VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

GERALD TRUDELL et al

v. DOCKET NO.: 612-8-10 Wncv

STATE OF VERMONT, SECRETARY OF STATE

DECISION ON MOTION TO DISMISS

Gerald Trudell, an independent candidate for Vermont's seat in the U.S. House of Representatives, and Myron Dorfman, a supporter who signed his nominating statement, challenge the filing deadline imposed on independent candidates by 17 V.S.A. §§ 2356, 2402(d).

The Secretary of State has filed a motion to dismiss. For purposes of the motion, the court accepts as true all allegations in the complaint.

FACTS

In April 2010, the Vermont legislature enacted Act 73 which moved the date for major party primary elections from the second Tuesday of September to the fourth Tuesday of August.[1] The change was made to comply with new federal requirements that the ballot for the general election be printed not less than 45 days before the election to facilitate absentee voting, especially by military personnel. See 42 U.S.C. § 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. § 1973ff-1(a)).

The new primary date required an earlier deadline for primary petitions. To get a place on the primary ballot, a candidate is now required to submit his petition not later than the "second Thursday after the first Monday in June." 17 V.S.A. § 2356. In 2010, this deadline fell on Thursday, June 17, 2010—68 days before the primary election at the end of August.

Act 73 also changed the filing deadlines for the submission of general election nomination statements for independent candidates and minor party candidates. 2009, No. 73 (Adj. Sess.), §§ 4, 6. These candidates are now held to the same June deadline as major party candidates. 17 V.S.A. §§ 2356, 2402(d). Prior to the enactment of Act 73, independent candidates were permitted to file their statements to appear on the ballot up to three days after the primary election. 17 V.S.A. § 2402(d) (2009).

[1] Act 73, adopted in April 2010, was amended by Act 98 the following month. 2009, No. 98 (Adj. Sess.), § 1. In this decision, the court's references to Act 73 include its Act 98 amendments.

In 2010, the primary election took place on Tuesday, August 24. Mr. Trudell attempted to submit an election petition during the week prior to the election. His petition was rejected because he had not met the June 17 deadline.

ANALYSIS

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the U.S. Supreme Court identified the constitutional protections available both to independent candidates who face early filing deadlines and to the people who wish to vote for them.[2] The deadline provisions are subject to scrutiny similar to that given to other provisions of the voting laws.

> Each provision of [state election laws], whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree the individual's right to vote and his right to associate with others for political ends.

Id. at 788. The specific constitutional right which is protected is the First and Fourteenth Amendment "right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997); accord *Anderson*, 460 U.S. at 786–88. In addition, some election law provisions may violate the Equal Protection Clause. *Jenness v. Fortson*, 403 U.S. 431, 437 (1971) (discussing *Williams v. Rhodes*, 393 U.S. 23 (1968)).

The civil liberties associated with the right to vote are not unlimited. *Anderson* and the cases which precede it recognize the need for state laws to provide an orderly and fair electoral process. "Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

Anderson recognized the important role of independent and minority party candidates in American history.[3] Drawing upon the work of Professor Alexander Bickel, the Court observed that:

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[2] In 1980, John Anderson, a Republican candidate for President with support from "Rockefeller Republicans," announced his candidacy as an independent on April 24, 1980 after it became clear that Reagan would win the Republican nomination. *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983); see generally Wikipedia, http://en.wikipedia.org/wiki/John_B._Anderson (last visited Feb 22, 2011). "Anderson was barred by early filing deadlines in Ohio and four other States; he succeeded in obtaining court orders requiring placement on the ballot in all five." *Anderson*, 460 U.S. at 795 n.20. He eventually won 7% of the popular vote, the most for an independent candidate since George Wallace won 14% in 1968.

[3] Independent and minority party candidates have also played an important role in Vermont politics. In 2006, Senator James Jeffords retired as an independent (although his status as an independent was unrelated to the election process). He was succeeded by Senator Bernie Sanders who had already been elected as an independent in the House for 8 terms. Senator Sanders's career as an elected official owes much to another independent candidate—"sore loser" Richard Bove who ran in a three-way race for mayor of Burlington in 1981 after failing to unseat the incumbent Democratic mayor Gordon Paquette in the Democratic primary. Independents—and the views they express—are not taken lightly in this state.

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group . . . restrictions [on access to the ballot] threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.

Id. at 794.

In instructing the trial court about how best to balance the First Amendment principle of access to the ballot and the need for a fair and orderly election process, the *Anderson* Court provided a two-step recipe:

> [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 much 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.

Id. at 789. See *Burdick v. Takushi*, 504 U.S. 428 (1992), for a more detailed discussion of the flexible standard inherent to the *Anderson* test.

An appreciation of the interests of each side in this dispute—and, particularly, a determination of whether the burden imposed upon the plaintiffs is necessary to achieve the State's purposes—requires a far richer factual record than that afforded by the pleadings. It requires a hearing.

The scope and direction of the hearing is up to the parties. But some issues obviously require careful examination. For example, it appears unlikely that the preparation of the ballot is made any easier by the new deadline. Ballots cannot be printed until after the primary results are known. Is the early deadline needed for some other administrative reason related to the smooth running of the election process?

Not all justifications advanced for early filing deadlines are procedural. Some are related to the substance of the election, either through protecting majority parties or by requiring a longer period of public exposure for candidates.

The principal concern frequently advanced by state officials in support of imposing the same deadline for primary petitions and independent petitions for the general election is the protection of majority parties from "sore losers" who split their party's vote by running as an independent after losing the primary. Do any of the independent candidates who have run for state-wide office in Vermont over the last twenty years fit this description? Do the majority parties actually need or wish this type of protection? Is there an alternative, less burdensome way to provide "sore loser" protection to the major parties such as a prohibition against appearing on the general election ballot after losing a primary election?[4]

Another reason frequently advanced by state election officials is the need to educate the public by identifying all candidates early in the process. Is there any substance to this concern? Have independent candidates received any additional exposure between the filing deadline and the primary as a result of Act 73? When do voters actually pay attention to elections? How do we weigh the costs of exclusion from the ballot against the benefits of two additional months of public identification for all candidates?

These paragraphs are not intended to be exhaustive. They illustrate, however, the need for a real hearing with testimony from both sides. The court will allow three months for preparation. Expert witnesses, if any, shall be disclosed by both sides not later than April 1, 2011. Any depositions shall be complete by May 15, 2011. The court will schedule a two-day hearing (one day for each side) after May 15, 2011.

CONCLUSION

The motion to dismiss is DENIED.

Dated: February 22, 2011

Geoffrey Crawford,
Superior Court Judge

[4] Ohio election law included such a provision at the time of the *Anderson* decision. As a result, the "sore loser" justification was not available as a basis for upholding the early filing deadline.