IN THE SUPREME COURT

OF THE

STATE OF VERMONT

GERALD TRUDELL AND MYRON DORFMAN

vs.

STATE OF VERMONT, SECRETARY OF STATE DEBORAH MARKOWITZ

Supreme Court Docket No. 2011-311

Gerald Trudell, Appellant

Appeal from
Vermont Superior Court, Washington Unit
Docket No. 612-8-10 Wncv

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the trial court err, as a matter of law, in relying upon legislators' testimony regarding the Legislative purpose in changing the deadline by which independent candidates must file statements of nomination?

2. Did the trial court err, as a matter of law, in finding that the deadline change serves legitimate state purposes and poses only minor, permissible burdens on independent candidates' and voters' 1st and 14th amendment rights under the United States' Constitution?

3. Did the trial court err, as a matter of law, in holding that the deadline change is permissible under Articles 7th and 8th of the Vermont Constitution?

TABLE OF CONTENTS

Statement of the Issues i

Table of Authorities iii

Statement of the Case 1

Standard of Review 3

Argument 3

I. The Trial Court Erred, as a Matter of Law, in Relying upon Vermont Legislators' Testimony Purporting to Define the Policy Goals of the Legislation. 3

II. The Trial Court Erred, as a Matter of Law, in Finding the Deadline Change Permissible Under the 1st and 14th Amendments of the Constitution of the United States. 6

A. The law is neither reasonable nor nondiscriminatory 7
B. The State failed to show an "important regulatory interest" justifying the restriction. 7

III. The Trial Court Erred, as a Matter of Law, in Holding the Deadline Change Permissible Under Articles 7th and 8th of the Vermont Constitution 10

A. Article 8th 10
B. Article 7th 11

Conclusion 12

Certificate of Compliance 13

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 1570 (1983) 4, 7, 8, 9
Baker v. State, 170 Vt. 194, 744 A.2d 864, 868 (1999) 4, 12
Barber v. Thomas, 130 S.Ct. 2499, 177 L.Ed. 2d 1 (2010) 5
Brigham v State, 2005 VT 105, 179 Vt. 525 4
Brownell v. Russell, 76 Vt. 326, 57 A. 103 (1904) 11
Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059 (1992) 7
Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836 (1982) 8
Doria v. University of Vermont, 156 Vt. 114, 589 A.2d 317, 320 (1991) 11
Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 1492 (1995) 5
In re Hodgdon, 2011 Vt. 19, 19 A.3d 598 .... 8, 9, 11, 12
Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 1976 (1971) 8
Lewis v. Thompson, 252 F.3d 567, 74 Soc.Sec.Rep.Serv. 167 (2d Cir.) (2001) 8
Mims v Arrow Financial Services, LLC, 132 S.Ct. 740, 752 (2012) 5
Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698 (1992) 7
Paey v. Rodrigue, 119 N.H. 186, 400 A.2d 51, 53 (1979) 11
Stoddard v. Quinn, 593 F. Supp. 300 (D.Me. 1984) 10
Storer v. Brown, 415 U.S. 724, 94 S. Ct. 1274, 1279 (1974) 9
Town of Hooksett v. Baines, 148 N.H. 625, 813 A.2d 474, 479 (2002) 12

Statutes

17 V.S.A. § 2351 2
17 V.S.A. § 2402 2

Other Authorities

Act 73 2
Military and Overseas Voter Empowerment (MOVE) Act 1, 2

Constitutional Provisions

1st and 14th Amendment United States Constitution 13
Article 7th Vermont Constitution 12, 13
Article 8th Vermont Constitution 11, 13

STATEMENT OF THE CASE

In 2009, the United States Congress enacted the Military and Overseas Voter Empowerment (MOVE) Act.[1] MOVE "requires states to transmit validly-requested absentee ballots to [uniformed and overseas citizen] voters no later than 45 days before a federal election, when the request has been received by that date." http://www.justice.gov/opa/pr/2010/October/10-crt-1212.html.

Prior to MOVE, Vermont held its primary races on the second Tuesday in September. 17 V.S.A. § 2351 (since amended). To comply with MOVE, Vermont enacted Act 73. 2009, No. 73 (Adj. Sess.), **PC 1**. Section 1 of Act 73 moved Vermont's primary election date from the second Tuesday in September to the fourth Tuesday in August. 17 V.S.A. § 2351. The change in the date of the primary election necessitated a change in the deadline by which primary candidates were required to file their primary petitions. **PC 1**. Previously, primary candidates had until the third Monday of July to file their primary petitions. 17 V.S.A. § 2356 (since amended). Act 73 changed the date to the second Monday in May. 17 V.S.A. § 2356.

The Legislature enacted an additional change, not necessary to comply with MOVE, **PC 6**, which gave rise to this litigation; the Legislature moved the date by which independent candidates were required to file their statements of nomination to run in the general election so as to make that deadline coincide with the deadline by which party candidates were required to file their primary petitions. 2009, No. 93 (Adj. Sess.) § 1; Compare 17 V.S.A. § 2402 (e) (since amended) to 17 V.S.A. § 2402. [2]

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[1] 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)

[2] Prior to 2009, independent candidates were required to file their statements of nomination no later than three days after the conclusion of the primary races. **PC 1, 47.** Under Acts 73 and 98, independent candidates must now file their statements of nomination to run in the general election by the deadline imposed on party candidates for filing their primary petitions to run in the primary race. **Id.**

In 2010, Appellant and independent candidate Gerald Trudell attempted to file an otherwise compliant statement of nomination to run for the United States Congress after the deadline imposed under Act 73 and 98, but before the deadline imposed under prior law. **PC 48.** The Vermont Secretary of State rejected Trudell's petition as untimely. **Id.**

Trudell and Myron Dorfman, a voter who supported Trudell's candidacy, brought a pro se Petition for Declaratory Judgment against the State and the Secretary of State in August 25, 2010, challenging the constitutionality of the new deadline for statements of nomination. **PC 12.** Appellants subsequently retained counsel.

Following a series of pre-trail motions, **PC 10-11**, the trial court heard Appellants' action on July 14 and 15, 2011 and ruled in favor of Appellees on July 20, 2011. **PC 1.** This appeal ensued.

STANDARD FOR REVIEW

Appellants challenge the constitutionality of the newly-imposed ballot access restrictions on independent candidates. While the Court pays due regard to the legislative process, the Court's review of the constitutionality of a statute is nondeferential and plenary. *Brigham v State,* 2005 VT 105, ¶10, 179 Vt. 525 (it is province of Court to decide whether Vermont law complies with Constitution).

The test for determining the constitutionality of a ballot access restriction statute was set forth by the United States Supreme Court in 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.

Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570 (1983).

ARGUMENT

I. The Trial Court Erred, as a Matter of Law, in Relying upon Vermont Legislators' Testimony Purporting to Define the Policy Goals of the Legislation.

"It is axiomatic that the principal objective of statutory construction is to discern the legislative intent." *Baker v. State,* 170 Vt. 194, 198, 744 A.2d 864, 868 (1999). The intent of any legislation is to effect one or more policy goal of the State. In weighing the constitutional validity of the deadline change, the Court must first determine the *precise* policy goals the Legislature sought to achieve and second, determine whether these goals pass constitutional muster. *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S. Ct. 1564, 1570 (1983) (in resolving

constitutional challenge, court must identify precise interests put forward by State and their legitimacy and strength).

In apprehending Legislative intent, courts uniformly reject post-enactment testimony of legislators.[3] *Heintz v. Jenkins,* 514 U.S. 291, 298, 115 S. Ct. 1489, 1492 (1995) (statement made by legislators after enactment of law simply represent views of said legislators, not views of Legislature); *Barber v. Thomas,* 130 S.Ct. 2499, 2507, 177 L. Ed. 2d 1 (2010) (courts normally give little weight to statements of individual legislators made after enactment of legislation); *Mims v Arrow Financial Services, LLC,* 132 S. Ct. 740, 752 (2012) (views of single legislator, even bill's sponsor, not controlling).

Three legislators testified on behalf of the State. Two were Democrats and one was a Republican. In well-orchestrated lockstep that is rarely, if ever, seen during actual legislative debates, each averred that the purpose of the legislation was to discourage sore-loser candidates and to provide transparency for voters.[4]

Senator Starr testified regarding a race he ran in 1978 in which he beat an opponent in the primary election and then was forced to beat the same opponent in the general election. Senator Starr testified that he "didn't think that was very fair" and that he "disliked [ ] anybody getting two bites at the apple." **Tr. 7/15/11, pp 93-94**. Senator Starr further testified that he was a strong supporter of the bill "for the fact that . . . the people, the voters, haven't had an opportunity to see who the candidates are and make a valid choice." **Id.** Later, Senator Starr expressed a third, less scripted and more believable basis for his support of the law. According

[3] This position likely has its antecedent in the defining line from *Marbury v. Madison,* inscribed on the wall of the United States Supreme Court building: "it is emphatically the province and duty of the Judicial Department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177, 5 U.S. 137, 177 (1803).

[4] As argued below, even if the implausibly unswerving testimony of the legislators is to be believed as indicative of the Legislatures' actual policy goals, neither claim constitutes an "important regulatory interest" justifying restrictions on the associational and voting rights of Vermonters.

to Senator Starr, requiring earlier registration prevents the September media bump independents received under the old law. **Id, at 95-96.**

Senator Brock said much the same thing. After a complicated description of why he voted against the initial bill but supported the amendment, Senator Brock stated that he "did not believe that it was fundamentally fair for a candidate to lose a primary election and then to again appear suddenly after the fact as an independent candidate in the general election." **Tr. 7/15/11, p 100**. Senator Brock also testified that he "thought it was important that a person who is running for a particular office be made known to the voters as early as possible and that all people who are going to be running in a general election be known to the voters." **Id.** Senator Brock stated that "transparency demanded for an informed election, for people to know all the people and all the potential choices at the first time that they voted." **Id, p 101.** Once off script, Senator Brock gave a third, more believable basis for his support of the law. In Senator Brock's staunch, party-centric view, **Tr. 7/15/11, p 97**, the "fulcrum" on which voters and candidates alike must be bound is the primary—an institution created to reduce political corruption caused by the parties **Tr. 7/15/11 pp 8-11**, paid for by taxpayers, and actively used by only a portion of the general voting population.[5]

Former Representative McDonald echoed the other legislators' testimony when she testified that she thought "the issue was always about transparency." **Tr. 7/15/11, p 114.** Representative McDonald conceded that the primary is strictly a party affair, that exists to allow the party to elect the person who will represent the party in the general election, and that the party has the right to and controls the campaigning information it will make available to its candidates. **Id, p 116.** Yet, according to the former representative, the State must bind all voters

[5] Even in 2010, when a five-way race for the Democratic nomination for governor brought many to the polls, the primary turnout was less than half the turnout of the general election. http://vermont-elections.org/elections1/2010_election_info.html

and candidates, including non-party people, to a schedule—in Senator Brock's words, a fulcrum—that exists for the sake of the parties.

Over the objections of Appellant, **Tr. 7/15/11, pp 91, 112**, the trial court allowed the testimony. Thereafter, the trial court improperly concluded that the legislators' testimony defined the policy reasons underpinning Act 73 and 98 and that these supposed policy reasons satisfied the *Anderson* test. See **PC 6, Tr. 7/15/11** (Court: ". . . you certainly accomplish the goal of transparency because everybody knows in June who's going to be in the race. . . .")

The post-enactment testimony of the legislators, however, carries no legal weight and cannot meet the State's burden of "identifying the precise interests put forward by the State [and the legitimacy and strength of these interests] as justification for the burden imposed by its rule." *Anderson v. Celebrezze,* 460 U.S. at 789, 103 S. Ct. at 1570 (1983). The trial court's reliance on the opinions of the legislators is reversible error.

II. The Trial Court Erred, as a Matter of Law, in Finding the Deadline Change Permissible Under the 1st and 14th Amendments of the Constitution of the United States.

Appellants aver that the change in deadline impermissibly impinges upon their associational and voting rights under the First Amendment to the United States Constitution. **PC 13**. The trial court properly recited the constitutional test applicable to this case. **PC 6.** Citing *Burdick v. Takushi,* 504 U.S. 428, 112 S. Ct. 2059 (1992) and *Norman v. Reed,* 502 U.S. 279, 112 S. Ct. 698 (1992), the trial court also properly delineated between severe restrictions, requiring strict scrutiny, and restrictions which are reasonable and non-discriminatory, and which therefore require only a showing of the "State's important regulatory interests." **PC 6.**

The trial court, however, did not apply the test it articulated. Instead, it applied the much weaker rational basis test. See *Lewis v. Thompson,* 252 F.3d 567, 74 Soc. Sec. Rep. Serv. 167

(2001) (under rational basis test, government not obligated to produce evidence, empirical data, and can rely upon "rational speculation"). This was error.

A. The law is neither reasonable nor non-discriminatory.

As noted above, the primary election is a party affair paid for by taxpayers for the benefit of the parties. There is nothing "reasonable" in demanding that all members of our democratic society bend their First Amendment, constitutional rights of association to a time table created for the benefit of two associational groups.

The law is impermissibly discriminatory. With the exception of race- or gender-based discrimination, it is hard to conceive of anything more impermissibly discriminatory—or harmful to our democracy—than a law which forces independent-minded voters to adhere to a timetable adopted, promoted, even created, for the benefit of established political groups. A primary race is not a general election race. Party candidates file their petition to run in a primary race, not the general election race. The trial court is simply incorrect in concluding that it is nondiscriminatory to require two differently situated candidates to file two distinct documents for two distinct races. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S. Ct. 1970, 1976 (1971) cited in *Anderson v. Celebrezze*, 460 U.S. at 801 (1983).

B. The State failed to show an "important regulatory interest" justifying the restriction.

In evaluating First Amendment challenges to ballot restriction laws, the Court must undertake a specific, fact-based analysis of the alleged "important regulatory interests" supporting the restriction. For example, in *In re Hodgdon*, this Court performed an in-depth review of the "important regulatory interests" supporting a resign-to-run canon. Citing favorably to *Clements v. Fashing,* 457 U.S. 957, 102 S. Ct. 2836 (1982) (plurality decision), this Court

observed that a resign-to-run law serves an "important regulatory interest" by ensuring that a judge will not neglect duties or devote less time than the judge's full time and energies to the responsibilities of the judicial office. *In re Hodgdon,* 2011 VT 19, ¶ 14, 19 A.3d 598.

In contradistinction to *Hodgdon*, the trial court accepted, without analysis and without supporting evidence, the legislators' self-interested and speculative claim that the new law will discourage "sore-loser" candidates and promote voter education. Not surprisingly, the trial court's acceptance of the State's theoretical claims produced fatal conflicts in the body of the decision.

Appellants presented unchallenged testimony that the "'sore loser' phenomenon has not played a role in weakening the major parties[.]" **Tr. 7/14/11, p 54**. Appellants also presented unchallenged testimony that from 1974 to the present, no so-called "sore loser"[6] ever won a race in Vermont. **Id. pp 75-80**. Finally, as acknowledged by the trial court, the new law does not even eliminate a candidate's opportunity to be a "sore loser." **PC 6.**

Nevertheless, the trial court concluded that "the 'sore loser' phenomenon has affected almost one state-wide election out of 5." **PC 7.** But it is not logically possible to conclude that elections have been meaningfully "affected" if one has no evidence of the supposed degree or direction of the supposed affect. Floating alone, the statement is as tautological, as self-proving, as the statement of the *Storer Court* that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974). Without some grounding in fact, there is every reason to conclude that

[6] The term "sore-loser" is patently cynical. Perhaps the apogee of this cynicism is captured in footnote 4 of Justice Rehnquist's dissent in *Anderson v. Celebrezze*, 460 U.S. at 815. Apparently ignorant of John Anderson's and the "Rockefeller Republican's" disdain for the direction Justice Rehnquist's political patrons were steering the Republican Party, Justice Rehnquist unnecessarily and unjustly proclaimed John Anderson a "sore loser" when he "ducked out" of the Republican primary.

weather has had a greater influence on voter turnout and candidate performance than the presence of sore loser candidates.

Simply put, the State produced no evidence supporting a conclusion that the sore loser "affect" is meaningful or that it constitutes an "important regulatory interest" requiring a restriction on Vermonter's associational and voting rights. The trial court's conclusion, therefore, that the sore loser phenomenon has had a deleterious effect on our politics is purely speculative. It may be sufficient to meet the rational basis test; it is insufficient to establish an "important regulatory interest" justifying ballot access restrictions.

There may well be a reason that the State could only produce theoretical arguments in favor of the deadline change. One must candidly acknowledge that the restriction on independent voters' and candidates' associational rights benefits the very individuals who voted for the change—but no one else. As noted by the United States District Court for the District of Maine:

> [t]he Court cannot be blind to the fact that restrictions on independent candidacies are enacted by members of major parties, who have some level of direct interest in the success or failure of independent candidacies. Laws enacted by major parties that tend to quell independent candidacies must be scrutinized carefully in order to preserve First Amendment rights of association and voting.

Stoddard v. Quinn, 593 F. Supp. 300, 308-309 (D. Me. 1984). The interest of an independent candidate in making a so-called "late" decision to declare her candidacy for the general election is certainly no less valid an interest than the personal, strategic, non-constitutional interest a party candidate has in requiring independents to declare early.

The same lack of analytical support applies to the trial court's conclusion regarding transparency. Notwithstanding Senator Brock's theoretical statements that early registration would serve to inform voters, the trial court noted "[t]he testimony was undisputed [ ] that

relatively little attention is paid by the electorate even to the primary races during the summer months." **PC 6.**

The trial court's conclusion that some value may inure to the public by requiring earlier registration wars with the undisputed testimony and trial court's own finding and improperly substitutes the rational basis test for the proper, "important regulatory interest test."

III. The Trial Court Erred, as a Matter of Law, in Holding the Deadline Change Permissible Under Articles 7th and 8th of the Vermont Constitution.

A. Article 8th.

Article 8th of the Vermont Constitution confers on voters the right to elect officers and—more intriguingly—the right to "be elected into office agreeably to the regulations made in this constitution." VT. CONST. ART. 8. Although the Vermont Supreme Court has stated that "the constitutional right to hold elective office is a *very* important interest," *In re Hodgdon*, 2011 VT 19, ¶ 24, 19 A.3d 598 (emphasis added), the full extent of this right has not been effectively explored in Vermont. See *Doria v. University of Vermont*, 156 Vt. 114, 120, 589 A.2d 317, 320 (1991) (individual rights secured by Articles 6th, 7th and 8th do not restrict actions of non-governmental agency); *Brownell v. Russell*, 76 Vt. 326, 330, 57 A. 103 (1904) (city charter prohibiting member of board of police examiners from being delegate of non-governmental, partisan caucus not violation of member's right to be elected into office).

The right to run cannot be absolute. See *Paey v. Rodrigue,* 119 N.H. 186, 189, 400 A.2d 51, 53 (1979) (constitutional provision granting every inhabitant having proper qualifications equal right to be elected into office does not confer upon convicted felon absolute right to hold selectboard office). Nevertheless, the purpose of the "elected into office" provision is clear; it is

to further the core value of equality of right—and privilege—that gave life to our State's constitution. See *Baker v. State*, 170 Vt. 194, 208, 744 A.2d 864, 874 (1999) ("Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley"). The early filing deadline for independent candidates is repugnant to the core constitutional goal of making elective office as accessible as possible to the citizens of Vermont by imposing unnecessary restrictions on ballot access. See *Town of Hooksett v. Baines*, 148 N.H. 625, 631, 813 A.2d 474, 479 (2002) (rejecting town's charter provision imposing term limits on elected officials as violation of State constitutional provision giving every inhabitant equal right to be elected into office.)

B. Article 7th.

The Common Benefits Clause is the Vermont Constitution's more liberal analogue to the Equal Protection Clause. *Baker v. State*, 170 Vt. 194, 202–03, 744 A.2d 864, 870–71 (1999). The *Baker* Court described the Common Benefits Clause analysis as being "broadly deferential to the legislative prerogative to define and advance governmental *ends,* while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective." *Id.*

As noted above, the State presented only theoretical arguments, in the form of post-enactment testimony of three legislators, that the early filing deadlines for independent candidates *may* promote voter education and *may* discourage sore-loser candidates. This is a far cry from the hard, factual and legislative analysis undertaken by the Baker Court in reviewing whether denying same sex couples the benefits and protections accorded to married couples violates Vermont's common benefits clause, or the Hodgdon Court's determination that a resign-

to-run canon was the *only* means to achieve the State's interest in assuring an impartial judiciary. *In re Hodgdon*, 2011 VT 19, ¶¶ 23–24, 19 A.3d 598.

Conclusion

For the reasons given, Appellant respectfully requests the Court reverse the trial court's decision and find that the requirement that independent candidates file their statements of nomination to run in the general election by the same deadline party candidates must file their primary petitions unconstitutionally restricts Appellant's 1st and 14th Amendment rights under the United States Constitution, and Appellant's Articles 7th and 8th rights under the Vermont Constitution.

Dated at Montpelier, Vermont, April 9, 2012

GERALD TRUDELL AND MYRON DORFMAN

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies the following pursuant to V.R.A.P. Rule 32(a)(7)(A):

The principal brief I have filed on behalf of my client is in compliance with V.R.A.P. 32(a)(7)(A). My brief uses 12-point font, and contains no more than 9,000 words. Specifically, as determined by Microsoft Word the brief contains 3,276 words exclusive of the Table of Contents, Table of Authorities and signature blocks.

Dated at Montpelier, Vermont, this 9th day of April, 2012.

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