No. 11-3152

IN THE

# UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**CONSTITUTION PARTY OF KANSAS, CURT ENGELBRECHT, and MARK PICKENS,**

Plaintiffs – Appellants,

Versus

**KRIS KOBACH, in his official capacity as Secretary of State,**

Defendant – Appellee.

*On Appeal from the Final Order of the U.S. District Court for the District of Kansas, District Judge Sam A. Crow, presiding, Case No. 5:10-cv-0403-SAG-KGS*

## REPLY BRIEF

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## ARGUMENT

*Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1084) controls the question at issue in this case. Kris Kobach's ("Kobach") Answer Brief (the "Opposition Brief") was a clever attempt to hide the ball, but required a couple of key misleading statements to get there. Most importantly, the Opposition Brief incorrectly asserted that *Rainbow Coalition of Oklahoma v. Oklahoma State Elections Bd.*, 844 F.2d 740 (10th Cir. 1988) "did not include an analysis using the *Baer* factors." (Opp'n Br., p. 26.) Nothing could be further from the truth, as is shown below. There are several paragraphs at the end of *Rainbow Coalition* that apply *Baer* to the facts of that case. *Rainbow Coalition*, 844 F.2d at 747 (beginning with the paragraph that reads: "In *Baer*, we observed . . .")

Second, the parade of horribles trumpeted by Kobach about the political anarchy that is imminent should this Court rule in Plaintiffs-Appellants' (hereinafter, collectively the "Constitution Party") favor do not constitute valid bases to continue to violate the Constitution Party's constitutional rights. The Constitution Party is not seeking a rule that would allow any person to whimsically put any party name down on a voter registration form and force the state to recognize it. The Constitution Party is only arguing that political parties like the Plaintiff-Appellant Constitution Party of Kansas should be an option on voter registration forms. Kobach is fully capable of developing a system of rules or

regulations, or the Kansas Legislature is fully capable of developing a statute, that will adequately protect the state's interest in limiting tiny fractional interests. This Court's role is not to develop a constitutional electoral system. Rather, this Court's role is only to decide whether a party like the Constitution Party of Kansas has a right under the Constitution's equal protection and right to associate clauses to be given a place on voter registration forms.

## I. *BAER V. MEYER* DOES CONTROL THE ANALYSIS OF THIS CASE BECAUSE IT ESTABLISHED THE METHOD OF APPLYING THE BALANCING TEST IN *ANDERSON V. CELEBREZZE* TO THE ISSUE OF PARTY AFFILIATION IN VOTER REGISTRATIONS.

Kobach's statement that *Rainbow Coalition* did not apply the *Baer* factors is incorrect. A plain reading of the case shows that *Baer* was considered in the last five paragraphs of the *Rainbow Coalition* Decision. In *Baer*, the three factors considered to determine whether a political party had a sufficient modicum of support to deserve recognition on voter registration forms were weighed against the burdens that would be imposed on the state should the state be required to recognize the plaintiff-party.

The *Rainbow Coalition* Decision did not discuss the three *Baer* factors because it found that the administrative cost was a sufficient burden such that "contrary to the situation in *Baer*, the administrative burden on the state that would result from permitting designation of minority party affiliation would not be merely nominal." *Rainbow Coalition*, 844 F.2d 740, 747 (10th Cir. 1988). There

was no need to go into the three factors – mainly (1) political organization exists, (2) has recognized officials, and (3) has had candidates – because the case turned on the state's burden. Here, the burden on Kansas is nominal, just like it was in *Baer*. The entire state's voter registration system is computerized just like Colorado's registration system in *Baer*. *Baer*, 728 F.2d at 475. The administrative costs associated with throwing out some paper and reprinting some forms from computerized pdf copies is also nominal notwithstanding the protestations of Kobach in his Opposition Brief.

## II. *BAER V. MEYER* WAS NOT DEPENDENT ON STATE LAW ANALYSIS BECAUSE THE *BAER* PANEL REFERRED TO A COLORADO SUPREME COURT CASE IN ITS OPINION.

The *Baer* Decision was issued pursuant to federal constitutional law, not pursuant to Colorado state law. Kobach is arguing that Kansas is not subject to the Colorado Supreme Court's decision in *McBroom v. Brown*, 53 Colo. 412 (1912). *See Baer*, 728 F.2d at 475. While the Tenth Circuit cited that case in its *Baer* Decision, it was not to adopt state law. In *Baer*, the state defendants argued similarly to how Kobach argues in this case: "that if required to permit the additional designations it would be faced with the impossible task of sorting out the purely frivolous and insubstantial attempts to designate party affiliation on the registration form." *Id*. at 475. Does that sound familiar? "In enacting this solution, the Kansas Secretary of State's office would be given no discretion to

weed-out illegitimate parties." (Opp'n Br., p. 20.) Kobach is making the exact same argument here that the Colorado defendants made in *Baer*, and just like *Baer*, this Court should reject the argument.

The real reason *McBroom* was cited was to show that anarchy was not at the state's doorstep. *Baer* held that if a party is organized, has officers, and has fielded candidates from the party's ranks, that the party has the sufficient modicum of support necessary to require the State to track voter affiliation with that party. *Baer*, 728 F.2d at 475-76. It just so happened that those three "*Baer* factors" were set forth in a Colorado Supreme Court case, and it is the factors themselves, not the original source of their articulation, that is relevant to the constitutional question in this case. Just like Colorado in *Baer*, Kansas and Kobach are not on the verge of complete anarchy. Will Kobach have to develop a system of reviewing eligible organizations? Sure they will, but that is not a sufficient reason for continuing to discriminate against smaller parties that have a sufficient modicum of support by refusing to track the affiliation of voters in these smaller parties when they provide that substantial benefit to well-established parties.[1]

[1] Kansas is not constitutionally required to keep track of party affiliation of voters. Indeed, the undersigned's former state of residence was Wisconsin which does not keep track of any voter party affiliation. But when Kansas decided to keep track of voter affiliation and give major parties the substantial benefits attendant to that system, they obligated themselves to provide that benefit to all parties under the equal protection clause. "The Equal Protection Clause does not . . . add any thing

Therefore, the *Baer* factors are just that, the *Baer* factors. They are not the *McBroom* factors. The Tenth Circuit did not enforce Colorado state law, but rather interpreted the equal protection clause in a set of factual circumstances very similar to the case before this Court today. In fact, *Baer* is the Tenth Circuit's articulation of how the balancing test in *Anderson v. Celebrezze* is to be considered in voter affiliation cases. Therefore, *Baer* controls the analysis in this case, and this case should be remanded with instructions to enter judgment in favor of the Constitution Party.

## III. KOBACH'S PARADE OF HORRIBLES IS INSUFFICIENT TO WARRANT THE CONTINUED DISCRIMINATION AGAINST SMALL POLITICAL PARTIES.

Kobach throws up several extreme conclusions, none of which are correct, in an attempt to thwart the just result in this case, which is to allow Constitution Party supporters and members to declare their affiliation with the Constitution Party when they register to vote. The Constitution Party is not asking this Court to require Kobach or Kansas to recognize all parties "no matter how tiny or fractional." (Opp'n Br., p. 4.) Rather, the Constitution Party is only asking that the Court require that parties be recognized if they satisfy the *Baer* factors.

Second, the fact that voter affiliations can be "record[ed] . . . on its own at any point in this process," (Opp'n Br., p. 15), does not change the fact that the state

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to the rights which one citizen has under the Constitution against another." *United States v. Guest*, 383 U.S. 745, 755 (1966) (internal quotations omitted).

is using its funds to support large parties, but refusing to do the same for smaller potentially competitive parties. The equal protection clause protects persons like the Constitution Party from the unjustified discriminatory applications of state laws.[2]

Third, Kobach complains that "there would be no standardization of names." (Opp'n Br., p. 16.) Of course, this is something Kobach would remedy when developing a constitutional system to incorporate the *Baer* factors in the voting registration process. As long as a party can establish that the *Baer* factors exist, they should be added to the voter registration forms. The Constitution Party suggested that an "Other" line be utilized as a cheap alternative, but that is not the only way to accomplish the goal of tracking voter affiliation with *Baer*-eligible political parties. The instructions for the voter registration form could list the then-eligible parties for nomination, the parties could be listed on the form by name. However Kobach decides to handle it, putting *Baer* into practice would not constitute the anarchy that Kobach makes it out to be.

Fourth, Kobach expresses grave concern over the competence of the average Kansan voter. "This [system of allowing voters to affiliate with non-ballot-

[2] Kobach also states that the Constitution Party is only suing because they do not want to go through the process of becoming ballot qualified and "[p]laintiffs have determined it is easier to sue in federal court." (Opp'n Br., p. 10.) Of course, that's what the civil rights statute is designed for. When a state refuses to enforce its laws in a constitutional manner, the quickest and most effective means is through federal court action.

qualified parties] 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." (Opp'n Br., p. 18.) While Kobach's comments might be better considered his own indictment on the Kansas public education system, the Constitution Party has more confidence in the average voter. It is not really that tough a concept to grasp. "A voter can affiliate with a political party before that party is eligible for a separate place on the ballot." That might be a line that can be placed in a press release, or in a voter information guide, or in the instructions for filling out voter registration forms. The Constitution Party believes that most Kansans could understand that statement, even if Kobach believes otherwise.

Finally, as to the costs to the system, the record is void of any cost to update the system and any opinion Kobach has in that regard is merely speculation. The Constitution Party asserts that the cost is insignificant in the grand scheme of things, especially here, where the constitutional rights of the Constitution Party are implicated.

Kobach presents no reasonable justification for failing to allow Constitution Party members, and members of other parties (if there are any), that would satisfy *Baer* to affiliate with their political party through the voter registration system. Therefore, the *Anderson* balancing test, as interpreted by *Baer*, requires judgment

in the Constitution Party's favor. The burden on the state is much less than the burden on the Constitution Party and its supporters.

## CONCLUSION

For all of the foregoing reasons, the Judgment should be reversed and the case remanded with instructions to enter a Judgment in favor of the Plaintiffs-Appellants.

Dated at Milwaukee, Wisconsin, on this the 6th day of October, 2011.

RESPECTFULLY SUBMITTED

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## CERTIFICATE OF COMPLIANCE

The following is hereby certified by the undersigned below:

1. All fonts are Times, in 14-point type. (Footnotes are in 14-point type).

2. This brief contains 1,896 words, exclusive of the table of contents, table of authorities, this certificate of compliance, and the certificate of service. This word count was performed with the Macintosh "Microsoft Word X" word count tool.

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## CERTIFICATE OF DIGITAL COMPLIANCE

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5;

2. If required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on October 6, 2011.

I hereby certify that seven (7) copies of the Opening Brief and two (2) copies of the Appendix were served this day on the Tenth Circuit Court of Appeals by sending via Federal Express overnight delivery to the Clerk of Court. Furthermore, one (1) copy of the Opening Brief and Appendix was served via Federal Express overnight delivery to the following addresses:

Ryan Kriegshauser, Deputy Secretary of State
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Dated on October 6, 2011.

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