VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

GERALD TRUDELL et al

DOCKET NO.: 612-8-10 Wncv

v.

STATE OF VERMONT, SECRETARY
OF STATE

FINAL JUDGMENT ORDER

Following a court trial on July 14-15, 2011, and based upon the Findings of Fact and Conclusions of Law entered by the court, the court enters final judgment in favor of the defendant State of Vermont, Secretary of State.

Dated: July 20, 2011

Geoffrey Crawford,
Superior court Judge

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v.

DOCKET NO.: 612-8-10 Wncv

STATE OF VERMONT, SECRETARY
OF STATE

FINDINGS OF FACT and CONCLUSIONS OF LAW

On July 14 –15, 2011, the court held a bench trial in this constitutional challenge to the recent change in the deadline under the Vermont election laws for filing independent candidate petitions.

FINDINGS OF FACT

Statutory Changes to the Filing Deadlines

In 2009, in response to reports that U.S. troops stationed overseas were having difficulty voting by absentee ballot, Congress enacted the MOVE Act. See 42 U.S.C. sec. 1973ff-1(a)(8)(A); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190,2322 (2009)(adding subsection 8 to 42 U.S.C. sec. 1973ff-1(a)). This legislation imposed fixed deadlines by which states had to prepare their ballots. For general elections, ballots are required to be completed 45 days in advance of the election.

Vermont has long held its primary elections relatively late in the electoral cycle on the second Tuesday in September. In order to comply with the requirements of the MOVE Act, the Vermont legislature changed the primary date to the fourth Tuesday in August. 17 V.S.A. sec. 2351. Proposals for an earlier primary date met resistance in the legislature from members who believed that electioneering should not begin in earnest until after Labor Day and the commencement of the school year.

The fourth Tuesday in August was the latest possible date by which the Secretary of State could receive the primary results from the towns and cities, complete the canvas process, prepare the ballot styles (141 in all for the various districts, towns and other subdivisions), and receive the general election ballots back from the printers in time to meet the 45 day federal deadline. Although calendar years vary, this date gave the election officials about 25 days to produce completed ballots by the MOVE deadline.

A new primary date required a new deadline for the submission of primary petitions. The legislature moved the deadline for primary registration to mid-June ("not later than 5:00 pm on the second Thursday after the first Monday in June"). 17 V.S.A. sec. 2356.

Before these statutory changes, independent and minor party candidates were permitted to file their election petitions up to three days after the primary election. With a short deadline for the completion of the ballot, the legislature considered altering the deadline for independent and minor party candidates. The Director of Elections testified that a registration deadline of the Thursday before the primary (two working days plus the intervening weekend) would provide enough additional time to review the independent petitions and identify all candidates, including those running on multiple tickets.

Instead of four calendar days, the legislature moved the deadline for the registration of independent candidates to the same date required for primary candidates: the second Thursday after the first Monday in June. In 2010, the time between the registration deadline and the primary was 68 days (June 17 – August 24).

The Parties

Plaintiff Gerald Trudell has long had an interest in environmental issues and electoral politics. He first ran for statewide office in 2006 when he ran for Vermont's seat in the U.S. House of Representatives. He ran in order to bring attention to environmental issues rather than with the expectation of gaining office. He received 1,000 votes in the general election. He ran again in 2008 on a similar platform and received 10,000 votes. He spent less than $300 in each election.

In 2010, he did not file an election petition by the June deadline. He decided to run in mid-June due to his concerns about the oil spill in the Gulf of Mexico. By then it was too late for him to collect 500 signatures in time for the June 17 deadline. He filed a petition anyway in late August and was denied a place on the ballot because the petition was late. He ran instead as a write-in candidate.

Plaintiff Myron Dorfman is a voter and occasional supporter of Mr. Trudell. He voted for him in 2006 and for Peter Welch in 2008. Mr. Dorfman is attracted to individual candidates more than to parties. He opposes a June registration deadline for independent candidates because it limits his choice as a voter. He wished to have the option of voting for Mr. Trudell in 2010 but was unable to find him on the ballot.

Independent Candidacies in Vermont

Independent candidates and minor parties have long played an important role in Vermont politics. As the state moved from a bastion of Republicanism to a strongly Democratic state in the 1960's and 70's, successful candidates such as Phil Hoff in 1962 ran both as independents and as party nominees. This permitted people who were opposed to voting Democrat to vote for Governor Hoff as an independent. Until 1978, a voter's candidacy could appear at several places on the ballot: as an independent, as a major party nominee, and as a minor party nominee. The votes were totaled from each category.

With the advent of the consolidated ballot in 1978, the advantage of having one's name appear at multiple locations was lost, but independent candidates continued to play a role. Senator Bernie Sanders first ran for state-wide office as an independent in the 1986 race for governor. He

received about 15 % of the votes. In 1988 he ran for the U.S. House as an independent and came in second, ahead of the Democratic candidate. In 1990 he won election to the House as an independent.

While Senator Sanders is the most visible example of independent candidacy in Vermont, he is hardly alone. The total number of independent candidates in elections since 2000 has been:

Election Year	All Independent Candidates	Statewide Candidates
2000	35	5
2002	38	5
2004	20	5
2006	32	9
2008	34	7
2010	46	12

Although the numbers of candidates and the percentage of votes cast for them are small, their numbers have increased. The number increased most sharply in 2010 – despite the new early registration deadline. There is no clear answer as to why although one credible explanation, offered by the Director of Elections, is that the website offered by the Secretary of State has made the process of qualifying as a candidate far easier to understand.

The rate of independent candidacy is consistent with Vermont's position as an easy state in which to qualify as a candidate. There are no filing fees. The signature requirement for statewide elections is low (500 signatures except for President for which it is 1,000) and there is no longer a requirement of certification of signatures against voter registration lists. Vermont has a high level of community engagement at events such as town meetings. These may encourage some people to place their name on the ballot. The absence of party registration and the appearance of recognized third political parties such as the Progressive and Liberty Union parties also foster an atmosphere in which independent candidates flourish.

Competing Policy Choices

At trial several witnesses provided testimony about the events and policy choices which gave rise to Acts 73 and 98 -- the two bills which were introduced in order to change the primary and registration dates. Most important was the decision to move the primary date into late August in order to comply with the federal MOVE legislation. A second event was the expression of concern by some legislators about the existing system which permitted candidates who lost in the primaries to find a place on the general election ballot as independents.

Legislators such as Representative Starr and Senator Brock believed that it was unfair to give such candidates "two bites at the apple."[1] In addition, legislators who favored a common registration deadline for all candidates believed that voter choice and values of transparency

[1] There is no prohibition against running in the primary and in the general election so long as the candidate registers as a primary candidate and an independent by the June deadline. Such a candidate would be seen from the outset as a person who intended to run in the general election regardless of the outcome of the primary.

were best served by requiring all candidates to make themselves known to the electorate at the same time. Since the primary candidates had to register in June, approximately two months before the August primary, there was legislative support for a change in the law to make independent and minor party candidates meet the same deadline.

The burden which a June deadline places on independent candidates and their supporters is minor. The testimony established that the general public pays limited attention to the primary races and virtually none to the independent candidates during the summer months. The primaries see low voter turnout in most years. Independent candidates obviously do not appear on primary ballots (unless they have registered as independents and primary candidates) and are rarely included in debates and candidate forums until after the primaries. An independent candidate lucky or skilled enough to attract some media attention could get a small bump from an early registration and announcement. Most languish unnoticed until the general election season is underway. A June deadline requires more foresight and advance planning from the independent candidates, and it also eliminates those who decide to run only after watching the performance of the primary candidates or in response to an event such as Mr. Trudell's decision to run after he learned of the Gulf oil spill.[2]

The evidence was strong that independent candidates have long been a consistent presence on Vermont ballots. Their numbers increased sharply in 2010: the first election year with the June deadline. Other than Mr. Trudell, there is no evidence that other candidates would have entered the race during July and August if the deadline had been later. From 2008 to 2010, however, the numbers of independent candidates increased by over 40 percent for statewide candidates and nearly as much for total candidates (local and statewide combined).

CONCLUSIONS OF LAW

Article I, sec. 4 of the U.S. Constitution authorizes the state legislatures to enact election laws governing the election of the congressional delegations.

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Like all other states, Vermont has long provided for such elections. Under the supervision of the Secretary of State, candidates register and run in both the primary and general elections. The election results are subject to canvas and reporting requirements. Elections for federal and state office are very much a function of state government.

In order to run a fair and orderly election, it is inevitable that state election law will include filing and registration deadlines. In particular, ballots must be printed well in advance in order to reach

[2] Mr. Trudell's testimony that he decided to run in response to the Gulf spill is rendered less credible by the chronology. The Deepwater Horizon explosion occurred on April 20, 2010, and remained front-page news until the well was capped on July 15, 2010. The court does not doubt Mr. Trudell's recollection of when he decided to run, but the oil spill is not an example of an incident which occurred too late in the election cycle to permit an independent to run in response.

absentee voters on time. Any restriction on the right to vote, however, is subject to review under the First and Fourteenth Amendments. The constitutional test was established in *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983):

> [A court] must first consider the character and 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 justifications 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 also must 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.

This test received additional illumination in *Burdick v. Takushi*, 504 U.S. 428 (1992) in which the Court distinguished between severe restrictions of voting rights and those which are reasonable and nondiscriminatory. Severe restrictions must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279 (1992). A reasonable, nondiscriminatory restriction requires only a showing of the State's important regulatory interests.

The restriction in this case is a requirement that independent candidates submit their nominating petitions, signed by 500 voters, at the same time as the primary candidates. This is nondiscriminatory. It applies equally to all candidates. The restriction is reasonable in the sense that it requires a candidate to register to run about 70 days before the primary. In *Burdick*, a ban on write-in candidacies was upheld in large part because independent candidates were permitted to register 60 days before the primary and, in other respects, Hawaii offered easy access to the ballot. The court is satisfied that this case is a similar example of a nondiscriminatory, reasonable limitation which is subject to the less stringent standard of constitutional review.

Turning to the *Anderson* test, the court first considers the degree of injury asserted by the plaintiffs who include a candidate and a voter. The law change requires a candidate to make up his or her mind and collect the necessary signatures two months earlier than before. The issue is not just procrastination. There are candidates who may be motivated to run by what they see happening in the primary races. Or, as Mr. Trudell argues, a candidate may be inspired to run by a very recent event such as an oil spill or a terrorist attack. The U.S. Supreme Court has held that such timing concerns should not be given great weight. See *Storer v. Brown*, 415 U.S. 724 (1986)(little weight given to the interest of a candidate in making a late rather than an early decision to enter race).

The plaintiffs' witnesses also raised a concern that there is a "hurry up and wait" disadvantage for an independent candidate who must disclose his intentions in June and then sit on the sidelines until after the primaries. The testimony was undisputed, however, that relatively little attention is paid by the electorate even to the primary races during the summer months. And the independent candidate can schedule his or her announcement and campaign activities whenever she likes. No one except the Secretary of State's office is likely to pay much attention to the filing of registration papers in June.

The court assesses the harm to the independent candidates of an earlier filing deadline as mild. The earlier deadline may exclude candidates who were moved to run by late-breaking developments in the news. Some candidates may feel unsure about what to do with their nascent candidacy during the summer months when the limited public attention available for political races is focused on the primaries. But these are relatively minor problems which are offset by the short time between registration and primary (approximately 70 days) and the liberal rules for access to the Vermont ballot.

The state's public policy concerns were also addressed by the witnesses. These include more time to prepare the ballots for the general election, the protection of the major parties from the divisions caused by "sore losers" and a more transparent process in which all candidates are identified early. The need for more time to comply with the MOVE Act requirements of ballots printed 45 days before the general election required only a few additional days. This is not a strong reason for moving the independent registration deadline back into June.

Since 1974, the "sore loser" phenomenon has affected almost one state-wide election out of 5. See Ex. 10. It is not eliminated by moving the deadline; candidates will still be permitted to register simultaneously for primaries and as independents. With the change in the law, those candidates will be seen from the outset as people whose ambition or commitment to an issue exceeds their loyalty to their party. There will no longer be any surprise when the candidate who describes himself as a major party candidate runs anyway after losing the primary. This court does not decide whether a deadline which reduces the "sore loser" phenomenon is a good or a bad idea. The decision to make it more difficult for primary candidates to run after losing is a legitimate policy choice which the Vermont legislature voted into law. The court will give it deference and weight in the *Anderson* calculus.

Finally, the goal of "transparency" is a second legitimate legislative goal. Once the names of all candidates are known, the Secretary of State provides information about the identities and positions of all. Within reason, more time permits greater inquiry and familiarity with a candidate's views and his or her past positions and conduct. An extra 68 days in 2010 for the electorate to consider the advantages of voting for the "Socialist," "United States Marijuana," "Liberty Union," or "Working Families" candidates could not go amiss.[3]

Acts 73 and 98 satisfy the *Anderson* test because the policy reasons which underlie the change in the election law are reasonable and important and the restrictions imposed on the plaintiffs are relatively minor and offset by the easy access of all independent candidates to the ballot in Vermont.

Claims under the Vermont Constitution

Plaintiffs also assert that the change in the deadline violates Articles 7 and 8 of the Vermont Constitution. From the court's perspective, these state constitutional guarantees are coterminous with the U.S. Constitutional guarantees of freedom of expression, association, and due process which are expressed in the First and Fourteenth Amendments. Article 8 guarantees free elections and the right "to elect officers, and be elected into office, agreeably to the regulations

[3] The Working Families candidate was also the victor – Governor Peter Shumlin who ran on two tickets.

made in this constitution." This Article anticipates the regulation of elections, presumably through the grant of legislative power contained in Ch. II, sec. 6. The registration deadline is a reasonable exercise of legislative authority, neither arbitrary in its requirements nor unfair to one group over another. Similarly, the Common Benefits Clause, Ch. 1, Art. 7, adds little to the debate. It guarantees equality among citizens and prohibits disparate treatment by government. *Baker v. State*, 170 Vt. 194 (1999). A registration deadline which is symmetrical and applies in exactly the same way to all candidates is consistent with the Common Benefits Clause.

CONCLUSION

The court will enter final judgment in favor of the defendant.

Dated: July 20, 2011

Geoffrey Crawford,
Superior Court Judge