on their associational and equal protection rights, they have not articulated a true injury.

While not recording voter registration for the Plaintiffs, the state does nothing to prohibit the Plaintiffs from tracking affiliated voters on their own. In the age of electronic social networking and the internet, the Plaintiffs could easily build their party organization so that they could ultimately meet the 2% threshold or even the 5% threshold. Until the 2% threshold is met, the burden on the state to record party affiliation is not justified because the adequate modicum of support has not been realized by small parties. There are numerous small parties representing tiny factional interests with little chance of having the state conduct a primary election for them sometime in the future.

Even from an associational perspective as the Plaintiffs argue,[7] it is unjustified for the state to record voter affiliation for tiny parties because their members are more likely to be localized and inter-connected. For example, if an individual creates an entirely new party, that person will be the focal point for party-building and the new party's contact with new individuals. It is not until a party becomes sufficiently well known purely by reputation that unconnected voters will independently choose to affiliate with that party. In other words, the party must reach a critical mass.

[7] While the state's interest in tracking party affiliation is to enable primary elections, the Plaintiffs argue that the statutes allow parties to associate with members. *See* Appellants' Brief, pp. 13-14. While this may be a by-product allowed by the state, it is not the main purpose for which the voter registration structure is necessary.

Even with the associational interest taken into account with the state's interest in allowing parties to conduct closed primaries, it is still unjustified to record party registration until at least this critical mass is achieved. Until that point, parties are small and localized enough to track affiliated voters on their own. The Kansas legislature has determined that the very low 2% figure is the critical mass threshold which constitutes the point where a party is organized and well known enough that unconnected voters may independently desire affiliation. At this point, the state should start recording the affiliation for that party because the party is sufficiently well known in reputation, likely to be more de-centralized, and, most importantly, it is more likely that such a party will meet the 5% threshold, making a closed primary possible.

The larger and more organized a party gets, the more likely it is to conduct a formal closed nomination process – the main purpose for which the state records party affiliation. However, until the party reaches the 5% threshold in a gubernatorial election, the party will conduct its own nomination process without state involvement. In this intermediate level, state tracking of party affiliation may be helpful to the party in conducting a closed nomination process but it is not absolutely necessary but for the legal requirement.

At the point a party reaches the 5% threshold and decides to participate in the primary election process, the recordation of voter party affiliation by the state

becomes necessary because the state actually conducts the primary election. As described above, Kansas's voter registration and party affiliation structure is carefully constructed to follow this reasoning. The more likely it becomes that a party may have the state conduct a primary election, the more important it becomes that the state record voter affiliation with that party.

Regardless, nothing in the state's voter registration and party affiliation statutes prohibit a party from recording voter affiliation on its own at any point in this process. Therefore, there is no true injury to the Plaintiffs.

The Plaintiffs seem to be arguing that they have a constitutional right that the state track party affiliation for them. However, this is clearly not the case when various states such as Missouri do not record voter affiliation at all. Because of the state interests discussed below, it is only in exceptional circumstances that the court should find that the burden argued by the Plaintiff is sufficient to find a voter registration or party affiliation statute unconstitutional. These exceptional circumstances do not exist in the case at bar.

2. Interests Advanced by and Burdens Imposed on the State if its Voter Registration Laws are Struck Down.

As the district court discussed in its opinion, the state has advanced three main interests in preserving its voter registration and party affiliation statutes. (Doc. 30, pp. 8-11; Appellant's Appendix, pp. 18-21.) Additionally, accepting the Plaintiffs argument would impose administrative burdens on the state.

a. Maintaining Order in Elections.

The state has an interest in assuring that elections are orderly. This is closely related to the state's interest in conducting closed primary elections if desired and ensuring that the process is well organized. As the district court stated, "[i]t is well settled that a state has the power to engage in "substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic processes." *See* Doc. 30, pp. 9-11; Appellant's Appendix, pp. *quoting Storer v. Brown*, 415 U.S. 724, 730 (1974). The Plaintiffs argue that the state should place an "other" checkbox on the voter registration form so that individual voters can write the name of the party with which the voter would like to affiliate. Such a solution would detract from the order of Kansas elections.

Under the Plaintiffs' plan, there would be no standardization of party names. Voters could write abbreviations or confuse party names. For example, although they are already a recognized party in Kansas, prior to their recognition, voters might have written any of the following while intending to be affiliated with the Americans Elect Party: Americans Elect, Americans-Elect, American Elect,[8] America Elect, A.E., Elect Americans, Electing Americans, Am. Elect., or E.A.[9]

[8] It was this incorrect iteration of the party's name used by the plaintiffs in their brief. *See* Appellants' Brief, p. 5. This demonstrates how easy it is for individuals to submit the incorrect party name.

[9] There are also party name requirements that are unlikely to be followed by individual voters. *See* Kan. Stat. Ann. § 25-302a.

The district court also noted that "some substantial regulation of elections is necessary to ensure that elections are fair, honest, and orderly." *See* Doc. 30, pp. 10; Appellant's Appendix, pp. 20 *citing Storer v. Brown*, 415 U.S. at 730. The Plaintiffs' solution would also allow a different sort of "party raiding." Factions within parties could use the voter registration form to attempt to split or factionalize a party. For example, a member of the "Green Party" could register with the "Green Environmental Party" or the "New Green Party." Even more problematic, what if the Green Party gained enough public support to meet the primary election threshold and determined to hold a primary election, how would the Secretary of State determine which party factions would be able to vote in the primary election and which were, in fact, a separate and discrete parties? In situations where party factions attempt to nominate multiple party candidates, often a secretary of state will become the adjudicator of which nominee is the true nominee and will ultimately go on the general election ballot. *See e.g. Buchanan v. Secretary of State*,616 N.W.2d 162 (Mich. 2000) (involving an intra-party dispute as to the true Reform Party nominee for president); *Reform Party of Connecticut v. Bysiewicz*, 760 A.2d 1257 (Conn. 2000) (involving an intra-party dispute as to the true Reform Party nominee for president). It is likely this type of confusion would occur under the Plaintiffs' solution if a minor party achieved enough support to have a state run primary election. This would probably produce

litigation costs incurred by the State of Kansas in the future. The current structure in Kansas maintains order in the election system. Ultimately, the district court was correct in attributing weight to this interest advanced by the state.

b. Avoiding Voter Confusion.

Kansas's voter registration statutes also serve to minimize voter confusion. The state has a legitimate state interest in avoiding voter confusion. *Bullock v. Carter*, 405 U.S. 134, 145 (1972). The district court also noted that "[t]he state has a legitimate interest in avoiding voter confusion, deception, or other election process frustrations without presenting empirical evidence that the contested measure in fact reduces those risks." *See* Doc. 30, p. 10; Appellant's Appendix, p. 20 *citing Storer v. Brown*, 415 U.S. at 736. Under the Plaintiffs "other" checkbox and empty blank solution, voter confusion would increase. The Plaintiffs do not dispute the constitutionality of Kansas's ballot access requirements; therefore, regardless of the outcome of this case, unrecognized parties would not be granted a place on the general election ballot even though they could be indicated on a voter registration form. This would confuse voters about why the state would allow them to affiliate with a party on the voter registration rolls, yet not have a candidate granted ballot access for the general election ballot. The voter confusion would be exacerbated because even if an unrecognized party candidate achieved ballot access through an independent petition, such a candidate would be listed as

"independent" on the general election ballot even though the candidate might run as a member of the unrecognized party and voters could affiliate with the unrecognized party on their voter registration form. Such voter confusion would frustrate voters and likely decrease participation in the process and should be avoided. For these reasons, the district court was correct in attributing weight to this interest advanced by the state.

c. Controlling Frivolous Party Registration of Tiny Fractional Interests.

Perhaps the most significant and applicable interest advanced by the state in this case is controlling frivolous party registration. It is clear that "[t]he State has broad latitude in controlling frivolous party registration of tiny fractional interests." *Baer v. Meyer*, 728 F.2d at 472. As discussed above, the Plaintiffs' solution would allow numerous parties to be listed on the voter registration rolls. However, even more important is that such a scheme would completely strip the state of its ability to control frivolous party registration.

As the district court noted, there would be no limitation on what voters could write on the "other" line. (Doc. 30, pp. 10; Appellant's Appendix, pp. 20.) Kansas's voter registration rolls would suddenly inflate with innumerable party affiliations. *See e.g.* R. 22, p. 7. Anyone could simply make up any imaginary party and affiliate with that party of their registration form. Such an imaginary party listed could even include profanity or violate Kansas's party name

requirements. *See* Kan. Stat. Ann. § 25-302a. In enacting this solution, the Kansas Secretary of State's office would be given no discretion to weed-out illegitimate parties. Furthermore, the Secretary of State would have no way of knowing which parties were seriously organized but relatively unknown and which parties were simply created by individual voters.

d. Administrative Burden on the State.

Although dismissed by the Plaintiffs as insubstantial, there is an administrative burden that would be imposed on the state. "Also relevant is the administrative burden the state would bear in providing for the indication of minority party affiliation." *Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740 *citing Baer v. Meyer*, 728 F.2d at 475. Many of the issues discussed above clearly demonstrate the administrative burden imposed on the state. Employing the Plaintiffs' solution would likely result in costly litigation as described above as well as forcing the Secretary of State to spend a great deal of time to attempt to sort out the issues described above.

However, there would be additional costs incurred by the state in a time of state financial difficulty. It should be noted that merely adding an additional checkbox as was needed to include that Americans Elect Party is a very different situation than the solution advocated by the Plaintiffs. Adding an additional "Other" checkbox with a free-form blank field would necessitate the re-

programming of at least two systems – the Election Voter Information System (ELVIS) and the DMV voter registration system. The re-programming of both of these systems would likely have to be done by vendors through a change-order to the current contract. This would result in costs to the state.

Additionally, all current voter registration applications would have to be destroyed and new forms printed. Although these forms are provided electronically, there must be paper copies provided for those who do not have a computer or prefer using a form printed by the state. This would also be an additional cost.

After weighing all of these factors, the district court was correct in determining that the balancing test tipped in favor of the state and found that the statutes at issue were "unquestionably constitutional." (Doc. 30, p. 17; Appellant's Appendix, p.27.)

E. The District Court Correctly Applied the *Baer* and *Rainbow Coalition* Decisions.

Using the balancing test articulated in *Anderson*, the district court found that the statutes at issue were constitutional. The Plaintiffs argue that this was in error because the District Court did not use the *Baer* factors[10] correctly in its analysis.

[10] The *Baer* Factors as argued by the Plaintiffs are: (1) a political organization already exists in the State under its name, (2) has recognized officials, and (3) has previously placed a candidate on the ballot by petition. *See* Appellant's Brief, p. 19 *quoting Baer v. Meyer*, 728 F.2d at 475.

However, case law from this circuit indicates that the district court was correct in its analysis. Furthermore, using the Plaintiffs' approach would create numerous problems. Finally, the district court is not alone in its analysis, although not binding, the Eighth Circuit has conducted a similar approach after reviewing some of the Tenth Circuit opinions at issue in this case.

1. The Plaintiffs are Incorrect that it was Imperative that the District Court Apply the *Baer* Factors in its Analysis.

The Plaintiffs seem to be arguing that there are actually two tests articulated in *Baer* and *Rainbow Coalition*: (1) the *Anderson* "balancing test" and; (2) a test involving the three "*Baer* Factors." *See* Appellant's Brief, pp. 17-19 & 19-21.[11] This is an incorrect interpretation of *Baer*, as demonstrated by the *Rainbow Coalition* decision which only applied the balancing test without regard to the *Baer* Factors. *See Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d at 747. A close analysis of both *Baer* and *Rainbow Coalition*, as well as other cases, show that the balancing test is the only test that is necessary in determining the outcome of these cases. Contrary to the argument of the Plaintiffs, the Tenth Circuit in *Baer* merely used the *Baer* Factors, which were based on Colorado law, to analyze one discrete interest asserted by the state: controlling frivolous party registration of tiny fractional interests.

[11] This is particularly demonstrated by the Plaintiffs' argument the district court's Footnote 12 was used to collapse these "these two distinct issues."

The balancing test was succinctly stated in the district court's decision. *See* Doc. 30, p. 7; Appellant's Appendix, p. 17. The test ultimately comes from *Anderson v. Celebreeze* as discussed above. *Anderson v. Celebreeze*, 460 U.S. at 789. The district court correctly used this analysis in that case at bar.

The Plaintiff's argue that the *Baer* Factors are also somehow conclusive in voter registration tracking cases. They argue that if a party meets *Baer* Factors, then by law, such a party has automatically demonstrated a "sufficient modicum of support" and; therefore, the state must record voter registration for the party. *See* Appellant's Brief, p. 19.

Contrary to Plaintiffs' argument, rather than being a stand-alone test, the *Baer* Factors were used by the *Baer* Court in its application of the balancing test to analyze one interest proposed by the state – controlling frivolous party registration. The *Baer* Court weighed the burden on the Citizens and Libertarian parties against the administrative burden on the state and the main interest asserted by the state which was controlling frivolous registration. After concluding that the administrative burden was low, the court's analysis focused on the state's interest in controlling frivolous party registration. It is only in relation to this one interest that the *Baer* Factors were used. In applying the balancing test and using the *Baer* Factors to analyze one particular state interest, the *Baer* Court determined that the overall balancing test favored the Plaintiffs. That is not to say that the *Baer*

Factors need to be used or that other interests advanced by the state could not alter the outcome of this balancing test. Thus, the decision in *Rainbow Coalition* was correct in not applying the *Baer* Factors in its balancing test analysis. Additionally, there are numerous other problems with the Plaintiffs' argument that using the *Baer* Factors are necessary in determining whether a party's registration must be recorded by the state.

a. Necessitating the Use of the *Baer* Factors Would Make the Balancing Test Completely Unnecessary.

If the Plaintiffs are correct, the *Baer* Factors are conclusive and the balancing test is unnecessary. Under the Plaintiff's analysis there is no purpose for the balancing test articulated by the Supreme Court. In voter registration recordation cases, such as the case at bar, a court only needs to mechanically determine whether or not the *Baer* Factors are met. If they are met, the party must be recognized because it has demonstrated the sufficient "modicum of support" and applying the *Anderson* balancing test serves little purpose. The Plaintiffs do not explain how they believe the *Baer* Factors interact with the balancing test in *Anderson*. Rather, they seem to argue that by meeting the *Baer* Factors it necessitates a decision in their favor. If this is the case, the analysis by this circuit in *Rainbow Coalition* is off target because it used the *Anderson* balancing test. The Plaintiffs should at least explain this interaction under their interpretation because

otherwise it appears that the *Anderson* balancing test is completely unnecessary in cases such as the one at bar.

b. Making the *Baer* Factors Imperative Broadens the Application of *Baer* Beyond this Court's Intent.

If the Plaintiffs are correct, all party recognition statutes not incorporating the *Baer* Factors are unconstitutional. This is contrary to the limited holding in *Baer*. There is no doubt that the holding of *Baer* was intended to be very narrow under a plain reading of the decision. This Court clearly stated, "[w]e are not at liberty to set out specifics and details of what the state may do in regulating this important interest. Moreover, we carefully do not conclude that the Secretary of State must recognize any political organizations other than the two which were before the court in this case." *Baer v. Meyer*, 728 F.2d at 476. Later, the narrow focus of the *Baer* decision was reiterated by adding, "to the extent that it could be construed more broadly than our holding in [the *Baer* opinion], we disapprove it." *Id*. Despite this articulation of the narrow application intended by the Tenth Circuit, the Plaintiffs are attempting to apply the opinion to not only other political organizations but in other states as well. Instead of dictating that Colorado merely recognize two specific political parties, the Plaintiffs argue that the *Baer* Court intended to strike down all party recognition statutes not incorporating the *Baer* Factors. This interpretation by the Plaintiffs cannot be harmonized with the limiting language in *Baer*.

c. Making the *Baer* Factors Imperative is Inconsistent with *Rainbow Coalition*.

If the Plaintiffs' argument is correct, the *Rainbow Coalition* decision is in error because, like the district court, it also did not include an analysis using the *Baer* Factors. The Plaintiffs generally argue that the "district court erred in failing to follow the reasoning in *Atherton*,[12] *Rainbow Coalition*, and *Baer*." *See* Appellants' Brief, p. 22. Specifically, the Plaintiffs argue that "substituting the *Baer* Factors with the statutory criteria Kansas established for official political party status constituted reversible error." *Id*., p. 19. However, the Plaintiffs ignore the fact that this court also never mentioned *Baer* Factors in *Rainbow Coalition* even though the same interest advanced by the state in *Baer* was discussed – "preventing 'the purely frivolous and insubstantial attempts to designate party affiliation on the registration form.'" *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d at 747. The Plaintiffs have failed to explain how, under their reasoning, the district court should have applied the *Baer* Factors and followed the reasoning in *Rainbow Coalition* when the *Rainbow Coalition* opinion also did not apply the *Baer* Factors test. The Plaintiffs should have, at a minimum, explained why using the *Baer* Factors is imperative in the case at bar but was not necessary in *Rainbow Coalition*.

[12] The Plaintiffs argue that *Atherton* should have been followed by the district court even though it is a non-binding decision from the United States District Court for the Western District of Oklahoma. *Atherton v. Ward*, 22 F. Supp.2d 1265 (W.D. Ok. 1998).

d. The *Baer* Factors are Merely a Product of Colorado State Law.

The answer to the question above as provided by the district court was simple. The *Baer* Factors are a product of Colorado state law. *See* Doc. 30, p. 14; Appellant's Appendix, p. 24. Therefore, it was not necessary for the *Rainbow Coalition* Court to analyze them. In its overall analysis, the *Baer* Court cited to the *Ashwander* doctrine, stating, "[t]he principles of American jurisprudence caution us not to decide a constitutional issue if a proper construction of a statute or an interpretation of existing case law could be controlling." *Baer v. Meyer*, 728 F.2d at 474. Accordingly, the Court analyzed a Colorado Supreme Court decision, *McBroom v. Brown*, 127 P. 957 (Colo. 1912). It appears that the *Baer* Factors came from this Colorado Supreme Court decision. *Baer v. Meyer*, 728 F.2d at 475 (stating, "the Supreme Court of Colorado in *McBroom* has already provided a water mark" immediately before laying out the *Baer* Factors). The Plaintiffs have failed to explain why a product of a Colorado Supreme Court decision should apply in Kansas when it is contrary to Kansas state law. Rather, the Plaintiffs gloss over this issue by merely stating that the *Baer* Factors should be applied because of *Baer*'s nature as a Tenth Circuit opinion. The Plaintiffs attempt to advance this argument while ignoring the fact the Tenth Circuit has already declined to apply the *Baer* Factors in another state in the *Rainbow Coalition* decision. The Plaintiffs

have provided no indication from this circuit that *Baer* was intended to force other states to apply Colorado law.

2. The Eighth Circuit also Supports the District Court's Approach.

The Plaintiffs' proposed application of *Baer* and *Rainbow Coalition* is flawed by advocating a sweepingly broad and mechanical application of the *Baer* Factors. This argument is not based in a reasonable reading of *Rainbow Coalition* or the text of *Baer*. In fact, the exact same argument was raised in *Iowa Socialist Party v. Nelson* and discarded by the Eighth Circuit. *See generally Iowa Socialist Party v. Nelson* 909 F.2d 1175. The Eighth Circuit dedicated an entire footnote to specifically rejecting the argument now propounded almost verbatim[13] by the Plaintiffs:

> [The Iowa Socialist Part ("ISP")] urges us to adopt what it considers to be the standard of the Tenth Circuit. Citing *Baer* [Citation omitted], ISP argues that Iowa must permit it to allow registrants to indicate their support for a party on the voter registration form if: (1) a political organization already exists in the State under its name; (2) has recognized officials; and (3) has previously placed a candidate on the ballot by petition. *We believe ISP misconstrues the Baer opinion*. While these factors may have been relevant and sufficient in Baer to require the state to permit party designation, *the same factors might not be relevant in a different context*. In fact, in *Rainbow Coalition*, decided four years after *Baer*, the Tenth Circuit did not even discuss any of these factors in rejecting the applicant's challenge to Oklahoma election statutes which allegedly precluded members of minor political organizations from designating their party affiliation on the voter registration forms. *See Rainbow Coalition* [citation omitted]. *We too reject these factors as the exclusive or even necessarily the most reliable,*

[13] *See* Appellant's Brief , pp. 19-20.

> *indicators of the state registration procedure's constitutionality*. In balancing a state's interest against the registrant's interests, we must examine the individual facts in each case. We therefore reject the mechanistic approach urged by ISP.

Iowa Socialist Party v. Nelson, 909 F.2d at 1179, F.N. 7 (emphasis added).

While the Eighth Circuit's analysis of *Baer* is, of course, not binding in the case at bar, the Eighth Circuit's analysis of the *Baer* balancing test is firmly rooted in a plain reading of both *Baer* and *Rainbow Coalition* as described above. The Plaintiffs are completely silent as to the views expressed by the Eighth Circuit in *Nelson*. *See Iowa Socialist Party v. Nelson*, 909 F.2d at 1179, F.N. 7.

Contrary to the *Baer* factors, the overall *Anderson* balancing test discussed has been used by the Tenth Circuit in other cases. *See generally Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740. The district court in this case correctly used these opinions and applied the correct test by "weighing the severity of the burdens placed on the asserted rights by the challenged provisions, then evaluating the interests of the state in the challenged statutes." (Doc. 30, p.7; Appellant's Appendix, p. 17.) In applying this test, the District Court correctly upheld the challenged statutes.

CONCLUSION

For all the foregoing reasons, the Judgment should be **affirmed**. Alternatively, in the event that this Court finds that the *Baer* factors were

incorrectly applied, this court should remand the case with instructions to the district court to use the *Baer* factors in conducting the balancing test.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionately spaced and contains 6750 words.

I relied on my word processor to obtain the count and it is Microsoft Word 2007.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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I hereby certify that a copy of the Foregoing **APPELLEE'S ANSWER BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Symantic Endpoint Protection and, according to the program is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that a copy of the Foregoing **APPELLEE'S ANSWER BRIEF** was furnished through (ECF) electronic service to the following on this the 12th day of September, 2011.

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